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9:00 a.m.–Noon

WHERE: Office of the Federal Register
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Washington, DC 20002

RESERVATIONS: (202) 741-6008



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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1170

RIN 0581-AC66

[Doc. #AMS-DA-07-0047; DA-06-07]

Dairy Product Mandatory Reporting

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule adopts amendments to the Dairy Product Mandatory Reporting Program that was established on August 2, 2007 on an interim final basis. The Dairy Market Enhancement Act of 2000, and certain provisions of the Farm Security and Rural Investment Act of 2002, amended the Agricultural Marketing Act of 1946 to provide for timely, accurate, and reliable market information to facilitate more informed marketing decisions and promote competition in the dairy product manufacturing industry.

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

FOR FURTHER INFORMATION CONTACT: For information relevant to this final rule: (a) Concerning dairy product price data collection, reporting and verification contact John R. Mengel, Chief Economist, USDA/AMS/Dairy Programs, Office of the Chief Economist, STOP 0229—Room 2753, 1400 Independence Ave., SW., Washington, DC 20250-0229, (202) 720-4664; (b) concerning dairy products storage data collection and reporting contact Dan Kerestes, Chief, Livestock Branch, USDA/NASS, STOP 2053—Room 6435, 1400 Independence Ave., SW., Washington, DC 20250-2053, (202) 720-3570.

SUPPLEMENTARY INFORMATION: This final rule is a statutory requirement pursuant to the Agricultural Marketing Act of 1946 [7 U.S.C. 1621 *et seq.*], as amended

November 22, 2000, by Public Law 106-532, 114 Stat. 2541, and further amended May 13, 2002, by Public Law 107-171, 116 Stat. 207. The Agricultural Marketing Act of 1946 and its amendments are hereinafter referred to as the “Act.”

The provisions of the interim final rule were published in the **Federal Register** on July 3, 2007 (72 FR 36341), and became effective on August 2, 2007. The interim final rule states that comments were to be submitted on or before September 4, 2007. On November 2, 2007, a **Federal Register** notice was issued to reopen the comment period whereby comments were to be submitted on or before December 3, 2007 (72 FR 62105). The U.S. Department of Agriculture (USDA) has reviewed and considered all of the comments submitted in a timely manner for this final rule.

Background: The Act provides for and accordingly, the interim final rule established, a Dairy Product Mandatory Reporting Program that: (1) Requires persons engaged in manufacturing dairy products to provide to USDA certain information including the price, quantity, and moisture content, where applicable, of dairy products sold by the manufacturer; and (2) requires manufacturers and other persons storing dairy products to report to USDA information on the quantity of dairy products stored. Under the interim final rule, the National Agricultural Statistics Service (NASS) collects such information. This final rule, in accordance with the Act, maintains these requirements. Any manufacturer that processes and markets less than 1 million pounds of the applicable dairy products per calendar year is exempt from these reporting requirements as specified in (1) of this paragraph.

NASS began publishing cheddar cheese price data in 1997. It began publishing butter, nonfat dry milk (NFDM), and dry whey price data in 1998. Currently, NASS publishes cheddar cheese, butter, dry whey, and NFDM prices on a weekly basis. USDA has collected and reported stock data on a voluntary basis for butter and cheese since 1916, for NFDM since 1930, and for dry whey since 1975. Stock information on specific cheeses, salted and unsalted butter, anhydrous milkfat, butter oil, nonfat dry milk and dry whey

is now collected and published on a monthly basis.

The Act, as amended, provides USDA with the authority needed to make the reporting of dairy product price and stock information mandatory. No additional commodities are included under this rule. The Act also provides that USDA shall take such actions as it considers necessary to verify the accuracy of the information submitted or reported. With more complete and accurate information, USDA and the dairy industry can be confident that reported dairy product prices and inventories are more precise indicators of supply and demand conditions.

The Agricultural Marketing Service (AMS) has implemented a plan to verify the price information submitted by reporting entities to NASS. Each reporting entity may report for a single dairy plant or it may report for more than one dairy plant, depending upon how the business is structured. During the first year of verification, AMS planned to visit all of the reporting entities eligible to file reports at least once. AMS visited all of the reporting entities within the first five months of implementation. In subsequent years, AMS plans to visit larger entities that account for 80 percent of the yearly reported product volume of each specified dairy product at least once annually. AMS plans to visit one-half of entities that account for the remaining 20 percent each year, visiting each such entity at least once every other year.

During each visit, AMS will review applicable sales transactions records for at least the four most recent weeks. In some cases AMS may review sales records for longer periods of up to 2 years. AMS will verify that sales transactions agree with information reported to NASS and that there are no applicable sales transactions that are not reported to NASS. This final rule includes noncompliance, appeals, and enforcement procedures. These procedures are carried out by AMS.

AMS requested comments on all aspects of the reporting requirements, the reporting specifications, and the verification program. AMS has reviewed all timely comments received and has considered these comments in developing this final rule.

Executive Order 12866: Regulatory Planning and Review

This final rule has been determined not to be "significant" for purposes of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget. A cost benefit analysis prepared for the interim final rule is available at <http://www.ams.usda.gov/dairy/>.

Executive Order 12988: Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Regulatory Flexibility Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), AMS considered the economic impact of this final rule on small entities and determined that the rule would not have a significant economic impact on a substantial number of small entities. The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Small businesses in the dairy product manufacturing¹ industry have been defined by the Small Business Administration (SBA) as those processors employing not more than 500 employees. For purposes of determining a processor's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees. There are approximately 98 dairy product manufacturers and 110 manufacturers and other persons storing dairy products that would be subject to the provisions of this rule. According to U.S. Census Bureau Statistics of U.S. Businesses, there were 1,110 dairy manufacturing firms in the United States in 2004. Of these businesses, 1,017 firms had fewer than 500 employees and 93 firms had greater than 500 employees.

Therefore, few of the manufacturers and persons affected by this final rule are small businesses under the criteria

established by the SBA. Those manufacturers that process and market less than 1 million pounds of the applicable dairy products annually are exempted from price reporting by this final rule, and most of the entities that would be subject to mandatory reporting already report this information to NASS. The annual cost to manufacturers reporting product prices is estimated at \$381 per plant. As discussed in the Paperwork Reduction Act section below, AMS believes the records that would be required to be maintained under this final rule are already being maintained for at least 2 years as part of the normal course of business. Thus, there would be no additional burden or cost associated with the maintenance of these records. Therefore, the final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. Chapter 35), reporting and recordkeeping requirements that are utilized to collect the information required by the Act have been approved by the Office of Management and Budget (OMB). The OMB control number for the Dairy Products Prices questionnaire and the Dairy Products questionnaire is 0535–0020. The OMB control number for the Cold Storage questionnaire is 0535–0001.

The primary function of NASS is to provide timely, accurate, and useful statistics in service to U.S. agriculture. Estimates of milk production, production and storage of manufactured dairy products, and prices of milk and dairy products are integral parts of this function. Milk and dairy statistics are used by USDA to help administer Federal programs and are used by the dairy industry in planning, pricing, and projecting supplies of milk and milk products.

Neither the interim final rule nor this final rule changes the current method and frequency of data collection utilized by NASS. Data collection of Dairy Products Prices is conducted weekly to collect sales transactions data for the previous week. Manufacturers are provided a supply of report forms for the products they are to report. The dairy product manufacturer completes the forms with information, including the manufacturer's name, address, plant location, quantities sold, and prices (or dollars received) for cheddar cheese, butter, dry whey, and NFDM. Manufacturers report to NASS by facsimile or electronic data reporting.

The monthly Dairy Products questionnaire is mailed each month to manufacturers of dairy products. Manufacturers report to NASS the name, address, production, stocks, and shipments data for a wide variety of dairy products, including nonfat dry milk and dry whey. Reporting entities report to NASS by facsimile, phone, or mail.

The monthly Cold Storage questionnaire is mailed each month to manufacturers and other entities storing stocks of a wide variety of refrigerated agricultural commodities, including butter, cheese, and similar products. Manufacturers and other entities report to NASS the name, address, and stocks on hand at the end of the month. Reporting entities report to NASS by facsimile, phone, mail, or electronic data reporting.

This final rule continues implementation of recordkeeping requirements established under the interim final rule and authorized by the Act. Under this regulation, each person required to report information to USDA shall maintain, and make available to USDA, on request, original contracts, agreements, receipts, and other records associated with the sale or storage of any dairy products during the 2-year period beginning on the date of the creation of the records. AMS has consulted with several entities that are required to maintain records under this rule. According to the entities consulted, the necessary records are already being maintained for at least 2 years as part of the normal course of business. Therefore, there would be no additional burden or cost associated with the maintenance of these records.

The reliability of prices announced by NASS is dependent on the accuracy of the reports submitted by manufacturers. To verify that the data submitted to NASS for the Dairy Products Prices report is accurate, all manufacturers required to submit questionnaires will be subject to a verification procedure conducted by AMS. Failure on the part of manufacturers or other entities to comply with the data collection and recordkeeping requirements could lead to enforcement action, including the levying of civil penalties provided under section 273 of the Act, as amended [7 U.S.C. 1637b], against the violating person or entity.

Except as otherwise directed by the Secretary of Agriculture or the U.S. Attorney General for enforcement purposes, no officer, employee, or agent of the United States shall make available to the public information, statistics, or documents obtained from or submitted by any person under the Act other than

¹ North American Industry Classification System (NAICS) code 3115.

in a manner that ensures confidentiality is preserved regarding the identity of persons, including parties to a contract and proprietary business information. All report forms include a statement that individual reports are kept confidential.

With respect to the application of the Privacy Act of 1974 (5 U.S.C. 552a) to the maintenance of records required by the Act, the Dairy Products Prices survey population consists of agribusinesses. Data collected by this survey relates to agribusinesses' dealings and not those of individuals. Records maintained at business sites for verification of information reported to NASS include contracts, agreements, receipts and other material related to sales of specific dairy products. No records about individuals are maintained by NASS for this survey, and AMS believes that none would be part of these maintained business papers.

Summary of Changes in the Final Rule From the Interim Final Rule

All substantive changes in this final rule from the interim final rule concern reporting requirements and specifications pertaining to the Dairy Products Prices report. Changes are as follows:

(1) Products that are produced under faith-based close supervision and are marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher products produced with a rabbi on site who is actively involved in supervision of the production process) are excluded in the reporting specifications.

(2) With the interim final rule, dairy products sold under the Dairy Export Incentive Program (DEIP) were included in the reporting specifications. DEIP sales or other premium-assisted sales are excluded in reporting specifications with this final rule.

(3) Products certified as organic by USDA-accredited certifying agents are excluded in the reporting specifications with this final rule.

(4) With the interim final rule the grade requirements stated that each product to be reported was to be of a certain grade. The final rule indicates that each product to be reported must only meet certain grade standards.

(5) The interim final rule indicates that transportation charges are to be excluded from the reported price for each commodity. The final rule clarifies that each sale shall be reported either f.o.b. plant if the product is "shipped out" from the plant or f.o.b. storage facility location if the product is

"shipped out" from a storage facility. In calculating the total dollars received or dollars per pound, the reporting entity shall neither add transportation charges incurred at the time the product is "shipped out" or after the product is "shipped out" nor deduct transportation charges incurred before the product is "shipped out."

(6) The interim final rule excludes clearing charges in the reporting specifications. The final rule specifies that in calculating the total dollars received or dollars per pound, the reporting entity shall not deduct brokerage fees or clearing charges paid by the manufacturer.

(7) This final rule specifies that the verification and noncompliance procedures are pursuant to section 273(b)(1)(A)(i) of the Act.

(8) This final rule specifies the time by which dairy product manufacturers must report on all dairy products sold. Manufacturers must report by noon on Wednesday on all products sold during the seven days ending with the previous Saturday.

(9) Changes have been made in the organization or content of some sections for greater clarity.

Discussion of Comments

The interim final rule solicited comments to be submitted to USDA on or before September 4, 2007. During this initial 60-day comment period, 19 comment submissions were received: 6 from dairy cooperative associations, 4 from federations of dairy cooperative associations, 3 from producer associations, 3 from proprietary dairy manufacturers, 1 from a dairy manufacturer association, and 2 from individuals. After reviewing comments received, USDA determined that additional information from interested parties would be helpful. On November 2, 2007, a **Federal Register** notice was issued to reopen the comment period for an additional 30 days. USDA specifically solicited comments concerning the issues of product specifications, minimum transaction volumes, kosher dairy products, and products produced from cows not treated with recombinant bovine somatotropin (rBST). USDA was concerned that for the initial comment period some commenters may have limited their comments to the issues of forward-priced contracts and verification. During the extended 30-day comment period, 10 comment submissions were received: 2 from dairy cooperative associations, 2 from federations of dairy cooperative associations, 1 from a producer association, 1 from a dairy manufacturer

association, and 4 from individuals. USDA has reviewed and considered all of the comments submitted in a timely manner for this final rule.

The following discussion is based upon USDA consideration of all comments received concerning the interim final rule and other considerations. The discussion concerns reporting requirements and specifications for the Dairy Products Prices survey.

1. Forward-Priced Contracts

Under the interim final rule, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed) are excluded from reporting specifications.

The issue of forward-priced contracts is the issue discussed at greatest length and by the greatest number of commenters. All comments concerning the issue focus upon sales of nonfat dry milk (NFDM). None of the commenters argues for including forward-priced contracts in the reporting specifications for the other dairy products.

Positions taken by commenters on the issue are essentially as follows:

a. Include forward-priced contracts for NFDM.

b. Include contracts for export sales of NFDM that are shipped within 90 days of contract execution.

c. Include contracts for domestic or export sales of NFDM that are shipped within 90 days of contract execution.

d. Make no changes.

e. In addition to excluding forward-priced contracts for which the selling price is set 30 or more days before the transaction was completed from reporting specifications, also exclude contracts that reference a defined prices series, plus or minus a basis, entered into more than 30 days before delivery.

Supporters of including forward-priced contracts in NFDM price reporting argue that the current exclusion of forward-priced contracts discourages exports because almost all NFDM exports are through contracts with shipments more than 30 days after execution. Therefore, the vast majority of export sales are excluded from NASS reporting. DairyAmerica, Inc., states, "The proposed NASS sample that leaves out critical supply and demand for milk represented by the export market raises the question of 'unbiasedness'. * * * " DairyAmerica contends that if fixed-priced contracts were included in the reporting requirements, Class IV milk prices would more closely align with the majority of sales of NFDM. It claims that this would reduce risks for NFDM producers. It points out that there is no

effective futures market for NFDM at this time. Other supporters of including forward-priced contracts in NFDM price reporting include California Dairies, Inc., and the Alliance of Western Milk Producers.

Fonterra Co-operative Group Limited provides a discussion of contracts used for the international dairy market. Fonterra points out that due to certification procedures, regulatory requirements, etc., a seller in the international market does not have complete control of the timeframe for delivery. Fonterra describes spot, medium-term, and long-term export contracts. An export contract for "immediate" delivery can take 1 to 2 months to complete. A medium-term contract typically covers 3 months but usually takes about 5 months from the time of contract to the time of the last invoice date. A long-term contract is typically for 6 months but may be as long as 12 months.

National Milk Producers Federation (NMPF) advocates extending the time period of reporting NFDM sales from 30 days to 90 days in recognition of growth of NFDM exports and the requirements for export sales. NMPF notes that effective and liquid futures contracts exist for Class III milk (which are often used as hedge instruments for cheese prices) and butter. However, the same is not the case for NFDM. The extension of the time period as proposed by NMPF would only apply to export contracts. NMPF states that limiting the reporting time period to 90 days will ensure that forward-priced export contracts do not have a disproportionate effect on Federal order pricing. Land O'Lakes, Inc., (LOL) and DairyIdea Cooperative, Inc., support NMPF's position. Western United Dairymen also proposes extending the time of reporting from 30 to 90 days, but it does not specify that the extension would apply to exports only.

Supporters of the current 30-day limit assert that the current policy better reflects the current market price. International Dairy Foods Association (IDFA) states, "The inclusion of sales in which the price was set more than 30 days in advance of the actual transaction would mean including survey data based on expectations of today's market environment, not the actual current market environment itself." Dean Foods contends that including forward-priced contracts could result in a market distortion related to Class II products. According to Dean Foods, at times it may be advantageous to manufacture Class II products from NFDM rather than from Class II milk since the spot NFDM price

in the domestic market place would not necessarily be in alignment with the Class IV price or Class II price. With respect to NFDM futures markets, Leprino Foods Company states, "Although there are likely additional factors, we believe that the historic practice of certain nonfat manufacturers of including long-term contracts in prices reported and used in establishing the underlying milk prices have substantially limited the establishment of viable nonfat dry milk futures." Other supporters of the current regulation include Nestlé USA and an individual commenter.

Dairy Producers of New Mexico (DPNM) advocates the current 30-day limit reporting exclusion and also the exclusion of forward contracts that reference a defined price series plus or minus a basis. It contends that inclusion of such contracts in reporting leads to circularity in pricing and does not provide accurate information concerning spot prices for dairy products.

This final rule maintains the current reporting exclusion for forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed). IDFA's argument has merit: "The inclusion of sales in which the price was set more than 30 days in advance of the actual transaction would mean including survey data based on expectations of today's market environment, not the actual current market environment itself."

This final rule does not exclude from reporting specifications forward contracts that reference a defined price series plus or minus a basis. Information is not readily available to indicate that there is any significant problem with bias caused by circularity in the reporting of such forward contracts.

2. Electronic Data Collection by AMS

NMPF lists reasons as to why AMS, rather than NASS, should have full responsibility for mandatory dairy product reporting. According to NMPF, AMS is better suited for regulatory enforcement, and AMS staff is better equipped to collect and verify consistent data from milk plants. NMPF states that AMS staff employees generally have more dairy expertise and usually have longer tenure than NASS employees. NMPF believes that coordination of the data collection and the verification would be improved if AMS handled both functions. Since AMS has experience with electronic reporting through its mandatory livestock reporting program, NMPF asserts that AMS is better suited to

implement electronic reporting for dairy products.

IDFA also asserts that AMS should be responsible for data collection and that the data should be collected electronically. IDFA contends that if AMS were to collect the data electronically at a national level, timeliness of reporting would be improved and conflicting information from NASS offices in different States would be eliminated. DairyIdea Cooperative also advocates that AMS collect the data electronically.

This rule makes no changes with respect to responsibilities or methods for data collection. The Secretary of Agriculture has delegated NASS, an agency with data collection as its primary mission, as the USDA agency with price reporting responsibilities for the Mandatory Dairy Product Reporting Program.

3. More Frequent Verification

New York Farm Bureau is concerned that the frequency of verification visits in the proposed rule may not be sufficient to guarantee accurate and timely verification. It does not propose a specific time period for the frequency of visits. IDFA supports the AMS plan to visit all of the entities eligible to file reports at least once during the first year. However, it urges AMS to follow up with quarterly visits to any entities that have been found to have reported incorrectly.

AMS planned to visit all entities eligible to report in the first year at least once. AMS visited all of the reporting entities within the first five months of the Mandatory Dairy Product Reporting Program implementation. Some reporting entities have been visited more than once. AMS plans to visit large entities that account for 80 percent of the yearly reported product volume of each specified dairy product at least once annually. AMS plans to visit one-half of the remaining entities each year, visiting each such entity at least once every other year. This does not preclude additional visits if necessary.

4. Organic Product Exclusion

IDFA, NMPF, and Dean Foods propose that organic products be excluded from the surveys because they receive higher wholesale market prices reflecting additional costs that are not representative of the products in the broader market. Dean Foods is more specific than IDFA or NMPF, stating that "Certified Organic" products should be excluded. No comments were received advocating the inclusion of organic products in price reporting.

This final rule excludes products certified as organic by USDA-accredited certifying agents in the reporting specifications because such products command higher prices, reflecting consumers' perception that such products are of higher value than similar products.

5. Coordination of Price Reporting With the California Department of Food and Agriculture (CDFA)

Both NMPF and DairyAmerica encourage USDA to take steps to align price data, methodology, and timing with that of CDFA. While NMPF encourages broad cooperation with CDFA concerning alignment of all class prices, DairyAmerica's comments are limited to considerations of NFDM price reporting.

DairyAmerica's submission of comments includes testimony from a recent CDFA hearing concerning NFDM price reporting. CDFA conducted a public hearing on August 28, 2007, to consider revisions to weekly and monthly NFDM price reporting for the California Weighted Average Price (CWAP). On October 17, 2007, CDFA issued a final decision regarding the CWAP (http://www.cdffa.ca.gov/dairy/dairy_hear_finalresults_Aug07.html). The decision became effective on October 26, 2007.

AMS has reviewed testimony from the CDFA hearing in its deliberations for this final rule. As DairyAmerica acknowledges, “* * * AMS cannot simply agree to operate its system based upon California.” USDA must make decisions based upon its own program objectives, consideration and judgment of the issues, and comments.

6. Transaction-Size Thresholds

The typical sales unit for dairy products included in the Dairy Products Prices survey is 40,000 pounds. IDFA recommends setting a transaction-size threshold of 40,000 pounds for products to be reported for the Dairy Products Prices survey. It points out that dairy contracts for the Chicago Mercantile Exchange (CME) are based upon this typical size unit. Similarly, NMPF proposes that USDA set transaction-size thresholds for reporting sales, claiming that products distributed in smaller lots have added value and cost. However, NMPF states that any decision to establish transaction thresholds should be considered very carefully to ensure that no important product volumes are omitted from reporting and to avoid efforts by manufacturers “to reorganize distribution to evade reporting.” NMPF suggests that USDA consider a threshold

of 30,000 pounds for each product included in the survey.

USDA has not included transaction-size thresholds in this final rule. An objective of the survey is to obtain a broad measure of basic dairy commodity prices across the U.S. There is concern that a significant number of plants may be excluded from reporting if thresholds are established. Also, there is concern, as expressed by NMPF, that some reporting entities could “reorganize distribution to evade reporting.” Furthermore, adding transaction-size thresholds to the reporting specifications could add an unnecessary reporting burden for some reporting entities due to the necessity of keeping separate sales totals for transactions that meet thresholds and those that do not.

7. High-Heat and Fortified NFDM

According to LOL, the costs and pricing arrangements for high-heat NFDM closely resemble those of low-heat and medium-heat NFDM. LOL asserts that including high-heat NFDM in the reporting specifications would result in greater alignment with the CWAP. DairyAmerica also proposes including high-heat NFDM in the reporting specifications and also would include fortified NFDM.

This final rule continues exclusions for high-heat and fortified NFDM in the reporting specifications. Observation of prices reported in USDA Dairy Market News indicates that prices for high-heat NFDM are generally higher than those for low and medium-heat NFDM. Adding value to NFDM through fortification also would result in a higher price generally than that of the basic commodity.

8. Dairy Export Incentive Program (DEIP) or Other Premium-Assisted Sales

DairyAmerica claims that DEIP sales should continue to be reported, asserting that excluding DEIP sales in the reporting specifications would be in conflict with the policy decision of Congress to support exports with taxpayer dollars. DairyAmerica claims that if DEIP sales were to be excluded from the reporting specifications, prices paid for milk through the Federal order system would not be reflective of the commodity prices of products sold through DEIP. This situation increases the risk that the manufacturers engaged in DEIP sales will suffer loss. For the same reasons, DairyAmerica asserts that export assistance sales through the voluntary industry program, Cooperatives Working Together (CWT) program, should be reported.

Leprino asserts that the timeliness criteria for reporting DEIP sales should

be the same as for any other dairy products that meet the reporting specifications. It asserts the same rationale as for other sales: DEIP sales for which the sale price was established greater than 30 days prior to ship date may not be reflective of current market conditions.

With this final rule, all DEIP sales or other premium-assisted sales, such as export assistance sales through the CWT program, are excluded from the reporting specifications. Before mandatory reporting became effective, DEIP sales were included in reporting specifications to encourage voluntary reporting by manufacturers that wanted DEIP sales to be included. Since reporting is now mandatory, this is no longer a consideration. As pointed out by Leprino, DEIP contracts entered into more than 30 days before date of shipment may not be reflective of current market conditions. Furthermore, DEIP sales or other premium-assisted sales include bonuses paid by third parties. Export bonuses are frequently based upon market averages of domestic and international commodity prices that may or may not be reflective of the actual needs of the two parties to reach a sales agreement.

9. Commodity Credit Corporation (CCC) Purchases Under the Milk Price Support Program and Related Programs

DairyAmerica asserts that CCC sales must continue to be reportable in order to avoid the risk that Federal order minimum prices would fall below support levels.

CCC purchases under the Milk Price Support Program and related programs continue to be included in the reporting specifications under this final rule. Including CCC purchases provides a broader survey that more accurately reflects market conditions.

10. Intra-Company Sales

Reporting specifications exclude intra-company sales. DairyAmerica supports this policy in general because such sales may not represent a true market price. However, DairyAmerica asserts that its sales, as a federation of dairy cooperatives, between a member and that member's wholly-owned subsidiary should be reportable. It argues that these sales are arms-length transactions. DairyAmerica states that its corporate structure requires it to maximize revenue for its members and that it cannot favor one member of the federation over another.

This final rule continues the exclusion of intra-company sales, even if those sales are to wholly-owned subsidiaries through a federation of

dairy cooperatives. Although a federation of dairy cooperatives may have rules that all sales will be at market prices, it may not be possible to verify through the federation and manufacturer books and records that such intra-company sales are arms-length transactions.

11. Enforcement

DPNM asserts that manufacturers who misreport to NASS should have greater liability than stated in the interim final rule. DPNM proposes that a handler that misreports prices be held responsible to account to various producer settlement funds for any shortfalls that occur due to the misreporting. Dairylea proposes that USDA be held responsible for shortfalls in dairy producer income that result from misreporting of prices.

The Act is clear concerning the civil penalty for noncompliance with a cease and desist order relative to specified unlawful acts. The Act states, "If the [district] court finds that the person violated the order, the person shall be subject to a civil penalty of not more than \$10,000 for each offense." Since the Act does not provide for the redress proposed by either DPNM or Dairylea, this final rule does not include the enforcement proposals by DPNM or Dairylea.

12. Products Labeled or Contracted as Sourced From Cows Not Treated With Recombinant Bovine Somatotropin (rBST):

NMPF lists reasons that it believes products sourced from milk from cows not treated with rBST should be included in reporting specifications. According to USDA Animal and Plant Health Inspection Service, only 15 percent of dairy herds include cows treated with rBST. Many products are made from such milk even if not marketed as such. Marketing of such products is increasing, and NMPF asserts that excluding them would compromise the survey. Manufacturers may have mixed sales (some from cows treated with rBST and some with cows not treated with rBST), complicating reporting and verification. Furthermore, NMPF claims that it would be inappropriate for USDA to define, categorize, and verify labeling of such products.

Three individuals submitted comments in support of including products labeled or contracted as sourced from cows not treated with rBST in the reporting specifications. Two of the individuals assert that excluding such products would undervalue milk prices paid to dairy farmers.

LOL urges AMS to exclude products labeled as sourced from cows not treated with rBST in the reporting specifications. LOL claims that producers who discontinue using rBST have a significant drop in milk production, and it claims that the opportunity costs of discontinuing use of rBST are \$1.00 to \$1.50 per hundredweight. Therefore, LOL asserts that these producers should receive premiums. Excluding such products would in part help to share these premiums with only those producers who forego the benefits of using rBST. In the future, if products labeled as sourced from cows not treated with rBST become more common, LOL would support including such products in the surveys.

IDFA urges USDA to exclude products labeled or contracted as sourced from cows not treated with rBST, claiming that such products are value-added products rather than commodity products.

The final rule does not exclude products labeled or contracted as sourced from cows not treated with rBST. Further, USDA does not have information to indicate that there are substantial price premiums for such products, and the sales volumes of such products are unknown.

13. Kosher Products

NMPF points out that nearly all butter and nonfat dry milk, and most dry whey production is kosher, by some standard. The same can be said for a substantial amount of cheese. NMPF asserts that there are many kosher standards and that it would be improper for USDA to rule based upon those standards. LOL and two individual commenters support including all kosher products in the reporting specifications.

DairyAmerica advocates a very narrow exclusion of only a specially supervised form of kosher designated as "Cholov Yisroel," a kosher designation that requires close rabbinical supervision from the farm through the dairy product manufacturing process. It states that this type of kosher product should not be reportable, or the extra cost element for this type of kosher designation should be deducted. IDFA urges USDA to exclude kosher products from the reporting specifications if the contract requires the products to be certified as kosher under direct rabbinical supervision.

Since the final rule is concerned with capturing prices for basic commodities, it attempts to exclude value-added products from the price surveys. For kosher products, care is taken in the final rule to use a standard that is

neither too broad nor too narrow. Excluding all products meeting the least stringent kosher standards would be too broad since such products are commonplace and the added market value is insignificant. This final rule only excludes products manufactured under close rabbinical supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity.

It is possible that reporting issues will arise concerning dairy products that are manufactured to meet certain faith-based standards other than kosher requirements. For example, Islamic Halal has certain production requirements for dairy products. For this reason, this final rule excludes any dairy products produced under any faith-based close supervision that are marketed at a higher price than the manufacturer's wholesale market price for the basic commodity.

14. Cost Add-Ons

Dairylea proposes that "AMS allow for dairy product manufacturing cost of production surcharges—determined through a regulated process—to be reported in the pricing survey. These USDA determined cost increases should be allowed to be passed on from a manufacturer to the marketplace, without it impacting the Federal Order class prices."

Consideration of Dairylea's cost add-ons proposal in this informal rulemaking is not appropriate. Dairylea provided the same proposal in its testimony at a hearing concerning Class III and IV prices (Federal milk marketing order hearing; Indianapolis, Indiana; April 11, 2007, Tr. page 1966; exhibit 53). USDA is considering Dairylea's proposal in formal rulemaking with respect to that hearing.

15. Expansion of the Scope of Data Collection and Reporting

DPNM proposes that the Dairy Product Mandatory Reporting Program be expanded to include the volume of milk and milk components acquired by the plant, the prices paid for milk and milk components acquired by the plant, the volume of milk products produced at the plant, the value of the milk products produced at the plant, and, alternatively, the costs and yields associated with making reported products.

DPNM proposes that these items be collected and reported in order to help USDA make better decisions with respect to make allowances and yield factors. DPNM notes that the Act uses the phrase "information concerning the price, quantity, and moisture content of

dairy products” in the description of information to be obtained. Using a broad perspective of the word “concerning,” DPNM asserts that USDA has authority to collect the additional information proposed.

This final rule does not add data collection as proposed by DPNM. Collection of such information is beyond the scope of the Act.

16. *Product f.o.b. Points*

The interim final rule states that sales shall be reported f.o.b. processing plant or storage location. Leprino claims that pricing f.o.b. storage center is inappropriate because such pricing results in a price with a different location value than that of the plant. It further claims that costs to ship products to storage centers are not included in Federal order make allowance calculations; therefore, such costs should not be included in the survey prices. It proposes that the price reported should be reduced by the cost of transporting products to storage centers.

With this final rule, AMS continues the policy of requiring sales to be reported f.o.b. reporting plant or storage center without adjustment for transportation to storage facilities prior to sale. While pricing f.o.b. storage center may reflect a location value that is different than that which exists at the manufacturing plant, reducing the price by some unspecified transportation cost, which may or may not be consistent with the product value, is inappropriate. The pricing at f.o.b. storage facility would presumably be competitive with prices of competitors in the surrounding area. Reporting a price reduced by the transporting of the product to the storage center may understate the wholesale value of the product at that location and time.

The interim final rule indicates that transportation charges are to be excluded from the reported price for each commodity. This exclusion is not intended to apply to transportation costs from the manufacturer to a storage facility before the product is sold. The final rule clarifies that each sale shall be reported either f.o.b. plant if the product is “shipped out” from the plant or f.o.b. storage facility location if the product is “shipped out” from a storage facility. In calculating the total dollars received or dollars per pound, the reporting entity shall neither add transportation charges incurred at the time the product is “shipped out” nor deduct transportation charges incurred before the product is “shipped out.”

17. *Grade A Dry Whey*

Leprino states that Grade A dry whey should continue to be excluded because it is a premium product. This final rule agrees and continues the exclusion for Grade A dry whey.

18. *Inclusion of Products That Are Not Graded*

Questions have arisen concerning the reporting of products that are not graded by authorities stated in the reporting specifications but that meet grade standards. Most dairy products for the Dairy Products Prices survey are not actually graded but meet the grade standards of authorities designated in the reporting specifications. For greater clarification the wording of the final rule has been changed to clarify that products that meet grade standards, as determined by the manufacturer, are to be reported.

19. *Exemptions*

One individual submitted comments proposing that mandatory reporting regulations not be “implemented except as they would apply to truly industrial level dairy production.” The commenter does not define a level of production to be considered as “truly industrial.” Stating concerns about compliance costs, the individual proposes that a cost-benefit analysis be performed for different levels of production for manufacturers before the regulation is implemented.

According to the cost-benefit analysis, the annual cost to manufacturers reporting product prices is estimated at \$381 per plant. Even for a small plant, such reporting costs would not be expected to be prohibitive. Concerning the maintaining of records, AMS has consulted with several reporting entities and has found that manufacturers already maintain records for at least 2 years as required by the final rule. With the interim final rule, AMS invited comments on whether all entities subject to the rule maintain the necessary records for at least 2 years. No such comments were received.

Under this final rule, manufacturers who process and market less than 1 million pounds of the applicable dairy products per year are exempt from price reporting requirements.

20. *Brokerage Fees and Clearing Charges*

Practically all firms that buy or sell products have marketing expenses. These marketing expenses are figured into the selling prices negotiated between buyers and sellers. These expenses often take the form of internal expenses, such as salaries paid to sales

people. They could also take the form of fees paid to third parties, such as brokerage fees, clearing charges, etc. To maintain consistency, none of the marketing expenses, whether internal expenses or fees paid to third parties, should be deducted from the prices reported to NASS. While the interim final rule excluded clearing charges from the reporting specifications for each product, this final rule specifies that in calculating the total dollars received or dollars per pound, the reporting entity shall not deduct brokerage fees or clearing charges paid by the manufacturer.

Effective Date

The availability of accurate market data for all market participants is extremely important. Buyers and seller of the basic dairy commodities, and indeed, the buyers and sellers of all dairy products depend on the accuracy of the prices affected by this final rule to provide them a sense of the current supply and demand conditions in the dairy sector. Improvements in the quality of price information of the basic dairy commodities—butter, cheddar, cheese, nonfat dry milk, and dry whey—were made by the interim final rule. This final rule makes certain amendments which further enhance the quality of such price information. For this reason, good cause is found that this rule will be effective the Sunday after publication in the **Federal Register**.

List of Subjects in 7 CFR Part 1170

Dairy products, Reporting and recordkeeping requirements, Cheese, Butter, Whey, Nonfat dry milk.

■ For the reasons set forth in the preamble, Title 7, subtitle B, chapter X is amended by revising part 1170, to read as follows:

PART 1170—DAIRY PRODUCT MANDATORY REPORTING

Sec.	
1170.1	Secretary.
1170.2	Act.
1170.3	Person.
1170.4	Dairy products.
1170.5	Manufacturer.
1170.6	Store.

Dairy Product Reporting Programs

1170.7	Reporting requirements.
1170.8	Price reporting specifications.
1170.9	Price reporting exemptions.
1170.10	Storage reporting specifications.
1170.11	Records.
1170.12	Confidential information.

Verification and Enforcement

1170.13	Verification of reports.
1170.14	Noncompliance procedures.

- 1170.15 Appeals.
1170.16 Enforcement.

Authority: 7 U.S.C. 1637–1637b, as amended by Pub. L. 106–532, 114 Stat. 2541 and Pub. L. 107–171, 116 Stat. 207.

§ 1170.1 Secretary.

Secretary means the Secretary of Agriculture of the United States or any other officer or employee of USDA to whom authority has been delegated.

§ 1170.2 Act.

Act means the Agricultural Marketing Act of 1946, 7 U.S.C. 1621 *et seq.*, as amended by the Dairy Market Enhancement Act of 2000, Public Law 106–532, 114 Stat. 2541, and the Farm Security and Rural Investment Act of 2002, Public Law 107–171, 116 Stat. 207.

§ 1170.3 Person.

Person means an individual, partnership, corporation, association, or any other business unit.

§ 1170.4 Dairy products.

Dairy Products means:

(a) Manufactured dairy products that are used by the Secretary to establish minimum prices for Class III and Class IV milk under a Federal milk marketing order issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937; and

(b) Substantially identical products designated by the Secretary in this Part.

§ 1170.5 Manufacturer.

Manufacturer means any person engaged in the business of buying milk in commerce for the purpose of manufacturing dairy products in one or more locations.

§ 1170.6 Store.

(a) *Store* means to place cheese or butter in a warehouse or facility which is artificially cooled to a temperature of 50 degrees Fahrenheit or lower and hold these dairy products for 30 days or more; or

(b) *Store* means to place nonfat dry milk or dry whey in a manufacturing plant, packaging plant, distribution point, or shipment in transit.

Dairy Product Reporting Programs

§ 1170.7 Reporting requirements.

(a) All dairy product manufacturers, with the exception of those who are exempt as described in § 1170.9, shall submit a report to National Agricultural Statistics Service (NASS) by noon on Wednesday of all products sold as specified in § 1170.8 during the seven days ending with the previous Saturday.

If a Federal holiday falls on a Tuesday or Wednesday, NASS will contact manufacturers via e-mail or phone concerning the applicable report deadline. The report is to be submitted on the appropriate forms supplied by NASS and shall indicate the name, address, plant location(s), quantities sold, total sales dollars or dollars per pound for the applicable products, and the moisture content where applicable. Each sale shall be reported for the time period when the transaction is completed, i.e. the product is “shipped out” and title transfer occurs. Each sale shall be reported either f.o.b. plant if the product is “shipped out” from the plant or f.o.b. storage facility location if the product is “shipped out” from a storage facility. In calculating the total dollars received or dollars per pound, the reporting entity shall neither add transportation charges incurred at the time the product is “shipped out” or after the product is “shipped out” nor deduct transportation charges incurred before the product is “shipped out.” In calculating the total dollars received or dollars per pound, the reporting entity shall not deduct brokerage fees or clearing charges paid by the manufacturer.

(b) Manufacturers or other persons storing dairy products are required to report, on a monthly basis, stocks of dairy products (as defined in § 1170.4) on hand, on the appropriate forms supplied by the NASS. The report shall indicate the name, address, and stocks on hand at the end of the month for each storage location.

§ 1170.8 Price reporting specifications.

The following are the reporting specifications for each dairy product:

(a) Specifications for Cheddar Cheese Prices:

- (1) Variety: Cheddar cheese.
- (2) Style: 40-pound blocks or 500-pound barrels.
- (3) Moisture Content:
 - (i) 40-pound blocks: Moisture content is not reported. Exclude cheese that will be aged.
 - (ii) 500-pound barrels: Report weighted average moisture content of cheese sold. NASS will adjust price to a benchmark of 38.0 percent based on standard moisture adjustment formulas. Exclude cheese with moisture content exceeding 37.7 percent.
- (4) Age: Not less than 4 days or more than 30 days on date of sale.
- (5) Grade:
 - (i) 40-pound blocks: Product meets Wisconsin State Brand or USDA Grade A or better standards.

(ii) 500-pound barrels: Product meets Wisconsin State Brand or USDA Extra Grade or better standards.

(6) Color:

(i) 40-pound blocks: colored and within the color range of 6–8 on the National Cheese Institute color chart.

(ii) 500-pound barrels: white.

(7) Packaging:

(i) 40-pound blocks: Price should reflect cheese wrapped in a sealed, airtight package in corrugated or solid fiberboard containers with a reinforcing inner liner or sleeve. Exclude all other packaging costs from the reported price.

(ii) 500-pound barrels: Exclude all packaging costs from the reported price.

(8) Exclude: Intra-company sales, resales of purchased cheese, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed), cheese produced under faith-based close supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher cheese produced with a rabbi on site who is actively involved in supervision of the production process), sales under the Dairy Export Incentive Program or other premium-assisted sales (for example, export assistance sales through the Cooperatives Working Together program), and cheese certified as organic by a USDA-accredited certifying agent.

(b) Specifications for Butter Prices:

(1) Variety: 80 percent butterfat, salted, fresh or storage.

(2) Grade: Product meets USDA Grade AA standards.

(3) Packaging: 25-kilogram and 68-pound box sales.

(4) Exclude: Unsalted and Grade A butter, intra-company sales, resales of purchased butter, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed), butter produced under faith-based close supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher butter produced with a rabbi on site who is actively involved in supervision of the production process), sales under the Dairy Export Incentive Program or other premium-assisted sales (for example, export assistance sales through the CWT program), and butter certified as organic by a USDA-accredited certifying agent.

(c) Specifications for Dry Whey Prices:

(1) Variety: Edible nonhygroscopic.

(2) Age: No more than 180 days.

(3) Grade: Product meets USDA Extra Grade standards.

(4) Packaging or container: 25-kilogram bag, 50-pound bag, tote, or tanker.

(5) Exclude: Sales of Grade A dry whey, intra-company sales, resales of purchased dry whey, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed), dry whey produced under faith-based close supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher dry whey produced with a rabbi on site who is actively involved in supervision of the production process), premium-assisted sales, and dry whey certified as organic by a USDA-accredited certifying agent.

(d) Specifications for the Nonfat Dry Milk Prices:

(1) Variety: Non-fortified.

(2) Age: No more than 180 days.

(3) Grade: Product meets USDA Extra Grade or USPH² Grade A standards.

(4) Packaging or container: 25-kilogram bag, 50-pound bag, tote, or tanker.

(5) Exclude: Nonfat dry milk manufactured using high heat process, sales of instant nonfat dry milk, sales of dry buttermilk products, intra-company sales, resales of purchased nonfat dry milk, forward pricing sales (sales in which the selling price was set [not adjusted] 30 or more days before the transaction was completed), nonfat dry milk produced under faith-based close supervision and marketed at a higher price than the manufacturer's wholesale market price for the basic commodity (for example, kosher nonfat dry milk produced with a rabbi on site who is actively involved in supervision of the production process), sales under the Dairy Export Incentive Program or other premium-assisted sales, and nonfat dry milk certified as organic by a USDA-accredited certifying agent.

§ 1170.9 Price reporting exemptions.

(a) Any manufacturer that processes and markets less than 1 million pounds of cheddar cheese per calendar year is exempt from reporting cheddar cheese sales as specified in § 1170.8(a).

(b) Any manufacturer that processes and markets less than 1 million pounds of butter per calendar year is exempt from reporting butter sales as specified in § 1170.8(b).

(c) Any manufacturer that processes and markets less than 1 million pounds of dry whey per calendar year is exempt

from reporting dry whey sales as specified in § 1170.8(c).

(d) Any manufacturer that processes and markets less than 1 million pounds of nonfat dry milk per calendar year is exempt from reporting nonfat dry milk sales as specified in § 1170.8(d).

§ 1170.10 Storage reporting specifications.

(a) Cold Storage Report:

(1) Reporting universe: All warehouses or facilities, artificially cooled to a temperature of 50 degrees Fahrenheit or lower, where dairy products generally are placed and held for 30 days or more. Excluded are stocks in refrigerated space maintained by wholesalers, jobbers, distributors, and chain stores; locker plants containing individual lockers; and frozen food processors whose inventories are turned over more than once a month.

(2) Products required to be reported:

(i) Natural cheese, domestic and foreign made, including barrel and cheese to be processed; American type cheeses, (cheddar, Monterey, Colby, etc.), including government owned stocks; Swiss; other natural cheese types (brick, mozzarella, Muenster, Parmesan, etc.). Exclude processed cheese.

(ii) Salted and unsalted butter, anhydrous milkfat (AMF), butter oil, including government owned stocks.

(b) Dairy Products Report:

(1) Reporting universe: All manufacturing plants.

(2) Products required to be reported:

(i) Nonfat dry milk.

(ii) Dry whey.

§ 1170.11 Records.

Each person required to report information to the Secretary shall maintain, and make available to the Secretary, on request, original contracts, agreements, receipts, and other records associated with the sale or storage of any dairy products during the 2-year period beginning on the date of the creation of the records.

§ 1170.12 Confidential information.

Except as otherwise directed by the Secretary or the Attorney General for enforcement purposes, no officer, employee, or agent of the United States shall make available to the public information, statistics, or documents obtained from or submitted by any person in compliance with the Dairy Product Mandatory Reporting program other than in a manner that ensures that confidentiality is preserved regarding the identity of person, including parties to a contract, and proprietary business information.

Verification and Enforcement

§ 1170.13 Verification of reports.

For the purpose of assuring compliance and verification, records and reports required to be filed by manufacturers or other persons pursuant to section 273(b)(1)(A)(i) of the Act, the Agricultural Marketing Service, through its duly authorized agents, shall have access to any premises where applicable records are maintained, where dairy products are produced or stored, and at any time during reasonable business hours shall be permitted to inspect such manufacturer or person, and any original contracts, agreements, receipts, and other records associated with the sale of any dairy products.

§ 1170.14 Noncompliance procedures.

(a) When the Secretary becomes aware that a manufacturer or person may have willfully delayed reporting of, or failed or refused to provide, accurate information pursuant to section 273(b)(1)(A)(i) of the Act, the Secretary may issue a cease and desist order.

(b) Prior to the issuance of a cease and desist order, the Secretary shall provide notice and an opportunity for an informal hearing regarding the matter to the manufacturer or person involved.

(c) The notice shall contain the following information:

(1) That the issuance of a cease and desist order is being considered;

(2) That the reasons for the proposed cease and desist order in terms sufficient to put the person on notice of the conduct or lack thereof upon which the notice is based;

(3) That within 30 days after receipt of the notice, the manufacturer or person may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed cease and desist order; and

(4) That if no response to the notice is received within the 30 days after receipt of the notice, that a cease and desist order may be issued immediately.

(d) If a manufacturer or person requests a hearing, the hearing should be held at a location and time that is convenient to the parties concerned, if possible. The hearing will be held before the Deputy Administrator, Dairy Programs, Agricultural Marketing Service, or a designee. The manufacturer or person may be represented. Witnesses may be called by either party.

(e) The Deputy Administrator, Dairy Programs, Agricultural Marketing Service, or a designee will make a decision on the basis of all the

² USPH refers to the US Department of Health and Human Services—Public Health Service/Food and Drug Administration.

information in the administrative record, including any submission made by the manufacturer or person. The decision of whether a cease and desist order should be issued shall be made within 30 days after receipt of any information and argument submitted by the manufacturer or person. The cease and desist order shall be final unless the affected manufacturer or person requests a reconsideration of the order to the Administrator, Agricultural Marketing Service, within 30 days after the date of the issuance of the order.

§ 1170.15 Appeals.

If the cease and desist order is confirmed by the Administrator, Agricultural Marketing Service, the manufacturer or person may appeal the order in the appropriate United States District Court not later than 30 days after the date of the confirmation of the order.

§ 1170.16 Enforcement.

(a) If a person subject to the Dairy Product Mandatory Reporting program fails to obey a cease and desist order after the order has become final and unappealable, or after the appropriate United States district court has entered a final judgment in favor of the Administrator, Agricultural Marketing Service, the United States may apply to the appropriate United States district court for enforcement of the order.

(b) If the court determines that the cease and desist order was lawfully made and duly served and that the manufacturer or person violated the order, the court shall enforce the order.

(c) If the court finds that the manufacturer or person violated the cease and desist order, the manufacturer or person shall be subject to a civil penalty of not more than \$10,000 for each offense.

Dated: June 10, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8-13550 Filed 6-16-08; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 520

Oral Dosage Form New Animal Drugs; Ivermectin Paste

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental abbreviated new animal drug application (ANADA) filed by Cross Vetpharm Group Ltd. The supplemental ANADA adds effectiveness claims against various species of internal parasites when horses are treated with ivermectin paste.

DATES: This rule is effective June 17, 2008.

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

SUPPLEMENTARY INFORMATION: Cross Vetpharm Group Ltd., Broomhill Rd., Tallaght, Dublin 24, Ireland, filed a supplement to ANADA 200-326 for BIMECTIN (ivermectin) Paste 1.87% adding effectiveness claims against various species of internal parasites of horses. The supplemental ANADA is approved as of May 23, 2008, and 21 CFR 520.1192 is amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to support approval of this application may be seen in the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, between 9 a.m. and 4 p.m., Monday through Friday.

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

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

List of Subjects in 21 CFR Part 520

Animal drugs.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 520 is amended as follows:

PART 520—ORAL DOSAGE FORM NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 520 continues to read as follows:

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

■ 2. In § 520.1192, remove paragraphs (b)(4) and (e)(1)(ii)(C) and revise paragraph (b)(3) to read as follows:

§ 520.1192 Ivermectin paste.

* * * * *

(b) * * *

(3) Nos. 051311, 054925, and 061623 for use of a 1.87 percent paste for use as in paragraphs (e)(1)(i), (e)(1)(ii)(A), and (e)(1)(iii) of this section.

* * * * *

Dated: June 9, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8-13607 Filed 6-16-08; 8:45 am]

BILLING CODE 4160-01-S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 558

New Animal Drugs For Use in Animal Feeds; Tylosin

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a supplemental new animal drug application (NADA) filed by Elanco Animal Health, A Division of Eli Lilly & Co. The supplemental NADA provides for revision of an effectiveness claim and pathogen nomenclature for a tylosin phosphate and sulfamethazine Type A medicated article used to manufacture medicated swine feeds.

DATES: This rule is effective June 17, 2008.

FOR FURTHER INFORMATION CONTACT: Timothy Schell, Center for Veterinary Medicine (HFV-128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240-276-8116, e-mail: timothy.schell@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed a supplement to NADA 41-275 that provides for use of TYLAN 40 SULFAG (tylosin phosphate and sulfamethazine) Elliptical Pellets, a Type A medicated article. The

supplement provides for revision of an effectiveness claim and pathogen nomenclature. The supplemental NADA is approved as of May 8, 2008, and the regulations in 21 CFR 558.630 are amended to reflect the approval.

Approval of this supplemental NADA did not require review of additional safety or effectiveness data or information. Therefore, a freedom of information summary is not required.

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

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

List of Subjects in 21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 558 is amended as follows:

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 1. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

■ 2. Revise § 558.630 to read as follows:

§ 558.630 Tylosin and sulfamethazine.

(a) *Specifications.* Type A medicated articles containing equal amounts of tylosin phosphate and sulfamethazine, available in concentrations of 4, 5, 10, 20, or 40 grams each, per pound.

(b) *Approvals.* See sponsor numbers in § 510.600(c) of this chapter for use as in paragraph (e) of this section.

(1) No. 000986: 10 or 40 grams per pound each for use as in paragraph (e)(2)(i) of this section.

(2) No. 021930: 2 grams per pound each for use as in paragraph (e)(2)(i) of this section.

(3) No. 051311: 40 grams per pound each for use as in paragraph (e)(2)(ii) of this section.

(4) No. 017139: 4, 10, or 20 grams per pound each for use as in paragraph (e)(2)(ii) of this section.

(5) Nos. 000986, 010439, 016968, 021930, 024174, 030841, 034936, 035098, 046573, 046987, and 051359: 5, 10, 20, or 40 grams per pound each for

use as in paragraph (e)(2)(ii) of this section.

(6) No. 000986: 40 grams per pound each for use as in paragraph (e)(2)(iii) of this section.

(c) *Special considerations.* Labeling shall bear the statement: "Do not use in medicated feeds containing in excess of 2% bentonite."

(d) *Related tolerances.* See §§ 556.670 and 556.740 of this chapter.

(e) *Conditions of use.* It is used in feed for swine as follows:

(1) *Amount per ton.* 100 grams tylosin and 100 grams sulfamethazine.

(2) *Indications for use—*(i) Maintaining weight gains and feed efficiency in the presence of atrophic rhinitis; lowering the incidence and severity of *Bordetella bronchiseptica* rhinitis; prevention of swine dysentery (vibronic); control of swine pneumonias caused by bacterial pathogens (*Pasteurella multocida* and/or *Corynebacterium pyogenes*); for reducing the incidence of cervical lymphadenitis (jowl abscesses) caused by Group E *Streptococci*. Only the sulfamethazine portion of this combination is active in controlling jowl abscesses.

(ii) Maintaining weight gains and feed efficiency in the presence of atrophic rhinitis; lowering the incidence and severity of *Bordetella bronchiseptica* rhinitis; prevention of swine dysentery (vibronic); control of swine pneumonias caused by bacterial pathogens (*Pasteurella multocida* and/or *Corynebacterium pyogenes*).

(iii) For maintaining weight gains and feed efficiency in the presence of atrophic rhinitis; lowering the incidence and severity of *Bordetella bronchiseptica* rhinitis; prevention of swine dysentery associated with *Brachyspira hyodysenteriae*; and control of swine pneumonias caused by bacterial pathogens (*Pasteurella multocida* and/or *Arcanobacterium pyogenes*).

(3) *Limitations.* Withdraw 15 days before swine are slaughtered.

Dated: June 9, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–13606 Filed 6–16–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9401]

RIN 1545–BH33

Alternative Simplified Credit Under Section 41(c)(5)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the election and calculation of the alternative simplified credit under section 41(c)(5) of the Internal Revenue Code. The final and temporary regulations implement changes to the credit for increasing research activities under section 41 made by the Tax Relief and Health Care Act of 2006. The final and temporary regulations will affect certain taxpayers claiming credit under section 41. The text of these temporary regulations also serves as the text of the proposed regulations (REG–149405–07) published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective Date:* These regulations are effective on June 17, 2008.

Applicability Date: For dates of applicability, see §§ 1.41–6T(j), 1.41–8T(b)(5), and 1.41–9T(d).

FOR FURTHER INFORMATION CONTACT: David A. Selig (202) 622–3040 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1 to provide rules relating to the alternative simplified credit (ASC), which may be elected under section 41(c)(5) of the Internal Revenue Code (Code).

General Overview

Section 41(a) provides an incremental tax credit for increasing research activities (research credit), and is based on a percentage of a taxpayer's qualified research expenses (QREs) above a base amount. The Tax Relief and Health Care Act of 2006 (Pub. L. 109–432, 120 Stat. 2922, December 20, 2006) (the Act) made certain changes to the research credit, including the addition of another method of computation that taxpayers may elect to use in computing the amount of the research credit. The relevant Act provisions are effective generally for tax years after December 31, 2006, but provide certain

transitional rules for fiscal year taxpayers.

Prior to the Act changes, there were two ways a taxpayer could determine the research credit under section 41(a). One way, commonly referred to as the regular credit, is determined by following the rules and percentages stated under section 41(a)(1). Under the regular credit, the base amount is generally determined with reference to the gross receipts of the taxpayer for the four prior taxable years preceding the taxable year in which credit is being determined (credit year) and the QREs and gross receipts over the five-year base period from 1984–1988. The base amount cannot be less than 50 percent of the taxpayer's QREs for the credit year. Special rules are provided for certain start-up companies.

The second way a taxpayer could compute the research credit prior to the Act was to elect, in lieu of the regular credit, the alternative incremental credit (AIRC) under section 41(c)(4). Under the AIRC, the base amount is determined with reference to the gross receipts of the taxpayer for the four prior taxable years.

The Act added a third way, the ASC, under section 41(c)(5), which a taxpayer may elect to compute the research credit. Section 41(c)(5)(A) provides the general rule that, at the election of the taxpayer, the credit determined under section 41(a)(1) shall be equal to 12 percent of so much of the QREs for the taxable year as exceeds 50 percent of the average QREs for the three taxable years preceding the taxable year for which the credit is being determined. Section 41(c)(5)(B) provides a special rule that the credit shall be equal to 6 percent of the QREs for the taxable year if the taxpayer does not have QREs in each of the three taxable years preceding the year for which credit is being determined.

Section 41(c)(5)(C) provides that an ASC election under section 41(c)(5) shall apply to the taxable year for which made and all succeeding taxable years unless revoked with the consent of the Secretary. It further provides that an ASC election under section 41(c)(5) may not be made for any taxable year to which an AIRC election under section 41(c)(4) applies.

Explanation of Provisions

The primary objective of these temporary regulations is to provide guidance on the ASC under section 41(c)(5). The temporary regulations provide rules for the ASC similar to some of the rules relating to the AIRC as contained in § 1.41–8 of the current regulations. However, because there are

also differences, such as the formula calculation for the ASC, the ASC rules are provided in a new § 1.41–9T. These final and temporary regulations also make conforming and clarifying changes to §§ 1.41–1, 1.41–6, and 1.41–8.

Section 1.41–9T provides that, at the election of the taxpayer, the credit determined under section 41(a)(1) equals the amount determined under the ASC under section 41(c)(5). Generally, a taxpayer may elect the ASC for any taxable year of the taxpayer ending after December 31, 2006. However, for certain transitional rules, see Division A, section 104(b)(3), (c)(2), and (c)(4) of the Act. Because the transitional rules are of limited duration and have already been described and implemented in the 2006 version of Form 6765, “Credit for Increasing Research Activities,” these regulations do not address the transitional rules.

The temporary regulations generally provide the same rules related to elections and revocations as those provided for the AIRC in § 1.41–8 in the current regulations. If a taxpayer makes an ASC election under section 41(c)(5), the election applies to the taxable year for which made and all subsequent taxable years unless revoked. An ASC election under section 41(c)(5) is made by completing the portion of Form 6765, “Credit for Increasing Research Activities,” (or successor form) relating to the election of the ASC, and attaching the completed form to the taxpayer's timely filed (including extensions) original return for the taxable year to which the election applies. The election may not be revoked except with the consent of the Commissioner. A taxpayer is deemed to have requested, and to have been granted, the consent of the Commissioner to revoke the election if the taxpayer completes the portion of Form 6765 (or successor form) relating to the credit determined under section 41(a)(1) or the AIRC and attaches the completed form to the taxpayer's timely filed (including extensions) original return for the year to which the revocation applies. As is the case with a revocation of an AIRC election under § 1.41–8, an election under section 41(c)(5) may not be made or revoked on an amended return. Accordingly, for purposes of further clarification, the temporary regulations also provide that an extension of time to make or revoke an election under section 41(c)(5) (and similarly, under section 41(c)(4)) will not be granted under § 301.9100–3.

In the case of a controlled group of corporations, all the members of which are not included on a single consolidated return, an election or revocation must be made by the

designated member by satisfying the requirements described above. The election or revocation by the designated member is binding on all the members of the group for the credit year to which the election or revocation relates. If the designated member fails to timely make or revoke an election, each member of the group must compute the group credit using the method used to compute the group credit for the immediately preceding credit year.

The term *designated member* means that member of the group that is allocated the greatest amount of the group credit under § 1.41–6(c) based on the amount of credit reported on the original timely-filed Federal income tax return (even if that member subsequently is determined not to be the designated member). If the members of a group compute the group credit using different methods (the method described in section 41(a), the AIRC method, or the ASC method) and at least two members of the group qualify as the designated member, then the term *designated member* means that member that computes the group credit using the method that yields the greatest group credit.

The temporary regulations provide several special rules. Section 1.41–9T(c) provides that unless a taxpayer has QREs in each of the three taxable years preceding the taxable year for which the credit is being determined, the credit equals the percentage of the QREs for the taxable year provided by section 41(c)(5)(B)(ii).

The temporary regulations also provide special rules relating to consistency and short taxable years. The temporary regulations provide that in computing the credit, QREs for the three taxable years preceding the credit year must be determined on a basis consistent with the definition of QREs for the credit year, without regard to the law in effect for the three taxable years preceding the credit year. This consistency requirement applies even if the period for filing a claim for credit or refund has expired for any of the three taxable years preceding the credit year. The regulations also provide special rules similar to the rules in § 1.41–3(b) of the existing regulations for taxpayers that have a short taxable year. If one or more of the three taxable years preceding the credit year is a short taxable year, then the QREs for such year are deemed to be equal to the QREs actually paid or incurred in that year multiplied by 12 and divided by the number of months in that year. Additionally, the temporary regulations provide that if a credit year is a short taxable year, then the average QREs for

the three taxable years preceding the credit year are modified by multiplying that amount by the number of months in the short taxable year and dividing the result by 12.

The regulations also clarify that the average QREs for the three taxable years preceding the taxable year for which credit is being determined will be considered the base amount for purposes of the computation under section 41(h)(2). Therefore, if the research credit expires during the credit year, the average QREs for the three taxable years preceding the credit are multiplied by the ratio of the number of days for which the research credit is effective to the total number of days in the credit year.

The Treasury Department and the IRS note that the rules generally applicable under section 6001 provide sufficient detail about required documentary substantiation for purposes of the research credit. Section 1.6001-1 requires the keeping of records "sufficient to establish the amount of * * * required to be shown * * *." The IRS may deny the credit for failure to provide sufficient records substantiating the claimed credit for any method used in determining the research credit.

Effective/Applicability Date

Sections 1.41-6T(j), 1.41-8T(b)(5), and 1.41-9T(d) of these regulations apply to taxable years ending after December 31, 2006, the effective date of section 41(c)(5), and terminate on or before June 13, 2011.

For certain transitional rules under section 41, see Division A, sections 104(b)(3), (c)(2), (c)(4), and 123(a) of the Act.

The IRS and Treasury Department are committed to providing appropriate relief to taxpayers that have used methodologies inconsistent with the short taxable year rules provided in these regulations on tax returns filed after the effective date of section 41(c)(5) and prior to the publication of these regulations.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act, refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed

rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.41-8T also issued under 26 U.S.C. 41(c)(4)(B);
Section 1.41-9T also issued under 26 U.S.C. 41(c)(5)(C); * * *

§ 1.41-0 [Amended]

■ **Par. 2.** Section 1.41-0 is amended by:
■ 1. Revising the introductory text.

§ 1.41-6 [Amended]

■ 2. Revising the paragraph heading for § 1.41-6(j) and adding entries for paragraphs (j)(1), (j)(2), and (j)(3).

§ 1.41-8 [Amended]

■ 3. Revising the section heading for § 1.41-8 and entries for paragraphs (a) and (b)(5).
■ 4. Adding § 1.41-9.

The additions and revisions read as follows:

§ 1.41-0 Table of contents.

This section lists the table of contents for §§ 1.41-1 through 1.41-9.

* * * * *

§ 1.41-6 Aggregation of expenditures.

* * * * *

(j) Effective/applicability date.

(1) In general.

(2) Consolidated group rule.

(3) Taxable years ending on or before December 31, 2006.

* * * * *

§ 1.41-8 Alternative incremental credit.

(a) Determination of credit.

(b) * * *

(5) Effective/applicability dates.

§ 1.41-9 Alternative simplified credit.

[Reserved]. For further guidance, see the entries for § 1.41-9T in § 1.41-0T.

■ **Par. 3.** Section 1.41-0T is added to read as follows:

§ 1.41-0T Table of contents (temporary).

This section lists the table of contents for §§ 1.41-6T, 1.41-8T, and 1.41-9T.

§ 1.41-6T Aggregation of expenditures (temporary).

(a) [Reserved]. For further guidance, see the entry for § 1.41-6(a) in § 1.41-0.

(b) Computation of the group credit.

(1) In general.

(2) [Reserved]. For further guidance, see the entry for § 1.41-6(b)(2) in § 1.41-0.

(c) Allocation of the group credit.

(1) [Reserved]. For further guidance, see the entry for § 1.41-6(c)(1) in § 1.41-0.

(2) Stand-alone entity credit.

(d) [Reserved]. For further guidance, see the entry for § 1.41-6(d) in § 1.41-0.

(e) Example.

(f) through (i) [Reserved]. For further guidance, see the entries for § 1.41-6(f) through (i) in § 1.41-0.

(j) Effective/applicability dates.

* * * * *

§ 1.41-8T Alternative incremental credit (temporary).

(a) [Reserved]. For further guidance, see the entry for § 1.41-8(a) in § 1.41-0.

(b) Election.

(1) In general.

(2) Time and manner of election.

(3) Revocation.

(4) Special rules for controlled groups.

(i) In general.

(ii) Designated member.

(5) Effective/applicability dates.

§ 1.41-9T Alternative simplified credit (temporary).

(a) Determination of credit.

(b) Election.

(1) In general.

(2) Time and manner of election.

(3) Revocation.

(4) Special rules for controlled groups.

(i) In general.

(ii) Designated member.

(c) Special rules.

(d) Effective/applicability dates.

(e) Expiration date.

■ **Par. 4.** Section 1.41-1 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 1.41-1 Credit for increasing research activities.

(a) * * * For taxable years ending after December 31, 2006, and at the

election of the taxpayer, the portion of the credit determined under section 41(a)(1) may be calculated using either the alternative incremental credit set forth in section 41(c)(4), or the alternative simplified credit set forth in section 41(c)(5).

* * * * *

■ **Par. 5.** Section 1.41–6 is amended by:

■ 1. Revising paragraph (e) introductory text and the paragraph heading for paragraph (j).

■ 2. Adding paragraph (j)(3).

The revision and addition reads as follows:

§ 1.41–6 Aggregation of expenditures.

* * * * *

(e) *Examples.* The following examples illustrate the provisions of this section. Unless otherwise stated, no members of a controlled group are members of a consolidated group, no member of the group made any basic research payments or paid or incurred any amounts to an energy research consortium, and the group has not made an AIRC election (except as provided in Example 6) or an ASC election. For an example illustrating the calculation of the alternative simplified credit under section 41(c)(5), which is applicable for taxable years ending after December 31, 2006, see § 1.41–6T(e).

* * * * *

(j) *Effective/applicability dates.* * * *

(3) *Taxable years ending on or before December 31, 2006.* Paragraphs (b)(1) and (c)(2) of this section are applicable for taxable years ending on or before December 31, 2006. For taxable years

ending after December 31, 2006, see § 1.41–6T.

■ **Par. 6.** Section 1.41–6T is added to read as follows:

§ 1.41–6T Aggregation of expenditures (temporary).

(a) [Reserved]. For further guidance, see § 1.41–6(a).

(b) *Computation of the group credit—*
(1) *In general.* All members of a controlled group are treated as a single taxpayer for purposes of computing the research credit. The group credit is computed by applying all of the section 41 computational rules on an aggregate basis. All members of a controlled group must use the same method of computation, either the method described in section 41(a)(1), the alternative incremental credit (AIRC) method described in section 41(c)(4), or the alternative simplified credit (ASC) method described in section 41(c)(5), in computing the group credit for a credit year.

(2) [Reserved]. For further guidance, see § 1.41–6(b)(2).

(c) *Allocation of the group credit.* (1) [Reserved]. For further guidance, see § 1.41–6(c)(1).

(2) *Stand-alone entity credit.* The term *stand-alone entity credit* means the research credit (if any) that would be allowable to a member of a controlled group if the credit were computed as if section 41(f)(1) did not apply, except that the member must apply the rules provided in § 1.41–6(d)(1) (relating to consolidated groups) and § 1.41–6(i) (relating to intra-group transactions).

Each member's stand-alone entity credit for any credit year must be computed under whichever method (the method described in section 41(a), the method described in section 41(c)(4), or the method described in section 41(c)(5)) results in the greatest stand-alone entity credit for that member, without regard to the method used to compute the group credit.

(d) [Reserved]. For further guidance see § 1.41–6(d).

(e) *Example.* Group alternative simplified credit. The following example illustrates a group computation in a year for which the ASC method under section 41(c)(5) is in effect. No members of the controlled group are members of a consolidated group and no member of the group made any basic research payments or paid or incurred any amounts to an energy research consortium.

Example. (i) *Facts.* Q, R, and S, all of which are calendar-year taxpayers, are members of a controlled group. The research credit under section 41(a)(1) is not allowable to the group for the 2008 taxable year (the credit year) because the group's aggregate QREs for the credit year are less than the group's base amount. The group does not use the AIRC method of section 41(c)(4) because its aggregate QREs for the credit year do not exceed 1 percent of the average annual gross receipts for the four years preceding the credit year. The group credit is computed using the ASC rules of section 41(c)(5).

Assume that each member of the group had QREs in each of the three years preceding the credit year. For purposes of computing the group credit for the credit year, Q, R, and S had the following:

	Q	R	S	Group aggregate
Credit Year QREs	\$0x	\$20x	\$30x	\$50x
Average QREs for 3 Years Preceding the Credit Year	10x	20x	10x	40x

(ii) *Computation of the group credit.* The research credit allowable to the group is computed as if Q, R, and S are one taxpayer. The group credit is equal to 12 percent of so much of the QREs for the credit year as exceeds 50 percent of the average QREs for the three taxable years preceding the credit year. The group credit is $0.12 \times (\$50x - (0.5 \times \$40x))$, which equals \$3.6x.

(iii) *Allocation of the group credit.* Under paragraph (c)(2) of this section,

the stand-alone entity credit for each member of the group must be computed using the method that results in the greatest stand-alone entity credit for that member. The stand-alone entity credit for Q is zero under all three methods. Assume that the stand-alone entity credit for each of R (\$1.2x) and S (\$3x) is greatest using the ASC method. Therefore, the stand-alone entity credits for each of R and S must be computed using the ASC method. The sum of the

stand-alone entity credits of the members of the group is \$4.2x. Because the group credit of \$3.6x is less than the sum of the stand-alone entity credits of all the members of the group (\$4.2x), the group credit is allocated among the members of the group based on the ratio that each member's stand-alone entity credit bears to the sum of the stand-alone entity credits of all the members of the group. The \$3.6x group credit is allocated as follows:

	Q	R	S	Total
Stand-Alone Entity Credit	\$0x	\$1.2x	\$3x	\$4.2x
Allocation Ratio (Stand-Alone Entity Credit/Sum of Stand-Alone Entity Credits)	0/4.2	1.2/4.2	3/4.2	
Multiplied by: Group Credit	\$3.6x	\$3.6x	\$3.6x	
Equals: Credit Allocated to Member	\$0x	\$1.03x	\$2.57x	\$3.6x

(f) through (i) [Reserved]. For further guidance see § 1.41–6(f) through (i).

(j) *Effective/applicability dates.* This section is applicable for taxable years ending after December 31, 2006. For taxable years ending on or before December 31, 2006, see § 1.41–6.

(k) *Expiration date.* The applicability of this section will expire on or before June 13, 2011.

■ **Par. 7.** Section 1.41–8 is amended by:

■ 1. Revising the section heading and the heading of paragraph (a).

■ 2. Removing the language “paragraph (c) of this section” from the first sentence of paragraph (b)(4)(ii) and adding “§ 1.41–6(c)” in its place.

■ 3. Revising the paragraph heading and adding two sentences at the end of paragraph (b)(5).

The revisions and additions read as follows:

§ 1.41–8 Alternative incremental credit.

(a) *Determination of credit.* * * *

(b) * * *

(5) *Effective/applicability dates.*

* * * Paragraphs (b)(3) and (b)(4)(ii) of this section are applicable for taxable years ending on or before December 31, 2006. For taxable years ending after December 31, 2006, see § 1.41–8T.

■ **Par. 8.** Section 1.41–8T is added to read as follows:

§ 1.41–8T Alternative incremental credit (temporary).

(a) [Reserved]. For further guidance, see § 1.41–8(a).

(b) *Election*—(1) [Reserved]. For further guidance, see § 1.41–8(b)(1).

(2) *Time and manner of election.* An election under section 41(c)(4) is made by completing the portion of Form 6765, “Credit for Increasing Research Activities,” (or successor form) relating to the election of the AIRC, and attaching the completed form to the taxpayer’s timely filed (including extensions) original return for the taxable year to which the election applies. An election under section 41(c)(4) may not be made on an amended return. An extension of time to make an election under section 41(c)(4) will not be granted under § 301.9100–3 of this chapter.

(3) *Revocation.* An election under this section may not be revoked except with the consent of the Commissioner. A taxpayer is deemed to have requested, and to have been granted, the consent of the Commissioner to revoke an election under section 41(c)(4) if the taxpayer completes the portion of Form 6765, “Credit For Increasing Research Activities,” (or successor form) relating to the amount determined under section 41(a)(1) (the regular credit) or the

alternative simplified credit (ASC) and attaches the completed form to the taxpayer’s timely filed (including extensions) original return for the year to which the revocation applies. An election under section 41(c)(4) may not be revoked on an amended return. An extension of time to revoke an election under section 41(c)(4) will not be granted under § 301.9100–3 of this chapter.

(4) *Special rules for controlled groups*—(i) [Reserved]. For further guidance, see § 1.41–8(b)(4)(i).

(ii) *Designated member.* For purposes of this paragraph (b)(4), for any credit year, the term *designated member* means that member of the group that is allocated the greatest amount of the group credit under § 1.41–6(c) based on the amount of credit reported on the original timely-filed Federal income tax return (even if that member subsequently is determined not to be the designated member). If the members of a group compute the group credit using different methods (the method described in section 41(a)(1), the AIRC method of section 41(c)(4), or the ASC method of section 41(c)(5)) and at least two members of the group qualify as the designated member, then the term *designated member* means that member that computes the group credit using the method that yields the greatest group credit. For example, A, B, C, and D are members of a controlled group but are not members of a consolidated group. For the 2008 taxable year (the credit year), the group credit using the method described in section 41(a)(1) is \$10x. Under this method, A would be allocated \$5x of the group credit, which would be the largest share of the group credit under this method. For the credit year, the group credit using the AIRC method is \$15x. Under the AIRC method, B would be allocated \$5x of the group credit, which is the largest share of the group credit computed using the AIRC method. For the credit year, the group credit using the ASC method is \$10x. Under the ASC method, C would be allocated \$5x of the group credit, which is the largest share of the group credit computed using the ASC method. Because the group credit is greatest using the AIRC method and B is allocated the greatest amount of credit under that method, B is the designated member. Therefore, if B makes a section 41(c)(4) election on its original timely-filed return for the credit year, that election is binding on all members of the group for the credit year.

(5) *Effective/applicability dates.* This section is applicable for taxable years ending after December 31, 2006. For

taxable years ending on or before December 31, 2006, see § 1.41–8.

(6) *Expiration date.* This applicability of this section expires on or before June 13, 2011.

■ **Par. 9.** Sections 1.41–9 and 1.41–9T are added to read as follows:

§ 1.41–9 Alternative simplified credit.

[Reserved]. For further guidance, see § 1.41–9T.

§ 1.41–9T Alternative simplified credit (temporary).

(a) *Determination of credit.* At the election of the taxpayer, the credit determined under section 41(a)(1) equals the amount determined under section 41(c)(5).

(b) *Election*—(1) *In general.* A taxpayer may elect to apply the provisions of the alternative simplified credit (ASC) in section 41(c)(5) for any taxable year of the taxpayer ending after December 31, 2006. If a taxpayer makes an election under section 41(c)(5), the election applies to the taxable year for which made and all subsequent taxable years unless revoked in the manner prescribed in paragraph (b)(3) of this section.

(2) *Time and manner of election.* An election under section 41(c)(5) is made by completing the portion of Form 6765, “Credit for Increasing Research Activities,” (or successor form) relating to the election of the ASC, and attaching the completed form to the taxpayer’s timely filed (including extensions) original return for the taxable year to which the election applies. An election under section 41(c)(5) may not be made on an amended return. An extension of time to make an election under section 41(c)(5) will not be granted under § 301.9100–3 of this chapter.

(3) *Revocation.* An election under this section may not be revoked except with the consent of the Commissioner. A taxpayer is deemed to have requested, and to have been granted, the consent of the Commissioner to revoke an election under section 41(c)(5) if the taxpayer completes the portion of Form 6765 (or successor form) relating to the credit determined under section 41(a)(1) (the regular credit) or the alternative incremental credit (AIRC) and attaches the completed form to the taxpayer’s timely filed (including extensions) original return for the year to which the revocation applies. An election under section 41(c)(5) may not be revoked on an amended return. An extension of time to revoke an election under section 41(c)(5) will not be granted under § 301.9100–3 of this chapter.

(4) *Special rules for controlled groups*—(i) *In general.* In the case of a

controlled group of corporations, all the members of which are not included on a single consolidated return, an election (or revocation) must be made by the designated member by satisfying the requirements of paragraph (b)(2) or (b)(3) of this section (whichever applies), and such election (or revocation) by the designated member shall be binding on all the members of the group for the credit year to which the election (or revocation) relates. If the designated member fails to timely make (or revoke) an election, each member of the group must compute the group credit using the method used to compute the group credit for the immediately preceding credit year.

(ii) *Designated member.* For purposes of this paragraph (b)(4), for any credit year, the term *designated member* means that member of the group that is allocated the greatest amount of the group credit under § 1.41–6(c) based on the amount of credit reported on the original timely-filed Federal income tax return (even if that member subsequently is determined not to be the designated member). If the members of a group compute the group credit using different methods (the method described in section 41(a), the AIRC method of section 41(c)(4), or the ASC method of section 41(c)(5)) and at least two members of the group qualify as the designated member, then the term *designated member* means that member that computes the group credit using the method that yields the greatest group credit. For example, A, B, C, and D are members of a controlled group but are not members of a consolidated group. For the 2008 taxable year (the credit year), the group credit using the method described in section 41(a)(1) is \$10x. Under this method, A would be allocated \$5x of the group credit, which would be the largest share of the group credit under this method. For the credit year, the group credit using the AIRC method is \$10x. Under the AIRC method, B would be allocated \$5x of the group credit, which is the largest share of the group credit computed using the AIRC method. For the credit year, the group credit using the ASC method is \$15x. Under the ASC method, C would be allocated \$5x of the group credit, which is the largest share of the group credit computed using the ASC method. Because the group credit is greatest using the ASC method and C is allocated the greatest amount of credit under that method, C is the designated member. Therefore, if C makes a section 41(c)(5) election on its original timely-filed return for the credit year, that

election is binding on all members of the group for the credit year.

(c) *Special rules—(1) Qualified research expenses (QREs) required in all years.* Unless a taxpayer has QREs in each of the three taxable years preceding the taxable year for which the credit is being determined, the credit equals that percentage of the QREs for the taxable year provided by section 41(c)(5)(B)(ii).

(2) *Section 41(c)(6) applicability.* QREs for the three taxable years preceding the credit year must be determined on a basis consistent with the definition of QREs for the credit year, without regard to the law in effect for the three taxable years preceding the credit year. This consistency requirement applies even if the period for filing a claim for credit or refund has expired for any of the three taxable years preceding the credit year.

(3) *Section 41(h)(2) applicability.* Solely for purposes of the computation under section 41(h)(2), the average QREs for the three taxable years preceding the taxable year for which the credit is being determined shall be treated as the base amount.

(4) *Short taxable years.* If one or more of the three taxable years preceding the credit year is a short taxable year, then the QREs for such year are deemed to be equal to the QREs actually paid or incurred in that year multiplied by 12 and divided by the number of months in that year. If a credit year is a short taxable year, then the average QREs for the three taxable years preceding the credit year are modified by multiplying that amount by the number of months in the short taxable year and dividing the result by 12.

(5) *Controlled groups.* For purposes of computing the group credit under § 1.41–6, a controlled group must apply the rules of this paragraph (c) on an aggregate basis. For example, if the controlled group has QREs in each of the three taxable years preceding the taxable year for which the credit is being determined, the controlled group applies the credit computation provided by section 41(c)(5)(A) rather than section 41(c)(5)(B)(ii).

(d) *Effective/applicability dates.* This section is applicable for taxable years ending after December 31, 2006. For certain transitional rules, see Division A, section 104(b)(3), (c)(2), and (c)(4) of the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432, 120 Stat. 2922).

(e) *Expiration date.* The applicability of this section expires on or before June 13, 2011.

Dated: June 6, 2008.

Steven T. Miller,

Acting Deputy Commissioner for Services and Enforcement.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 08–1362 Filed 6–13–08; 11:51am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 104

[Docket No. USCG–2008–0028]

RIN 1625–AB26

Implementation of Vessel Security Officer Training and Certification Requirements—International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as Amended

AGENCY: Coast Guard, DHS.

ACTION: Interim rule; correction.

SUMMARY: On May 20, 2008, the Coast Guard published in the **Federal Register** an interim rule with request for comments to amend its regulations to implement the vessel security officer training and certification amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, and the Seafarers' Training, Certification and Watchkeeping Code. In the interim rule a clerical error was made stating as an option that to qualify for a VSO endorsement, a person must “have approved sea service of not less than 90 days on any vessel subject to section 104.215 of this part * * *.” Instead, the option should have stated that a person must have not less than six months to qualify for a VSO endorsement, not 90 days. This document corrects that error.

DATES: This interim rule is effective June 19, 2008.

FOR FURTHER INFORMATION CONTACT: If you have questions on this interim rule, contact Ms. Mayte Medina, Maritime Personnel Qualifications Division, Coast Guard, by telephone 202–372–1406 or by e-mail at Mayte.Medina2@uscg.mil. If you have questions on viewing or submitting material to the docket, contact Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Need for Correction

On May 20, 2008, the Coast Guard published in the **Federal Register** an interim rule with request for comments to amend its regulations to implement the vessel security officer training and certification amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended, and the Seafarers' Training, Certification and Watchkeeping Code. In 33 CFR 104.215(d)(1)(v)(B), a typographical error was made stating as an option that to qualify for a VSO endorsement, a person must "have approved sea service of not less than 90 days on any vessel subject to section 104.215 of this part * * *." Instead, the option should have stated that a person must have not less than six months to qualify for a VSO endorsement, not 90 days. In the preamble section of the Interim Rule section, the discussion of 33 CFR 104.215 states that "The sea service requirements in § 104.215 will provide two options: (1.) 12 months; or (2.) 6 months with knowledge of ship operations." The paragraph further discusses the requirements to qualify under the six-month option. This shows the intent of the Coast Guard to provide an option of sea service of not less than 6 months in § 104.215(d)(v)(B). Since this error would be misleading and cause confusion, this document corrects the typographical error found in amendatory instruction 2.

Correction of Publication

■ In rule FR Doc. E8–11225 published on May 20, 2008, (73 FR 29060) make the following correction.

§ 104.215 [Corrected]

■ 1. On page 29070, in the second column, revise § 104.215(d)(1)(v)(B) by removing the words "90 days" and adding the words "6 months" in their place.

Dated: June 9, 2008.

David L. Nichols,

Acting Chief, Regulations and Administrative Law, United States Coast Guard.

[FR Doc. E8–13552 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 150 and 165

[Docket No. USCG–2007–0087]

RIN 1625, RIN 1625–AA00, 1625–AA11, and 1625–AA87

Regulated Navigation Areas, Safety Zones, Security Zones, and Deepwater Port Facilities; Navigable Waters of the Boston Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing regulated navigation areas around a recently constructed deepwater port facility in the waters of the Atlantic Ocean near the entrance to Boston Harbor as well as safety and security zones around liquefied natural gas carriers (LNGCs) calling on these deepwater port facilities. The purpose of these regulated navigation areas, as well as safety and security zones, is to protect vessels and mariners from the potential safety hazards associated with deepwater port operations and to protect the LNGCs and deepwater port infrastructure from security threats or other subversive acts. All vessels, with the exception of LNGCs and deepwater port support vessels, are prohibited from anchoring or otherwise deploying equipment which could become entangled in submerged infrastructure within 1000 meters of the submerged turret loading (STL) buoys associated with the deepwater port, and are prohibited from entering waters within 500 meters of the deepwater port STL buoys or the LNGCs using them. Additionally, this rule makes minor amendments to the existing LNG security regulations for the Boston Captain of the Port (COTP) Zone to reflect multi-agency enforcement of those regulations.

DATES: This rule is effective July 17, 2008.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2007–0087 and are available online at <http://www.regulations.gov>. This material is 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 Coast Guard Sector Boston, 427 Commercial Street, Boston, MA 02109 between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call LCDR Heather Morrison at 617–223–3028. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 11, 2008, we published a notice of proposed rulemaking (NPRM) entitled "Regulated Navigation Areas, Safety Zones, Security Zones, and Deepwater Port Facilities; Navigable Waters of the Boston Captain of the Port Zone" in the **Federal Register** (73 FR 71). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

On May 14, 2007, the Maritime Administration (MARAD), in accordance with the Deepwater Port Act of 1974, as amended, issued a license to Excelerate Energy to own, construct, and operate a natural gas deepwater port, "Northeast Gateway." Northeast Gateway Deepwater Port (NEGDWP) is located in the Atlantic Ocean, approximately 13 nautical miles south-southeast of the City of Gloucester, Massachusetts, in Federal waters. The coordinates for its two submerged turret loading (STL) buoys are: STL Buoy A, Latitude 42°23'38" N, Longitude 070°35'31" W and STL Buoy B, Latitude 42°23'56" N, Longitude 070°37'00" W. The NEGDWP can accommodate the mooring, connecting, and offloading of two liquefied natural gas carriers (LNGCs) at a time. The NEGDWP operator plans to offload LNGCs by regasifying the liquefied natural gas (LNG) on board the vessels. The regasified natural gas is then transferred through two submerged turret loading buoys, via a flexible riser leading to a seabed pipeline that ties into the Algonquin Gas Transmission Pipeline for transfer to shore.

In order to protect mariners from the hazards associated with submerged deepwater port infrastructure and to ensure safety and security at and around LNGCs engaged in regasification and transfer operations at deepwater ports, the Coast Guard is exercising its authority under the Ports and Waterway Safety Act (33 U.S.C. 1221, *et seq.*) to establish regulated navigation areas

(RNAs) around the primary components of NEGDWP. The RNAs will prohibit vessels from anchoring or otherwise deploying equipment that could become entangled in submerged infrastructure within 1000 meters of the STL buoys associated with NEGDWP facilities. Specifically, in addition to anchoring, vessels will be precluded from engaging in commercial fishing in the RNAs using nets, dredges or traps.

Under the authority of the Port and Waterways Safety Act (33 U.S.C. 1226) and the Magnuson Act (50 U.S.C. 191), the Coast Guard is also placing safety and security zones within the corresponding RNAs that will prohibit vessels from entering all waters within a 500-meter radius of the same STL buoys. The Coast Guard considers the RNAs that are being established by this rule as meeting the requirement and intent of the Deepwater Port Act of 1974, as amended, and as codified at 33 U.S.C. 1509(d). Accordingly, in addition to amending 33 CFR part 165 (Regulated Navigation Areas and Limited Access Area), this rulemaking also amends a corresponding section in 33 CFR part 150 (Deepwater Ports: Operations). The amendments to 33 CFR part 150 include amending that part to reflect ships' routing measures—"an area to be avoided" (ATBA) and two "no anchoring areas" (NAA)—that are being concurrently established in consultation with the International Maritime Organization. The ATBA and NAAs will be reflected on nautical charts of the affected area along with the regulated navigation areas described herein.

This rule also promotes safety and security of LNG transfer operations by amending the existing regulations regarding LNGCs in the Boston Captain of the Port (COTP) Zone, to place safety and security zones around LNGCs while they are anchored, moored, or otherwise engaged in regasification and transfer procedures with deepwater ports within the navigable waters of the United States in the Boston COTP Zone.

Regulations already exist which provide for safety and security zones around LNGCs while transiting, anchored, or moored in other portions of the Boston COTP Zone. These regulations can be found at 33 CFR 165.110. The current regulations provide for safety and security zones for LNGCs transiting the Boston COTP Zone, anchored in the Broad Sound, or moored at the Distrigas LNG facility in Everett, Massachusetts. This rule amends those regulations to add safety and security zones around vessels calling at deepwater ports in the Boston COTP Zone and within the navigable waters of the United States, as defined

in 33 CFR 2.3.6(a) (i.e., out to 12 nautical miles from the territorial sea baseline). Without these changes, the security zone around a transiting LNGC would cease to exist once the vessel moored to NEGDWP. This rule eliminates that potential gap in security coverage.

This rule also adds definitions to make the regulations more clear, while eliminating the definition of "navigable waters of the United States" currently found at 33 CFR 165.110(a) as that paragraph is duplicative of the standard definition found at 33 CFR 2.36(a).

Finally, this rule amends the language describing who may enforce the safety and security zones surrounding LNGCs in the Boston COTP Zone to better reflect recently executed Memoranda of Agreement between the Coast Guard and the Commonwealth of Massachusetts, the City of Boston, and other local municipalities. Under the terms of these agreements, State and local law enforcement officers may enforce, on behalf of the Coast Guard, maritime safety and security zones implemented by the Coast Guard under the authority of the Magnuson Act and the Port and Waterways Safety Act when falling within their respective jurisdiction. Copies of these agreements are available in the public docket for this rule where indicated in the **ADDRESSES** section above.

Discussion of Comments and Changes

No comments or changes were suggested to the proposed rule. None have been made.

Discussion of Rule

The Coast Guard is establishing regulated navigation areas (RNAs) in which vessels may not anchor within 1000 meters of the STL buoys for NEGDWP as described above. Additionally, safety and security zones within the RNAs are hereby established to prohibit vessels, other than LNGCs and support vessels as defined in 33 CFR 148.5, from entering waters within 500 meters of the aforementioned STL buoys.

The Coast Guard is also establishing safety and security zones encompassing all waters within a 500-meter radius of vessels carrying LNG while they are anchored, moored, or attached to or otherwise engaged in regasification or transfer procedures with deepwater ports.

Additionally, the Coast Guard is amending 33 CFR Part 150 to reflect one recommendatory ships' routing measure—an "area to be avoided"—and two mandatory ships' routing measures—two "no anchoring areas"—

that are being concurrently established with, but separate and apart from, this rulemaking in consultation with the International Maritime Organization.

Finally, this rule alters the existing language of the regulations for LNGCs operating in the Boston COTP Zone to reflect the fact that federal, state, and local law enforcement personnel may enforce such zones within their respective jurisdictions on behalf of the COTP.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

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.

The USCG and MARAD are responsible for processing license applications to own, construct, and operate deepwater ports. To meet the requirements of the National Environmental Policy Act of 1969 (NEPQ), the Coast Guard, in cooperation with MARAD, prepared an Environmental Impact Statement (EIS) in conjunction with reviewing the NEGDWP licensing application. Among other things, the EIS assessed the potential economic impacts associated with the construction and operation of NEGDWP, including the no anchoring and limited access areas that would be implemented by this rule. That EIS is available in the public docket for the licensing application (USCG-2005-22219) at <http://www.regulations.gov>.

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 may be small entities: the owners or operators of vessels intending to transit or fish within 1000 meters of the STL Buoys for NEGDWP. The impact on small entities is expected to be minimal because vessels wishing to transit the Atlantic Ocean in the vicinity of the deepwater port may do so, provided they remain more than 500 meters from NEGDWP's STL Buoys and any LNGC vessels calling on the deepwater port, and provided they refrain from anchoring or deploying nets, dredges, or traps within 1000 meters of the STL Buoys. Vessels wishing to fish in the area may do so in nearby and adjoining areas when otherwise permitted by applicable fisheries regulations.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could 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. No comments were received as a part of this rulemaking.

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.ID and Department of Homeland Security Management Directive 5100.1, which guide 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. The reason it falls under this exception is that it is a regulation establishing a Regulated Navigation Area, security zone, and a safety zone.

A final environmental analysis checklist and a final categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 150

Harbors, Marine safety, Navigation (water), Occupational safety and health, Oil pollution, and Reporting and recordkeeping requirements.

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 parts 150 and 165 as follows:

PART 150—DEEPWATER PORTS: OPERATIONS

■ 1. The authority citation for part 150 continues to read as follows:

Authority: 33 U.S.C. 1231, 1321(j)(1)(C), (j)(5), (j)(6), (m)(2); 33 U.S.C. 1509(a); E.O. 12777, sec. 2; E.O. 13286, sec. 34, 68 FR 10619; Department of Homeland Security Delegation No. 0170.1(70), (73), (75), (80).

■ 2. In § 150.940, add paragraph (c) to read as follows:

§ 150.940 Safety zones for specific deepwater ports.

* * * * *

(c) Northeast Gateway Deepwater Port (NEGDWP).

(1) Location. The safety zones for the NEGDWP consist of circular zones, each with a 500-meter radius and centered on each of the deepwater port's two submerged turret loading (STL) buoys. STL Buoy "A" is centered at the following coordinates: 42°23'38" N, 070°35'31" W. STL Buoy "B" is centered

at the following coordinates: 42°23'56" N, 070°37'00" W. Each safety zone is located approximately 13 miles south-southeast of the City of Gloucester, Massachusetts, in Federal waters.

(2) No anchoring areas. Two mandatory no anchoring areas for NEGDWP are established for all waters within circles of 1,000-meter radii centered on the submerged turret loading buoy positions set forth in paragraph (c)(1) of this section.

(3) Area to be avoided. An area to be avoided (ATBA) for NEGDWP is as described in Table 150.940(B):

TABLE 150.940(B).—ATBA FOR NEGDWP

Plotting guidance	Latitude N	Longitude W
(i) Starting at	42°24'17"	070°35'16"
(ii) A rhumb line to:	42°24'35"	070°36'46"
(iii) Then an arc with a 1250 meter radius centered at point	42°23'56"	070°37'00"
(iv) To a point	42°23'17"	070°37'15"
(v) Then a rhumb line to	42°22'59"	070°35'45"
(vi) Then an arc with a 1250 meter radius centered at point	42°23'38"	070°35'31"
(vii) To the point of starting	42°24'17"	070°35'16"

(4) Regulations. (i) In accordance with the general regulations set forth in 33 CFR 165.23 and elsewhere in this part, no person or vessel may enter the waters within the boundaries of the safety zones described in paragraph (c)(1) of this section unless previously authorized by the Captain of the Port (COTP) Boston, or his/her authorized representative.

(ii) Notwithstanding paragraph (c)(4)(i) of this section, tankers and support vessels, as defined in 33 CFR 148.5, operating in the vicinity of NEGDWP are authorized to enter and move within such zones in the normal course of their operations following the requirements set forth in 33 CFR 150.340 and 150.345, respectively.

(iii) All other vessel operators desiring to enter or operate within the safety zones described in paragraph (c)(1) of this section must contact the COTP or the COTP's authorized representative to obtain permission by calling the Sector Boston Command Center at 617-223-5761. Vessel operators given permission to enter or operate in the safety zone must comply with all directions given to them by the COTP or the COTP's authorized representative.

(iv) No vessel, other than a support vessel or tanker calling on NEGDWP may anchor in the area described in paragraph (c)(2) of this section.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05-1, 6.04-1, 6.04-6, 160.5; Pub. L. 107-295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 4. In § 165.110, revise paragraphs (a), (c)(2) and (c)(3); and add paragraph (b)(4) to read as follows:

§ 165.110 Safety and Security Zone; Liquefied Natural Gas Carrier Transits and Anchorage Operations, Boston, Massachusetts.

(a) *Definitions.* As used in this section—

Authorized representative means a Coast Guard commissioned, warrant, or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port (COTP) Boston.

Deepwater port means any facility or structure meeting the definition of deepwater port in 33 CFR 148.5.

Support vessel means any vessel meeting the definition of support vessel in 33 CFR 148.5.

(b) * * *

(4) Vessels calling on a deepwater port. All waters within a 500-meter radius of any LNGC engaged in regasification or transfer, or otherwise moored, anchored, or affixed to a deepwater port listed in 33 CFR 150.490

and falling within the waters of the Boston COTP Zone, as defined in 33 CFR 3.05-10.

(c) * * *

(2) No person or vessel may enter the waters within the boundaries of the safety and security zones described in paragraph (b) of this section unless previously authorized by the COTP Boston, or his/her authorized representative. However, LNGCs and support vessels, as defined in 33 CFR 148.5, operating in the vicinity of NEGDWP are authorized to enter and move within such zones in the normal course of their operations following the requirements set forth in 33 CFR 150.340 and 150.345, respectively.

(3) All vessels operating within the safety and security zones described in paragraph (b) of this section must comply with the instructions of the COTP or his/her authorized representative.

■ 5. Add § 165.117 to read as follows:

§ 165.117 Regulated Navigation Areas, Safety and Security Zones: Deepwater Ports, First Coast Guard District.

(a) Location. (1) Regulated navigation areas. All waters within a 1,000 meter radius of the geographical positions set forth in paragraph (a)(3) of this section are designated as regulated navigation areas.

(2) Safety and security zones. All waters within a 500-meter radius of the geographic positions set forth in

paragraph (a)(3) of this section are designated as safety and security zones.

(3) Coordinates. (i) The geographic coordinates forming the loci for the regulated navigation areas, safety and security zones for the Northeast Gateway Deepwater Port are: 42°23'38" N, 070°35'31" W; and 42°23'56" N, 070°37'00" W (NAD 83).

(ii) [Reserved]

(b) *Definitions*. As used in this section—

Authorized representative means a Coast Guard commissioned, warrant, or petty officer or a Federal, State, or local law enforcement officer designated by or assisting the Captain of the Port (COTP) Boston.

Deepwater port means any facility or structure meeting the definition of deepwater port in 33 CFR 148.5.

Dredge means fishing gear consisting of a mouth frame attached to a holding bag constructed of metal rings or mesh.

Support vessel means any vessel meeting the definition of support vessel in 33 CFR 148.5.

Trap means a portable, enclosed device with one or more gates or entrances and one or more lines attached to surface floats used for fishing. Also called a pot.

(c) Applicability. This section applies to all vessels operating in the regulated navigation areas set forth in paragraph (a) of this section, except—

(1) Those vessels conducting cargo transfer operations with the deepwater ports whose coordinates are provided in paragraph (a)(3) of this section,

(2) Support vessels operating in conjunction therewith, and

(3) Coast Guard vessels or other law enforcement vessels operated by or under the direction of an authorized representative of the COTP Boston.

(d) Regulations. (1) No vessel may anchor or engage in commercial fishing using nets, dredges, or traps (pots) in the regulated navigation areas set forth in paragraph (a)(1) of this section.

(2) In accordance with the general regulations in §§ 165.23 and 165.33 of this part, entry into or movement within the safety and security zones designated in paragraph (a)(2) of this section is prohibited unless authorized by the COTP Boston, or his/her authorized representative.

(3) Notwithstanding paragraph (d)(2) of this section, tankers and support vessels, as defined in 33 CFR 148.5, operating in the vicinity of NEGDWP are authorized to enter and move within such zones in the normal course of their operations following the requirements set forth in 33 CFR 150.340 and 150.345, respectively.

(4) All vessels operating within the safety and security zones described in

paragraph (a)(2) of this section must comply with the instructions of the COTP or his/her authorized representative.

Dated: June 6, 2008.

T.S. Sullivan,

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

[FR Doc. 08–1364 Filed 6–12–08; 4:01pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0044]

RIN 1625–AA00

Safety Zone; Milwaukee Harbor, Milwaukee, WI

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of final rule.

SUMMARY: The Coast Guard will enforce the Milwaukee Harbor Safety Zone in Milwaukee Harbor during June 2008. This action is necessary to protect vessels and people from the hazards associated with fireworks displays. This safety zone will restrict vessel traffic from portions of the Captain of the Port Lake Michigan Zone.

DATES: Effective between June 7, 2008 and August 17, 2008.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Kimber Bannan, Prevention Department, Coast Guard Sector, Lake Michigan, Milwaukee, WI at (414) 747–7159.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce Safety Zones, Milwaukee Harbor, Milwaukee, WI, 33 CFR 165.935 for the following events:

(1) *Pride Fest fireworks display* on June 07, 2008 from 9 p.m. through 10 p.m.; and

(2) *Polish Fest fireworks display* on June 20–21, 2008 from 10 p.m. through 11 p.m.; and

(3) *Summerfest fireworks display* on June 26, 2008 from 10 p.m. through 11 p.m.; and

(4) *Festa Italiana fireworks display* on July 17–20, 2008 from 10 p.m. through 11 p.m.; and

(5) *German Fest fireworks display* on July 27, 2008 from 10 p.m. through 11 p.m.; and

(6) *Arab World Fest fireworks display* on August 9, 2008 from 10 p.m. through 11 p.m.; and

(7) *Irish Fest fireworks display* on August 17, 2008 from 10 p.m. through 11 p.m.

All vessels must obtain permission from the Captain of the Port or his on-scene representative to enter, move within or exit the safety zone. Vessels and persons granted permission to enter the safety zone shall obey all lawful orders or directions of the Captain of the Port or a designated representative. While within a safety zone, all vessels shall operate at the minimum speed necessary to maintain a safe course.

This notice is issued under authority of 33 CFR 165.935 Safety Zone, Milwaukee Harbor, Milwaukee, WI (72 FR 32522) and 5 U.S.C. 552(a). In addition to this notice in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of these enforcement periods via broadcast Notice to Mariners or Local Notice to Mariners. The Captain of the Port will issue a Broadcast Notice to Mariners notifying the public when enforcement of the safety zone established by this section is suspended. The Captain of the Port may be contacted via U.S. Coast Guard Sector Lake Michigan on channel 16, VHF–FM.

Dated: May 22, 2008.

Bruce C. Jones,

Captain, U.S. Coast Guard, Captain of the Port Lake Michigan.

[FR Doc. E8–13107 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0427]

RIN 1625–AA00

Safety Zone; New River, Jacksonville, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard will establish a safety zone on the navigable waters of the New River near Camp Lejeune during a military exercise being conducted by the United States Marine Corps.

DATES: This rule is effective from 6 a.m. through 4 p.m. on June 23, 2008 and from 6 a.m. through 4 p.m. on June 24, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2008–

0427 and are available online at <http://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 at USCG SECTOR North Carolina, 2301 East Fort Macon Road, Atlantic Beach, NC 28512 between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Lieutenant Bryan Wick, United States Coast Guard Sector North Carolina, Enforcement Division at (252) 247-4537 or (252) 247-4537. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because immediate action was necessary to ensure the safety of the participants of the military exercise and the safety of recreational and commercial boaters in the area. Since large military barges will be moving people and equipment across the river, the potential for a collision with a recreational or commercial boat exists and it will be in the public's interest to have this regulation in effect during the military exercise. The Coast Guard will issue a broadcast notice to mariners to advise vessel operators of navigational restrictions. 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 United States Marine Corps will be conducting a military exercise on the New River along the shores of Camp Lejeune to exercise moving personnel

and equipment across the river. The safety zone will establish an area on the water to protect the participants of the military exercise and to protect any recreational or commercial boaters transiting the area.

Discussion of Rule

The Coast Guard's safety zone will prohibit persons or vessels from entering into, transiting through, or anchoring during the days this safety zone is in effect. The entry into this safety zone will be permitted when specifically authorized by the Captain of the Port or designated representative of the Captain of the Port. The purpose of this safety zone is to prevent any collisions between military vessels and recreation or commercial vessels while the military is conducting an exercise.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

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.

Although this regulation will limit access to the regulated area, the effect of this rule will not be significant because (i) the safety zone will be in effect for a limited duration of time, (ii) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly, and (iii) vessels will be allowed to transit through the safety zone when authorized by the on scene Coast Guard vessels.

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 because the safety zone will only be in place for a limited duration of time, maritime advisories will be issued in advance to allow the public to adjust their plans accordingly, and vessel will be allowed to transit the safety zone with approval from the on scene Coast Guard vessels.

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.ID and Department of Homeland Security Management Directive 5100.1, which guide 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 checklist 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 (waters), Reporting and recordkeeping requirements, Security measures, and Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 subpart C 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. A temporary § 165.T05–0427 is added to read as follows: Section 165.T05–0427 Safety Zone: On the waters of the New River, Jacksonville, North Carolina.

(a) *Location:* The following area is a safety zone: All waters of the New River, Jacksonville, North Carolina, located along the shore of USMC Camp Lejeune from the position of latitude 34°39'49" N, longitude 077°23'55" N labeled Town Pt on the chart to latitude 34°38'09" N, longitude 077°20'22" N labeled Weil Pt on the chart. All coordinates reference Datum NAD 1983.

(b) *Definitions:* Captain of the Port Representative is any Coast Guard commissioned, warrant, or petty officer who has been authorized to act on the Captain of the Port's behalf.

(c) *Regulations:* (1) In accordance with the general regulations in section 165.23 of this part, entry into this zone is prohibited unless authorized by the Captain of the Port or a Captain of the Port Representative. All vessel movement within the safety zone is prohibited except as specifically authorized by the Captain of the Port or a Captain of the Port Representative. The general requirements of section 165.23 also apply to this regulation.

(2) Persons or vessels requiring entry into or passage through any portion of the safety zone must first request authorization from the Captain of the Port, or authorized representative, unless the Captain of the Port previously announced via Marine Safety Radio Broadcast on VHF Marine Band Radio channel 22 (157.1 MHz) that this regulation will not be enforced in that portion of the safety zone. The Captain of the Port can be contacted at telephone number (252) 247–4570 or (252) 247–4546, or by radio on VHF Marine Band Radio, channels 13 and 16.

(d) The Captain of the Port will notify the public of changes in the status of this zone by Marine Safety Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHz).

(e) *Enforcement period:* This rule is effective from 6 a.m. (est) to 4 p.m. (est) on Monday, June 23, 2008 and from 6 a.m. (est) to 4 p.m. (est) on Tuesday, June 24, 2008.

J.E. Ryan,

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

[FR Doc. E8–13551 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–15–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Part 1281

[NARA–07–0005]

RIN 3095–AA82

Presidential Library Facilities

AGENCY: National Archives and Records Administration.

ACTION: Final rule.

SUMMARY: The National Archives and Records Administration (NARA) is issuing regulations under the Presidential Libraries Act (PLA) amendments of 1986 (codified at 44

U.S.C. 2112). Section 2112 requires the Archivist of the United States to promulgate architectural and design standards for Presidential libraries and to report to Congress before accepting title to or entering into an agreement to use land, a facility, and equipment as a Presidential library. The Archivist must also report to Congress before accepting a gift for the purpose of making any physical or material change or addition to an existing library. Because new Presidential libraries have traditionally been built by private, nonprofit charitable foundations, either by themselves or in collaboration with state and local government or universities, this rule will affect these nonfederal entities.

DATES: This regulation is effective July 17, 2008. The incorporation by reference of the publication listed in the rule is approved by the Director of the Federal Register as of July 17, 2008.

FOR FURTHER INFORMATION CONTACT: Nancy Allard at (301) 837-1477 or Laura McCarthy at (301) 837-3023.

SUPPLEMENTARY INFORMATION: On December 20, 2007, NARA published a proposed rule (72 FR 72319) for a 60 day comment period on new regulations for Presidential libraries under the Presidential Libraries Act (PLA) amendments of 1986 (codified at 44 U.S.C. 2112). We received two comments on the proposed rule, from an architectural firm and a mobile shelving manufacturer. The commenters noted concern with requirements found in the architectural and design standards promulgated by the Archivist and referenced in § 1281.4; the requirements are not in the proposed regulations themselves.

Both commenters questioned the ability to comply with limiting the size of the archival depository to 70,000 square feet if the height of the mobile shelving is limited to 111", as stated in the referenced architectural and design standards, and noted that NARA has provided exceptions to that height in two recent Presidential libraries.

To address these comments, NARA has revised the architectural and design standards to allow for mobile shelving higher than 111" if the proposed shelving configuration (including the proposed fire suppression and fire detection systems) are evaluated by the designer and approved by NARA for conformance with NARA's maximum loss criteria. The method of evaluation of the proposed shelving configuration must be either by live fire testing performed at a nationally recognized live fire testing facility or by computer modeling. NARA also corrected the

maximum loss criteria to 300 cubic feet of records lost in a single fire event. This criteria applies to all NARA archival space.

The last comment by the architectural firm concerns the recommendation for building efficiency in the architectural and design standards referred to in § 1281.4. NARA recommends a design goal of at least 75% building efficiency (the ratio of usable to gross square footage) which is a major influence on the costs of operating and maintaining a facility. The firm did not believe recently constructed libraries have met this recommendation and does not believe it feasible, given the functional requirements of the width circulation for moving items in the archival spaces or the space required for large crowds. The firm believes a more realistic efficiency ratio should replace the current recommendation. NARA emphasizes that this is stated in the standards as a design *recommendation*, not a *requirement*. We must report the anticipated operations and maintenance costs in our report to Congress and a building efficiency significantly lower than 75% will affect the estimated operations and maintenance costs. As a result, we did not change the recommended building efficiency ratio in response to the firm's comment.

This final rule contains information collection activities which are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. These information collection requirements, contained in §§ 1281.8 and 1281.12 have been approved by OMB under the control number 3095-0036 with a current expiration date of June 30, 2008.

This final rule is not a significant regulatory action for the purposes of Executive Order 12866. As required by the Regulatory Flexibility Act, it is hereby certified that this proposed rule will not have a significant impact on small entities. This rule is not a major rule as defined in 5 U.S.C. Chapter 8, Congressional Review of Agency Rulemaking.

List of Subjects in 36 CFR Part 1281

Archives and records, Federal buildings and facilities, Incorporation by reference, Reporting and recordkeeping.

PART 1281—PRESIDENTIAL LIBRARY FACILITIES

For the reasons set forth in the preamble, add a new part 1281 in Subchapter G of Chapter XII, Title 36,

Code of Federal Regulations, to read as follows:

PART 1281—PRESIDENTIAL LIBRARY FACILITIES

Sec.

- 1281.1 What is the scope of this part?
- 1281.2 What publications are incorporated by reference?
- 1281.3 What definitions apply to this part?
- 1281.4 What are the architectural and design standards for Presidential libraries?
- 1281.6 What certifications must be provided to NARA?
- 1281.8 What information must be provided to NARA for its report to Congress on a new Presidential library facility?
- 1281.10 When does a foundation consult with NARA before offering a gift of a physical or material change, or addition to an existing library?
- 1281.12 What information must be provided to NARA for its report to Congress on a change or addition to a Presidential library facility?
- 1281.14 What type of endowment is required for a Presidential library?
- 1281.16 What standard does NARA use for measuring building size?

Authority: 44 U.S.C. 2104(a), 2112.

§ 1281.1 What is the scope of this part?

(a) This part implements provisions of the Presidential Libraries Act, codified at 44 U.S.C. 2112(a) and (g). The Act requires the Archivist of the United States to promulgate architectural and design standards for new and existing Presidential libraries in order to ensure that such depositories preserve Presidential records subject to Chapter 22 of this title and papers and other historical materials accepted for deposit under section 2111 of this title and contain adequate research facilities. In addition the Archivist must submit a written report to the Congress before accepting new libraries or certain proposed physical or material changes or additions to an existing library; and to ensure, for existing libraries subject to the mandatory endowment requirement, that the endowment specified by 44 U.S.C. 2112(g) has been transferred to the National Archives Trust Fund before acceptance by the Archivist.

(b) This part applies to design and construction of new libraries that are offered to NARA on or after July 17, 2008 and to material changes or additions to new and existing libraries funded wholly by gift on or after that date.

§ 1281.2 What publications are incorporated by reference?

(a) The materials listed in this section are incorporated by reference in the corresponding sections noted. These incorporations by reference were

approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses noted below. You may inspect a copy at the National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740 or at the Office of the Federal Register (OFR). For information on the availability of this material at the OFR, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) The following materials are available for purchase from the Building Owners and Managers Association (BOMA), BOMA International 1201 New York Avenue, NW., Suite 300, Washington DC, 20005, <http://www.boma.org>, or the American National Standards Institute, (ANSI), Inc., 11 West 42nd Street, New York, NY 10036.

(1) ANSI/BOMA Z65.1-1996, Standard Method for Measuring Floor Areas in Office Buildings (the BOMA Standard), approved June 7, 1996; IBR approved for §§ 1281.3, and 1281.8.

(2) [Reserved]

§ 1281.3 What definitions apply to this part?

The following definitions apply to this part:

Architectural and design standards. This term refers to the document cited in § 1281.4.

Archival functions. The term means arranging, describing, reviewing, preserving, reproducing, restoring, exhibiting, and making available Presidential and other records and historical materials in the care and custody of the Presidential libraries, and includes the salaries and expenses of NARA personnel performing those functions.

Endowment library. This term means a Presidential library that is subject to the endowment requirements of 44 U.S.C. 2112(g). The term includes the existing libraries of presidents who took the oath of office as President for the first time on or after January 20, 1985, the proposed library of President George W. Bush, and the libraries of presidents who take the oath of office as President for the first time on or after July 1, 2002.

Equipment. As used in this part, the term means operating equipment that must be furnished with the new library and included in the calculation of the required endowment. Operating

equipment is fundamental to the operation of the library and is normally built into the facility or permanently mounted to the structure.

Existing library. This term means a Presidential library that has been accepted by the Archivist under 44 U.S.C. 2112(a) and established as part of the system of Presidential libraries managed by NARA.

Facility operations. This term means those activities, including administrative services, involved with maintaining, operating, protecting, and improving a Presidential library.

Foundation. This term means a private organization organized under state law to construct a new Presidential library. The term usually refers to nonprofit charitable organizations that meet the requirements of section 501(c)(3) of the Internal Revenue Code (26 CFR 501(c)(3)). The term specifically includes “foundation” and “institute,” as those terms are used in 44 U.S.C. 2112(a)(1)(B).

Historical materials. The term “historical materials” has the meaning set forth at 44 U.S.C. 2101.

New library. This term means a Presidential library for a President who took the oath of office as President for the first time on or after January 20, 1985, that has not been accepted by the Archivist under 44 U.S.C. 2112(a). Presidential libraries that have been accepted by the Archivist and established as part of the system of Presidential libraries that are managed by NARA are “existing libraries.”

Physical or material change or addition. This term means any addition of square footage, as defined by the BOMA Standard (incorporated by reference in § 1281.2) or any physical or material change to the existing structure of an existing library that results in a significant increase in the cost of facility operations.

Presidential library. This term means a Presidential archival depository as defined in 44 U.S.C. 2101.

Presidential records. The term has the meaning set forth at 44 U.S.C. 2201.

§ 1281.4 What are the architectural and design standards for Presidential libraries?

The Archivist is required by 44 U.S.C. 2112(a)(2) to promulgate architectural and design standards for Presidential libraries. The standards address the architectural, design, and structural requirements of a new Presidential library and additions or renovations, and they ensure that Presidential libraries are safe and efficient to operate and provide adequate and secure research and museum facilities. A copy of the standards is provided to the

foundation upon request and is available from the Office of Presidential Libraries (NL), Room 2200, 8601 Adelphi Rd., College Park, MD 20740-6001.

§ 1281.6 What certifications must be provided to NARA?

(a) The foundation must provide to NARA design and construction certifications specified in the architectural and design standards.

(b) Any item that NARA finds is not in compliance with the architectural and design standards must be corrected by the foundation or, if not corrected by the foundation, will be corrected by NARA with the foundation paying the full cost of taking necessary corrective action.

§ 1281.8 What information must be provided to NARA for its report to Congress on a new Presidential library facility?

(a) NARA must submit a report to Congress on a proposed new library pursuant to 44 U.S.C. 2112(a)(3). The foundation that is building the library must help NARA as necessary in compiling the information needed for this report. If a State, political subdivision, university, institution of higher learning, or institute participates in the construction of the new library (e.g., by making land available for the facility), that party is subject to the same requirement. Requested information must be sent to the Office of Presidential Libraries (NL), Room 2200, 8601 Adelphi Rd., College Park, MD 20740-6001 far enough in advance of the anticipated date of transfer of the Library for NARA to compile and submit the report so that it may lie before Congress for the minimum time period specified in 44 U.S.C. 2112(a)(5). The normal lead time for submitting the required information is a least six months in advance of the anticipated date of transfer, but the submission date is subject to negotiation between NARA and the foundation in specific cases. The collection of information by NARA for these purposes has been approved under the Paperwork Reduction Act by the Office of Management and Budget with the control number 3095-0036.

(b) Paragraph (a)(3) of 44 U.S.C. 2112 lists the information that NARA must include in its report to Congress. The foundation and NARA will agree as part of the planning process for a new library on what information the foundation will provide and when. The same requirement applies to other entities involved in the construction of a new library (e.g., a local government or university). Foundations will normally be responsible, at a minimum, for

providing the following information to NARA:

(1) A description of the land, facility, and equipment offered as a gift or to be made available without transfer of title, which must include:

(i) The legal description of the land, including plat, and evidence of clear title to the land upon which the library is constructed;

(ii) Site plan, floor plans, building sections and elevations, artist's representation of building and grounds;

(iii) Description of building contents, including furniture, equipment, and museum installations; and

(iv) Measurement of the facility in accordance with § 1281.16.

(2) A statement specifying the estimated total cost of the library and the amount of the endowment required pursuant to 44 U.S.C. 2112(g);

(3) An offer or other statement setting forth the terms of the proposed agreement for transfer or use of the facility, if any;

(4) Copies of any proposed agreements between the state, other political subdivision, the donating group, other institutions, and the United States which may affect ownership or operation of the library facility;

(5) A statement of and copies of any proposed agreements concerning the proposed support of library programs by non-federal sources; and

(6) A statement on cost-saving design features of the building.

(7) A written certification that the library and the equipment therein will comply with NARA standards.

§ 1281.10 When does a foundation consult with NARA before offering a gift of a physical or material change, or addition to an existing library?

A foundation must consult with the Office of Presidential Libraries before beginning the process of offering a gift for the purpose of making a physical or material change or addition to a new or existing library. NARA will furnish the interested foundation the current architectural and design standards as specified in § 1281.4. Others may request a single copy by writing the Office of Presidential Libraries (NL), Room 2200, 8601 Adelphi Road, College Park, Maryland 20740-6001.

§ 1281.12 What information must be provided to NARA for its report to Congress on a change or addition to a Presidential library facility?

(a) NARA must submit a report to Congress on a proposed physical or material change or addition to an existing library that is being funded wholly by gift. The foundation or other party offering the gift to NARA must

help NARA as necessary in compiling the information needed for the report. Required information must be sent to the Office of Presidential Libraries (NL), Room 2200, 8601 Adelphi Rd., College Park, MD 20740-6001, far enough in advance of the Archivist's acceptance of the gift for NARA to compile and submit the report to Congress in accordance with 44 U.S.C. 2112(a)(5). The normal lead time for submitting the required information on physical or material changes or additions is at least nine (9) months in advance of the anticipated date that work will begin on the physical or material change or addition to the library. The collection of information contained in this section has been approved under the Paperwork Reduction Act by the Office of Management and Budget with the control number 3095-0036.

(b) Paragraph (a)(4) of 44 U.S.C. 2112 lists the information that NARA must include in its report to Congress. The donor and NARA will agree as part of the planning process what information the donor will provide and when, but donors will normally be responsible, at a minimum, for providing the following information to NARA:

(1) A description of the gift, which must include as appropriate:

(i) The legal description of the land, including plat;

(ii) Site plan, floor plans, building sections and elevations, artist's representation of building and grounds as they will be affected by the gift;

(iii) Description of building contents that are part of the gift, including furniture, equipment, and museum installations;

(iv) For endowment libraries, a measurement of the addition or change to the facility in accordance with § 1281.16; and

(v) A review of all critical spaces where NARA holdings will be stored, used, or exhibited, including information on life-safety, environmental, holdings storage, and other systems against NARA standards.

(2) A statement of the estimated total cost of the proposed physical or material change or addition to the library, and, for endowment libraries, an estimate of the amount of the additional endowment required pursuant to 44 U.S.C. 2112(g).

(3) A statement of the purpose of the proposed change or addition.

(4) A written certification that the library and the equipment therein will comply with NARA standards after the change or addition is made.

§ 1281.14 What type of endowment is required for a Presidential library?

(a) *Endowment requirement—new libraries.* The foundation or organization that is offering NARA a new Presidential library must establish an endowment for the library, by gift or bequest, in the National Archives Trust Fund before the Archivist may accept the transfer of the library. The purpose of the endowment is to help NARA defray the cost of facility operations. The endowment requirement for the prospective new library of President George W. Bush is set forth in paragraphs 2 and 3 of 44 U.S.C. 2112(g). The endowment requirements for the new libraries of presidents taking the oath of office from the first time on or after July 1, 2002, are set forth in paragraphs 2, 3, and 5 of 44 U.S.C. 2112(g).

(b) *Endowment requirement—change or addition to an endowment library.* For a proposed physical or material change or addition to an endowment library that is being funded wholly by gift, the foundation or other organization that is offering the gift must agree, as a condition of the gift, to transfer monies by gift or bequest to the library's existing endowment in the National Archives Trust Fund in an amount sufficient to satisfy the requirements of paragraphs 2, 3, and 5 of 44 U.S.C. 2112(g). The Archivist must determine that the additional endowment monies have been transferred to the Trust Fund before he accepts the gift of the physical or material change or addition.

(c) *Use of endowment income.* The income from a library's endowment is available to cover the cost of facility operations, but is not available for the performance of archival functions.

(d) *Calculating a library's endowment.* The formulas for calculating the required endowment are set forth in 44 U.S.C. 2112(g)(3)–(5).

(e) *Equipment costs that must be included in the endowment calculation.* The cost of all operating equipment provided with a new library must be included in the endowment calculation pursuant to 44 U.S.C. 2112(g)(3). The Archivist will provide in the architectural and design standards, a list of equipment guidelines, recommendations, and minimum requirements for a foundation's use in designing and building a new library. The list is not exhaustive and requirements may change with evolving technology, program requirements, and the final library design.

(f) *Formula for a shared use library building.* For endowment purposes, the construction cost of a shared use library

building containing both NARA and Foundation-controlled areas will be determined using the following formula: The percentage of the usable square footage of the NARA-controlled areas to the usable square footage of the entire building multiplied by the cost of the entire building. That figure is then used in calculating a library's endowment as specified by subsection (d) of this section and 44 U.S.C. 2112(g)(3)–(5).

§ 1281.16 What standard does NARA use for measuring building size?

For purposes of 44 U.S.C. 2112(g)(3) and (4), and this part, NARA has adopted the BOMA Standard (incorporated by reference in § 1281.2) as the standard for measuring the size of the facility and the value for calculating the endowment. The architectural and design standards contain the description of the area to be measured as to obtain the useable square footage and the exclusions to the measurement.

Dated: June 5, 2008.

Allen Weinstein,

Archivist of the United States.

[FR Doc. E8–13465 Filed 6–16–08; 8:45 am]

BILLING CODE 7515–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 99–87; RM–9332; FCC 08–127]

Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the *Fourth Memorandum Opinion and Order* in WT Docket No. 99–87 (*Fourth Memorandum Opinion and Order*), the Federal Communications Commission (Commission or FCC) clarifies the Commission's *Third Report and Order* in this docket, and takes the opportunity to correct the inadvertent deletion of language in the rules regarding the schedule for Private Land Mobile Radio systems in the 150–174 MHz and 421–512 MHz bands to transition to narrowband kHz technology.

DATES: Effective July 17, 2008.

FOR FURTHER INFORMATION CONTACT:

Melvin Spann, Mobility Division, Wireless Telecommunications Bureau, at Melvin.Spann@FCC.gov, or (202) 418–1333.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Fourth Memorandum Opinion and Order* in WT Docket No. 99–87 (*Fourth Memorandum Opinion and Order*), FCC 08–127, adopted on March 12, 2008, and released on March 13, 2008. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by sending an e-mail to fcc504@fcc.gov or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

1. The *Fourth Memorandum Opinion and Order* addresses issues raised in the *Third Report and Order* (*Third Report and Order*) at 72 FR 19387, April 18, 2007, in this WT Docket No. 99–87 proceeding. The Commission takes the following significant actions in the *Fourth Memorandum Opinion and Order*: (i) clarifies that it intends to provide notice and seek comment prior to adopting final rules establishing a 6.25 kHz migration schedule and that licensees that have already commenced the transition to 12.5 kHz technology in order to comply with the 2013 deadline should not suspend or abandon those efforts; and (ii) revises 47 CFR 90.209(b)(5) of the Commission's rules to restore language relating to the 2013 deadline that was inadvertently removed in an unrelated rulemaking proceeding, and to revise that language to make it more precise.

I. Procedural Matters

A. Paperwork Reduction Act Analysis

2. The *Fourth Memorandum Opinion and Order* does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

II. Ordering Clauses

3. Pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and

§ 1.2 of the Commission's rules, 47 CFR 1.2, the Request for Clarification filed by Kenwood USA Corporation, Communications Sector on May 9, 2007 is granted to the extent set forth herein.

4. Pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and § 1.429 of the Commission's rules, 47 CFR 1.429, the Petition for Reconsideration filed by City of New York on May 18, 2007 is granted to the extent set forth herein.

5. The rule changes as set forth will become effective July 17, 2008.

6. The Commission's Consumer and Governmental Affairs Bureau shall send a copy of this *Fourth Memorandum Opinion and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR part 90

Communications equipment, Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 2. Section 90.209 is amended by revising footnote 3 to the table in paragraph (b)(5) to read as follows:

§ 90.209 Bandwidth limitations.

* * * * *

(b) * * *

(5) * * *

³ Operations using equipment designed to operate with a 25 kHz channel bandwidth will be authorized a 20 kHz bandwidth. Operations using equipment designed to operate with a 12.5 kHz channel bandwidth will be authorized a 11.25 kHz bandwidth. Operations using equipment designed to operate with a 6.25 kHz channel bandwidth will be authorized a 6 kHz bandwidth. All stations must operate on channels with a bandwidth of 12.5 kHz or less beginning January 1, 2013, unless the operations meet the efficiency standard of § 90.203(j)(3).

* * * * *

[FR Doc. E8–13628 Filed 6–16–08; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register

Vol. 73, No. 117

Tuesday, June 17, 2008

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Parts 305 and 318

[Docket No. APHIS–2007–0052]

RIN 0579–AC70

Revision of the Hawaiian and Territorial Fruits and Vegetables Regulations

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to revise and reorganize the regulations pertaining to the interstate movement of fruits and vegetables from Hawaii and the territories to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, and make various editorial and nonsubstantive changes to the regulations to make them easier to use. We are also proposing to make substantive changes to the regulations including establishing criteria within the regulations that, if met, would allow us to approve certain new fruits and vegetables for interstate movement in the United States and to acknowledge pest-free areas in Hawaii and U.S. territories expeditiously, and removing the listing in the regulations of some specific commodities as regulated articles. These changes are intended to simplify and expedite our processes for approving certain regulated articles for interstate movement and pest-free areas while continuing to allow for public participation in the processes. This proposal, if adopted, would not allow for the interstate movement of any specific new fruits or vegetables, nor would it alter the conditions for interstate movement of currently approved fruits or vegetables. These proposed changes would make our domestic interstate movement

regulations more consistent with our fruits and vegetables import regulations. The proposed changes would not alter the manner in which the risk associated with a regulated article interstate movement request is evaluated, nor would it alter the manner in which those risks are ultimately mitigated.

DATES: We will consider all comments that we receive on or before August 18, 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-2007-0052> 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–2007–0052, 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–2007–0052.

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. David Lamb, Import Specialist, Commodity Import Analysis and Operations, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1231; (301) 734–8758.

SUPPLEMENTARY INFORMATION:

Background

Under the regulations in 7 CFR part 318, “Hawaiian and Territorial Quarantine Notices” (referred to below as the regulations), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture (USDA or the Department) prohibits or restricts the interstate movement of

fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to the continental United States to prevent the spread of plant pests and noxious weeds that occur in Hawaii and the territories.

We are proposing to revise and reorganize those portions of the regulations pertaining to the interstate movement of fruits and vegetables to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, and make various editorial and nonsubstantive changes to the regulations to make them easier to use. We are also proposing to make substantive changes to the regulations including: Establishing criteria within the regulations that, if met, would allow us to approve certain new fruits and vegetables for interstate movement in the United States and to acknowledge pest-free areas in Hawaii and U.S. territories expeditiously; and removing the listing in the regulations of some specific commodities as regulated articles. These changes are intended to simplify and expedite our processes for approving certain regulated articles for interstate movement and pest-free areas while continuing to allow for public participation in the processes. This proposal, if adopted, would not allow for the interstate movement of any specific new fruits or vegetables, nor would it alter the conditions for interstate movement of currently approved fruits or vegetables. These proposed changes would make our domestic interstate movement regulations more consistent with our fruits and vegetables import regulations. The proposed changes would not alter the manner in which the risk associated with a regulated article’s interstate movement request is evaluated, nor would it alter the manner in which the risk is ultimately mitigated.

The Current Regulations

Currently, the regulations prohibit the interstate movement of fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam into the continental United States or any other territory or possession of the United States unless the regulations specifically allow the interstate movement of the particular fruit, vegetable, or product.

The regulations are divided into five subparts: Hawaiian Fruits, Vegetables, and Flowers (§§ 318.13 through 318.13-17); Territorial Cotton, Cottonseed, and Cottonseed Products (§§ 318.47 through 318.47-4); Fruits and Vegetables From Puerto Rico or the Virgin Islands (§§ 318.58 through 318.58-16); Sand, Soil, or Earth, with Plants From Territories and Districts (§ 318.60); and Guam (§§ 318.82 through 318.82-3). For the purposes of this proposal, we will focus on three of those subparts: Hawaiian Fruits, Vegetables, and Flowers; Fruits and Vegetables From Puerto Rico or the Virgin Islands; and Guam. The Territorial Cotton, Cottonseed, and Cottonseed Products subpart and Sand, Soil, or Earth, with Plants From Territories and Districts subpart are not addressed in this proposal.

Of the three subparts that are the focus of this proposal, each subpart contains a list of regulated articles from each State or territory, requirements of general applicability, as well as specific requirements regarding certain regulated articles.

As a condition of interstate movement under the regulations, all approved fruits, vegetables, and other products are subject to some type of restriction to ensure that the regulated article does not act as a pathway for the dissemination of plant pests or noxious weeds within the United States. These restrictions are known as phytosanitary measures, and include any activities that have the effect of reducing the plant pest risk posed by a fruit, vegetable, or other product.

Typically, certain products may be moved interstate if the movement is authorized by a limited permit or a valid certificate issued on the basis of pest inspection and verification of pest freedom or on the basis of treatment. These requirements are considered applicable to the interstate movement of all commodities. A partial list of the commodities that may be moved interstate from Hawaii and from Puerto Rico or the U.S. Virgin Islands under these conditions may be found in §§ 318.13-2 and 318.58-2, respectively. Certain other fruits, vegetables, or products must meet additional requirements to be eligible for movement, including distribution restrictions, packing requirements, and other measures determined to be necessary to mitigate the pest risk posed by the particular regulated article. Requirements for the interstate movement of these commodities can be found in ((318.13-4b through 318.13-4j and §§ 318.58-4a through 318.58-4c.

Proposed Revisions

Reorganization of the Regulations and Consolidation of Similar Provisions

The Hawaii subpart and the Puerto Rico and U.S. Virgin Islands subpart are constructed in a similar manner and, with the exception of commodity-specific sections, each subpart contains the following 17 sections that can be applied to all commodities moving interstate from those areas:

- Notice of quarantine;
- Definitions;
- Conditions of movement;
- Conditions governing the issuance of certificates or limited permits;
- Application for inspection;
- Container marking and identity;
- Products as ships' stores or in the possession of passengers or crew;
- Articles and persons subject to inspection;
- Inspection of means of conveyance;
- Inspection of baggage, other personal effects, and cargo;
- Disinfection of means of conveyance;
- Posting of warning notice and distribution of baggage declarations;
- Movement by the U.S. Department of Agriculture;
- Parcel post inspection;
- Costs and charges;
- Withdrawal of certificates, transit permits, limited permits, or compliance agreements; and
- Transit of fruits and vegetables from Hawaii or the territories into or through the United States.

With the exception of the provisions regarding the posting of warning notices and distribution of baggage declarations, which appear only in the Hawaii subpart, there is little to no variation between the subparts in these 17 sections; any differences are more editorial than substantive. Each subpart also contains commodity-specific instructions for the movement of certain regulated articles. As explained later in this document, if this proposal is adopted, all of those sections would be removed from or relocated in the regulations. (See "Regulated Article-Specific Provisions" section later in this document.) While the interstate movement of regulated articles from Guam is covered within the scope of the Guam subpart, that subpart is outdated and most interstate movement requirements for Guam are not accurately reflected in the subpart.

We are proposing to reorganize the regulations by combining the three Hawaiian and territorial subparts into one single subpart, "Regulated Articles From Hawaii and the Territories" (§§ 318.13-1 through 318.13-25). In

doing so, we would consolidate the generally applicable provisions that now appear in each subpart. We would also explicitly include the Commonwealth of the Northern Mariana Islands (CNMI) within the scope of the regulations and update the regulations to reflect administrative and procedural processes that have been modified or established since we last updated the regulations.

In some cases, we would make no changes to the content of the current sections, but simply change their paragraph and section designations. In other cases, we would amend the text to make the regulations easier to understand, to correct errors, or to update them to reflect current APHIS operating procedures.

In order to facilitate review of this proposal, which, if adopted, would relocate all current provisions to new sections within the regulations, we have prepared a cross-reference table that links the current provisions with the proposed provisions. The cross-reference document may be viewed on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov) and may be obtained by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. The cross-reference document may also be viewed in our reading room (information on the location and hours of the reading room is provided under the heading **ADDRESSES** at the beginning of this proposed rule).

Section-by-Section Discussion of Additional Amendments

Additional proposed amendments to the regulations are discussed below, by proposed section.

Notice of Quarantine (Proposed § 318.13-1)

Proposed § 318.13-1 describes the authority held by the Secretary of Agriculture to regulate the interstate movement of fruits, vegetables, and other regulated articles.¹ Proposed § 318.13-1 would continue to prohibit the interstate movement of fruits and vegetables and associate plants and portions of plants and other regulated articles except as provided in the Hawaii and territorial quarantine regulations or elsewhere in part 318. These proposed provisions were all drawn from and are consistent with those found in the existing Hawaiian and territorial subparts.

¹ The Secretary of Agriculture has delegated authority for the formulation, direction, and supervision of APHIS policies, programs, and activities to the Administrator of APHIS.

Definitions (Proposed § 318.13–2)

Proposed § 318.13–2 contains definitions of terms used in the subpart. All the terms and their definitions were drawn from the existing Hawaiian and territorial subparts; however, we are proposing to make some substantive changes, including revising, adding, and removing certain definitions.

Specifically, we are proposing to revise definitions for *fruits and vegetables*, *interstate*, and *person*. These new definitions would clarify the meaning of those terms in the context of the revised regulations.

We are also proposing to add definitions for *approved growing media*, *lot*, *regulated article*, and *soil*. We are proposing to replace the current definition of *certificate* with a definition for *certification*. As explained later in this document under the section titled “General Requirements for All Regulated Articles (Proposed § 318.13–3),” the term *certification* more accurately reflects current operating procedures. We are proposing to replace the current definition of *commercial shipment* with a definition of *commercial consignment* in order to eliminate confusion over what constitutes a “shipment.” We are also proposing to replace the current definition of *plant litter* with a definition of *plant debris* in order to provide the most up-to-date term. All new and revised definitions may be found in § 318.13–2 in the regulatory text at the end of this document.

We are proposing to remove the definitions for *administrative instructions*; *cactus plants*; *cereals*; *cotton and cotton covers*; *mango seeds*; *rice straw*; *seeds*; *State, territory, or district of the United States*; and *sugarcane or parts or by-products thereof* because these terms are not used in the proposed new subpart.

General Requirements for All Regulated Articles (Proposed § 318.13–3)

As explained earlier in this document, we are proposing to consolidate all existing general requirements for the interstate movement of regulated articles into § 318.13–3. These requirements include provisions that pertain to:

- Freedom of regulated articles from plant debris;
- Certification;
- Limited permits;
- Compliance agreements;
- Withdrawal of certification, transit permits, limited permits, or compliance agreements;
- Container marking and identity;
- Refusal of entry;

- Costs and charges; and
- Responsibility for damage arising from quarantine actions or procedures.

The current provisions for these requirements are contained in §§ 318.13 through 318.13–4, §§ 318.13–5 through 318.13–17, §§ 318.58 through 318.58–4, §§ 318.58–5 through 318.58–16, § 318.82–2, and § 318.82–3. In consolidating those provisions into a single section, we would set out the general requirements as follows:

Freedom From Plant Debris

Proposed § 318.13–3(a) would require that fruits and vegetables moved interstate from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, or Guam must be free from plant debris. These proposed provisions are drawn from and are consistent with those found in the existing Hawaiian and territorial subparts.

Certification

Proposed § 318.13–3(b) contains provisions under which certificates or limited permits may be issued for the movement of regulated articles under certain conditions. These proposed provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts. However, while the regulations refer to the issuance of certificates, APHIS inspectors do not issue certificates, but rather stamp shipping boxes and/or containers or accompanying documents with a release stamp as a verification of certification. Therefore, we are proposing to amend the regulations by removing all references to issuing certificates, and we would instead use the term *certification*.

Limited Permits

Proposed § 318.13–3(c) contains provisions for the issuance of limited permits. These proposed provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Compliance Agreements

Proposed § 318.13–3(d) contains provisions for entering into compliance agreements with APHIS. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts. We are also proposing to require persons wishing to move fruits and vegetables interstate under certain approved notice-based measures to enter into a compliance agreement with APHIS. Specifically, we would require

compliance agreements for persons wishing to move fruits and vegetables from fruit fly-free areas, in commercial consignments, or with inspection in the State of origin. The compliance agreement would help APHIS to trace back consignments should problems occur with the shipment as well as to monitor the establishment in which the fruits and vegetables are grown, packed, and otherwise processed.

Attachment of Limited Permit or Verification of Certification

Proposed § 318.13–3(e) contains provisions pertaining to the attachment of certification and limited permits. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Withdrawal of Transit Permits, Limited Permits, or Compliance Agreements

Proposed § 318.13–3(f) contains conditions under which APHIS will withdraw certification, transit permits, limited permits, or compliance agreements. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Container Marking and Identity

Proposed § 318.13–3(g) contains provisions regarding container marking and identity. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Refusal of Entry

Proposed § 318.13–3(h) explains conditions under which APHIS would refuse entry of a regulated article. Specifically, paragraph (h) provides that if an inspector finds that a regulated article is prohibited, or is not accompanied by required documentation, or is so infested with a plant pest or noxious weed that, in the judgment of the inspector, it cannot be cleaned or treated, or contains soil or other prohibited contaminants, the entire lot or consignment may be refused movement elsewhere in the United States. This change would clearly state our existing authority in the regulations and would not affect program operations in any way.

Costs and Charges for APHIS Services

Proposed § 318.13–3(i) contains provisions related to costs and charges for APHIS services. These provisions were drawn from and are consistent

with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

APHIS Not Responsible for Damage

Proposed § 318.13–3(j) contains provisions pertaining to responsibility for damages to regulated articles resulting from required treatments. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Approval of Certain Fruits and Vegetables for Interstate Movement (Proposed § 318.13–4)

Under our current process, in order for a fruit or vegetable to be approved for interstate movement from Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands, the Commonwealth of Northern Mariana Islands, or any other territory or possession of the United States, APHIS, after receiving the movement request from a State or territory, first gathers information on the fruit or vegetable and then performs a pest risk analysis. The pest risk analysis usually contains two main components: (1) A risk assessment, to determine what pests of quarantine significance are associated with the fruit or vegetable and which of those are likely to follow the import pathway, and (2) a risk management analysis, to identify phytosanitary measures that could be applied to the fruit or vegetable and evaluate the potential effectiveness of those measures. When the risk analysis is complete, APHIS may then propose to allow the interstate movement of the fruit or vegetable through a proposed rule published in the **Federal Register**. Following its evaluation of public comments on the proposal and any other supporting documentation, APHIS may then issue a final rule that specifically lists the fruit or vegetable, and any applicable phytosanitary measures, in the regulations. The results of a pest risk analysis may also reveal that the risks posed by a fruit or vegetable cannot be sufficiently mitigated for a variety of reasons, and such movement continues to be prohibited. The current process for approving new commodities for interstate movement takes a significant period of time, ranging on average from 18 months to over 3 years (beginning with the initial request and ending with the publication of a final rule).

In a final rule published on July 18, 2007 (72 FR 39482–39528, Docket No. APHIS–2005–0106) and effective on August 17, 2007, we established a performance-based process for

approving the importation of commodities that, based on the findings of a pest risk analysis, can be safely imported subject to one or more of the designated phytosanitary measures listed in § 319.56–4(b) of the regulations. These measures are:

- The fruits or vegetables are subject to inspection upon arrival in the United States and comply with all applicable provisions of § 319.56–3;
- The fruits or vegetables are imported from a pest-free area in the country of origin that meets the requirements of § 319.56–5 for freedom from that pest and are accompanied by a phytosanitary certificate stating that the fruits or vegetables originated in a pest-free area in the country of origin;
- The fruits or vegetables are treated in accordance with 7 CFR part 305;
- The fruits or vegetables are inspected in the country of origin by an inspector or an official of the national plant protection organization of the exporting country, and have been found free of one or more specific quarantine pests identified by the risk analysis as likely to follow the import pathway; and/or
- The fruits or vegetables are imported as commercial consignments only.

In response to comments received on our proposed rule that preceded the July 2007 final rule, and in order to make our domestic regulations consistent with our import regulations, we are proposing to establish a similar regulatory approach that would allow APHIS to approve or reject certain fruits and vegetables for interstate movement from Hawaii and the territories. The process, which would be codified in proposed § 318.13–4, would entail the publication of notices in the **Federal Register** to advise the public of the findings of pest risk analyses and invite comment on those analyses prior to authorizing the interstate movement of any fruit or vegetable. The proposed measures, which are referred to as “designated measures” elsewhere in this document, would be similar, but not identical to those which are located in § 319.56–4, given that the proposed designated measures have been modified to account for the differences between interstate movement and importation. For example, in the current Hawaii/territorial regulations, inspectors must certify consignments through inspection or treatment before consignments may move interstate. Therefore, we have included certification as part of two designated measures—treatment and inspection in the State of origin. Also, § 319.56–4 lists inspection upon arrival in the United

States as a designated measure for imports. In proposed § 318.13–4 we require that the inspection take place in the State of first arrival, which more accurately reflects the fact that the consignment is already in commerce in the United States. In § 319.56–4, inspection in the country of origin by an inspector or an official of the national plant protection organization (NPPPO) of the exporting country is listed as a designated measure, while this proposed rule would provide that inspection and certification take place in the State of origin by an inspector. The inspector could be a State agricultural inspector or an individual authorized by APHIS or the Department of Homeland Security. Finally, § 319.56–4 provides that fruits or vegetables coming from approved pest-free areas be accompanied by a phytosanitary certificate. States do not issue phytosanitary certificates, nor do they issue any comparable document; therefore, the proposed equivalent measure would not provide for the issuance of additional documentation for consignments moving from pest-free areas. The proposed designated measures are as follows:

- Inspection in the first State of arrival and subject to other general requirements of proposed § 318.13–3.
- Origination from a pest-free area in the State of origin in accordance with proposed § 318.13–5.
- Treatment in accordance with part 305 and certification of applied treatment for pest(s).
- Commercial consignments only.
- Inspection and certification that the fruit or vegetable is pest free in the State of origin by an inspector.

This proposed process for approving interstate movement would apply only to fruits and vegetables, not propagative material or other products (i.e., cut flowers, seeds, etc.) that are regulated under 7 CFR part 318. Further, the proposed process would apply only to those fruits and vegetables that, based on the findings of risk analysis, we determine can be safely moved subject to one or more of the designated measures.

We believe the proposed process would measurably speed up the evaluation and approval or denial of requests for interstate movement of fruits and vegetables, while continuing to provide opportunity for public analysis of and comment on the evidence used in our evaluation of the potential pest risks associated with the fruit or vegetable.

In addition to the phytosanitary measures added to the regulations for the notice-based approach in the July

2007 final rule, we have evaluated one additional measure, limited distribution, for the notice-based process in this proposal. Limited distribution would be applied if the results of the pest risk analysis indicated that the risk of introducing specific pests of concern could be mitigated by limiting the geographical area within which the fruit or vegetable could be moved interstate. For example, based on the quarantine pest(s) identified, a pest risk analysis may determine that a mitigation measure should be to limit distribution of the fruit or vegetable to Alaska because the climate there would not be conducive for the particular pest's establishment. There are also box marking requirements that are associated with this measure to ensure that consignments are not misdirected. Using the previous example, we would require the shipping containers be marked as "For Distribution in Alaska Only."

We have determined that limited distribution has a good track record of efficacy when used in combination with one or more of the other proposed designated measures. There are a number of regulated articles that currently move from Hawaii under distribution limitations (e.g., litchi and longan may not be moved interstate into Florida, and avocados may only be moved interstate to Alaska). Therefore, we are proposing to include this measure in the list of designated measures in this proposed rule.

The interstate movement of fruits and vegetables that require additional phytosanitary measures beyond one or more of the designated measures cited above would continue to be authorized through specific prior rulemaking. For ease of discussion in this document, we refer to the proposed streamlined process as the "notice-based process" and the existing process as the "rulemaking-based process." Note that the determination as to which process to follow (rulemaking or the notice-based process) would be based exclusively on the conclusions of a risk analysis.

Using the proposed notice-based process, when APHIS receives a request from a State Department of Agriculture to allow interstate movement of an additional fruit or vegetable, it would gather information on the fruit or vegetable and conduct a pest risk assessment. When the assessment is complete, if quarantine pests are associated with the fruit or vegetable in

the State of origin,² we would evaluate whether the risk posed by each quarantine pest can be mitigated by one or more of the designated measures cited previously in this document.³ If the designated measures alone are not sufficient to mitigate the risk posed by the fruit or vegetable—i.e., if additional risk mitigation is required beyond one or more of the designated phytosanitary measures—any further action on approving the fruit or vegetable for interstate would be undertaken using the rulemaking-based process for authorizing new fruits and vegetables for interstate movement. However, if APHIS determines in a risk management analysis that the risk posed by each identified quarantine pest associated with the fruit or vegetable in the State of origin can be mitigated by one or more of the designated measures, our findings would be communicated using the notice-based process; APHIS would publish in the **Federal Register**, for a public comment period of a minimum of 60 days, a notice announcing the availability of the pest risk analysis. Each pest risk analysis made available for public comment will specify which of the designated phytosanitary measures would be required to be applied by APHIS.

Under the notice-based process, APHIS would evaluate the comments we received in response to our notice of availability of the risk analysis. In the event that we receive no comments, or in the event that commenters do not provide APHIS with information that shows that the conclusions of the pest risk analysis are incorrect and that changes to the pest risk analysis are necessary, APHIS would then publish another notice in the **Federal Register** announcing that the Administrator has determined that, based on the information available, the application of one or more of the designated measures described above (and as specified in a given pest risk analysis) is sufficient to mitigate the risk that plant pests or noxious weeds could be introduced into or disseminated within the United States via the moved fruit or vegetable. APHIS would also respond to all substantive comments received on the initial notice in this second notice. APHIS would begin allowing the interstate movement of the particular

fruit or vegetable, subject to the conditions described in the pest risk analysis, beginning on the date the **Federal Register** notice is published.

In the event that commenters provide APHIS with information that shows that changes to the pest risk analysis are necessary, and if the changes made affect the conclusions of the analysis (i.e., that the application of the identified phytosanitary measures will not be sufficient to mitigate the risk posed by the identified pests), APHIS would proceed as follows:

- If additional phytosanitary measures beyond the designated measures described earlier in this document are determined to be necessary to mitigate the risk posed by the particular fruit or vegetable, any further action on the fruit or vegetable would follow the rulemaking-based process.

- If additional risk mitigation measures beyond those evaluated in the pest risk analysis are determined to be necessary, but the added measures still only include one or more of the designated measures described earlier in this document, APHIS may publish another notice announcing that the Administrator has determined that the application of one or more of the designated measures will be sufficient to mitigate the risk that plant pests or noxious weeds could be disseminated within the United States via the interstate movement of the fruit or vegetable. The notice would explain the additional mitigation measures that will be required for the interstate movement of the fruit or vegetable to be authorized and how APHIS made its determination. APHIS would begin allowing the interstate movement for the particular fruit or vegetable, subject to the conditions described in the revised pest risk analysis, beginning on the date specified in the **Federal Register** notice. Alternately, if APHIS believes that the revisions to the pest risk analysis are substantial, and that there may be continued uncertainty as to whether the designated measures are sufficient to mitigate the risk posed by the fruit or vegetable, APHIS may elect to make the revised risk analysis available for public comment via a notice in the **Federal Register**, or may make any further action on approving the fruit or vegetable for interstate movement subject to rulemaking.

Note that APHIS does not set policy or regulatory requirements based on issues of economic competitiveness; our authority is tied to pest risk, and therefore our decisionmaking is based on an analysis of risk. While the proposed process would not preclude

² Risk analyses could consider a State or territory, part of a State or territory, or all or parts of several States or territories.

³ If no quarantine pests are identified in the pest risk analysis as likely to follow the pathway, a detailed risk management analysis would likely not be performed, but the interstate movement of the commodity would still be subject to the general requirements of proposed § 318.13–3.

the submission of comments regarding issues unrelated to risk, comments on issues such as economic competitiveness (e.g., comments that the proposed fruit or vegetable movement would result in decreased sales for continental U.S. producers of the same fruit or vegetable) would not merit a detailed response by APHIS. This proposal would allow APHIS to focus public discussion on the analysis of pest risk, which is the primary basis for our decisionmaking. We believe this policy is consistent with the provisions of the Plant Protection Act.

The notice-based process would employ the use of **Federal Register** notices to communicate APHIS's consideration and approval or denial of requests that were previously only approved via rulemaking. As described above, **Federal Register** notices would be used to announce the availability of pest risk analyses for public comment. **Federal Register** notices would also be used to announce when the Administrator has determined that a particular fruit or vegetable that has been subject to risk analysis and public comment can, based on the findings of pest risk analysis, be approved for interstate movement in the United States. These notices would make clear the conditions under which such movement could occur, and would state that APHIS will immediately begin allowing the interstate movement of the fruit or vegetable. As described later in this document, these notices would also be used to make available any documentation of our consideration of the potential effects of the interstate movement of a fruit or vegetable on the environment, as required under the National Environmental Policy Act, as well as any other analyses determined by APHIS to be necessary under other Federal statutes, such as the Endangered Species Act.

If the notice-based process is adopted for use by APHIS, we would not list commodities approved under this approach in the regulations, though such commodities would be listed in APHIS' Hawaii/CNMI and Puerto Rico/U.S. Virgin Islands fruits and vegetables manuals⁴ and the documentation supporting their approval would be made available on the Internet; we also would remove from the regulations

those listed commodities that are currently approved for interstate movement subject only to one or more of the designated measures described earlier in this document. Consequently, we would remove the lists of commodities contained in current §§ 318.13–2, 318.13–4b, 318.13–4f, and 318.58–2 and the provisions in § 318.58–4b, "Irradiation treatment of regulated articles from Puerto Rico and the U.S. Virgin Islands," and § 318.13–4c, "Administrative instructions approving methyl bromide fumigation as a condition for certification of tomatoes for movement from Hawaii."

We recognize that removing a large number of commodities from the regulations may cause some confusion as to whether a particular fruit or vegetable is approved for interstate movement in the United States, and under what conditions. However, for many years, APHIS has maintained Hawaii/CNMI and Puerto Rico/U.S. Virgin Islands fruits and vegetables manuals that were designed to be a hands-on reference for our inspectors. The manuals are a complete reference for all fruits and vegetables approved for interstate movement from those States and may be viewed on the APHIS Web site at http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/hawaii.pdf and http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/puerto_rico.pdf. These manuals are frequently used by shippers and other interested persons, in addition to APHIS personnel.

Under this proposal, commodities that have been authorized for interstate movement under the provisions of § 318.13–4 would be added to the manuals for their State or territory of origin, but not the regulations. Furthermore, the manual would list those designated measures that apply to each of those commodities. We also plan to incorporate commodities that have been approved for interstate movement into a searchable database at some point in the future. We are currently developing a database for commodities in our imported fruits and vegetables manual. The new database will allow interested persons to search by regulated article or by country, and will list clearly the conditions that apply to each particular regulated article from a specified country. We envision the database as a comprehensive source for all types of users—inspectors, importers, shippers, and other members of the public.

We would also include in proposed § 318.13–4 provisions that would allow APHIS to amend interstate movement

requirements or withdraw approval of particular commodities whose movement is approved under § 318.13–4. Specifically, APHIS could amend interstate movement requirements if we determine that the currently assigned designated phytosanitary measures are not sufficient to mitigate the risk posed by the particular fruit or vegetable. This could occur due to interceptions of new pests in moved fruits or vegetables or evidence of other risks. Under this provision, APHIS would announce that it was prohibiting or further restricting the interstate movement of the particular fruit or vegetable by publishing a notice in the **Federal Register**. In such cases, APHIS would take immediate action as appropriate at ports of entry, and would follow such action as quickly as practicable with notice in the **Federal Register**. The notice would specify the amended interstate movement requirements, provide an effective date for the change, and would invite public comment on the subject. It is likely that most such actions would be effective immediately, in order to address newly identified risks in a timely fashion; however, if there is uncertainty as to the risk posed, APHIS may request comment on a change in interstate movement requirements prior to making such a change effective.

Pest-Free Areas (Proposed § 318.13–5)

Currently, there are no provisions for establishing pest-free areas for Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands, or CNMI. In this document, we are proposing to add a process for establishing pest-free areas and would provide for pest-free areas to be recognized using a notice-based approach. Proposed § 318.13–5, paragraph (a) would provide that APHIS would make a determination of an area's pest-free status based on information provided by the State. The information APHIS would use in its determination would include trapping and surveillance data, survey protocols, and protocols for actions to be taken upon discovery of a pest. If warranted, APHIS would publish a notice in the **Federal Register**, making the information used to make the determination available to the public and solicit comment for 60 days. Following the comment period, if appropriate, APHIS would begin allowing movement of the regulated article from the pest-free area without mitigations for the particular pest because:

1. No comments were received on the notice or
2. The comments on the notice did not affect the overall conclusions of the

⁴Currently, APHIS does not maintain a fruits and vegetables manual for Guam because there are no regulated articles being moved from Guam (see proposed § 318.13–17 "Regulated articles from Guam"). If as a result of this proposed rule, it becomes necessary to maintain a list of fruits and vegetables from Guam outside of the regulations, APHIS would list such information on the PPQ Internet Web site.

notice and the Administrator's determination of risk.

A comprehensive list of pest-free areas would be made available by APHIS on the Internet, but no such list would be contained in the regulations. Rather, the regulations would simply identify the standards an area must meet to be considered pest free, as shown in proposed § 318.13-5.

In conjunction with this proposed change, we would also include a provision in proposed § 318.13-5 regarding how we would acknowledge the decertification of pest-free areas. Specifically, paragraph (d) of that section would provide that in the event of pest infestation in an approved pest-free area, APHIS will publish in the **Federal Register** a notice announcing that the pest-free status of the area in question has been withdrawn, and that movement of host crops for the pest in question are subject to additional mitigations, if any exist. If an alternative mitigation for the pest is not available, the interstate movement would be prohibited. In order for a decertified pest-free area to be reinstated, a State would have to submit new information supporting its pest-free status as discussed in paragraph (b) of this section to be approved by APHIS.

Paragraph (e) would set forth general requirements for the interstate movement of regulated articles from pest-free areas in Hawaii, Puerto Rico, Guam, CNMI, or the U.S. Virgin Islands. Specifically, paragraph (e) would provide that each box of fruits or vegetables that is moved interstate from a pest-free area under this subpart be labeled with the name of the orchard or grove or origin, or the name of the grower; the name of the municipality and State or territory in which the fruits or vegetables were produced; and the type and amount of fruit the box contains. Paragraph (e) would further provide that persons wishing to move fruits or vegetables from Hawaii, Puerto Rico, Guam, CNMI, or the U.S. Virgin Islands enter into a compliance agreement with APHIS in accordance with the provisions for compliance agreements in § 318.13-3(d). Finally, paragraph (e) would require that fruits or vegetables moved from a pest-free area into or through a non-free area be safeguarded during the time they are present in a non-free area by insect-proof mesh screens or plastic tarpaulins, including while in transit to the packinghouse and while awaiting packaging. Further, we would require fruits or vegetables that are moved through a non-free area during transit to a port to be packed in insect-proof cartons or containers or be covered by

insect-proof mesh or plastic tarpaulins during transit to the port and subsequent movement to the continental United States. These safeguards would provide necessary protection of commodities moved interstate against pest infestation while they are in transit through the United States and are consistent with standard operating procedures of all current programs for the export of fruits or vegetables from foreign pest-free areas.

General Requirements

Transit of Regulated Articles From Hawaii or the Territories Into or Through the Continental United States (Proposed § 318.13-6)

Proposed § 318.13-6 contains provisions for fruits and vegetables from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam to transit through the United States en route to another country. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Products as Ships' Stores or in the Possession of Passengers or Crew (Proposed § 318.13-7)

Proposed § 318.13-7 contains provisions for certain regulated articles from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam to be moved interstate as ships' stores or in the possession of passengers and crew on ships. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Articles and Persons Subject to Inspection (Proposed § 318.13-8)

Proposed § 318.13-8 contains provisions related to the inspection of persons, means of conveyance, baggage, cargo, and any other articles destined for movement from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam to a destination elsewhere in the United States. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Inspection and Disinfection of Means of Conveyance (Proposed § 318.13-9)

Proposed § 318.13-9 contains provisions for inspecting aircraft prior to departure from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam; inspection of aircraft moving to Guam; and inspection of ships upon arrival in the United States. Proposed § 318.13-9 also contains provisions for

disinfecting means of conveyance. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Inspection of Baggage, Other Personal Effects, and Cargo (Proposed § 318.13-10)

Proposed § 318.13-10 contains provisions for inspecting aircraft passengers, aircraft crew, persons traveling to Guam, persons traveling by ship as well as provisions for accepting baggage and loading on aircraft, loading of certain cargoes, removing certain cargoes in Guam, and providing space and facilities for baggage and cargo inspection. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Posting of Warning Notice and Distribution of Baggage Declarations (Proposed § 318.13-11)

Proposed § 318.13-11 contains provisions for distributing baggage declarations to passengers on aircrafts, ships, vessels, or other surface craft moving to Guam, CNMI, or American Samoa. In addition, proposed § 318.13-11 contains requirements for posting warning notices directing attention to the regulations in the Hawaii and territorial subparts on docks, harbors, or landing fields in Hawaii, Puerto Rico, Guam, CNMI, or the U.S. Virgin Islands. These provisions were drawn from and are consistent with the provisions that appear in the corresponding section in the Hawaii subpart; except that we are proposing to amend some of those provisions to reflect current APHIS practices. Specifically, we are proposing to amend those provisions to require that baggage declarations be distributed to passengers on aircraft, ships, vessels, or other surface crafts moving to Guam, CNMI, or American Samoa. Hawaii does not distribute baggage declarations to passengers on all outgoing aircraft, ships, vessels, or other surface crafts; therefore we are also proposing to remove those requirements. Paragraph (b) of § 318.13-12 of the current regulations contains instructions for posting warning notices in docks, harbors, or landing fields in Hawaii, which direct the passengers' attention to the quarantine and regulations in 7 CFR part 318. We would not include footnotes 5 and 6 in proposed § 318.13-11 because the footnotes reference form PPQ 232, which no longer exists.

Movement by the U.S. Department of Agriculture (Proposed § 318.13–12)

Proposed § 318.13–12 contains provisions under which the USDA may move articles whose interstate movement is otherwise prohibited or restricted to move interstate from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, or Guam. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Movement of Frozen Fruits and Vegetables (Proposed § 318.13–13)

Proposed § 318.13–13 provides conditions under which frozen fruits and vegetables may be certified for interstate movement from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, or Guam. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Movement of Processed Fruits, Vegetables, and Other Products (Proposed § 318.13–14)

The Hawaii/territorial fruits and vegetables manuals currently place restrictions on the interstate movement of processed fruits, vegetables, and other products from those areas; however, there are no corresponding requirements in the regulations. In this document, we are proposing to add general requirements regarding the interstate movement of processed products from Hawaii, Puerto Rico, the U.S. Virgin

Islands, CNMI, and Guam in proposed § 318.13–14. Specifically, proposed § 318.13–14(a) would provide that fruits, vegetables, and other products that are processed sufficiently as to preclude the survival of any live pests can be moved interstate from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam. A listing of processed products that are currently approved for interstate movement from those States can be found in the Hawaii/territorial manuals. Proposed paragraph (b) of this section provides that consignments of dried fruits, vegetables, or other products that are capable of harboring fruit flies will be subject to the same interstate movement conditions that apply to the fruit or vegetable in its unprocessed state.

Parcel Post Inspection (Proposed § 318.13–15)

Proposed § 318.13–15 provides conditions under which inspectors are authorized to inspect parcel post packages placed in the mail in Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, or Guam. These provisions were drawn from and are consistent with the provisions that appear in the corresponding sections of each of the Hawaiian and territorial subparts.

Regulated Articles Allowed Interstate Movement Subject to Specific Conditions (Proposed § 318.13–16)

Currently, the regulations contain provisions for interstate movement of certain regulated articles from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam to other locations in the United States subject to inspection and other

requirements. As explained elsewhere in this document, most such commodities would no longer be listed in the regulations under this proposal. However, as also explained earlier in this document, some commodities listed in the current regulations are allowed interstate movement subject to additional measures beyond the designated measures used in the notice-based process. We are proposing to list those commodities, and any requirements that apply to their interstate movement beyond the general requirements of § 318.13–3, in proposed § 318.13–16. Such commodities would remain subject to the same restrictions that currently apply to their interstate movement. In some cases, restrictions that apply to the movement of specific fruits, vegetables, and other products from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam are contained in each State's respective fruits and vegetables manual, but not in the regulations. Consequently, we are proposing to add some commodities to the regulations that are currently listed, along with applicable movement restrictions, only in one of those manuals. A table with those commodities and the location of their current interstate movement requirements follows. See proposed § 318.13–16 for a list of commodities and applicable requirements. Authorization of additional commodities subject to any of these additional measures or measures other than the designated measures described earlier in this document would continue to require prior specific rulemaking.

State of origin	Common name	Botanical name	Location of current interstate movement requirements
Hawaii	Bananas	<i>Musa</i> spp.	Hawaii/CNMI fruits and vegetables manual ("Additional fruits and vegetables approved for movement from Hawaii to Alaska only" table on page 6–13).
	Edible flowers (Pot marigold, johnny-jump-ups, pansies, and violets).	<i>Calendula</i> spp.	Hawaii/CNMI fruits and vegetables manual (page 6–12).
	Pineapple	<i>Ananas comosus</i>	Hawaii/CNMI fruits and vegetables manual (page 6–12).
Puerto Rico	Cactus	<i>Cactaceae</i>	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (table 7–3–19).
	Okra	<i>Abelmoschus esculentus</i> .	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (tables 7–3–1 and 7–3–3).
	Edible flowers (pot marigold, johnny-jump-ups, pansies, and violets).	<i>Calendula</i> spp.	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (table 7–3–1).
U.S. Virgin Islands	Cactus	<i>Cactaceae</i>	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (table 7–3–19) and § 318.58–2(b)(3).
	Okra	<i>Abelmoschus esculentus</i> .	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (tables 7–3–1 and 7–3–3).
	Edible flowers (pot marigold, johnny-jump-ups, pansies, and violets).	<i>Calendula</i> spp.	Puerto Rico/U.S. Virgin Islands fruits and vegetables manual (table 7–3–1).

Regulated Articles From Guam
(Proposed § 318.13–17)

Proposed § 318.13–17 contains interstate movement requirements that would apply specifically to regulated articles from Guam. These provisions were drawn from and are consistent with the provisions that appear in the Guam subpart; except that the reference to part 321, “Restricted Entry Orders,” has been removed (see 62 FR 50237–50239, Docket No. 97–010–2).

Sections 318.13–18 through 318.13–20 would be reserved to provide additional space in “Subpart–Hawaiian and Territorial Quarantine Notices” for future amendments, should such amendments be needed.

Regulated Article-Specific Provisions
(Proposed §§ 318.13–21 through 318.13–25)

Sections 318.13–4a through 318.13–4j and §§ 318.58–4a through 318.58–4c contain restrictions on the movement of specific commodities. As explained elsewhere in this document, a number of these sections will be removed if this proposal is adopted. However, all or part of the following sections would be retained under this proposal:

- § 318.13–4d, “Vapor heat treatment of sweetpotatoes from Hawaii.”
- § 318.13–4g, “Administrative instructions governing movement of avocados from Hawaii to Alaska.”
- § 318.13–4i, “Conditions governing the movement of bananas from Hawaii.”
- § 318.13–4j, “Administrative instructions governing the interstate movement of cut blooms of gardenia from Hawaii.”
- § 318.58–4c, “Movement of sweetpotatoes from Puerto Rico to certain ports.”

Under this proposal, some or all of the provisions contained in the sections listed above would be relocated to new sections of the proposed regulations, as shown in the cross reference document. As would be the case with requirements of general applicability, we would make no changes to the content of the sections, but simply change paragraph and section designations. In other cases, we are proposing to amend the text to make the regulations easier to understand, to correct errors, or to update them to reflect current APHIS operating procedures. None of these changes would represent a substantive change in interstate movement policy.

Current § 318.13–4d contains restrictions on the interstate movement of sweetpotatoes from Hawaii. Under this proposal, all provisions contained in current § 318.13–4d would be

relocated to proposed § 318.13–25, except that the new section would not include a statement that vapor heat treatment is an authorized treatment for sweetpotatoes from Hawaii, as part 305 already lists vapor treatment as an approved treatment.

Current § 318.13–3(b)(1) contains conditions governing the interstate movement of cut flowers from Hawaii except for cut blooms and leis of mauna loa and jade vine and except for cut blooms of gardenia not grown in accordance with § 318.13–4j, “Administrative instructions governing the interstate movement of cut blooms of gardenia from Hawaii.” Under this proposal, the cut flower-related provisions of § 318.13–3(b)(1) and the conditions for the interstate movement of gardenia in § 318.13–4j would be relocated to proposed § 318.13–23.

Current § 318.13–4i contains conditions governing the interstate movement of bananas from Hawaii, including a requirement that the fruit be safeguarded from fruit fly infestation during transit. Under this proposal, all provisions contained in current § 318.13–4i would be relocated to proposed § 318.13–22, except that the new section would specifically provide that bananas being moved interstate must be safeguarded from fruit fly infestation by being covered with insect-proof packaging, such as insect-proof mesh screens or plastic tarpaulins. This change is necessary to clarify the safeguarding requirement in this section.

Current § 318.58–4c contains conditions governing the interstate movement of sweetpotatoes from Puerto Rico. The current regulations provide that the fields in which sweetpotatoes have been grown must be treated with an approved soil insecticide and that before planting in treated fields, the sweetpotato draws and vine cuttings must be dipped in an approved insecticidal solution. Under this proposal, all provisions contained in current § 318.58–4c would be relocated to proposed § 318.13–24, except that we would clarify that the soil insecticide and insecticidal solution must be approved by APHIS.

Miscellaneous Changes

In addition to the changes described elsewhere in this document, we propose to update references to contact points for APHIS program units as appropriate. We would also update, as necessary, various references to sections of the fruits and vegetables regulations located elsewhere in 7 CFR chapter III.

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 have prepared an initial regulatory flexibility analysis that considers the potential economic effects of this proposed rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available from the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to Docket No. APHIS–2007–0052 when requesting copies. The full analysis is also available on the Regulations.gov Web site and in our reading room (instructions for accessing Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this document).

This proposed rule would revise and reorganize the regulations pertaining to the interstate movement of fruits and vegetables from Hawaii, Puerto Rico, the U.S. Virgin Islands, and Guam. This would be done to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, make various editorial and nonsubstantive changes to the regulations to make them easier to use, and expand their applicability to include the CNMI and all other territories and possessions of the United States.

APHIS is also proposing to make substantive changes to the regulations. This proposed rule would establish criteria within the regulations that, if met, would allow APHIS to approve certain fruits and vegetables for interstate movement and to acknowledge pest-free areas in Hawaii and U.S. territories without undertaking rulemaking. Currently, these commodities may only be brought into the continental United States after completion of a pest risk analysis, risk management document, and rulemaking, if the commodities are not currently included on the list of regulated articles. A similar type of notice-based procedure has been implemented by APHIS for approving imports. Implementing this rule would establish a similar approach for authorizing the interstate movement of certain fruits and vegetables and other

articles. This proposed rule would also result in certain regulated articles no longer being listed in the regulations. These changes would simplify and expedite the APHIS processes for approving certain regulated articles for interstate movement and pest-free areas while continuing to allow for public participation in the process.

APHIS expects little impact on the total supply of fruits and vegetables available in the continental United States, and little change in the movement of fruits and vegetables from Hawaii and the territories; effects on U.S. producers, marketers, and consumers are expected to be small. The main provision of this proposed rule represents a structural revision of the regulations pertaining to the movement of fruits and vegetables from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and CNMI, and establishes a new process for approving commodities for movement into the continental United States. However, those commodity movement requests most likely to qualify for the notice-based process are specialty crops having limited markets. The proposed rule would not alter the conditions that apply to currently approved fruits or vegetables.

Of particular note with respect to the approval process, the change would allow a newly approved commodity to move more quickly into commerce to the benefit of consumers and Hawaiian and territorial producers once it has been determined that the commodity can be safely moved interstate subject to one or more designated risk management measures. This proposal, itself, would not allow for the interstate movement of any specific fruits or vegetables, nor would it alter the conditions for interstate movement of currently approved fruits or vegetables except as specifically described in the proposed rule. These proposed changes would not alter the manner in which the risk associated with a commodity interstate movement request is evaluated, nor would it alter the manner in which those risks are ultimately mitigated. Consumers would have quicker access to some fruits and vegetables, while risks would still be evaluated and appropriate mitigations required, as they are currently.

The requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for this rulemaking are met through the following analysis. The economic effects of approving specific commodities for interstate movement using the streamlined approach would not be analyzed at the time of their approval, since such approval would occur without additional rulemaking.

Fruit and Vegetable Production

The fruit and tree nut and the vegetable and melon sectors are vibrant in the United States, for both consumers and producers. The United States is one of the world's leading producers and consumers of vegetables and melons. The annual sale of vegetables and melons earned farmers \$17.3 billion on average during 2001–03, more than 8 percent of all farm cash receipts (crops and livestock) and 17 percent of crop receipts. Similarly, the U.S. fruit and tree nuts industry is an important component of the U.S. farm sector. It generated over \$12 billion in U.S. farm cash receipts annually in the early 2000s, averaging 6 percent of all farm cash receipts and 12 percent of all crop receipts.

The typical American annually consumes over 280 pounds of fruit and tree nuts (fresh and processed products) each year, ranking third in per capita consumption of major food groups, next to dairy and vegetables. Annual per capita consumption of all vegetables and melons rose 4 percent from 1991–93 to 2001–03, reaching 440 pounds as fresh consumption increased and processed fell. Consumer expenditures for fruit and vegetables are growing faster than for any food group other than meats. Increased domestic and world supplies, rising disposable incomes, and a growing and more culturally diverse population will continue to expand consumer demand for fruits and vegetables in the United States over the next decade. Another important stimulus is continued emphasis on health and nutrition. The fruit and vegetable industries have been very active in promoting the health benefits of fruit and vegetable consumption.

Hawaii and the U.S. territories are important sources of fresh fruits and vegetables for the rest of the United States. In 2002, 666 Hawaiian farms produced more than \$55 million in vegetables, melons, potatoes, and sweet potatoes, equal to about 10 percent of total Hawaiian agricultural sales; and 2,582 Hawaiian farms produced more than \$179 million in fruits, tree nuts, and berries, accounting for more than 33 percent of total Hawaiian agricultural sales. In 2002, Hawaii ranked seventh among the States in the production of fruits, tree nuts, and berries, and 28th in the production of vegetables, melons, potatoes and sweet potatoes. Hawaii's growers of tropical specialty fruit produced and sold an estimated 1.5 million pounds of fresh fruit in 2005, according to the USDA's National Agricultural Statistics Services (NASS) Hawaii field office. This amount was

half again as large as the revised 2004 output of 1 million pounds and the highest on record for fresh tropical specialty fruit since records began to be published for this group.

Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act requires agencies to evaluate the potential effects of proposed and final rules on small businesses, small organizations, and small governmental jurisdictions.

Description of the Reasons Why Action by APHIS is Being Considered

This proposed rule would revise and reorganize the regulations pertaining to the interstate movement of fruits and vegetables from Hawaii, Puerto Rico, the U.S. Virgin Islands, CNMI, and Guam to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, and make various editorial and nonsubstantive changes to the regulations to make them easier to use. It would also establish criteria within the regulations that, if met, would allow APHIS to approve certain fruits and vegetables for interstate movement and to acknowledge pest-free areas in Hawaii and U.S. territories without undertaking rulemaking. These changes would simplify the regulations and expedite the APHIS processes for approving certain regulated articles for interstate movement and pest-free areas while continuing to allow for public participation in the process.

Objectives of, and Legal Basis for, the Proposed Rule

By eliminating the need for specific prior rulemaking for commodities for which the notice-based process would be appropriate, considerable time savings could be reaped. The current process for approving fruits and vegetables for interstate movement takes a notable period of time, ranging on average from 18 months to 3 years (beginning with the initial request and ending with the publication of a final rule).

Consumers benefit from the ability to purchase fruits and vegetables from a wide variety of sources. Many of the commodities that are likely to be covered by this rule are niche products, unavailable or limited in availability in the continental United States. This rule would allow producers in Hawaii and the U.S. territories to more quickly meet continental U.S. consumer demand for those niche products. In addition, climate causes most fruit and vegetable production in the continental United

States to be seasonal, with the largest harvests occurring during the summer and fall. Speeding up the process of approving the interstate movement of fruits and vegetables from Hawaii and the U.S. territories would allow continental supplies to be more quickly supplemented, especially of fresh products during the winter; increased choices for consumers and more markets for producers would occur sooner than under the rulemaking process.

The Plant Protection Act (7 U.S.C. 7701 *et seq.*) gives authority to the Secretary of Agriculture to prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction of a plant pest or noxious weed within the United States. The Secretary has delegated this authority to the APHIS Administrator.

Description and Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

Those entities most likely to be economically affected by the rule are wholesalers and producers of fruits and vegetables. The Small Business Administration (SBA) has established guidelines for determining which establishments are to be considered small. A firm primarily engaged in wholesaling fresh fruits and vegetables is considered small if it employs not more than 100 persons. In 2002, about 95 percent (4,044 of 4,244) of fresh fruit and vegetable wholesalers in the United States were small by SBA standards.⁵ All types of fruit and vegetable farms are considered small if they have annual receipts of \$0.75 million or less. With some exceptions, vegetable and melon farms are largely individually owned and relatively small, with two-thirds harvesting fewer than 25 acres. In 2002, between 80 and 84 percent of U.S. vegetable and melon farms were considered small. Similarly, although numbers have declined, fruit and tree nut production is still dominated by small, family, or individually run farm operations. In 2002, between 92 and 95 percent of all fruit and tree nut farms were considered small.⁶

⁵ 2002 Economic Census. Department of Commerce, U.S. Bureau of the Census. North American Industry Classification system (NAICS) Category 424480; Fresh fruit & Vegetables wholesalers.

⁶ 2002 Census of Agriculture, USDA-NASS. NAICS Categories—1112: Vegetable and melon farming; 1113: Fruit and tree nut farming.

Based on the information that is available, the effects of this rule should be small whether the entity affected is small or large. Those commodity interstate movement requests most likely to qualify for the notice-based process would be for specialty crops with limited markets. This proposal would merely allow certain commodities to move more quickly into interstate commerce to the benefit of consumers and Hawaiian and territorial producers, once it has been determined that the commodity can be safely moved subject to one or more designated risk management measures. Hence, we expect little impact on the total volume of U.S. fruits and vegetables, or on U.S. producers, marketers, and consumers.

Nevertheless, we invite public comment on the proposed rule, including any comment on the expected impacts for small entities, and on how the proposed rule could be modified to reduce expected costs or burdens for small entities consistent with its objectives. Any comment suggesting changes to the proposed criteria should be supported by an explanation of why the changes should be considered.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

The proposed rule contains, under the heading “Paperwork Reduction Act,” a description of the information collection and recordkeeping requirements associated with the proposed rule.

Duplication, Overlap, or Conflict With Other Federal Rules

APHIS has not identified any duplication, overlap, or conflict of the proposed rule with other Federal rules.

Description of Any Significant Alternatives to the Proposed Rule

An alternative to this rule would be to simply continue under APHIS’ current process for authorizing the interstate movement of fruits and vegetables. In this case, we would continue to list all newly approved fruits and vegetables in the regulations through notice-and-comment rulemaking. A notice-based procedure has been implemented by APHIS for approving imports and is working successfully, and we believe a similar process for approving the interstate movement of certain articles would be appropriate. Thus, we believe that maintaining the current process for all regulated articles is unnecessary. We believe that the new approach would enable us to be more responsive to interstate movement requests while maintaining transparent

decisionmaking. Therefore this alternative was rejected.

Future Analyses

If this proposed rule is adopted as a final rule, the requirements of Executive Order 12866 or the Regulatory Flexibility Act will be met through the analyses that accompany the final rule. The economic effects of the interstate movement of the specific commodities that are approved using the streamlined approach would not be analyzed at the point of approval, since such approval would occur without additional rulemaking.

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) State and local laws and regulations will not 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.

National Environmental Policy Act

The majority of the regulatory changes proposed in this document are nonsubstantive, and would therefore have no effects on the environment. However, this proposal, if adopted, would allow APHIS to approve certain new articles for interstate movement without undertaking rulemaking. Despite the fact that those fruits and vegetable imports would no longer be contingent on the completion of rulemaking, the requirements of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), would still apply. As such, for each additional regulated article approved for interstate movement, APHIS would make available to the public documentation related to our analysis of the potential environmental effects of the interstate movement of new regulated articles. This documentation would likely be made available at the same time and via the same **Federal Register** notice as the risk analysis for the proposed article.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information

collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS-2007-0052. Please send a copy of your comments to: (1) Docket No. APHIS-2007-0052, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238, and (2) Clearance Officer, OCIO, USDA, room 404-W, 14th Street and Independence Avenue, SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to revise and reorganize the regulations pertaining to the interstate movement of fruits and vegetables to consolidate requirements of general applicability and eliminate redundant requirements, update terms and remove outdated requirements and references, and make various editorial and nonsubstantive changes to the regulations to make them easier to use. APHIS is also proposing to make substantive changes to the regulations including: Establishing criteria within the regulations that, if met, would allow us to approve certain new fruits and vegetables for interstate movement in the United States and to acknowledge pest-free areas in Hawaii and U.S. territories expeditiously; and doing away with the practice of listing in the regulations specific commodities as regulated articles. These changes are intended to simplify and expedite our processes for approving certain regulated articles for interstate movement and pest-free areas while continuing to allow for the public participation in the processes.

Implementing this rule will necessitate the use of limited permits, transit permits, compliance agreements, and additional information collection procedures such as inspection/certification, labeling, and trapping surveillance.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

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

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the information collection on those who are to respond (such as through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.4280 hour per response.

Respondents: Wholesalers and producers of fruits and vegetables, State officials.

Estimated annual number of respondents: 600.

Estimated annual number of responses per respondent: 33.6666.

Estimated annual number of responses: 20,200.

Estimated total annual burden on respondents: 8,646 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS's Information Collection Coordinator, at (301) 851-2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS's Information Collection Coordinator, at (301) 851-2908.

Lists of Subjects

7 CFR Part 305

Irradiation, Phytosanitary treatment, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements.

7 CFR Part 318

Cotton, Cottonseeds, Fruits, Guam, Hawaii, Plant diseases and pests, Puerto Rico, Quarantine, Transportation, Vegetables, Virgin Islands.

Accordingly, we propose to amend 7 CFR parts 305 and 318 as follows:

PART 305—PHYTOSANITARY TREATMENTS

1. The authority citation for part 305 continues to read as follows:

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. In § 305.17, paragraph (a) is revised to read as follows:

§ 305.17 Authorized treatments; exceptions.

(a) Quick freeze is an authorized treatment for all fruits and vegetables imported into the United States or moved interstate from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands, except for those fruits and vegetables listed in paragraph (b) of this section. Quick freeze for fruits and vegetables imported into the United States or moved interstate from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands must be conducted in accordance with § 319.56-12 of this subchapter for imported fruits and vegetables and § 318.13-13 of this subchapter for fruits and vegetables moved interstate.

* * * * *

§ 305.34 [Amended]

In § 305.34, paragraph (b)(2)(iii) is amended by removing the citation “§ 318.13-4(d)” and adding the citation “§ 318.13-3(d)” in its place.

PART 318—HAWAIIAN AND TERRITORIAL QUARANTINE NOTICES

3. The authority citation for part 318 continues to read as follows:

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

4. Subpart-Hawaiian Fruits, Vegetables, and Flowers, consisting of §§ 318.13 through 318.13-17, is removed and a new Subpart—Regulated Articles From Hawaii and the Territories, §§ 318.13-1 through 318.13-25, is added to read as follows:

Subpart—Regulated Articles From Hawaii and the Territories

Sec.

318.13-1 Notice of quarantine.

318.13-2 Definitions.

318.13-3 General requirements for all regulated articles.

318.13-4 Approval of certain fruits and vegetables for interstate movement.

318.13-5 Pest-free areas.

318.13-6 Transit of regulated articles from Hawaii or the territories into or through the continental United States.

- 318.13-7 Products as ships' stores or in the possession of passengers or crew.
- 318.13-8 Articles and persons subject to inspection.
- 318.13-9 Inspection and disinfection of means of conveyance.
- 318.13-10 Inspection of baggage, other personal effects, and cargo.
- 318.13-11 Posting of warning notice and distribution of baggage declarations.
- 318.13-12 Movement by the U.S. Department of Agriculture.
- 318.13-13 Movement of frozen fruits and vegetables.
- 318.13-14 Movement of processed fruits, vegetables, and other products.
- 318.13-15 Parcel post inspection.
- 318.13-16 Regulated articles allowed interstate movement subject to specified conditions.
- 318.13-17 Regulated articles from Guam.
- 318.13-18 through 318.13-20 [Reserved]
- 318.13-21 Avocados from Hawaii to Alaska.
- 318.13-22 Bananas from Hawaii.
- 318.13-23 Cut flowers from Hawaii.
- 318.13-24 Sweetpotatoes from Puerto Rico.
- 318.13-25 Sweetpotatoes from Hawaii.

Subpart—Regulated Articles From Hawaii and the Territories

§ 318.13-1 Notice of quarantine.

(a) Under the authority of section 412 of the Plant Protection Act, the Secretary of Agriculture may prohibit or restrict the movement in interstate commerce of any plant or plant product if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination within the United States of a plant pest or noxious weed.

(b) The Secretary has determined that it is necessary to prohibit the interstate movement of cut flowers and fruits and vegetables and plants and portions of plants from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands except as provided in this subpart.

§ 318.13-2 Definitions.

Administrator. The Administrator of the Animal and Plant Health Inspection Service (APHIS), U.S. Department of Agriculture, or any other employee of APHIS to whom authority has been delegated to act in the Administrator's stead.

Animal and Plant Health Inspection Service. The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture.

Approved growing media. Agar or other translucent tissue culture media, buckwheat hulls, clean ocean sand, excelsior, exfoliated vermiculite, ground cork, ground peat, ground rubber, paper, polymer stabilized cellulose, quarry

gravel, sawdust, wood shavings, cork shavings, sphagnum moss, tree fern slab (approved only for orchids), and vegetable fiber (free of pulp) including coconut and osmunda, but excluding cotton and sugarcane.

Certification (certified). A type of authorization, issued by an inspector, evidencing freedom from infestation, to allow the movement of certain regulated articles in accordance with the regulations in this subpart. "Certified" shall be construed accordingly.

Commercial consignment. A lot of fruits or vegetables that an inspector identifies as having been produced for sale or distribution in mass markets. Such identification will be based on a variety of indicators, including, but not limited to: Quantity of produce, type of packaging, identification of grower and packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer.

Compliance agreement. Any agreement to comply with stipulated conditions as prescribed under § 318.13-3 or § 318.13-4 of this subpart or § 305.34 of this chapter, executed by any person to facilitate the interstate movement of regulated articles under this subpart.

Continental United States. The 48 contiguous States, Alaska, and the District of Columbia.

Cut flower. Any cut blooms, fresh foliage, and dried decorative plant material customarily used in the florist trade and not planting; and being the severed portion of a plant, including the inflorescence, and any parts of the plant attached thereto, in a fresh state.

Disinfection (disinfect and disinfected). The application to parts or all of a ship, vessel, other surface craft, or aircraft of a treatment that may be designated by the inspector as effective against such plant pests as may be present. ("Disinfect" and "disinfected" shall be construed accordingly.)

Fruits and vegetables. A commodity class for fresh parts of plants intended for consumption or processing and not planting.

Inspector. A State agricultural inspector or any individual authorized by the Administrator of APHIS or the Commissioner of Customs and Border Protection, Department of Homeland Security, to enforce the regulations in this subpart.

Interstate. From one State into or through any other State; or within the District of Columbia, Guam, the Virgin Islands of the United States, or any other territory or possession of the United States.

Limited permit. A document issued by an inspector or a person operating under

a compliance agreement for the interstate movement of regulated articles to a specified destination for:

(1) Consumption, limited utilization or processing, or treatment; or

(2) Movement into or through the continental United States in conformity with a transit permit.

Lot. A number of units of a single commodity, identifiable by its homogeneity of composition and origin, forming all or part of a consignment.

Means of conveyance. A ship, truck, aircraft, or railcar.

Moved (move and movement). Shipped, offered for shipment to a common carrier, received for transportation or transported by a common carrier, or carried, transported, moved, or allowed to be moved, directly or indirectly, from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands into or through the continental United States or any other State or territory of the United States (or from or into or through other places as specified in this subpart). ("Move" and "movement" shall be construed accordingly.)

Packing materials. Any plant or plant product, soil, or other substance associated with or accompanying any commodity or consignment to serve for filling, wrapping, ties, lining, mats, moisture retention, protection, or any other auxiliary purpose. The word "packing," as used in the expression "packing materials," includes the presence of such materials within, in contact with, or accompanying a consignment.

Person. Any individual, partnership, corporation, association, joint venture, or other legal entity.

Plant debris. Detached leaves, twigs, or other portions of plants, or plant litter or rubbish as distinguished from approved parts of clean fruits and vegetables, or other commercial articles.

Plant pests. Any living stage of any of the following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, nonhuman animal, parasitic plant, bacterium, fungus, virus or viroid, infectious agent or other pathogen, or any article similar to or allied with any of those articles.

Regulated articles. Fruits or vegetables in the raw or unprocessed state; cut flowers; seeds; and plants or plant products for nonpropagative or propagative use.

Sealed (sealable) container. A completely enclosed container designed for the storage and/or transportation of commercial air, sea, rail, or truck cargo, and constructed of metal or fiberglass,

or other similarly sturdy and impenetrable material, providing an enclosure accessed through doors that are closed and secured with a lock or seal. Sealed (sealable) containers used for sea consignments are distinct and separable from the means of conveyance carrying them when arriving in and in transit through the continental United States. Sealed (sealable) containers used for air consignments are distinct and separable from the means of conveyance carrying them before any transloading in the continental United States. Sealed (sealable) containers used for air consignments after transloading in the continental United States or for overland consignments in the continental United States may either be distinct and separable from the means of conveyance carrying them, or be the means of conveyance itself.

Soil. The loose surface material of the earth in which plants grow, in most cases consisting of disintegrated rock with an admixture of organic material and soluble salts.

State. Each of the 50 States of the United States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and all other territories and possessions of the United States.

Transit permit. A written authorization issued by the Administrator for the movement of fruits and vegetables en route to a foreign destination that are otherwise prohibited movement by this subpart into the continental United States. Transit permits authorize one or more consignments over a designated period of time.

Transloading. The transfer of cargo from one sealable container to another, from one means of conveyance to another, or from a sealable container directly into a means of conveyance.

United States. All of the States of the United States, the Commonwealth of Northern Mariana Islands, the Commonwealth of Puerto Rico, the District of Columbia, Guam, the U.S. Virgin Islands, and all other territories and possessions of the United States.

§ 318.13-3 General requirements for all regulated articles.

All regulated articles that are allowed movement under this subpart must be moved in accordance with the following requirements, except as specifically provided otherwise in this subpart.

(a) **Freedom from plant debris.** All regulated articles moved under this subpart must be free from plant debris.

(b) **Certification.** Certification may be issued for the movement of regulated articles under the following conditions:

(1) **Certification on basis of inspection or nature of lot involved.** Regulated articles may be certified when they have been inspected by an inspector and found apparently free from infestation and infection, or without such inspection when the inspector determines that the lot for consignment is of such a nature that no danger of infestation or infection is involved.

(i) Persons intending to move any articles that may be certified must contact the local Plant Protection and Quarantine office as far as possible in advance of the contemplated date of shipment in order to request an inspection.

(ii) Persons intending to move any articles that may be certified must prepare, handle, and safeguard such articles from infestation or reinfestation, and assemble them at such points as the inspector may designate, placing them so that inspection may be readily made.

(2) **Certification on basis of treatment.**

(i) Regulated articles for which treatments are approved in part 305 of this chapter may be certified if such treatments have been applied in accordance with part 305 of this chapter and if the articles were handled after such treatment in accordance with a compliance agreement executed by the applicant for certification or under the supervision of an inspector.

(ii) Regulated articles certified after treatment in accordance with part 305 of this chapter that are taken aboard any ship, vessel, other surface craft, or aircraft must be segregated and protected in a manner as required by the inspector.

(c) **Limited permits.** (1) Limited permits¹ may be issued by an inspector for the movement of certain noncertified regulated articles to restricted destinations.

(2) Limited permits may be issued by an inspector for the movement of regulated articles that would otherwise be prohibited movement under this subpart, if the articles are to be moved in accordance with § 318.13-6.

(3) Except when the regulations specify that an inspector must issue the limited permit, limited permits may be issued by a person operating under a compliance agreement.

(d) **Compliance agreements.** As a condition for the movement of regulated articles for which a compliance agreement is required, the person

entering the compliance agreement must agree to the following:

(1) That he or she will use any permit or certification issued to him or her in accordance with the provisions in the permit, the requirements in this subpart, and the compliance agreement;

(2) That he or she will maintain at his or her establishment such safeguards against the establishment and spread of infestation and infection and comply with such conditions as to the maintenance of identity, handling (including post-treatment handling), and interstate movement of regulated articles and the cleaning and treatment of means of conveyance and containers used in such movement of the articles, as may be required by the inspector in each specific case to prevent the spread of infestation or infection; and

(3) That he or she will allow inspectors to inspect the establishment and its operations.

(e) **Attachment of limited permit or verification of certification.** Except as otherwise provided for certain air cargo and containerized cargo on ships moved in accordance with § 318.13-10, each box, bale, crate, or other container of regulated articles moved under certification or limited permit shall have the limited permit attached to the outside of the container or bear a U.S. Department of Agriculture stamp or inspection sticker verifying that the consignment has been certified in accordance with paragraph (b) of this section: *Provided*, That if a limited permit or certification is issued for a consignment of more than one container or for bulk products, certification shall be stamped on or the limited permit shall be attached to the accompanying waybill, manifest, or bill of lading.

(f) **Withdrawal of certification, transit permits, limited permits, or compliance agreements.** Any certification, transit permit, limited permit, or compliance agreement which has been issued or authorized may be withdrawn by an inspector orally or in writing, if such inspector determines that the holder thereof has not complied with all conditions under the regulations for the use of such document. If the cancellation is oral, the decision and the reasons for the withdrawal shall be confirmed in writing as promptly as circumstances allow. Any person whose certification, transit permit, limited permit, or compliance agreement has been withdrawn may appeal the decision in writing to the Administrator within 10 days after receiving the written notification of the withdrawal. The appeal shall state all of the facts and reasons upon which the person relies to show that the certification,

¹ Limited permits can be obtained from each State or territory's local Plant Protection and Quarantine office.

transit permit, limited permit, or compliance agreement was wrongfully withdrawn. The Administrator shall grant or deny the appeal, in writing, stating the reasons for such decision, as promptly as circumstances allow. If there is a conflict as to any material fact, a hearing shall be held to resolve such conflict. Rules of practice concerning such a hearing will be adopted by the Administrator.

(g) *Container marking and identity.* Except as provided in § 318.13–6(c), consignments of regulated articles moved in accordance with this subpart must have the following information clearly marked on each container or on the waybill, manifest, or bill of lading accompanying the articles: Nature and quantity of contents; name and address of shipper, owner, or person shipping or forwarding the articles; name and address of consignee; shipper's identifying mark and number; and the certification stamp or number of the limited permit authorizing movement, if one was issued.

(h) *Refusal of movement.* An inspector may refuse to allow the interstate movement of a regulated article if the inspector finds that the regulated article is prohibited, is not accompanied by required documentation, is so infested with a plant pest or noxious weed that, in the judgment of the inspector, it cannot be cleaned or treated, or contains soil or other prohibited contaminants.

(i) *Costs and charges.* Services of the inspector during regularly assigned hours of duty at the usual places of duty shall be furnished without cost to the one requesting such services. APHIS will not assume responsibility for any costs or charges, other than those indicated in this section, in connection with the inspection, treatment, conditioning, storage, forwarding, or any other operation of any character incidental to the physical movement of regulated articles or plant pests.

(j) *APHIS not responsible for damage.* APHIS assumes no responsibility for any damage to regulated articles that results from the application of treatment or other measures required under this subpart (or under part 305 of this chapter) to protect against the dissemination of plant pests within the United States.

(Approved by the Office of Management and Budget under control number 0579–0088)

§ 318.13–4 Approval of certain fruits and vegetables for interstate movement.

(a) *Determination by the Administrator.* The Administrator has determined that the application of one or more of the designated phytosanitary

measures cited in paragraph (b) of this section to certain fruits and vegetables mitigates the risk posed by those commodities, and that such articles may be moved interstate subject to one or more of those measures, as provided in paragraphs (c) and (d) of this section. The name and origin of all fruits and vegetables authorized movement under this section, as well as the applicable requirements for their movement, may be found on the Internet at http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/hawaii.pdf or http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/puerto_rico.pdf. Fruits or vegetables that require phytosanitary measures other than one or more of the designated phytosanitary measures cited in paragraph (b) of this section may only be moved in accordance with applicable requirements in § 318.13–3 and regulated article-specific requirements contained elsewhere in this subpart.

(b) *Designated phytosanitary measures.* (1) The fruits and vegetables are inspected in the first State of arrival.

(2) The fruits and vegetables originated from a pest-free area in the State of origin and the grower from which the fruit or vegetable originated has entered into a compliance agreement with the Administrator.

(3) The fruits and vegetables are treated in accordance with part 305 of this chapter and the treatment is certified by an inspector.

(4) The fruits and vegetables articles are inspected and certified in the State of origin by an inspector and have been found free of one or more specific quarantine pests identified by risk analysis as likely to follow the pathway.

(5) The fruits and vegetables are moved as commercial consignments only.

(6) The fruits and vegetables may be distributed only within a defined area and the boxes or containers in which the fruit or vegetables are distributed must be marked to indicate the applicable distribution restrictions.

(c) *Fruits and vegetables authorized for interstate movement under this section.*

(1) *Previously approved fruits and vegetables.* Fruits and vegetables that were authorized movement under this subpart either administratively or by specific regulation as of [Insert effective date of final rule] and that were subject only to one or more of the designated phytosanitary measures cited in paragraph (b) of this section and the general requirements of § 318.13–3 may continue to be moved interstate under the same requirements that applied

before [Insert effective date of final rule], except as provided in paragraph (d) of this section. The interstate movement conditions for those fruits and vegetables that were authorized movement under this subpart subject to additional measures beyond the designated measures in paragraph (b) of this section can be found in § 318.13–16 or one of the commodity-specific sections in this subpart.

(2) *Other fruits and vegetables.* Fruits and vegetables that do not meet the criteria in paragraph (c)(1) of this section may be authorized movement under this section as follows:

(i) *Pest risk analysis.* The risk posed by the particular article from a specified State has been evaluated and publicly communicated as follows:

(A) *Availability of pest risk analysis.* APHIS published in the **Federal Register**, for a public comment period of 60 days, a notice announcing the availability of a pest risk analysis that evaluated the risks associated with the movement of the particular fruit or vegetable.

(B) *Determination of risk; factors considered.* The Administrator determined, and announced in the notice referred to in the previous paragraph, that, based on the information available, the application of one or more of the designated phytosanitary measures described in paragraph (b) of this section is sufficient to mitigate the risk that plant pests or noxious weeds could be introduced into or disseminated elsewhere within the United States by the fruit or vegetable. In order for the Administrator to make the determination described in this paragraph, he or she must conclude based on the information presented in the risk analysis for the fruit or vegetable that the risk posed by each quarantine pest associated with the fruit or vegetable in the State of origin is mitigated by one or more of the following factors:

(1) *Inspection.* A quarantine pest is associated with the fruit or vegetable in the State of origin, but the pest can be easily detected via inspection in the State of first arrival;

(2) *Pest freedom.* No quarantine pests are known to be associated with the fruit or vegetable in the State of origin, or a quarantine pest is associated with the fruit or vegetable in the State of origin but the fruit or vegetable originates from an area that meets the requirements of § 318.13–5 for pest freedom;

(3) *Effectiveness of treatment.* A quarantine pest is associated with the fruit or vegetable in the State of origin, but the risk posed by the pest can be

reduced by applying an approved post-harvest treatment to the fruit or vegetable;

(4) *Predeparture inspection.* A quarantine pest is associated with the fruit or vegetable in the State of origin, but the fruit or vegetable is subject to predeparture inspection;

(5) *Commercial consignments.* A quarantine pest is associated with the fruit or vegetable in the State of origin, but the risk posed by the pest can be reduced by commercial practices.

(6) *Limited distribution.* A quarantine pest is associated with the fruit or vegetable in the State of origin, but the risk posed by the pest can be reduced by limiting distribution of the fruit or vegetable and labeling boxes containing the fruit or vegetable with those distribution instructions.

(ii) *Administrator's decision.* The Administrator will announce his or her decision in a subsequent **Federal Register** notice. If appropriate, APHIS would begin allowing the interstate movement of the fruits or vegetables subject to requirements specified in the notice because:

(A) No comments were received on the pest risk analysis;

(B) The comments on the pest risk analysis revealed that no changes to the pest risk analysis were necessary; or

(C) Changes to the pest risk analysis were made in response to public comments, but the changes did not affect the overall conclusions of the analysis and the Administrator's determination of risk.

(d) *Amendment of interstate movement requirements.* If, after [Insert effective date of final rule], the Administrator determines that one or more of the designated phytosanitary measures is not sufficient to mitigate the risk posed by any fruit or vegetable authorized interstate movement under this section, APHIS will prohibit or further restrict the interstate movement of the fruit or vegetable pending resolution of the situation. If APHIS concludes that a permanent change to the interstate movement requirements of a particular fruit or vegetable is necessary, APHIS will also publish a notice in the **Federal Register** advising the public of its finding. The notice will specify the amended interstate movement requirements, provide an effective date for the change, and invite public comment on the subject.

§ 318.13-5 Pest-free areas.

Certain fruits or vegetables may be moved interstate provided that the fruits or vegetables originate from an area that is free of a specific pest or pests. In some cases, fruits or vegetables may

only be moved interstate if the area of origin is free of all plant pests that attack the fruits or vegetables. In other cases, fruits or vegetables may be moved interstate if the area of origin is free of one or more plant pests that attack the fruit or vegetable and the risk posed by the remaining plant pests that attack the fruit or vegetable is mitigated by other specific phytosanitary measures contained in the regulations in this subpart.

(a) *Application of standards for pest-free areas.* APHIS will make a determination of an area's pest-free status based on information provided by the State. The information used to make this determination will include trapping and surveillance data, survey protocols, and protocols for actions to be performed upon detection of a pest.

(b) *Survey protocols.* APHIS must approve the survey protocol used to determine and maintain pest-free status, as well as protocols for actions to be performed upon detection of a pest. Pest-free areas are subject to audit by APHIS to verify their status.

(c) *Determination of pest freedom.* (1) For an area to be considered free of a specified pest for the purposes of this subpart, the Administrator must determine, and announce in a notice published in the **Federal Register** for 60 days public comment, that the area meets the criteria of paragraphs (a) and (b) of this section.

(2) The Administrator will announce his or her decision in a subsequent **Federal Register** notice. If appropriate, APHIS will allow movement of the regulated article from a pest-free area because:

(i) No comments were received on the notice or

(ii) The comments on the notice did not affect the overall conclusions of the notice and the Administrator's determination of risk.

(d) *Decertification of pest-free areas; reinstatement.* If a pest is detected in an area that is designated as free of that pest, APHIS will publish in the **Federal Register** a notice announcing that the pest-free status of the area in question has been withdrawn and that interstate movement of host crops for the pest in question is subject to application of an approved treatment for the pest. If a treatment for the pest is not available, interstate movement of the host crops would be prohibited. In order for a decertified pest-free area to be reinstated, it would have to meet the criteria of paragraphs (a) through (c) of this section.

(e) *General requirements for the interstate movement of regulated articles from pest-free areas.*

(1) *Labeling.* Each box of fruits or vegetables that is moved interstate from a pest-free area under this subpart must be clearly labeled with:

(i) The name of the orchard or grove of origin, or the name of the grower; and

(ii) The name of the municipality and State or territory in which the fruits or vegetables were produced; and

(iii) The type and amount of fruits or vegetables the box contains.

(2) *Compliance agreement.* Persons wishing to move fruits or vegetables from a pest-free area in Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands must enter into a compliance agreement with APHIS in accordance with § 318.13-3(d).

(3) *Safeguarding.* If fruits or vegetables are moved from a pest-free area into or through an area that is not free of that pest, the fruits or vegetables must be safeguarded during the time they are present in a non-pest-free area by being covered with insect-proof mesh screens or plastic tarpaulins, including while in transit to the packinghouse and while awaiting packaging. If fruits or vegetables are moved through an area that is not free of that pest during transit to a port, they must be packed in insect-proof cartons or containers or be covered by insect-proof mesh or plastic tarpaulins during transit to the port and subsequent movement into or through the United States. These safeguards described in this section must remain intact until the fruits or vegetables reach their final destination.

§ 318.13-6 Transit of regulated articles from Hawaii or the territories into or through the continental United States.

Fruits and vegetables from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands that are otherwise prohibited interstate movement into the continental United States by this subpart may transit the continental United States en route to a foreign destination when moved in accordance with this section.

(a) *Transit permit.* (1) A transit permit is required for the arrival, unloading, and movement through the continental United States of fruits and vegetables otherwise prohibited by this subpart from being moved through the continental United States from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands. Application for a transit permit may be made in writing or with PPQ Form 586.² The transit

² PPQ Form 586 can be obtained from PPQ Permit Services or at <http://www.aphis.usda.gov/>

permit application must include the following information:

(i) The specific types of fruits and vegetables to be shipped (only scientific or English common names are acceptable);

(ii) The means of conveyance to be used to transport the fruit or vegetable through the continental United States;

(iii) The port of arrival in the continental United States, and the location of any subsequent stop;

(iv) The location of, and the time needed for, any storage in the continental United States;

(v) Any location in the continental United States where the fruits or vegetables are to be transloaded;

(vi) The means of conveyance to be used for transporting the fruits or vegetables from the port of arrival in the continental United States to the port of export;

(vii) The estimated time necessary to accomplish exportation, from arrival at the port of arrival in the continental United States to exit at the port of export;

(viii) The port of export; and

(ix) The name and address of the applicant and, if the applicant's address is not within the territorial limits of the continental United States, the name and address in the continental United States of an agent whom the applicant names for acceptance of service of process.

(2) A transit permit will be issued only if the following conditions are met:

(i) APHIS inspectors are available at the port of arrival, port of export, and any locations at which transloading of cargo will take place and, in the case of air consignments, at any interim stop in the continental United States, as indicated on the application for the transit permit;

(ii) The application indicates that the proposed movement would comply with the provisions in this section applicable to the transit permit; and

(iii) During the 12 months prior to receipt of the application by APHIS, the applicant has not had a transit permit withdrawn under § 318.13–3(f), unless the transit permit has been reinstated upon appeal.

(b) *Limited permit.* Fruits or vegetables shipped from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands through the continental United States under this section must be accompanied by a limited permit, a

copy of which must be presented to an inspector at the port of arrival and the port of export in the continental United States, and at any other location in the continental United States where an air consignment is authorized to stop or where overland consignments change means of conveyance. An inspector will issue a limited permit if the following conditions are met:

(1) The inspector determines that the specific type and quantity of the fruits or vegetables being shipped are accurately described by accompanying documentation, such as the accompanying manifest, waybill, and bill of lading. (Only scientific or English names are acceptable.) The fruits or vegetables shall be assembled at whatever point and in whatever manner the inspector designates as necessary to comply with the requirements of this section; and

(2) The inspector establishes that the consignment of fruits or vegetables has been prepared in compliance with the provisions of this section.

(c) *Marking requirements.* Each of the smallest units, including each of the smallest bags, crates, or cartons, containing regulated articles for transit through the continental United States under this section must be conspicuously marked, prior to the locking and sealing of the container in the State of origin, with a printed label that includes a description of the specific type and quantity of the fruits or vegetables (only scientific or English common names are acceptable), the transit permit number under which the regulated articles are to be shipped, and, in English, the State in which they were grown and the statement "Distribution in the United States is Prohibited."

(d) *Handling of fruits and vegetables.* Fruits or vegetables shipped through the United States from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands in accordance with this section may not be commingled in the same sealed container with fruits or vegetables that are intended for entry and distribution in the United States. The fruits or vegetables must be kept in sealed containers from the time the limited permit required by paragraph (b) of this section is issued, until the fruits or vegetables exit the United States, except as otherwise provided in the regulations in this section. Transloading must be carried out in accordance with the requirements of paragraphs (a), (h), and (i) of this section.

(e) *Area of movement.* The port of arrival, the port of export, ports for air stops, and overland movement within the continental United States of fruits or

vegetables shipped under this section is limited to a corridor that includes all States of the continental United States except Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, Nevada, New Mexico, North Carolina, South Carolina, Tennessee, Texas, and Virginia, except that movement is allowed through Dallas/Fort Worth, TX, as an authorized stop for air cargo, or as a transloading location for consignments that arrive by air but that are subsequently transloaded into trucks for overland movement from Dallas/Fort Worth, TX, into the designated corridor by the shortest route. Movement through the United States must begin and end at locations staffed by APHIS inspectors.

(f) *Movement of regulated articles.* Transportation through the continental United States shall be by the most direct route to the final destination of the consignment in the country to which it is exported, as determined by APHIS based on commercial shipping routes and timetables and set forth in the transit permit. No change in the quantity of the original consignment from that described in the limited permit is allowed. No remarking is allowed. No diversion or delay of the consignment from the itinerary described in the transit permit and limited permit is allowed unless authorized by an APHIS inspector upon determination by the inspector that the change will not significantly increase the risk of plant pests or diseases in the United States, and unless each port to which the consignment is diverted is staffed by APHIS inspectors.

(g) *Notification in case of emergency.* In the case of an emergency such as an accident, a mechanical breakdown of the means of conveyance, or an unavoidable deviation from the prescribed route, the person in charge of the means of conveyance must, as soon as practicable, notify the APHIS office at the port where the cargo arrived in the United States.

(h) *Consignments by sea.* Except as authorized by this paragraph, consignments arriving in the United States by sea from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands may be transloaded once from a ship to another ship or, alternatively, once to a truck or railcar at the port of arrival and once from a truck or railcar to a ship at the port of export, and must remain in the original sealed container, except under extenuating circumstances and when authorized by an inspector upon determination by the inspector that the transloading would not significantly

[plant_health/permits/transit.shtml](http://www.aphis.usda.gov/permits/plant_health/permits/transit.shtml). Applications for transit permits should be submitted to USDA, APHIS, PPQ Permit Services, 4700 River Road Unit 136, Riverdale, MD 20737 or through e-permits http://www.aphis.usda.gov/permits/learn_epermits.shtml.

increase the risk of the introduction of plant pests or diseases into the United States, and provided that APHIS inspectors are available to provide supervision. No other transloading of the consignment is allowed, except under extenuating circumstances (e.g., equipment breakdown) and when authorized by an inspector upon determination by the inspector that the transloading would not significantly increase the risk of the introduction of plant pests or diseases into the continental United States, and provided that APHIS inspectors are available to provide supervision.

(i) *Consignments by air.* (1)

Consignments arriving in the United States by air from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands may be transloaded only once in the United States. Transloading of air consignments must be carried out in the presence of an APHIS inspector. Consignments arriving by air that are transloaded may be transloaded either into another aircraft or into a truck trailer for export by the most direct route to the final destination of the consignment through the designated corridor set forth in paragraph (e) of this section. This may be done at either the port of arrival in the United States or at the second air stop within the designated corridor, as authorized in the transit permit and as provided in paragraph (i)(2) of this section. No other transloading of the consignment is allowed, except under extenuating circumstances (e.g., equipment breakdown) and when authorized by an APHIS inspector upon determination by the inspector that the transloading would not significantly increase the risk of the introduction of plant pests or diseases into the United States, and provided that APHIS inspectors are available to provide supervision. Transloading of air consignments will be authorized only if the following conditions are met:

(i) The transloading is done into sealable containers;

(ii) The transloading is carried out within the secure area of the airport (i.e., that area of the airport that is open only to personnel authorized by the airport security authorities);

(iii) The area used for any storage is within the secure area of the airport; and

(iv) APHIS inspectors are available to provide the supervision required by paragraph (i)(1) of this section.

(2) Except as authorized by paragraph (f) of this section, consignments that continue by air from the port of arrival in the continental United States may be

authorized by APHIS for only one additional stop in the continental United States, provided the second stop is within the designated corridor set forth in paragraph (e) of this section and is staffed by APHIS inspectors. As an alternative to transloading a consignment arriving in the United States into another aircraft, consignments that arrive by air may be transloaded into a truck trailer for export by the most direct route to the final destination of the consignment through the designated corridor set forth in paragraph (e) of this section. This may be done at either the port of arrival in the United States or at the second authorized air stop within the designated corridor. No other transloading of the consignment is allowed, except under extenuating circumstances (e.g., equipment breakdown) and when authorized by an APHIS inspector upon determination by the inspector that the transloading would not significantly increase the risk of the introduction of plant pests or diseases into the United States, and provided that APHIS inspectors are available to provide supervision.

(j) *Duration and location of storage.*

Any storage in the United States of fruits or vegetables shipped under this section must be for a duration and in a location authorized in the transit permit required by paragraph (a) of this section. Areas where such fruits or vegetables are stored must be either locked or guarded at all times the fruits and vegetables are present. Cargo shipped under this section must be kept in a sealed container while stored in the continental United States.

(k) *Temperature requirement.* Except for time spent on aircraft and except during storage and transloading of air consignments, the temperature in the sealed containers containing fruits and vegetables moved under this section must be 60 °F or lower from the time the regulated articles leave Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or any other territory or possession of the United States until they exit the United States.

(l) *Prohibited materials.* (1) The person in charge of or in possession of a sealed container used for movement into or through the United States under this section must ensure that the sealed container is carrying only those fruits or vegetables authorized by the transit permit required under paragraph (a) of this section; and

(2) The person in charge of or in possession of any means of conveyance or container returned to the United States without being reloaded after

being used to export fruits or vegetables from the United States under this section must ensure that the means of conveyance or container is free of materials prohibited importation into the United States under this chapter.

(m) Authorization by APHIS of the movement of fruits or vegetables through the United States under this section does not imply that such fruits or vegetables are enterable into the destination country. Consignments returned to the United States from the destination country shall be subject to all applicable regulations, including "Subpart—Fruits and Vegetables" of part 319 and "Plant Quarantine Safeguard Regulations" of part 352 of this chapter.

(n) Any restrictions and requirements with respect to the arrival, temporary stay, unloading, transloading, transiting, exportation, or other movement or possession in the United States of any fruits or vegetables under this section shall apply to any person who brings into, maintains, unloads, transloads, transports, exports, or otherwise moves or possesses in the United States such fruits or vegetables, whether or not that person is the one who was required to have a transit permit or limited permit for the fruits or vegetables or is a subsequent custodian of the fruits or vegetables. Failure to comply with all applicable restrictions and requirements under this section by such a person shall be deemed to be a violation of this section.

(Approved by the Office of Management and Budget under control number 0579-0088)

§ 318.13-7 Products as ships' stores or in the possession of passengers or crew.

(a) *In the possession of passengers or crew members.* Small quantities of fruits, vegetables, or cut flowers subject to the quarantine and regulations in this subpart, when loose and free of packing materials, may be taken aboard any ship, vessel, or other surface craft by passengers or members of the crew without inspection and certification in the State of origin. However, if such articles are not eligible for certification under § 318.13-3, they must be entirely consumed or disposed of before arrival within the territorial waters of the continental United States, Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands.

(b) *As ships' stores or decorations.* Fruits, vegetables, or cut flowers subject to the quarantine and regulations in this subpart may be taken aboard a ship, vessel, or other surface craft in Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the

U.S. Virgin Islands without inspection or certification. Fruits, vegetables, and cut flowers that are so taken aboard such a carrier must be either:

(1) Entirely consumed or removed from the ship, vessel, or other surface craft before arrival within the territorial waters of the continental United States, Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or any other territory or possession of the United States; or

(2) In the case of a surface carrier, retained aboard such carrier under seal or otherwise disposed of subject to safeguards equivalent to those imposed on other prohibited or restricted products by paragraphs (b) and (c) of § 352.10 of this chapter.

§ 318.13–8 Articles and persons subject to inspection.

Persons, means of conveyance (including ships, other ocean-going craft, and aircraft), baggage, cargo, and any other articles, that are destined for movement, are moving, or have been moved from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to a destination elsewhere in the United States are subject to agricultural inspection at the port of departure, the port of arrival, or any other authorized port. If an inspector finds any article prohibited movement by the quarantine and regulations of this subpart, he or she, taking the least drastic action, shall order the return of the article to the place of origin, or the exportation of the article, under safeguards satisfactory to him or her, or otherwise dispose of it, in whole or part, to comply with the quarantine and regulations of this subpart.

§ 318.13–9 Inspection and disinfection of means of conveyance.

(a) *Inspection of aircraft prior to departure.* No person shall move any aircraft from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other State unless the person moving the aircraft has contacted an inspector and offered the inspector the opportunity to inspect the aircraft prior to departure and the inspector has informed the person proposing to move the aircraft that the aircraft may depart.

(b) *Inspection of aircraft moving to Guam.* Any person who has moved an aircraft from Hawaii, Puerto Rico, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to Guam shall contact an inspector and offer the inspector the opportunity to

inspect the aircraft upon the aircraft's arrival in Guam.

(c) *Inspection of ships upon arrival.* Any person who has moved a ship or other ocean-going craft from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other State shall contact an inspector and offer the inspector the opportunity to inspect the ship or other ocean-going craft upon its arrival.

(d) *Disinfection of means of conveyance.* If an inspector finds that a means of conveyance is infested with or contains plant pests, and the inspector orders disinfection of the means of conveyance, then the person in charge or in possession of the means of conveyance shall disinfect the means of conveyance and its cargo in accordance with an approved method contained in part 305 of this chapter under the supervision of an inspector and in a manner prescribed by the inspector, prior to any movement of the means of conveyance or its cargo.

§ 318.13–10 Inspection of baggage, other personal effects, and cargo.

(a) *Offer for inspection by aircraft passengers.* Passengers destined for movement by aircraft from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other State shall offer their carry-on baggage and other personal effects for inspection at the place marked for agricultural inspections, which will be located at the airport security checkpoint or the aircraft boarding gate, at the time they pass through the checkpoint or the gate. Passengers shall offer their check-in baggage for inspection at agricultural inspection stations prior to submitting their baggage to the check-in baggage facility. When an inspector has inspected and passed such baggage or personal effects, he or she shall apply a U.S. Department of Agriculture stamp, inspection sticker, or other identification to such baggage or personal effects to indicate that such baggage or personal effects have been inspected and passed as required. Passengers shall disclose any fruits, vegetables, plants, plant products, or other articles that are requested to be disclosed by the inspector. When an inspection of a passenger's baggage or personal effects discloses an article in violation of the regulations in this part, the inspector shall seize the article. The passenger shall state his or her name and address to the inspector, and provide the inspector with corroborative identification. The inspector shall record the name and address of the

passenger, the nature of the identification presented for corroboration, the nature of the violation, the types of articles involved, and the date, time, and place of the violation.

(b) *Offer for inspection by aircraft crew.* Aircraft crew members destined for movement by aircraft from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other State, shall offer their baggage and personal effects for inspection at the inspection station designated for the employing airline not less than 20 minutes prior to the scheduled departure time of the aircraft or the rescheduled departure time as posted in the public areas of the airport. When an inspector has inspected and passed such baggage or personal effects, he or she shall apply a U.S. Department of Agriculture stamp, inspection sticker, or other identification to the baggage or personal effects to indicate that such baggage or personal effects have been inspected and passed as required. Aircraft crew members shall disclose any fruits, vegetables, plants, plant products, or other articles that are requested to be disclosed by the inspector. When an inspection of a crew member's baggage or personal effects discloses an article in violation of the regulations in this part, the inspector shall seize the article. The crew member shall state his or her name and address to the inspector, and provide the inspector with corroborative identification. The inspector shall record the name and address of the crew member, the nature of the identification presented for corroboration, the nature of the violation, the types of articles involved, and the date, time, and place of the violation.

(c) *Baggage inspection for persons traveling to Guam on aircraft.* No person who has moved from Hawaii, Puerto Rico, or the U.S. Virgin Islands to Guam on an aircraft shall remove or attempt to remove any baggage or other personal effects from the area secured for customs inspections before the person has offered to an inspector, and has had passed by the inspector, his or her baggage and other personal effects. Persons shall disclose any fruits, vegetables, plants, plant products, or other articles that are requested to be disclosed by the inspector. When an inspection of a person's baggage or personal effects discloses an article in violation of the regulations in this part, the inspector shall seize the article. The person shall state his or her name and address to the inspector, and provide the inspector with corroborative identification. The inspector shall

record the name and address of the person, the nature of the identification presented for corroboration, the nature of the violation, the types of articles involved, and the date, time, and place of the violation.

(d) *Baggage acceptance and loading on aircraft.* No person shall accept or load any check-in aircraft baggage destined for movement from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other State unless the baggage bears a U.S. Department of Agriculture stamp, inspection sticker, or other indication applied by an inspector representing that the baggage has been inspected and certified.

(e) *Offer for inspection by persons moving by ship.* No person who has moved on any ship or other oceangoing craft from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to any other territory, State, or District of the United States, shall remove or attempt to remove any baggage or other personal effects from the designated inspection area as provided in paragraph (h) of this section on or off the ship or other ocean-going craft unless the person has offered to an inspector for inspection, and has had passed by the inspector, the baggage and other personal effects. Persons shall disclose any fruits, vegetables, plants, plant products, or other articles that are requested to be disclosed by the inspector. When an inspection of a person's baggage or personal effects discloses an article in violation of the regulations in this part, the inspector shall seize the article. The person shall state his or her name and address to the inspector, and provide the inspector with corroborative identification. The inspector shall record the name and address of the person, the nature of the identification presented for corroboration, the nature of the violation, the types of articles involved, and the date, time, and place of the violation.

(f) *Loading of certain cargoes.* (1) Except as otherwise provided in paragraph (f)(2) of this section, no person shall present to any common carrier or contract carrier for movement, and no common carrier or contract carrier shall load, any cargo containing fruits, vegetables, or other articles regulated under this subpart that are destined for movement from Hawaii, Puerto Rico, Guam, or the U.S. Virgin Islands to any other State unless the cargo has been offered for inspection, passed by an inspector, and bears a U.S. Department of Agriculture stamp or

inspection sticker, or unless a limited permit is attached to the cargo as specified in § 318.13–3(e).

(2) Cargo designated may be loaded without a U.S. Department of Agriculture stamp or inspection sticker attached to the cargo or a limited permit attached to the cargo if the cargo is moved:

(i) As containerized cargo on ships or other oceangoing craft or as air cargo;

(ii) The carrier has on file documentary evidence that a valid limited permit was issued for the movement or that the cargo was certified; and

(iii) A notation of the existence of these documents is made by the carrier on the waybill, manifest, or bill of lading that accompanies the consignment.

(3) Cargo moved in accordance with § 318.13–6(b) that does not have a limited permit attached to the cargo must have a limited permit attached to the waybill, manifest, or bill of lading accompanying the consignment.

(g) *Removal of certain cargoes in Guam.* No person shall remove or attempt to remove from a designated inspection area as provided in paragraph (h) of this section, on or off the means of conveyance, any cargo moved from Hawaii, Puerto Rico, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to Guam containing fruits, vegetables, or other articles regulated under this subpart, unless the cargo has been inspected and passed by an inspector in Guam.

(h) *Space and facilities for baggage and cargo inspection.* Baggage and cargo inspection will not be performed until the person in charge or possession of the ship, other oceangoing craft, or aircraft provides space and facilities on the means of conveyance, pier, or airport that are adequate, in the inspector's judgment, for the performance of inspection.

§ 318.13–11 Posting of warning notice and distribution of baggage declarations.

(a) Before any aircraft or any ship, vessel, or other surface craft moving to Guam, the Commonwealth of Northern Mariana Islands, or American Samoa from Hawaii or any other territory or possession of the United States arrives in Guam, the Commonwealth of Northern Mariana Islands, or American Samoa, a baggage declaration, to be furnished by the U.S. Department of Agriculture, calling attention to the provisions of the Plant Protection Act, and the quarantine and regulations in this subpart, must be distributed to each adult passenger. These baggage

declarations shall be executed and signed by the passengers and shall be collected and delivered by the master or other responsible officer of the aircraft, ship, vessel, or other surface craft to the inspector on arrival at the quarantine or inspection area.

(b) Every person owning or controlling any dock, harbor, or landing field in Hawaii, Puerto Rico, Guam, the Commonwealth of Northern Mariana Islands, or the U.S. Virgin Islands from which ships, vessels, other surface craft, or aircraft leave for ports in any other State shall post, and keep posted at all times, in one or more conspicuous places in passenger waiting rooms on or in said dock, harbor, or landing field a warning notice directing attention to the quarantine and regulations in this subpart. Every master, or other responsible officer of any ship, vessel, other surface craft, or aircraft leaving Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands destined to a port in any other State, shall similarly post, and keep posted at all times, such a warning notice in the ship, vessel, other surface craft, or aircraft under his charge.

§ 318.13–12 Movement by the U.S. Department of Agriculture.

Notwithstanding any other restrictions of this subpart, regulated articles may be moved if they are moved by the U.S. Department of Agriculture for experimental or scientific purposes and are moved under conditions found by the Administrator to be adequate to prevent the spread of plant pests and diseases.

§ 318.13–13 Movement of frozen fruits and vegetables.

Frozen fruits and vegetables may be certified for movement from Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands, into or through any other territory, State, or District of the United States in accordance with § 318.13–3. Such fruits and vegetables must be held at a temperature not higher than 20 °F during shipping and upon arrival in the continental United States, and in accordance with the requirements for the interstate movement of frozen fruits and vegetables in part 305 of this chapter. Paragraph (b) of § 305.17 lists frozen fruits and vegetables for which quick freezing is not an authorized treatment.

§ 318.13–14 Movement of processed fruits, vegetables, and other products.

(a) Fruits, vegetables, and other products that are processed sufficiently as to preclude the survival of any live

pests can be moved interstate from Hawaii, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands. Those processed products which are approved for interstate movement from those States can be found in the fruits and vegetables manuals for those States.

(b) Consignments of processed fruits, vegetables, or other products that have not been processed sufficiently as to be incapable of harboring fruit flies, are subject to the interstate movement

requirements which apply to the fruit, vegetable, or other product in its unprocessed state.

§ 318.13–15 Parcel post inspection.

Inspectors are authorized to inspect, with the cooperation of the U.S. Postal Service, parcel post packages placed in the mails in Hawaii, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, or the U.S. Virgin Islands to determine whether such packages contain products whose movement is not authorized under this

subpart, to examine any such products that are found for insect infestation, and to notify the postmaster in writing of any violations of this subpart that are found as a result of an inspection.

§ 318.13–16 Regulated articles allowed interstate movement subject to specified conditions.

(a) The following regulated articles may be moved interstate in accordance with § 318.13–3 and any additional requirements specified in paragraph (b) of this section.

State, territory, or district of origin	Common name	Botanical name	Plant part(s)	Additional requirements
Hawaii	Bananas ¹	<i>Musa</i> spp.	Fruit	(b)(1)(i), (b)(2)(ii)
	Pot marigold, johnny-jump-ups, pansies, and violets.	<i>Calendula</i> spp.	Flower	(b)(2)(iii)
	Pineapple ²	<i>Ananas comosus</i>	Fruit	(b)(2)(i)
Puerto Rico	Cactus	<i>Cactaceae</i>	Whole plant.	(b)(2)(iv), (b)(3)(ii)
	Okra	<i>Abelmoschus esculentus</i>	Fruit	(b)(3)(i)
	Pot marigold, johnny-jump-ups, pansies, and violets.	<i>Calendula</i> spp.	Flower	(b)(2)(iii)
U.S. Virgin Islands.	Cactus	<i>Cactaceae</i>	Whole plant.	(b)(2)(iv), (b)(3)(ii)
	Okra	<i>Abelmoschus esculentus</i>	Fruit	(b)(3)(i)
	Pot marigold, johnny-jump-ups, pansies, and violets.	<i>Calendula</i> spp.	Flower	(b)(2)(iii)

¹ Fruit may also be moved interstate in accordance with § 318.13–17.

² Fruit may also be moved interstate with treatment in accordance with part 305 of this chapter.

(b) Additional restrictions for applicable regulated articles as specified in paragraph (a) of this section.

(1) Restricted movement and distribution.

(i) Allowed movement into Alaska.

Cartons must be labeled, “For distribution in Alaska only.”

(ii) [Reserved]

(2) Plant types.

(i) Smooth cayenne variety and hybrids with 50 percent or more smooth cayenne parentage only.

(ii) Green bananas of the cultivars “Williams,” “Valery,” “Grand Nain,” and standard and dwarf “Brazilian” only.

(iii) Inflorescences only with no stems or leaves attached.

(iv) Bare-rooted plants or plants rooted in approved growing media only.

(3) Other conditions.

(i) If destined to States other than Alabama, Arizona, Arkansas, California, Florida, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, or Virginia, the consignment must be treated in accordance with part 305 of this chapter unless the consignment is for immediate consumption or processing.

(ii) Must be treated in accordance with part 305 of this chapter.

§ 318.13–17 Regulated articles from Guam.

(a)(1) Regulated articles, other than soil, may be moved from Guam into or through any other State only if, they meet the strictest plant quarantine requirements under part 319 of this chapter for similar articles offered for entry into such States from the countries of East and Southeast Asia, including Cambodia, India, Japan, Korea, Laos, the northeastern provinces of Manchuria, the Philippines, Taiwan, and Vietnam or the islands of the Central and South Pacific, including Micronesia, Melanesia, and Polynesia, as well as Australia, New Zealand, and the Malay Archipelago, except requirements for permits, phytosanitary certificates, notices of arrival, and notices of consignment from port of arrival. Soil must meet the requirements of § 330.300 of this chapter.

(2) Regulated articles that do not meet the requirements of paragraph (a)(1) of this section are prohibited movement from Guam into or through any other State.

(b)(1) Regulated articles moved from Guam into or through any other State shall be subject to inspection at the port of first arrival in another part of the United States to determine whether they are free of plant pests and otherwise meet the requirements applicable to

them under this subpart, and shall be subject to release, in accordance with § 330.105(a) of this chapter as if they were foreign arrivals. Such articles shall be released only if they meet all applicable requirements under this subpart.

(2) A release shall be issued in writing unless the inspection involves small quantities of regulated articles, in which case a release may be issued orally by the inspector.

§§ 318.13–18 through 318.13–20 [Reserved]

§ 318.13–21 Avocados from Hawaii to Alaska.

Avocados may be moved interstate from Hawaii to Alaska without treatment only under the following conditions:

(a) *Distribution and marking requirements.* The avocados may be moved interstate for distribution in Alaska only, the boxes of avocados must be clearly marked with the statement “Distribution limited to the State of Alaska,” and the consignment must be identified in accordance with the requirements of § 318.13–3.

(b) *Commercial consignments.* The avocados may be moved in commercial consignments only.

(c) *Packing requirements.* The avocados must have been sealed in the

packinghouse in Hawaii in boxes with a seal that will break if the box is opened.

(d) *Ports.* The avocados may enter the continental United States only at the following ports: Portland, OR; Seattle, WA; or any port in Alaska.

(e) *Shipping requirements.* The avocados must be moved either by air or ship and in a sealed container. The avocados may not be commingled in the same sealed container with articles that are intended for entry and distribution in any State other than Alaska. If the avocados arrive at either Portland, OR, or Seattle, WA, they may be transloaded only under the following conditions:

(1) *Consignments by sea.* The avocados may be transloaded from one ship to another ship at the port of arrival, provided they remain in the original sealed container and that APHIS inspectors supervise the transloading. If the avocados are stored before reloading, they must be kept in the original sealed container and must be in an area that is either locked or guarded at all times the avocados are present.

(2) *Consignments by air.* The avocados may be transloaded from one aircraft to another aircraft at the port of arrival, provided the following conditions are met:

(i) The transloading is done into sealable containers;

(ii) The transloading is carried out within the secure area of the airport (i.e., that area of the airport that is open only to personnel authorized by the airport security authorities);

(iii) The area used for any storage of the consignment is within the secure area of the airport, and is either locked or guarded at all times the avocados are present. The avocados must be kept in a sealed container while stored in the continental United States en route to Alaska; and

(iv) APHIS inspectors supervise the transloading.

(3) *Exceptions.* No transloading other than that described in paragraphs (e)(1) and (e)(2) of this section is allowed except under extenuating circumstances (such as equipment breakdown) and when authorized and supervised by an APHIS inspector.

(f) *Limited permit.* Consignments of avocados must be accompanied by a limited permit issued by an APHIS inspector in accordance with § 318.13–3(c). The limited permit will be issued only if the inspector examines the consignment and determines that the consignment has been prepared in compliance with the provisions of this section.

§ 318.13–22 Bananas from Hawaii.

(a) Green bananas (*Musa* spp.) of the cultivars “Williams,” “Valery,” “Grand Nain,” and standard and dwarf “Brazilian” may be moved interstate from Hawaii with certification in accordance with § 318.13–3 of this subpart if the bananas meet the following conditions:³

(1) The bananas must be picked while green and packed for shipment within 24 hours after harvest. If the green bananas will be stored overnight during that 24-hour period, they must be stored in a facility that prevents access by fruit flies;

(2) No bananas from bunches containing prematurely ripe fingers (i.e., individual yellow bananas in a cluster of otherwise green bananas) may be harvested or packed for shipment;

(3) The bananas must be inspected by an inspector and found free of plant pests as well as any of the following defects: Prematurely ripe fingers, fused fingers, or exposed flesh (not including fresh cuts made during the packing process); and

(4) To safeguard from fruit fly infestation, the bananas must be covered with insect proof packaging, such as insect-proof mesh screens or plastic tarpaulins, from the time that they are packaged for shipment until they reach the port of arrival on the mainland United States.

(b) Bananas of any cultivar or ripeness that do not meet the conditions of paragraph (a) of this section may also be moved interstate from Hawaii in accordance with the following conditions:

(1) The bananas are irradiated at the minimum dose listed in § 305.31(a) of this chapter and in accordance with the other requirements in § 305.34 of this chapter for the Mediterranean fruit fly (*Ceratitis capitata*), the melon fruit fly (*Bactrocera curcurbitae*), the Oriental fruit fly (*Bactrocera dorsalis*), and the green scale (*Coccus viridis*) and are inspected, after removal from the stalk, in Hawaii and found to be free of the banana moth (*Opogona sacchari* (Bojen)) by an inspector before or after undergoing irradiation treatment; or

(2) The bananas are irradiated at the minimum dose listed in § 305.31(a) of this chapter and in accordance with the other requirements in § 305.34 of this chapter for the Mediterranean fruit fly (*Ceratitis capitata*), the melon fruit fly (*Bactrocera curcurbitae*), and the Oriental fruit fly (*Bactrocera dorsalis*) and are inspected, after removal from the stalk, in Hawaii and found to be free

of the green scale (*Coccus viridis*) and the banana moth (*Opogona sacchari* (Bojen)) before or after undergoing irradiation treatment.

(3) Untreated bananas from Hawaii may be moved interstate for treatment on the mainland United States under a limited permit issued by an inspector. To be eligible for a limited permit under this paragraph, bananas from Hawaii must be inspected prior to interstate movement from Hawaii and found free of banana moth if they are to be treated in accordance with the requirements of paragraph (b)(1) of this section or inspected and found free of banana moth and green scale if they are to be treated in accordance with the requirements of paragraph (b)(2) of this section.

§ 318.13–23 Cut flowers from Hawaii.

(a) Except for cut blooms and leis of mauna loa and jade vine and except for cut blooms of gardenia not grown in accordance with paragraph (b) of this section, cut flowers may be moved interstate from Hawaii under limited permit, to a destination specified in the permit, directly from an establishment operated in accordance with the terms of a compliance agreement executed by the operator of the establishment, if the articles have not been exposed to infestation and they are not accompanied by any articles prohibited interstate movement under this subpart.

(b) Cut blooms of gardenia may be moved interstate from Hawaii if grown and inspected in accordance with the provisions of this section.⁴

(1) The grower's production area must be inspected annually by an inspector and found free of green scale. If green scale is found during an inspection, a 2-month ban will be placed on the interstate movement of cut blooms of gardenia from that production area. Near the end of the 2 months, an inspector will reinspect the grower's production area to determine whether green scale is present. If reinspection determines that the production area is free of green scale, shipping may resume. If reinspection determines that green scale is still present in the production area, another 2-month ban on shipping will be placed on the interstate movement of gardenia from that production area. Each ban will be followed by reinspection in the manner specified, and the production area must be found free of green scale prior to interstate movement.

³ Bananas from Hawaii may also be moved to Alaska under § 318.13–16.

⁴ Cut blooms of gardenia are also eligible for interstate movement with treatment in accordance with part 305 of this chapter.

(2) The grower must establish a buffer area surrounding gardenia production areas. The buffer area must extend 20 feet from the edge of the production area. Within the buffer area, the growing of gardenias and the following green scale host plants is prohibited: *Ixora*, ginger (*Alpinia purpurata*), plumeria, coffee, rambutan, litchi, guava, citrus, anthurium, avocado, banana, cocoa, macadamia, celery, *Pluchea indica*, mango, orchids, and annona.

(3) An inspector must visually inspect the cut blooms of gardenias in each consignment prior to interstate movement from Hawaii to the mainland United States. If the inspector does not detect green scale in the consignment, the inspector will certify the consignment in accordance with § 318.13–3(b). If the inspector finds green scale in a consignment, that consignment will be ineligible for interstate movement from Hawaii. (Approved by the Office of Management and Budget under control number 0579–0197)

§ 318.13–24 Sweetpotatoes from Puerto Rico.

Sweetpotatoes from Puerto Rico may be moved interstate to Atlantic Coast ports north of and including Baltimore, MD, under limited permit if treated in accordance with part 305 of this chapter or if the following conditions are met:

(a) The sweetpotatoes must be certified by an inspector of Puerto Rico as having been grown under the following conditions:

(1) Fields in which the sweetpotatoes have been grown must have been given a preplanting treatment with an APHIS-approved soil insecticide.

(2) Before planting in such treated fields, the sweetpotato draws and vine cuttings must have been dipped in an APHIS-approved insecticidal solution.

(3) During the growing season an approved insecticide must have been applied to the vines at prescribed intervals.

(b) An inspector of Puerto Rico must certify that the sweetpotatoes have been washed.

(c) The sweetpotatoes must be graded by inspectors of Puerto Rico in accordance with Puerto Rican standards which do not provide a tolerance for insect infestation or evidence of insect injury and found by such inspectors to comply with such standards prior to movement from Puerto Rico.

(d) The sweetpotatoes must be inspected by an inspector and found to be free of the sweetpotato scarabee (*Euscepes postfasciatus* Fairm).

§ 318.13–25 Sweetpotatoes from Hawaii.

(a) Sweetpotatoes may be moved interstate from Hawaii in accordance with this section only if the following conditions are met:⁵

(1) The sweetpotatoes must be treated in accordance with the vapor heat treatment schedule specified in § 305.24.

(2) The sweetpotatoes must be sampled, cut, and inspected and found to be free of the ginger weevil (*Elytrotreinus subtruncatus*). Sampling, cutting, and inspection must be performed under conditions that will prevent any pests that may emerge from the sampled sweetpotatoes from infesting any other sweetpotatoes intended for interstate movement in accordance with this section.

(3) The sweetpotatoes must be inspected and found to be free of the gray pineapple mealybug (*Dysmicoccus neobrevipes*) and the Kona coffee-root knot nematode (*Meloidogyne konaensis*).

(4)(i) Sweetpotatoes that are treated in Hawaii must be packaged in the following manner:

(A) The cartons must have no openings that will allow the entry of fruit flies and must be sealed with seals that will visually indicate if the cartons have been opened. They may be constructed of any material that prevents the entry of fruit flies and prevents oviposition by fruit flies into the fruit in the carton.⁶

(B) The pallet-load of cartons must be wrapped before it leaves the treatment facility in one of the following ways:

(1) With polyethylene sheet wrap;

(2) With net wrapping; or

(3) With strapping so that each carton on an outside row of the pallet load is constrained by a metal or plastic strap.

(C) Packaging must be labeled with treatment lot numbers, packing and treatment facility identification and location, and dates of packing and treatment.

(ii) Cartons of untreated sweetpotatoes that are moving to the mainland United States for treatment must be shipped in shipping containers sealed prior to interstate movement with seals that will visually indicate if the shipping containers have been opened.

⁵ Sweetpotatoes may also be moved interstate from Hawaii with irradiation in accordance with § 305.34 of this chapter or after fumigation with methyl bromide according to treatment schedule T-101-b-3-1, as provided for in § 305.6(a) of this chapter.

⁶ If there is a question as to the adequacy of a carton, send a request for approval of the carton, together with a sample carton, to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Science and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606.

(5)(i) *Certification on basis of treatment.* Certification shall be issued by an inspector for the movement of sweetpotatoes from Hawaii that have been treated in accordance with part 305 of this chapter and handled in Hawaii in accordance with this section.

(ii) *Limited permit.* A limited permit shall be issued by an inspector for the interstate movement of untreated sweetpotato from Hawaii for treatment on the mainland United States in accordance with this section.

(b) [Reserved]

(Approved by the Office of Management and Budget under control number 0579–0281)

Subpart—Fruits and Vegetables From Puerto Rico or Virgin Islands [Removed]

5. Subpart—Fruits and Vegetables From Puerto Rico or Virgin Islands, consisting of §§ 318.58 through 318.58–16, is removed.

Subpart—Guam [Removed]

6. Subpart—Guam, consisting of §§ 318.82 through 318.82–3, is removed.

Done in Washington, DC, this 10th day of June 2008.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E8–13480 Filed 6–16–08; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0657; Directorate Identifier 2007–NM–296–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300, A310, and A300–600 Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) that applies to certain Airbus Model A300, A310, and A300–600 series airplanes. The existing AD currently requires repetitive detailed visual inspections to detect cracks in the pylon thrust and sideload fitting of the wing, and replacement of any cracked pylon thrust and sideload fitting with a new fitting. This proposed AD would

reduce the threshold and repetitive intervals for the detailed inspection for certain airplanes and would reduce the applicability of the existing AD. This proposed AD results from issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. We are proposing this AD to detect and correct cracks in the pylon thrust and sideload fitting of the wing, which could result in reduced structural integrity of the airplane.

DATES: We must receive comments on this proposed AD by July 17, 2008.

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

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

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT:

Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1138; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2008-0657; Directorate Identifier 2007-NM-296-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will

consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

On July 24, 1998, we issued AD 98-16-11, amendment 39-10687 (63 FR 40816, July 31, 1998), for certain Airbus Model A300, A310, and A300-600 series airplanes. That AD requires repetitive detailed visual inspections to detect cracks in the pylon thrust and sideload fitting of the wing, and replacement of any cracked pylon thrust and sideload fitting with a new fitting. That AD resulted from issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. We issued that AD to detect and correct cracks in the pylon thrust and sideload fitting of the wing, which could result in reduced structural integrity of the airplane.

Actions Since Existing AD Was Issued

Since we issued AD 98-16-11, Airbus has issued the following service bulletins:

TABLE.—NEW SERVICE BULLETINS

Airbus service bulletin—	For model—
A300-57-0232, Revision 02, dated February 21, 2000	A300 series airplanes.
A300-57-6079, Revision 04, dated February 21, 2000	A300-600 series airplanes.
A310-57-2075, Revision 03, dated December 1, 2006	A310 series airplanes.

The repetitive detailed inspections and replacement procedures are essentially identical to those specified in previous issues of the service bulletins. (AD 98-16-11 refers to Airbus Service Bulletins A300-57-0232, Revision 01 (for Model A300 series airplanes); A310-57-2075, Revision 01 (for Model A310 series airplanes); and A300-57-6079, Revision 02 (for Model A300-600 series airplanes); all dated January 12, 1998; as the appropriate sources of service information for accomplishing the required actions.) Revision 03 of Airbus Service Bulletin A310-57-2075 reduces the detailed inspection thresholds and repeat intervals for certain airplanes. In addition, the effectivity listing of all three service bulletins has been revised to remove airplanes that have been

scrapped. No more work is necessary for airplanes on which previous issues of the service bulletins were done.

Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, mandated the service information and issued EASA airworthiness directive 2007-0243, dated September 4, 2007, to ensure the continued airworthiness of these airplanes in the European Union.

FAA's Determination and Requirements of the Proposed AD

These airplanes are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the

Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. As described in FAA Order 8100.14A, "Interim Procedures for Working with the European Community on Airworthiness Certification and Continued Airworthiness," dated August 12, 2005, the EASA has kept the FAA informed of the situation described above. We have examined the EASA's findings, evaluated all pertinent information, and determined that AD action is necessary for airplanes of this type design that are certificated for operation in the United States.

This proposed AD would supersede AD 98-16-11 and would continue to require, at reduced thresholds and repetitive intervals for certain airplanes, repetitive detailed visual inspections to detect cracks in the pylon thrust and

sideload fitting of the wing, and would continue to require replacement of any cracked pylon thrust and sideload fitting with a new fitting. This proposed AD would also require accomplishing the actions specified in service information described previously.

Differences Between Proposed Rule and EASA AD

The proposed AD would differ from the parallel EASA airworthiness directive in that it would not allow for adjustment in compliance time based on airplane utilization. In developing an appropriate compliance time for this proposed AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, and the average utilization of the affected fleet. In light of these factors, we find the compliance times specified in paragraphs (f)(1) and (f)(2) of this proposed AD to be warranted, in that they represent an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Change to Existing AD

This proposed AD would retain all requirements of AD 98–16–11. Since AD 98–16–11 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 98–16–11	Corresponding requirement in this proposed AD
paragraph (a)	paragraph (f).
paragraph (b)	paragraph (g).

In addition, we have revised the applicability of this proposed AD to refer to the latest revisions of the service information described previously.

We also changed all references to a “detailed visual inspection” in the

existing AD to “detailed inspection” in this action.

Costs of Compliance

This proposed AD would affect about 164 Model A300, A310, and A300–600 series airplanes of U.S. registry.

The inspections that are required by AD 98–16–11 and retained in this proposed AD take about 3 work hours per airplane, at an average labor rate of \$80 per work hour. Based on these figures, the estimated cost of the currently required actions is \$39,360, or \$240 per airplane, per inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–10687 (63 FR 40816, July 31, 1998) and adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2008–0657; Directorate Identifier 2007–NM–296–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by July 17, 2008.

Affected ADs

(b) This AD supersedes AD 98–16–11.

Applicability

(c) This AD applies to Airbus airplanes identified in Table 1 of this AD, certificated in any category.

TABLE 1.—APPLICABILITY

Model—	As identified in Airbus service bulletin—
(1) A300 series airplanes	A300–57–0232, Revision 02, dated February 21, 2000.
(2) A310 series airplanes	A310–57–2075, Revision 03, dated December 1, 2006.
(3) A300–600 series airplanes	A300–57–6079, Revision 04, dated February 21, 2000.

Unsafe Condition

(d) This AD results from issuance of mandatory continuing airworthiness information by a foreign civil airworthiness

authority. We are issuing this AD to detect and correct cracks in the pylon thrust and sideload fitting of the wing, which could result in reduced structural integrity of the airplane.

Compliance

(e) You are responsible for having the actions required by this AD performed within

the compliance times specified, unless the actions have already been done.

Requirements of AD 98–16–11:

Repetitive Detailed Inspections at Reduced Thresholds and Repeat Intervals for Certain Airplanes

(f) At the applicable time specified in paragraph (f)(1) or (f)(2) of this AD: Perform a detailed inspection to detect cracks in the pylon thrust and sideload fitting of the wing, in accordance with Airbus Service Bulletin

A300–57–0232, Revision 01 (for Model A300 series airplanes); A310–57–2075, Revision 01 (for Model A310 series airplanes); or A300–57–6079, Revision 02 (for Model A300–600 series airplanes); all dated January 12, 1998; as applicable; except as provided by paragraph (h) of this AD.

(1) For Model A300 and A300–600 series airplanes: Inspect prior to the accumulation of 2,800 total flight cycles, or within 18 months after September 4, 1998 (the effective date AD 98–16–11), whichever occurs later,

and thereafter at intervals not to exceed 2,800 flight cycles.

(2) For Model A310 series airplanes: Inspect at the earlier of the times specified in paragraph (f)(2)(i) and (f)(2)(ii) of this AD. Repeat thereafter at the applicable intervals specified in Table 3 of this AD.

(i) Prior to the accumulation of 2,800 total flight cycles, or within 18 months after September 4, 1998, whichever occurs later.

(ii) At the applicable time specified in Table 2 of this AD.

TABLE 2.—REDUCED INSPECTION THRESHOLDS FOR MODEL A310 SERIES AIRPLANES

Model	Compliance time (whichever occurs later)	
	Threshold	Grace period
A310–200 series airplanes ..	Before the accumulation of 1,500 total flight cycles or 3,000 total flight hours since first flight, whichever occurs first.	Within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.
A310–300 series airplanes (short range).	Before the accumulation of 1,300 total flight cycles or 3,800 total flight hours since first flight, whichever occurs first.	Within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.
A310–300 series airplanes (long range).	Before the accumulation of 800 total flight cycles or 4,000 total flight hours since first flight, whichever occurs first.	Within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.

TABLE 3.—REDUCED REPEAT INTERVALS FOR MODEL A310 SERIES AIRPLANES

For Model—	Repeat the detailed inspection at the later of—	And, thereafter at intervals not to exceed—
A310–200 series airplanes	Within 1,500 flight cycles or 3,000 flight hours since the last detailed inspection, whichever occurs first; or within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.	1,500 flight cycles or 3,000 flight hours, whichever occurs first.
A310–300 series airplanes (short range).	Within 1,300 flight cycles or 3,800 flight hours since the last detailed inspection, whichever occurs first; or within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.	1,300 flight cycles or 3,800 flight hours, whichever occurs first.
A310–300 series airplanes (long range).	Within 800 flight cycles or 4,000 flight hours since the last detailed inspection, whichever occurs first; or within 800 flight cycles or 1,600 flight hours after the effective date of this AD, whichever occurs first.	800 flight cycles or 4,000 flight hours, whichever occurs first.

Corrective Action

(g) If any crack is detected during any inspection required by paragraph (f) of this AD, prior to further flight, replace the pylon thrust and sideload fitting with a new fitting in accordance with Airbus Service Bulletin A300–57–0232, Revision 01 (for Model A300 series airplanes); A310–57–2075, Revision 01 (for Model A310 series airplanes); or A300–

57–6079, Revision 02 (for Model A300–600 series airplanes); all dated January 12, 1998; as applicable; except as provided by paragraph (h) of this AD.

New Actions Required by This AD:

New Service Information

(h) For all airplanes: As of the effective date of this AD, use only the

Accomplishment Instructions of the applicable service bulletin specified in Table 4 of this AD to do the repetitive detailed inspections required by paragraph (f) of this AD and the replacement required by paragraph (g) of this AD.

TABLE 4.—NEW SERVICE BULLETINS

Airbus service bulletin—	For model—
(1) A300–57–0232, Revision 02, dated February 21, 2000	A300 series airplanes.
(2) A300–57–6079, Revision 04, dated February 21, 2000	A300–600 series airplanes.
(3) A310–57–2075, Revision 03, dated December 1, 2006	A310 series airplanes.

(i) Actions done before the effective date of this AD in accordance with Airbus Service Bulletins A300–57–6079, Revision 02, dated January 12, 1998, or Revision 03, dated October 25, 1999 (for Model A300–600 series airplanes); A310–57–2075, Revision 01,

dated January 12, 1998, or Revision 02, dated February 21, 2000 (for Model A310 series airplanes); or A300–57–0232, Revision 01, dated January 12, 1998 (for Model A300 series airplanes); are acceptable for

compliance with the corresponding requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(j) The Manager, International Branch, ANM-116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1138; fax (425) 227-1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Related Information

(k) European Aviation Safety Agency (EASA) airworthiness directive 2007-0243, dated September 4, 2007, also addresses the subject of this AD.

Issued in Renton, Washington, on June 10, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8-13566 Filed 6-16-08; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-27739; Directorate Identifier 2006-NM-250-AD]

RIN 2120-AA64

Airworthiness Directives; Airbus Model A330 Airplanes; and Model A340-200 and -300 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: We are revising an original NPRM for the products listed above. This action revises the original NPRM by expanding the scope. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

* * * * *

The aim of * * * [Special Federal Aviation Regulation (SFAR) 88] is to require all holders of type certificates * * * to carry out a definition review against explosion hazards.

The unsafe condition is the potential of ignition sources inside fuel tanks,

which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by July 14, 2008.

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

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

- **Fax:** (202) 493-2251.

- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-40, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington 98057-3356; telephone (425) 227-2797; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2007-27739; Directorate Identifier 2006-NM-250-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://>

www.regulations.gov, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

We proposed to amend 14 CFR part 39 with an earlier NPRM for the specified products, which was published in the **Federal Register** on March 30, 2007 (72 FR 15063). That earlier NPRM proposed to require actions intended to address the unsafe condition for the products listed above.

Since that NPRM was issued, we have determined that additional bonding points must be modified and that the compliance time for performing the action specified in paragraph (f)(4)(ii) of this supplemental NPRM (increasing the distance between metallic parts on the trimmable horizontal stabilizer (THS) trim tank) may be extended for airplanes that are already compliant with certain requirements of Airbus All Operators Telex (AOT) 55-03, dated August 22, 1996. In addition, we have referred to the latest revisions of the service bulletins as the appropriate sources of service information for accomplishing certain actions in this supplemental NPRM. European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued Airworthiness Directive 2007-0278, dated November 5, 2007 [Corrected: November 8, 2007] (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. You may obtain further information by examining the MCAI in the AD docket. The MCAI states:

[T]he FAA published SFAR 88 (Special Federal Aviation Regulation 88).

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

The aim of this regulation is to require all holders of type certificates for passenger transport aircraft certified after January 1st, 1958 with a capacity of 30 passengers or more, or a payload of 3,402 kg or more, to carry out a definition review against explosion hazards.

Consequently, the following measures [are] rendered mandatory * * *:

- [Inspection and] replacement [if necessary] of the white P-clips by blue P-clips which are more fuel resistant remove the risks of fuel quantity indicator (FQI) and fuel level sensor system (FLSS) harnesses chafing against the metallic part of the P-clip,

- Modification of electrical bonding of equipment installed in fuel tanks in order to re-establish the conformity with the design definition by introducing additional bonding

leads, electrical bonding points and electrical bonding of a support bracket for a diffuser assembly installed between Rib 1 and Rib 2 on the stringers of the Number 1 bottom skin panel,

- Modification of bonding points, installation of additional bonding leads and other modifications of the Additional Center Tank (ACT),

- Modification to increase the distance between metallic parts on the THS Trim Tank,

- Installation of a bonding lead between the bonding tags on the Jettison valve actuator and drive assembly.

This new AD supersedes EASA AD 2006–0322 taking over its requirements and:

- Mandates SB A330–28–3082 Revision 04 which introduces an additional work for some bonding points which were omitted from the center tank at original issue (action n°2 [paragraph (f)(2) of this AD]);

- Mandates SB A340–28–4097 Revision 03 which introduces an additional work by addition of electrical bondings omitted from previous revisions (action n°2);

- Introduces an extension of the required compliance time to perform action n°4 for those aircraft already compliant with AIRBUS AOT 55–03 dated 22 August 1996 (“solution A”), mandated by DGAC [Direction Générale de l’Aviation Civile] AD F–1996–178–049(B) R1 and DGAC AD F–

1996–177–038(B) with a compliance time of November 15th, 1996;

- Refers to the latest revision of certain AIRBUS SBs.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Airbus has issued the service bulletins described in the following table.

AIRBUS SERVICE BULLETINS

Airbus service bulletin	Revision level	Date
A330–28–3082, including Appendix 01	04	August 3, 2007.
A330–55–3016	02	March 16, 2007.
A340–28–4073	02	March 8, 2007.
A340–28–4078	01	January 25, 2007.
A340–28–4097, including Appendix 01	03	July 3, 2007.
A340–28–4118	02	July 10, 2007.
A340–55–4017	02	March 16, 2007.

The actions described in the service information are intended to correct the unsafe condition identified in the MCAI.

Comments

We have considered the following comments received on the earlier NPRM.

Request to Use Latest Versions of Service Information

Air Transport Association, on behalf of its member U.S. Airways, requests that we allow for the most recent revisions to the applicable service bulletins to be used for compliance with the AD.

We agree. Airbus has revised the service bulletins described in the following table.

SERVICE BULLETINS THAT HAVE BEEN REVISED SINCE WE ISSUED THE NPRM

Airbus service bulletin	New revision	Revision level in original NPRM	Additional work necessary?	Reason for revision
A330–28–3082 ..	Revision 04, including Appendix 01, dated August 3, 2007.	Revision 02, including Appendix 01, dated August 11, 2006.	Yes, for those modified in accordance with original revision (dated June 14, 2004).	Adds bonding points that were omitted from the Accomplishment Instructions of the original revision of the service bulletin.
A330–55–3016 ..	Revision 02, dated March 16, 2007.	Revision 1, dated February 12, 1997.	No	Changes compliance classification.
A340–28–4073 ..	Revision 02, dated March 8, 2007.	Revision 01, dated October 9, 1998.	No	Updates effectivity, revise jettison-valve procedure, and format changes.
A340–28–4078 ..	Revision 01, dated January 25, 2007.	Original Issue, dated March 17, 2000.	No	Changes a kit quantity.
A340–28–4097 ..	Revision 03, including Appendix 01, dated July 3, 2007.	Revision 02, including Appendix 01, dated August 16, 2006.	Yes, for those modified in accordance with any previous revision.	Includes instructions for electrical bonding of fuel pump canisters for certain airplanes and for the water drain valve between rib 1 and rib 2 for all airplanes; adds new airplane configurations.
A340–28–4118 ..	Revision 02, dated July 10, 2007.	Revision 01, dated October 11, 2006.	No	Updates the effectivity, includes changes that followed validation of the service bulletin.
A340–55–4017 ..	Revision 02, dated March 16, 2007.	Revision 1, dated February 12, 1997.	No	Changes compliance classification.

performing the action specified in paragraph (f)(4) of this supplemental NPRM for airplanes that are already compliant with certain requirements of Airbus AOT 55-03 (mentioned in Table 1 of this Supplemental NPRM).

We have also revised the supplemental NPRM to give credit for accomplishment of earlier revisions of service information that specify that no additional work is necessary for airplanes on which the earlier revision was accomplished; we have removed credit for accomplishment of the original issue of Airbus Service Bulletin A330-28-3082; and we have removed credit for accomplishment of any revision of Airbus Service Bulletin A340-28-4097 that is earlier than Revision 03.

Explanation of Change to Certain Compliance Times

We have revised our month-based compliance times to correspond to the amount of elapsed time between the effective date of the MCAI and the compliance dates specified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

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

Certain changes described above expand the scope of the earlier NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this proposed AD.

Differences Between This AD and the MCAI or Service Information

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

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA

policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect 28 products of U.S. registry. We also estimate that it would take 670 work-hours per product to comply with this proposed AD. The average labor rate is \$80 per work-hour. Required parts would cost about \$2,718 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$1,576,904, or \$56,318 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus: Docket No. FAA-2007-27739; Directorate Identifier 2006-NM-250-AD.

Comments Due Date

(a) We must receive comments by July 14, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A330, A340-200, and A340-300 airplanes, all certified models, all serial numbers, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Codes 28: Fuel, and 55: Stabilizers.

Reason

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

[T]he FAA published SFAR 88 (Special Federal Aviation Regulation 88).

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

The aim of this regulation is to require all holders of type certificates for passenger transport aircraft certified after January 1st, 1958 with a capacity of 30 passengers or more, or a payload of 3,402 kg or more, to carry out a definition review against explosion hazards.

Consequently, the following measures [are] rendered mandatory * * *:

- [Inspection and] replacement [if necessary] of the white P-clips by blue P-clips which are more fuel resistant remove the risks of fuel quantity indicator (FQI) and

fuel level sensor system (FLSS) harnesses chafing against the metallic part of the P-clip,

- Modification of electrical bonding of equipment installed in fuel tanks in order to re-establish the conformity with the design definition by introducing additional bonding leads, electrical bonding points and electrical bonding of a support bracket for a diffuser assembly installed between Rib 1 and Rib 2 on the stringers of the Number 1 bottom skin panel,

- Modification of bonding points, installation of additional bonding leads and other modifications of the Additional Center Tank (ACT),

- Modification to increase the distance between metallic parts on the THS (trimmable horizontal stabilizer) Trim Tank,

- Installation of a bonding lead between the bonding tags on the Jettison valve actuator and drive assembly.

This new AD supersedes EASA AD 2006–0322 taking over its requirements and:

- Mandates SB A330–28–3082 Revision 04 which introduces an additional work for some bonding points which were omitted from the center tank at original issue (action n°2 [paragraph (f)(2) of this AD]);

- Mandates SB A340–28–4097 Revision 03 which introduces an additional work by addition of electrical bondings omitted from previous revisions (action n°2);

- Introduces an extension of the required compliance time to perform action n°4 for those aircraft already compliant with AIRBUS AOT 55–03 dated 22 August 1996

(“solution A”), mandated by DGAC [Direction Générale de l’Aviation Civile] AD F–1996–178–049(B) R1 and DGAC AD F–1996–177–038(B) with a compliance time of November 15th, 1996;

- Refers to the latest revision of certain AIRBUS SBs.

The unsafe condition is the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Actions and Compliance

(f) Unless already done, do the actions in paragraphs (f)(1), (f)(2), (f)(3), (f)(4), and (f)(5) of this AD for the applicable airplanes identified in Table 1 of this AD.

TABLE 1.—APPLICABLE PARAGRAPHS BY AIRPLANE MODEL

These airplane models—	Except airplanes—	Are affected by these paragraphs of this AD—
Model A330, A340–200, and A340–330 airplanes.	On which Airbus Modification 47634 has been embodied in production. • On which both Airbus Modifications 49135 and 49630 have been embodied in production. • Both Airbus Modifications 51825 and 55118 have been embodied in production. • That have been modified in-service in accordance with both Airbus Service Bulletin A330–28–3082, Revision 04, including Appendix 01, dated August 3, 2007; and Airbus Service Bulletin A330–28–3101, Revision 01, dated October 11, 2006. • That have been modified in-service in accordance with both Airbus Service Bulletin A340–28–4097, Revision 03, including Appendix 01, dated July 3, 2007; and Airbus Service Bulletin A340–28–4118, Revision 02, dated July 10, 2007.	(f)(1). (f)(2)(i), except as provided by paragraphs (f)(2)(ii) and (f)(2)(iii) of this AD.
Model A330 airplanes on which the actions specified in Airbus Service Bulletin A330–28–3082, dated June 14, 2004, have been accomplished before the effective date of this AD; and Model A340–200 and A340–300 airplanes on which the actions specified in Airbus Service Bulletin A340–28–4097, dated June 14, 2004, Revision 01, dated March 3, 2005, or Revision 02, dated August 16, 2006, have been accomplished before the effective date of this AD.	• On which both Airbus Modifications 49135 and 49630 have been embodied in production. • Both Airbus Modifications 51825 and 55118 have been embodied in production. • That have been modified in-service in accordance with both Airbus Service Bulletin A330–28–3082, Revision 04, including Appendix 01, dated August 3, 2007, and Airbus Service Bulletin A330–28–3101, Revision 01, dated October 11, 2006. • That have been modified in-service in accordance with both Airbus Service Bulletin A340–28–4097, Revision 03, including Appendix 01, dated July 3, 2007, and Airbus Service Bulletin A340–28–4118, Revision 02, dated July 10, 2007.	(f)(2)(ii) and (f)(2)(iii).
Model A340–200 and A340–300 airplanes that have the ACT embodied in production or in service (Airbus Modification 42612, 44002, or 44005).	That have been modified in service by Airbus Service Bulletin A340–28–4078, Revision 01, dated January 25, 2007.	(f)(3).
Model A340–200 and A340–300 airplanes	• On which Airbus Modification 44252 has been embodied in production. • That have been modified in-service in accordance with Airbus Service Bulletin A340–55–4017.	(f)(4)(i), except as provided by paragraph (f)(4)(ii) of this AD.
Model A330–300, –301, –321, –322, –341, –342 airplanes.	• On which Airbus Modification 44252 has been embodied in production. • That have been modified in-service in accordance with Airbus Service Bulletin A330–55–3016.	(f)(4)(i), except as provided by paragraph (f)(4)(ii) of this AD.

TABLE 1.—APPLICABLE PARAGRAPHS BY AIRPLANE MODEL—Continued

These airplane models—	Except airplanes—	Are affected by these paragraphs of this AD—
Model A330–300, –301, –321, –322, –341, –342 airplanes; and Model A340–200 and A340–300 airplanes.	On which the improvement of the THS lighting strike protection has already been performed before the effective date of this AD in accordance with Airbus All Operators Telex (AOT) 55–03, dated August 22, 1996 ("solution A"), mandated by Direction Générale de l'Aviation Civile (DGAC) Airworthiness Directive F–1996–178–049(B) R1, and DGAC Airworthiness Directive F–1996–177–038(B), with a compliance time of November 15, 1996.	(f)(4)(ii).
Model A340–200 and A340–300 airplanes	- On which Airbus Modification 46142 has been embodied in production. - That have been modified in-service in accordance with Airbus Service Bulletin A340–28–4073, Revision 02, dated March 8, 2007.	(f)(5).

(1) Within 24 months after the effective date of this AD, do a detailed visual inspection of the P-clips in the wings and center fuel tanks, and apply the applicable corrective actions, in accordance with the applicable instructions of Airbus Service Bulletin A330–28–3092, Revision 01, dated December 14, 2005; or Airbus Service Bulletin A340–28–4107, Revision 01, dated December 14, 2005.

(2) Do the requirements of paragraphs (f)(2)(i), (f)(2)(ii), and (f)(2)(iii) of this AD, as applicable, at the times specified in those paragraphs.

(i) For airplanes affected by this paragraph, as specified in Table 1 of this AD: Within 24 months after the effective date of this AD, modify the electrical bonding of the equipment installed in fuel tanks, in accordance with both Airbus Service Bulletin A330–28–3082, Revision 04, including Appendix 01, dated August 3, 2007, and Airbus Service Bulletin A330–28–3101, Revision 01, dated October 11, 2006; or both Airbus Service Bulletin A340–28–4097, Revision 03, including Appendix 01, dated July 3, 2007, and Airbus Service Bulletin A340–28–4118, Revision 02, dated July 10, 2007; as applicable.

(ii) For airplanes affected by this paragraph, as specified in Table 1 of this AD: Within 24 months after the effective date of this AD, modify the electrical bonding of the equipment installed in fuel tanks, in

accordance with Airbus Service Bulletin A330–28–3101, Revision 01, dated October 11, 2006; or Airbus Service Bulletin A340–28–4118, Revision 02, dated July 10, 2007; as applicable.

(iii) For airplanes affected by this paragraph, as specified in Table 1 of this AD: Within 48 months after the effective date of this AD, do the additional work specified in Airbus Service Bulletin A330–28–3082, Revision 04, including Appendix 01, dated August 3, 2007; or Airbus Service Bulletin A340–28–4097, Revision 03, including Appendix 01, dated July 3, 2007; in accordance with the accomplishment instructions of those service bulletins, as applicable.

(3) Within 24 months after the effective date of this AD, modify the electrical bonding in the ACT in accordance with the Accomplishment Instructions of Airbus Service Bulletin A340–28–4078, Revision 01, dated January 25, 2007.

(4) Within 24 months after the effective date of this AD, do the requirements of paragraphs (f)(4)(i) and (f)(4)(ii), as applicable.

(i) For airplanes affected by this paragraph, as specified in Table 1 of this AD: Within 24 months after the effective date of this AD, increase the distance between metallic parts on the THS trim tank in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–55–3016, Revision 02,

March 16, 2007; or Airbus Service Bulletin A340–55–4017, Revision 02, dated March 16, 2007; as applicable.

(ii) For airplanes affected by this paragraph, as specified in Table 1 of this AD: At the first THS removal from the aircraft done for any reason after the effective date of this AD (e.g., fuselage stress jacking, and repair) when the airplane is on a support tool (lifting and resting point fittings must be installed), or at the time of the first maintenance task that requires the use of THS lifting and resting point fittings, whichever occurs earlier, increase the distance between metallic parts on the THS trim tank in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–55–3016, Revision 02, March 16, 2007; or Airbus Service Bulletin A340–55–4017, Revision 02, dated March 16, 2007; as applicable.

(5) Within 24 months after the effective date of this AD, install a bonding lead between the bonding tags on the jettison valve actuator and drive assembly in accordance with the instructions of Airbus Service Bulletin A340–28–4073, Revision 02, dated March 8, 2007.

(6) Actions done before the effective date of this AD in accordance with the service bulletins listed in Table 2 of this AD are acceptable for compliance with the corresponding requirements of this AD.

TABLE 2.—CREDIT SERVICE BULLETINS

Airbus service bulletin	Revision level	Date	Corresponding paragraphs
A330–28–3082	01	March 2, 2005	(f)(2)(i) of this AD.
A330–28–3082	02	August 11, 2006	(f)(2)(i) of this AD.
A330–28–3082	03	November 15, 2006	(f)(2)(i) and (f)(2)(ii) of this AD.
A330–28–3101	Original	June 5, 2006	(f)(2)(i) of this AD.
A330–55–3016	Original	August 20, 1996	(f)(4)(i) and (f)(4)(ii) of this AD.
A330–55–3016	1	February 12, 1997	(f)(4)(i) and (f)(4)(ii) of this AD.
A340–28–4073	Original	May 14, 1998	(f)(5) of this AD.
A340–28–4073	01	October 9, 1998	(f)(5) of this AD.
A340–28–4078	Original	March 17, 2000	(f)(3) of this AD.
A340–28–4118	Original	June 5, 2006	(f)(2)(i) and (f)(2)(ii) of this AD.
A340–28–4118	01	October 11, 2006	(f)(2)(i) and (f)(2)(ii) of this AD.
A340–55–4017	Original	August 20, 1996	(f)(4)(i) and (f)(4)(ii) of this AD.

TABLE 2.—CREDIT SERVICE BULLETINS—Continued

Airbus service bulletin	Revision level	Date	Corresponding paragraphs
A340–55–4017	1	February 12, 1997	(f)(4)(i) and (f)(4)(ii) of this AD.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, ANM–116, International Branch, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tim Backman, Aerospace Engineer, ANM–116, International

Branch, Transport Airplane Directorate, FAA, 1601 Lind Ave., SW, Renton, Washington, 98057–3356, telephone (425) 227–2797; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required

to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Airworthiness Directive 2007–0278, dated November 5, 2007 [Corrected: November 8, 2007], and the service bulletins in Table 3 of this AD, for related information.

TABLE 3.—RELATED SERVICE BULLETINS

Airbus service bulletin	Revision level	Date
A330–28–3082, including Appendix 01	04	August 3, 2007.
A330–28–3092, excluding Appendix 01	01	December 14, 2005.
A330–28–3101	01	October 11, 2006.
A330–55–3016	02	March 16, 2007.
A340–28–4073	02	March 8, 2007.
A340–28–4078	01	January 25, 2007.
A340–28–4097, including Appendix 01	03	July 3, 2007.
A340–28–4107, excluding Appendix 01	01	December 14, 2005.
A340–28–4118	02	July 10, 2007.
A340–55–4017	02	March 16, 2007.

Issued in Renton, Washington, on June 10, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate,
Aircraft Certification Service.

[FR Doc. E8–13568 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–13–P

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

[Docket No. 2001–NM–237–AD]

RIN 2120–AA64

**Airworthiness Directives; Boeing
Model 767–200 and –300 Series
Airplanes**

AGENCY: Federal Aviation
Administration, DOT.

ACTION: Supplemental notice of
proposed rulemaking; reopening of
comment period.

SUMMARY: This document revises an
earlier proposed airworthiness directive
(AD), applicable to certain Boeing

Model 767–200 and –300 series
airplanes. That proposed rule would
have required replacing certain door-
mounted escape slides and slide-raft
assemblies with new slide-raft
assemblies; replacing certain escape
system latches with new latches; and
modifying or replacing certain
counterbalance assemblies with new
counterbalance assemblies; as
applicable. This new action revises the
proposed rule by extending the
compliance time, adding requirements
to install a longer firing cable and test
the valve of the inflation trigger system
of the slide-raft, and, for certain
airplanes, adding procedures to adjust
the door counter balance systems. The
actions specified by this new proposed
AD are intended to prevent the escape
slides and slide-rafts of the forward and
mid-cabin entry and service doors from
being too steep for evacuation in the
event that the airplane rotates onto the
aft fuselage into the extreme tip-back
condition. In the extreme tip-back
condition, the forward and mid-cabin
exits could result in steeper sliding
angles, which could cause injury to
passengers and crewmembers during an

emergency evacuation. This action is
intended to address the identified
unsafe condition.

DATES: Comments must be received by
July 14, 2008.

ADDRESSES: Submit comments in
triplicate to the Federal Aviation
Administration (FAA), Transport
Airplane Directorate, ANM–114,
Attention: Rules Docket No. 2001–NM–
237–AD, 1601 Lind Avenue, SW.,
Renton, Washington 98057–3356.
Comments may be inspected at this
location between 9 a.m. and 3 p.m.,
Monday through Friday, except Federal
holidays. Comments may be submitted
via fax to (425) 227–1232. Comments
may also be sent via the Internet using
the following address: [9-anm-
nprmcomment@faa.gov](mailto:9-anm-nprmcomment@faa.gov). Comments sent
via fax or the Internet must contain
“Docket No. 2001–NM–237–AD” in the
subject line and need not be submitted
in triplicate. Comments sent via the
Internet as attached electronic files must
be formatted in Microsoft Word 97 or
2000 or ASCII text.

The service information referenced in
the proposed rule may be obtained from
Boeing Commercial Airplanes, P.O. Box

3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.

- For each issue, state what specific change to the proposed AD is being requested.

- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001-NM-237-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate,

ANM-114, Attention: Rules Docket No. 2001-NM-237-AD, 1601 Lind Avenue, SW., Renton, Washington 98057-3356.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to certain Boeing Model 767-200 and -300 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on November 25, 2003 (68 FR 66026). That NPRM would have required replacing certain door-mounted escape slides and slide-raft assemblies with new slide-raft assemblies; replacing certain escape system latches with new latches; and modifying or replacing certain counterbalance assemblies with new counterbalance assemblies; as applicable. That NPRM was prompted by reports indicating that the original analysis of the highest sill heights for the forward and mid-cabin entry and service doors is no longer valid on certain Boeing Model 737-200 and -300 series airplanes. That condition, if not corrected, could result in injury to passengers and crewmembers during an emergency evacuation.

Actions Since Issuance of Previous Proposal

Since the issuance of that NPRM, we have received three reports of uncommanded deployments of the door-mounted escape slide inside the passenger cabin. The uncommanded inflation caused damage to a lavatory, ceiling panels, and doors. It has been determined that variability in packing the slide can result in excessive tension on the firing cable. Therefore, certain affected airplanes must have a longer firing cable installed, and the inflation trigger system must be tested. To accommodate this change, Boeing has issued the following service bulletins:

- Boeing Alert Service Bulletin 767-25A0266, Revision 2, dated September 27, 2007. We referred to Boeing Alert Service Bulletin 767-25-0266, dated September 14, 2000, as the appropriate source of service information for accomplishing the required actions in the original NPRM. In addition to the existing actions, Revision 2 of the service bulletin specifies procedures to adjust the door counterbalance systems for Group 1 and 2 airplanes (procedures were added in Boeing Alert Service Bulletin 767-25A0266, Revision 1, dated December 4, 2006). Revision 2 of the service bulletin also specifies that more work is necessary on airplanes changed in accordance with the procedures specified in the original

release of the service bulletin. Revision 2 also includes a reference to the procedures in Boeing Alert Service Bulletin 767-25A0395, Revision 1, adds instructions for adjusting the door counterbalance system for certain airplanes, and corrects certain part numbers (P/Ns), among other changes.

- Boeing Alert Service Bulletin 767-25A0395, Revision 1, dated January 25, 2007. This service bulletin describes procedures for determining if a slide-raft with supplier P/N 5A3294-1, 5A3294-2, 5A3295-1, or 5A3295-3 (Boeing P/N S416T214-3, S416T214-4, S416T214-2, and S416T214-1, respectively), is installed. If those P/Ns are not installed, the service bulletin specifies that no further action is necessary. If any of those P/Ns are installed, the service bulletin provides procedures for lengthening the firing cable and testing the valve of the inflation trigger system of the escape slide-raft.

Boeing Alert Service Bulletin 767-25A0395, Revision 1, refers to Goodrich Service Bulletin 5A3294/5A3295-25-362, dated July 25, 2006, as an additional source of service information for lengthening the firing cable and testing the valve of the inflation trigger system of the escape slide-raft.

Comments

Due consideration has been given to the comments received in response to the original NPRM:

Support for the Original NPRM

Airline Pilots Association, International (ALPA) concurs with the corrective actions in the original NPRM.

Support for Replacement Parts

Goodrich Aircraft Interior Products states that it is prepared to support the need for replacement parts within the compliance time specified in the original NPRM.

Request To Clarify the Unsafe Condition

Boeing requests a change to the wording of the unsafe condition in the Summary and Discussion sections of the NPRM. Boeing states that the existing slide-rafts are not "too short to reach the ground" as stated in the NPRM, but that the extreme tip-back condition results in a steeper sliding angle than the original design intent. Boeing requests that we instead specify, among other suggested wording, that "In the extreme tip-back condition, the forward and mid-cabin exits on one side of the airplane could result in steeper sliding angles. * * *

We partially agree with the requested changes. We disagree with using the words "one side of the airplane"

because they imply that passengers and crewmembers could safely evacuate from the side of the airplane with the lower sliding angles. Damage associated with a landing gear failure on the lower side of the airplane could cause passengers and crewmembers to perceive that only the side of the airplane with the sliding angle that is "too steep for evacuation" would be available for emergency evacuation. In addition, this type of failure could render the exits on the lower, damaged side to be unusable and/or unsafe. We agree with the other requested changes because they clarify the unsafe condition. We have revised the Summary section accordingly. However, we have not revised the Discussion section since that section of the preamble does not reappear in the same form in the supplemental NPRM. Instead, the Discussion section in the supplemental NPRM restates the wording of the original NPRM for reference.

Requests To Revise Cost Impact Section

Goodrich Aircraft Interior Products, All Nippon Airways (ANA), Boeing, and Air Transport Association (ATA), on behalf of its member American Airlines, all request that we revise the Cost Impact section of the NPRM. All commenters state that the costs shown in the NPRM are incomplete and should be revised.

We agree with the commenters. The Cost Impact section of the NPRM did not include the cost of the slide-rafts. We have revised the Cost Impact section of the supplemental NPRM to include those costs.

Requests To Extend Compliance Time

Boeing, ANA, and Air New Zealand request that we extend the compliance time. The commenters suggest extending the compliance time from the proposed 5 years to between 8 and 15 years. The commenters make their requests to extend the compliance time for numerous reasons, including:

- The proposed rule has a high economic impact on the operators, with small benefit to safety. Data are missing from the Cost Impact section of the proposed rule.
- The established replacement program (useful service life) of the life-limited slides and slide rafts is 15 years.
- There have been no reports of airplanes tipping back beyond the certified sill height.
- The exit slides and slide-rafts on the opposite side of the airplane would remain within the certified sill heights and corresponding sliding angles due to the roll of the airplane associated with

the extreme tip-back condition. The existing slides are not too short to reach the ground (as stated in the proposed rule).

- The slide and slide-raft manufacturer will likely have trouble producing the number of slides and slide-raft units necessary to modify every affected airplane in the worldwide fleet.

- We need to take into consideration low-cycle, high-hour operations.

We partially agree with the commenters' statements. Given the combination of an updated Cost Impact estimate for this supplemental NPRM (see "Request To Revise Cost Impact Section" above), and the risk of exposure to the situation addressed in this supplemental NPRM, we acknowledge that there is merit in revising the compliance time. It is our intent to allow operators to offset, partially, the costs associated with the supplemental NPRM by integrating the compliance time somewhat with the costs associated with normal slide replacement. Therefore, we have changed paragraph (a) of this supplemental NPRM to propose a compliance time of within 72 months after the effective date of the AD.

We have also considered the other reasons commenters gave for extending the compliance time, as discussed below.

- We have determined that an interval based on the "useful service life" of the slides, which is 15 years, would not address the unsafe condition in a timely manner.
- We do not agree that having no reported incidents of airplanes tipping back beyond the certified sill heights is sufficient justification for extending the proposed compliance time. While the specific condition addressed in this supplemental NPRM has not been encountered in service, we have received reports of similar, but less severe, accidents and incidents that could have been more severe given slightly different conditions.
- We do not agree that the exit slides and slide-rafts on the opposite side of the airplane would remain within the certified sill heights and provide a means of safe exit. The gear failure may be associated with or may have caused other damage that would not only raise the exit heights on the far side of the airplane, but also could render the exits on the near side of the airplane unsafe and/or unusable.
- The slide manufacturer has indicated that it is prepared to support operators with sufficient supplies of replacement slides and slide-rafts for the worldwide fleet within the

compliance time specified in this supplemental NPRM.

Therefore, although we have extended the compliance time for other reasons, we do not agree that these comments give adequate justification for extending the compliance time any further.

Requests To Withdraw Proposed Rule

ANA, and ATA on behalf of its member American Airlines, suggest that we withdraw the proposed rule because it represents a significant cost and addresses a scenario that is a remote possibility and, therefore, should not be considered an unsafe condition.

American Airlines explains that, with one main landing gear out, the engine would remain attached at "very low speeds" that are associated with taxiing, and would not shear off due to the weight of the airplane, as explained in the "Discussion" section of the proposed rule. American Airlines also explains that the extreme tip-back condition would occur only at extreme aft center-of-gravity (CG) conditions and that there is a low probability of this scenario resulting in a "time limited" (90-second) evacuation. American Airlines further states that there is a low probability of encountering the extreme tip-back position, based on no such occurrences having been encountered over the course of the fleet's high number of flight cycles.

We do not agree with the commenters' requests to withdraw the original NPRM. We consider this to be an unsafe condition for the reasons already given in the original NPRM and for the following reasons.

While we have received information from the airplane manufacturer that indicates that engines could not necessarily shear off the airplane at speeds experienced during taxi, takeoff, landing, or even under some emergency landing situations, further information from the manufacturer indicates that the CG associated with this condition is well within the current accepted operating parameters and is not an extreme condition. However, operators may consider CG restrictions and may make proposals for alternative methods of compliance (AMOC) consideration under the provisions of paragraph (d) of the supplemental NPRM. We will consider requests for approval of an AMOC if sufficient data are submitted to substantiate that the proposal would provide an acceptable level of safety.

In addition, although the specific conditions addressed in the proposed rule have not been encountered in service, we have received reports of partial tip-back during accidents/incidents that could have resulted in

extreme tip-back given slightly different conditions, making this type of event foreseeable. During at least one of these partial tip-back events, the slides were deployed to facilitate evacuation. We do not agree that the low probability of encountering such a foreseeable event is justification to withdraw the original NPRM.

Request To Limit the Applicability of the Original NPRM

UPS and ABX Air request that we revise the applicability of the original NPRM. UPS requests that we remove certain Model 767–300F series airplanes from the applicability of the proposed rule because they have a different egress system. ABX Air requests that the applicability of the proposed rule be limited to those airplanes that are required to be equipped with the affected escape slides. For example, the Model 767–300F (freighter) and Model 767–200 or 767–300 series airplanes that have been modified from a passenger configuration to a cargo configuration are not subject to the unsafe condition addressed by the proposed rule.

We agree that airplanes that are not required to be equipped with slides and slide-rafts are not subject to this unsafe condition. The applicability statement of the original NPRM currently includes only Model 767–200 and 767–300 series

airplanes and does not include Model 767–300F series airplanes; therefore, no change to the supplemental NPRM is necessary to exclude these airplanes from the applicability. However, we have revised the applicability statement of the supplemental NPRM to state that only Boeing Model 767–200 and –300 series airplanes that are equipped with door-mounted escape slide systems are affected.

Request To Remove Paragraph (b) of the Original NPRM

ABX Air recommends that we remove paragraph (b) of the original NPRM because the second sentence in the proposed rule, “Compliance: Required as indicated, unless accomplished previously,” already gives operators credit for accomplishing the actions before the effective date of the AD.

We agree with the request to remove paragraph (b) of the original NPRM. Paragraph (b) was intended to give operators credit for accomplishing actions in accordance with an earlier version of the referenced service bulletin. However, in this case, there is no earlier version of the service bulletin, and paragraph (b) was included inadvertently in the original NPRM. We have revised the supplemental NPRM accordingly.

Removal of Table 1 of the Original NPRM

We have removed Table 1 of the original NPRM. That table contains information about specific replacement procedures in Boeing Alert Service Bulletin 767–25–0266 that are necessary for each airplane group. We find that information is readily available in any revision of the service bulletin and therefore not necessary to include in the supplemental NPRM.

Conclusion

Certain changes described above expand the scope of the original NPRM. As a result, we have determined that it is necessary to reopen the comment period to provide additional opportunity for the public to comment on this supplemental NPRM.

Cost Impact

There are approximately 745 airplanes of the affected design in the worldwide fleet. The FAA estimates that 261 airplanes of U.S. registry would be affected by this supplemental NPRM. The work hours and required parts per airplane vary according to the configuration group to which the affected airplane belongs. The average labor rate is \$80 per work hour. The “Cost Impact Per Airplane Configuration Group” table shows the estimated costs.

COST IMPACT PER AIRPLANE CONFIGURATION GROUP

Airplane configuration group	U.S.-registered airplanes	Work hours	Kit cost	Slide cost	Cost per airplane	Fleet cost, by configuration group
1	208	6	\$1,236	\$174,400	\$176,116	\$36,632,128
2	12	12	2,472	354,264	357,696	4,292,352
3	41	11	98,858	174,400	274,138	11,239,658
4	0	11	34,012	174,400	209,292	0
5	0	17	35,248	354,264	390,872	0

Based on the figures in the “Cost Impact Per Airplane Configuration Group” table, the cost impact of this supplemental NPRM on U.S. operators is estimated to be \$52,164,138.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up,

planning time, or time necessitated by other administrative actions.

Authority for This Rulemaking

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

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations

for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal

would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Docket 2001–NM–237–AD.

Applicability: Model 767–200 and –300 series airplanes, line numbers 1 through 793 inclusive, certificated in any category; equipped with door-mounted escape slide systems.

Compliance: Required as indicated, unless accomplished previously.

To prevent the escape slides and slide-rafts of the forward and mid-cabin entry and service doors from being too steep for evacuation in the event that the airplane rotates onto the aft fuselage into the extreme tip-back condition, accomplish the following:

Replacement of Slide-Rafts

(a) Within 72 months after the effective date of this AD, replace the applicable slide-rafts at the applicable door or doors, and do all other applicable actions including, but not limited to, changing the latches, and replacing or modifying the counterbalance assemblies, by accomplishing all applicable actions specified in the Accomplishment Instructions in Boeing Service Bulletin 767–25A0266, Revision 2, dated September 27, 2007.

Modification of the Firing Cable

(b) Within 72 months after the effective date of this AD, do a general visual inspection of the slide-raft(s) to determine if supplier part number (P/N) 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is

installed (Boeing P/N S416T214–3, S416T214–4, S416T214–2, and S416T214–1, respectively). Do the inspection in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007. A review of airplane maintenance records is acceptable in lieu of this inspection if the P/N of the slide-raft can be conclusively determined from that review.

(1) If no affected P/N is installed, no further action is required by this paragraph.

(2) If any affected P/N is installed, before further flight, lengthen the firing cable and test the valve of the inflation trigger system of the escape slide-raft in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007.

Note 1: Boeing Alert Service Bulletin 767–25A0395, Revision 1, refers to Goodrich Service Bulletin 5A3294/5A3295–25–362, dated July 25, 2006, as an additional source of service information for lengthening the firing cable and testing the valve of the inflation trigger system of the escape slide-raft.

Credit for Actions Accomplished Previously

(c) Actions done before the effective date of this AD in accordance with the service bulletins listed in Table 1 of this AD are acceptable for compliance with the corresponding requirements of this AD.

TABLE 1.—PREVIOUS REVISIONS OF SERVICE BULLETINS

Boeing Alert Service Bulletin	Revision level	Date
767–25A0266	1	December 4, 2006.
767–25A0395	Original	August 31, 2006.

Alternative Methods of Compliance

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

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

Issued in Renton, Washington, on June 5, 2008.

Michael J. Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–13579 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–149405–07]

RIN 1545–BH32

Alternative Simplified Credit under Section 41(c)(5)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section in this issue of the **Federal Register**, the IRS is issuing temporary regulations relating to the election and calculation of the alternative simplified credit under section 41(c)(5) of the

Internal Revenue Code (ASC). The regulations implement changes to the credit for increasing research activities under section 41 made by the Tax Relief and Health Care Act of 2006 and will affect certain taxpayers claiming the section 41 credit. The text of those regulations also serves as the text of these proposed regulations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 15, 2008. Outlines of topics to be discussed at the public hearing scheduled for September 25, 2008, must be received by September 4, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–149405–07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington,

DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LDP:PR (REG-149405-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-149405-07). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, David Selig, (202) 622-3040; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina Johnson, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR Part 1) relating to section 41. The temporary regulations provide guidance concerning the election and calculation of the alternative simplified credit under section 41(c)(5). The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small entities may make an election under these regulations, any economic impact is minimal because an election under these regulations generally will simplify the calculation of the credit and may result in a benefit to the taxpayer. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. The IRS and the Treasury Department invite taxpayers to submit comments on the proposed regulations and issues relating to the election and calculation of the ASC under section 41(c)(5). In particular, the IRS and the Treasury Department encourage taxpayers to submit comments on the following issues:

Should the regulations allow a controlled group to make an election to use the ASC both for computation of the group credit and computation of every member's stand-alone entity credit, even if the ASC does not provide the greatest stand-alone entity credit?

If so, how should that election be made and by whom?

What relief should be made available to taxpayers that have used methodologies inconsistent with the short taxable year rules provided in these regulations on tax returns filed after the effective date of section 41(c)(5) and prior to the publication of these regulations?

A public hearing has been scheduled for September 25, 2008, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by September 15, 2008, and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by September 4, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of

the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is David Selig, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

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

Section 1.41-8 also issued under 26 U.S.C. 41(c)(4)(B); Section 1.41-9 also issued under 26 U.S.C. 41(c)(5)(C); * * *

Par. 2. Section 1.41-6 is amended by revising paragraphs (b)(1), (c)(2), (e) and (j) to read as follows:

§ 1.41-6 Aggregation of expenditures.

* * * * *

(b)(1) [The text of the proposed amendment to § 1.41-6(b)(1) is the same as the text of § 1.41-6T(b)(1) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(c) * * *

(2) [The text of the proposed amendment to § 1.41-6(c)(2) is the same as the text of § 1.41-6T(c)(2) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(e) [The text of the proposed amendment to § 1.41-6(e) is the same as the text of § 1.41-6T(e) published elsewhere in this issue of the **Federal Register**.]

* * * * *

(j) [The text of the proposed amendment to § 1.41-6(j) is the same as the text of § 1.41-6T(j) published elsewhere in this issue of the **Federal Register**.]

Par. 3. Section 1.41-8 is amended by revising paragraphs (b)(2), (b)(3), (b)(4) and (b)(5) to read as follows:

§ 1.41-8 Alternative incremental credit.

* * * * *

(b)(2) through (b)(5) [The text of proposed § 1.41-8(b)(2) through (b)(5) is

the same as the text of § 1.41–8T(b)(2) through (b)(5) published elsewhere in this issue of the **Federal Register**.]

* * * * *

Par. 4. Section 1.41–9 is added to read as follows:

§ 1.41–9 Alternative simplified credit.

[The text of proposed § 1.41–9 is the same as the text of § 1.41–9T (a) through (d) published elsewhere in this issue of the **Federal Register**.]

Steven T. Miller,

Acting Deputy Commissioner for Services and Enforcement.

[FR Doc. 08–1363 Filed 6–13–08; 11:51am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Parts 223, 228, 261, 292, and 293

Regulatory Flexibility Act Assessment—Locatable Minerals Operations

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Forest Service published in the **Federal Register** a proposed rule to revise the regulations for locatable minerals operations conducted on National Forest System lands. The proposed rule considered impacts to small entities under Executive Order 13272 and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). However, the proposed rule did not make available nor seek comment on the small entities flexibility assessment. This notice allows for

review and seeks comment on the flexibility assessment.

DATES: Comments must be received, in writing, on or before July 17, 2008.

ADDRESSES: Send written comments to Forest Service, USDA, Attn: Director, Minerals and Geology Management (MGM) Staff, (2810), Mail Stop 1126, Washington, DC 20250–1125; by electronic mail to 36cfr228a@fs.fed.us; by fax to (703) 605–1575. If comments are sent by electronic mail or by fax, the public is requested not to send duplicate written comments via regular mail. The public may inspect comments received on the proposed rule in the Office of the Director, MGM Staff, 5th Floor, Rosslyn Plaza Central, 1601 North Kent Street, Arlington, Virginia, on business days between the hours of 8:30 a.m. and 4 p.m. Those wishing to inspect comments are encouraged to call ahead at (703) 605–4646 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT:

Mike Doran, Minerals and Geology Management Staff, (208) 373–4132. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The assessment follows.

Description of Small Entities Affected

The proposed rule (73 FR 15694, Mar. 25, 2008) would directly affect all exploration and mining companies. There are currently approximately 1,800 exploration and mining companies

operating on the National Forests. Seventy-five percent of these companies are considered small business with less than 500 employees. The size of these 1,260 small businesses range from one person to 499 employees. Total production ranges from zero production for exploration companies to few thousand dollars per year for very small mining to several million dollars per year for the larger mining companies. Most mining companies require at least 20–25 percent profit to survive mining's volatile market.

Economic Impacts on Small Entities

Increased operating costs from the proposed rule to small exploration and mining companies is expected to be insignificant since the small entities are already working under the proposed rule through current direction and policy spelled out in the Forest Service manual and handbooks. The proposed rule codifies much of the existing direction and policy.

The most direct costs from the proposed regulations will come from how much time and money is spent on filling out and filing the required notice of intent, cessation of operations, or an operating plan. Table #1 records the 2007 annualized burden costs for an operator.

The United States Geological Survey (USGS) published earnings information pertaining to locatable mineral operations. That information can be found in the *Mineral Commodity Summaries 2007*. The USGS disclosed that the estimated “Average weekly earnings of production workers” for metal mining in 2006 was \$979. Based on 40 hours a week and on an 8-hour workday, the average hourly salary in the locatable mineral arena is about \$24.48. This rate is reflected in Table #1.

TABLE #1.—2007 ANNUALIZED BURDEN COSTS

Information collection	Number of respondents	Response frequency	Hour burden per collection	Total burden hours	Annualized costs @ \$24.48/hour	Cost per respondent
Plan of operations	319	1	12	3,828	\$93,709	\$293.76
Notice of intent	1,396	1	2	2,792	20,318	14.55
Cessation of operations	3	1	1	3	73	24.33

Each year the Forest Service surveys the regional offices to get an estimate of how many Plans of Operations and Notices of Intent were received. The latest figures indicate that 320 Plans of

Operations and 415 Notices of Intent were received in 2007. All of these plans and notices came from small entities.

Total estimated 2007 costs for small entities to comply with the information

collection was \$114,100. The estimated additional information collection costs for the proposed bonded notice are reflected in Table #2.

TABLE #2.—2007 ANNUALIZED BURDEN COSTS FOR A BONDED NOTICE
(Proposed Rule)

Information collection	Number of respondents	Response frequency	Hour burden per collection	Total burden hours	Annualized costs @\$24.48/hour	Cost per respondent
Bonded notice	100	1	6	600	\$14,688	\$146.88

The field units provided an initial estimate of 100 exploration and mining companies that would use the bonded notice instead of a plan of operation. A six hour burden per bonded notice was assumed giving a total of 600 burden hours. Annualized costs to the small entities would be \$14,688.

The economic impact on an individual respondent would be \$114,100 + \$14,688 = \$128,788 divided by 1,260 small businesses = \$102.21.

Conclusion

The comments will be addressed in the final rule for locatable minerals operations. The Forest Service has determined that the proposed rule will have an impact on a substantial number of small businesses. However, the economic impact of the proposed rule will not be significant. Under the proposed rule small entities will have the option of filing a bonded notice rather than a plan of operation for short-term, low impact exploration proposals rather the longer plan of operations requiring more analysis and a longer approval time. The Forest Service expects the major impact from the proposed rule to be a reduction of paperwork burden for the small entities which should be beneficial to small exploration and mining companies.

The Forest Service hereby certifies that the proposed rule will not have significant economic impact on a substantial number of small entities as defined by SBRFEA.

Dated: June 9, 2008.

Charles L. Myers,

Associate Deputy Chief, National Forest System.

[FR Doc. E8-13446 Filed 6-16-08; 8:45 am]

BILLING CODE 3410-11-P

GENERAL SERVICES ADMINISTRATION

48 CFR Part 501

[GSAR Case 2006–G502; Docket 2008–0007; Sequence 5]

RIN 3090–AI53

General Services Acquisition Regulation; GSAR Case 2006–G502; Rewrite of GSAR Part 501; General Services Administration Acquisition Regulation System

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Acquisition Regulation (GSAR) to update the text addressing the General Services Administration Acquisition Regulation System. This rule is a result of the General Services Administration Acquisition Manual (GSAM) Rewrite Initiative undertaken by GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR), and to implement streamlined and innovative acquisition procedures that contractors, offerors and GSA contracting personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

GSA will rewrite each part of the GSAR and GSAM, and as each GSAR part is rewritten, will publish it in the **Federal Register**.

This rule covers the rewrite of GSAR Part 501, General Services Administration Acquisition Regulation System.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before August 18, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G502 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by

inputting “GSAR Case 2006–G502” under the heading “Comment or Submission”. Select the link “Send a Comment or Submission” that corresponds with GSAR Case 2006–G502. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “GSAR Case 2006–G502” on your attached document.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G502 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Beverly Cromer at (202) 501–1448, or by e-mail at Beverly.Cromer@gsa.gov. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4035, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G502.

SUPPLEMENTARY INFORMATION:

A. Background

GSA published an Advance Notice of Proposed Rulemaking (ANPR) with request for comments in the **Federal Register** at 71 FR 7910, February 15, 2006, because GSA was beginning the review and update of the General Services Administration Acquisition Regulation (GSAR). No public comments were received on GSAR Part 501.

This GSAR rewrite will—

- Change “you” to “contracting officer”.

- Maintain consistency with the FAR but eliminate duplication.

- Revise GSAR sections that are out-of-date, or which imposed inappropriate burdens on the Government or contractors, especially small businesses.

- Streamline and simplify wherever possible.

In addition, GSA has recently reorganized into two, rather than three services. Therefore, the reorganization of the Federal Supply Service (FSS) and the Federal Technology Service (FTS) into the Federal Acquisition Service (FAS) was considered in the rewrite initiative.

This proposed rule contains the revisions made to Part 501, General Services Administration Acquisition Regulation System. Section 501.101 is revised to explain that the General Services Administration Acquisition Regulation (GSAR) implements or supplements the Federal Acquisition Regulation (FAR) and to change “you” to “contracting officer”. Section 501.103, Authority, is updated to add a reference to the Office of Federal Procurement Policy Act, 41 U.S.C. 421. Section 501.104 is revised to address the type of acquisitions that the GSAR applies to and to clarify the GSAR/FAR relationship. Subsection 501.105–1 is revised to state where the GSAM can be found online and to clarify the difference between the GSAR and the GSAM. Subpart 501.106, is revised to provide updated OMB approval numbers under the Paperwork Reduction Act. New Section 501.107 is added to provide procedures regarding certification requirements in accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425). It disallows any new requirements for a certification by a contractor or offeror in the GSAR unless certain criteria are met. Section 501.402 is deleted because it repeats information contained in the FAR and is therefore unnecessary. Sections 501.403 and 501.404 contain minor editorial changes to make language clearer. Subsection 501.404–71, Deviations to the nonregulatory GSAM, is revised to remove the language from the GSAR and place it in the GSAM because it is procedural, not regulatory.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The General Services Administration does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because no new requirements are being placed on the vendor community. No comments on this issue were received

from small business concerns or other interested parties.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the GSAM do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 501

Government procurement.

Dated: June 9, 2008

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR part 501 as set forth below:

1. The authority citation for 48 CFR part 501 revised to read as follows:

Authority: 40 U.S.C. 121(c).

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

2. Revise section 501.101 to read as follows:

501.101 Purpose.

The General Services Administration Acquisition Regulation (GSAR) implements and supplements the Federal Acquisition Regulation (FAR). It contains agency acquisition policies and practices, contract clauses, solicitation provisions, and forms that control the relationship between GSA and contractors, (including prospective contractors).

3. Revise section 501.103 to read as follows:

501.103 Authority.

GSA's Senior Procurement Executive (SPE) issues the GSAR under the general authority of the Federal Property and Administrative Services Act of 1949, as amended. Additional authority is found in the Office of Federal Procurement Policy Act, at 41 U.S.C. 421.

4. Amend section 501.104 by revising paragraphs (a) and (d) to read as follows:

501.104 Applicability.

(a) General. The GSAR applies to all acquisitions covered by the FAR. In general, this means supplies and services, including construction. In addition, the GSAR covers other actions, such as leasing in Part 570.

(d) GSAR/FAR Relationship. The FAR is the primary document. The GSAR only implements and supplements the FAR. The GSAR may deviate from the Federal Acquisition Regulation (FAR), if authorized.

5. Amend section 501.105–1 by revising paragraph (c) and removing paragraph (d) to read as follows:

501.105–1 Publication and code arrangement.

* * * * *

(c) GSA Acquisition Manual, which can be found at <http://www.acquisition.gov/gsam>. The GSAR is found in the gray shaded areas within the General Services Administration Acquisition Manual (GSAM) text on the GSAM website.

501.105–3 [Amended]

6. Amend section 501.105–3 by removing “in CFR” and adding “in the CFR” in its place.

501.106 [Amended]

7. Amend section 501.106 by removing GSAR Reference “511.104–70” with OMB Control Number “3090–0203”; adding GSAR Reference “514.201–1” with OMB Control Number “3090–0163”, and adding GSAR Reference “515.204–1” with OMB Control Number “3090–0163”; removing GSAR Reference “523.370” with OMB Control Number “3090–0205”, removing GSAR Reference “537.110(a)” with OMB Control Number “3090–0006”, and removing GSAR Reference “552.232–72” with OMB Control Number “3090–0205”; and adding GSAR Reference “552.238–75” with OMB Control Number “3090–0235”.

8. Add section 501.107 to read as follows:

501.107 Certifications.

(a) In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), a new requirement for a certification by a contractor or offeror may not be included in the GSAR unless—

(1) The certification requirement is specifically imposed by statute; or

(2) The SPE provides written justification to the Administrator for the certification, and the Administrator approves, in writing, the inclusion of the certification.

(b) Generally, no additional certification requirement should be contained in solicitations or clauses. However, in those rare instances where the contracting officer must request certification of certain types of information, approval from the SPE is required.

501.402 [Removed]

9. Remove section 501.402.

10. Revise section 501.403 to read as follows:

501.403 Individual deviations.

(a) An individual deviation affects only one contract action.

(1) The HCA must approve an individual deviation from the FAR. The authority to grant an individual deviation from the FAR may not be re-delegated.

(2) An individual deviation from the GSAR must be approved by the HCA. The authority to grant an individual deviation from the GSAR may be re-delegated to the Contracting Director.

(b) If GSA delegates authority to another agency and requires compliance with the GSAR as a condition of the delegation, the Contracting Director in the agency receiving the delegation may approve individual deviations from the GSAR unless the agency head receiving the delegation designates another official.

(c) A copy of the deviation must be provided to GSA's SPE.

11. Revise section 501.404 to read as follows:

501.404 Class deviations.

(a) A class deviation affects more than one contract action. A deviation for any solicitation that will result in multiple awards, or any solicitation under the Multiple Award Federal Supply Schedule program is considered to be a class deviation, as more than one contract action is affected. Each award under such a solicitation is considered an individual contract action.

(1) A proposed class deviation from the FAR must be forwarded by the cognizant HCA to GSA's SPE for approval. Prior to approving a class deviation from the FAR, the SPE will consult with the Chairman of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a)(1).

(2) A proposed class deviation from the GSAR must be forwarded by the cognizant HCA to GSA's SPE for approval.

(3) When an HCA knows that a proposed class deviation will be required on a permanent basis, the HCA should propose or recommend an appropriate FAR or GSAR revision.

(b) If GSA delegates authority to another agency and requires compliance with the GSAR as a condition of the delegation, the HCA in the agency receiving the delegation may approve class deviations from the GSAR unless the agency head receiving the delegation designates another official. A copy of the class deviation must be provided to GSA's SPE.

(c) A request for class deviations must fully describe the need for and the nature of the deviation and be supported by appropriate documentation.

(d) Class deviations from the GSAR—
(1) Expire in 12 months, if not extended; and

(2) May be rescinded earlier by GSA's SPE or by officials designated under paragraph (a) of this section without prejudice to any action taken previously.

501.404–71 [Removed]

12. Remove section 501.404–71.

[FR Doc. E8–13593 Filed 6–16–08; 8:45 am]

BILLING CODE 6820–61–S

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****49 CFR Part 531**

[Docket No. NHTSA–2008–0115]

Exemptions From Average Fuel Economy Standards; Passenger Automobile Average Fuel Economy Standards

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Proposed rule; proposed decision to grant exemption.

SUMMARY: This proposed decision responds to a petition filed by Mosler Automotive (Mosler) requesting that it be exempted from the generally applicable corporate average fuel economy (CAFE) standard of 27.5 miles per gallon (mpg) for model years 2008, 2009 and 2010, and that, for Mosler, lower alternative standards be established. In this document, NHTSA proposes that the requested exemption be granted to Mosler and that an alternative standard of 22.1 mpg be established for MYs 2008 through 2010.

DATES: Comments must be received on or before July 17, 2008.

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

- **Web Site:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- **Fax:** 1–202–493–2251.
- **Mail:** Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- **Hand Delivery:** The Docket Management Facility is on the ground

floor of the West Building, 1200 New Jersey Ave., SE. The Docket Management Facility is open between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

• **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this rulemaking. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading at the end of this notice.

Docket: For access to the docket to read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room W12–140 on the ground floor of the West Building, 1200 New Jersey Ave., SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: For technical issues, contact Ken Katz, Lead Engineer, Fuel Economy Division, Office of International Policy, Fuel Economy, and Consumer Programs, at (202) 366–0846, facsimile (202) 493–2290, electronic mail kkatz@nhtsa.dot.gov. For legal issues, contact Rebecca Yoon of the Office of the Chief Counsel, at (202) 366–2992.

SUPPLEMENTARY INFORMATION:**Statutory Background**

Pursuant to 49 U.S.C. 32902(d), NHTSA may exempt a low volume manufacturer of passenger automobiles from the generally applicable average fuel economy standards if NHTSA concludes that those standards are more stringent than the maximum feasible average fuel economy for that manufacturer and if NHTSA establishes an alternative standard for that manufacturer at its maximum feasible level. Under the statute, a low volume manufacturer is one that manufactured (worldwide) fewer than 10,000 passenger automobiles in the second model year before the model year for which the exemption is sought (the affected model year) and that will manufacture fewer than 10,000 passenger automobiles in the affected model year. In determining the maximum feasible average fuel economy, the agency is required under 49 U.S.C. 32902(f) to consider:

- (1) Technological feasibility,
- (2) Economic practicability,
- (3) The effect of other motor vehicle standards of the government on fuel economy, and

(4) The need of the United States to conserve energy.

The statute permits NHTSA to establish alternative average fuel economy standards applicable to exempted low volume manufacturers in one of three ways: (1) A separate standard for each exempted manufacturer; (2) a separate average fuel economy standard applicable to each class of exempted automobiles (classes would be based on design, size, price, or other factors); or (3) a single standard for all exempted manufacturers (49 U.S.C. 32902(d)(2)).

Background Information on Mosler

Mosler is a U.S. company, organized as a Florida corporation, formed in 1987 and owned by a single American shareholder. The company headquarters are in Riveria Beach, Florida. There is an engineering/assembly facility in Norfolk, England. The company has 25 U.S. employees. Race car development was initiated by the company in 1998, and the first street vehicle for the U.S. market was produced in 2004. Subsequently, U.S. street production was suspended because of issues with compliance with Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*.

The petitioner stated that it manufactured 15 vehicles in 2004. The petitioner estimates that it will produce 40 vehicles in 2008, 50 vehicles in 2009, and 60 vehicles in 2010.¹

The Mosler Petition

NHTSA's regulations on low volume exemptions from CAFE standards state that petitions for exemption must be submitted "not later than 24 months before the beginning of the affected model year, unless good cause for later submission is shown" (49 CFR 525.6(b)).

NHTSA received the petition from Mosler on June 19, 2007, seeking exemption from the passenger automobile fuel economy standards for MYs 2008 through 2010. This petition was filed less than 24 months before the beginning of MYs 2008 and 2009, and was therefore untimely under 49 CFR part 526 for those model years. Mosler indicated that it only decided to resume production for the U.S. market after it filed a petition for an exemption from the advanced air bag requirements in January 2007. The decision to file for this exemption was only made after NHTSA granted similar exemptions in September 2006.

Under the circumstances, NHTSA concludes that Mosler took reasonable measures to submit a petition in as timely a manner as possible. The agency notes that Mosler's ability to enter the U.S. market apparently hinges on a favorable decision regarding its petition for an exemption from the advanced air bag requirements. Mosler has filed this petition while awaiting a decision on the other petition. Therefore, the agency has determined that good cause exists for the late submission of the petition. This is consistent with previous determinations made by the agency with regard to the timeliness of petitions submitted by Spyker Automobielen B.V. (see 71 FR 49407; August 23, 2006; Docket No. NHTSA-2006-25593) and DeTomaso Automobiles, Ltd. (see 64 FR 73476; December 30, 1999; Docket No. NHTSA-99-6676).

Methodology Used To Project Maximum Feasible Average Fuel Economy Level for Mosler

Baseline Fuel Economy

To project the level of fuel economy which could be achieved by Mosler in the 2008 through 2010 model years, NHTSA considered whether there were technical or other improvements that would be feasible for these vehicles, and whether the company currently plans to incorporate such improvements in the vehicles. The agency reviewed the technological feasibility of any changes and their economic practicability.

NHTSA interprets "technological feasibility" as meaning technology which would be available to Mosler for use on its 2008 through 2010 model year automobiles. The areas examined for technologically feasible improvements were weight reduction, aerodynamic improvements, engine improvements, drive line improvements, and reduced rolling resistance.

The agency interprets "economic practicability" for the purpose of petitions filed under 49 CFR part 525 as meaning the financial capability of the manufacturer to improve its average fuel economy by incorporating technologically feasible changes to its 2008 through 2010 model year automobiles. In assuming that capability, the agency has always considered market demand as an implicit part of the concept of economic practicability.

In accordance with the concerns of economic practicability, NHTSA has considered only those potential fuel economy improvements that would be compatible with the basic design concepts of Mosler's automobiles. Since NHTSA assumes that Mosler will

continue to build high performance cars, design changes that would remove items traditionally offered on these types of vehicles were not considered. Such changes to the basic design would be economically impracticable since they could significantly reduce the demand for these automobiles, thereby reducing sales and causing significant economic injury to the low volume manufacturer.

Technology for Fuel Economy Improvement

Mosler states that the requested fuel economy value of 22.1 mpg² represents the best possible CAFE that Mosler can achieve for the 2008 through 2010 model years. Mosler argues that, as racing-derived sports cars, its vehicles by their nature cannot maximize fuel economy at the expense of speed or power. Also, Mosler lags in being able to apply the latest developments in fuel efficiency technology because suppliers generally provide components and technology to small manufacturers only after supplying large manufacturers. Mosler argues that it cannot achieve substantial fuel economy gains from changes to its chassis or body design.

Mosler is producing innovative sports cars using state-of-the-art design. Mosler's current vehicle, the MT900, is ultra lightweight. The double-wishbone suspension is unique. For its primary structure, the MT900 utilizes a high tech, high strength, lightweight advanced composite over an aluminum honeycomb monocoque chassis. The MT900 is aerodynamic, with a drag coefficient of 0.34cd. The weight of the vehicle is only 2440 pounds. Since the chassis/body configuration is small, aerodynamic, and lightweight, further fuel economy improvements through changes to the chassis and body appear to be limited.

Mosler also stated that it is unable to change the supplier of the vehicle's Corvette V8 engine. Mosler stated that it has revised the gear ratios in the transmission so that the average operating engine RPM is 15% lower, improving gas mileage compared to the 2004 model year vehicle. Mosler also stated that the fuel economy label values of the vehicle (15 mpg city and 22 mpg highway) are equal to or better than those of similar vehicles, e.g., Cadillac XLR (15/22), MB 550 SL (14/22), Lamborghini Gallardo (12/18), Ferrari F 430 (13/17), and Aston Martin V8 (13/19).

² This number is .05 mpg less than forecasted in order to allow for potential development and production variation. NHTSA also notes that fuel economy compliance is determined in tenths of mpg.

¹ As explained later in this notice, Mosler's production of any vehicles is contingent upon the grant of a pending petition for exemption under 49 CFR part 555.

Model Mix

Mosler has no opportunity to improve its fuel economy by changing its fleet mix since it has stated that it will only export one model to the U.S. during the years for which this petition was filed.

Effect of Other Motor Vehicle Standards of the Government

The need to comply with the FMVSS and other regulations are anticipated to have an adverse effect on the fuel economy of Mosler's vehicles and on Mosler's ability to improve its fuel economy. These standards include FMVSS No. 208, *Occupant Crash Protection*, and FMVSS No. 214, *Side Impact Protection*, and upcoming amendments to FMVSS No. 216, *Roof Crush Resistance*. These standards may reduce achievable fuel economy values, since they result in increased vehicle weight. Mosler's projection reflected the impact of these standards. Mosler is a small company and engineering resources are limited, limiting the amount of resources Mosler can apply to comply with both the mandatory standards and the fuel economy requirements.

Additionally, as a small volume manufacturer, the more stringent California evaporative emission standards and the U.S. EPA Tier 2–LEV II exhaust standards will be applicable. A portion of Mosler's limited engineering resources will have to be expended to comply with these more stringent standards.

The Need of the United States To Conserve Energy

The agency recognizes there is a need to conserve energy, to promote energy security, and to improve balance of payments. However, as stated above, NHTSA has tentatively determined that it is not technologically feasible or economically practicable for Mosler to achieve an average fuel economy in model years 2008 through 2010 above the levels set forth in this proposed decision. Granting an exemption to Mosler and setting an alternative standard at that level would not result in an increase in fuel consumption since Mosler cannot attain the generally applicable standards. Nevertheless, the agency estimates that the additional fuel that could be consumed by operating the MYs 2008 through 2010 fleets of Mosler's vehicles for the expected lifetime of these vehicles at the CAFE of 22.1 mpg (compared to a 27.5 mpg fleet) is 10,315 barrels of fuel, or about 1.09 barrels per day for the entire fleet of

Mosler vehicles.³ This is insignificant compared to the fuel used daily by the entire motor vehicle fleet, which amounts to over 9 million barrels per day for motor vehicles in the United States (USDOE/EIA, Monthly Energy Review, September 2007, Table 5.13c).⁴

Maximum Feasible Average Fuel Economy for Mosler

The agency has tentatively concluded that it would not be technologically feasible and economically practicable for Mosler to improve the fuel economy of its MY 2008 through 2010 fleets above an average of 22.1 mpg for those years, that Federal automobile standards would not adversely affect achievable fuel economy beyond the amount already factored into Mosler's projections, and that the national effort to conserve energy would not be affected by granting the requested exemption and establishing an alternative standard.

Consequently, the agency tentatively concludes that the maximum feasible average fuel economy for Mosler should be 22.1 mpg for MYs 2008, 2009 and 2010.

As discussed above, 49 U.S.C. chapter 329 permits NHTSA to establish an alternative average fuel economy standard applicable to exempted manufacturers in one of three ways: (1) A separate standard may be established for each exempted manufacturer; (2) classes, based on design, size, price or other factors, may be established for the automobiles of exempted manufacturers, with a separate fuel economy standard applicable to each class; or (3) a single standard may be established for all exempted manufacturers (49 U.S.C. 32902(d)(2)). The agency tentatively concludes that it would be appropriate to establish a separate standard for Mosler.

While the agency has the option of establishing a single standard for all exempted manufacturers, we note that previous exemptions have been granted to manufacturers of high-performance cars, luxury cars and specialized vehicles for the transportation of

persons with physical impairments. The agency's experience in establishing exemptions indicates that selection of a single standard would be inappropriate. Such a standard would have little impact on energy conservation while doing little to ease the burdens faced by small manufacturers which cannot meet the fuel economy standards applicable to larger manufacturers. Similarly, the agency is not proposing to establish alternative standards based on different classes of vehicles. Again, the agency's experience has been that vehicles manufactured by low volume manufacturers may differ widely in size, price, design or other factors. Based on the information available at this time, we do not believe it would be appropriate to establish class-based alternative standards.

Regulatory Impact Analyses

NHTSA has analyzed this decision and determined that neither Executive Order 12866 nor the Department of Transportation's regulatory policies and procedures apply. Under Executive Order 12866, the decision would not establish a rule, which is defined in the Executive Order as "an agency statement of general applicability and future effect." The decision is not generally applicable, since it would apply only to Mosler, as discussed in this notice. Under DOT regulatory policies and procedures, the decision would not be a "significant regulation." If Departmental policies and procedures were applicable, the agency would have determined that this decision is not significant. The principal impact of the decision to exempt Mosler from the 27.5 mpg standard is that they would not be required to pay civil penalties if its maximum feasible average fuel economy (22.1 mpg) were achieved. Since this tentative decision sets an alternative standard at the level determined to be the maximum feasible levels for Mosler for MYs 2008 through 2010, no fuel would be saved by establishing a higher alternative standard.

NHTSA found in the Section on "The Need of the United States To Conserve Energy" that because of the small size of the Mosler fleet, that incremental usage of gasoline by Mosler's customers would not affect the United States' need to conserve gasoline. Mosler is planning to produce 150 vehicles for the U.S. market by MY 2010. Given that over 7,602,000 passenger cars were produced for sale in the U.S. market in MY 2006,⁵ Mosler's production of these vehicles would amount to .001% of the U.S.

³ To estimate the additional fuel that could be consumed, NHTSA uses estimates of the average number of vehicles miles traveled (VMT) for the entire vehicle fleet over the lifetime of the vehicle (26 years). We then divide this figure by 22.1 mpg and 27.5 mpg, and the difference between the two amounts is the additional fuel usage per vehicle over its lifetime at the reduced CAFE standard. The total additional fuel usage figure for the Mosler fleet is determined by multiplying this figure by the estimated sales figures provided by Mosler. It is likely that this is actually an overestimate of the additional fuel that will be consumed, as these vehicles will likely have a VMT below the fleet average.

⁴ <http://www.eia.doe.gov/emeu/mer/>

⁵ "Summary of Fuel Economy Performance, March 2007" (Docket NHTSA–2007–28040–1).

market. Thus, there are not any impacts for the public at large.

The agency has also considered the environmental implications of this decision in accordance with the National Environmental Policy Act (NEPA) and determined that it would not significantly affect the quality of the human environment. Regardless of the fuel economy of the exempted vehicles, they must pass EPA emissions standards which measure the amount of regulated pollutant emissions per mile traveled. The incremental carbon dioxide emissions that might result from the proposed alternative standards would have a de minimus effect on air quality, due to the extremely small size of the Mosler vehicle fleet and the difference in miles per gallon required by the proposed alternative standards. Further, since the exempted passenger automobiles cannot achieve better fuel economy than provided, the decision does not affect the amount of fuel used or the amount of carbon dioxide emitted.

Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete

Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78), or at <http://www.regulations.gov>.

List of Subjects in 49 CFR Part 531

Energy conservation, Gasoline, Imports, Motor vehicles.

In consideration of the foregoing, 49 CFR part 531 is proposed to be amended to read as follows:

PART 531—[AMENDED]

1. The authority citation for part 531 continues to read as follows:

Authority: 49 U.S.C. 32902, delegation of authority at 49 CFR 1.50.

2. Section 531.5 is amended by adding paragraph (b)(15) to read as follows:

§ 531.5 Fuel economy standards.

* * * * *

(b) * * *

* * * * *

(16) Mosler Automotive.

AVERAGE FUEL ECONOMY STANDARD

Model year	Miles per gallon
2008	22.1
2009	22.1
2010	22.1

Issued on: June 10, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E8–13505 Filed 6–16–08; 8:45 am]

BILLING CODE 4910–59–P

Notices

Federal Register

Vol. 73, No. 117

Tuesday, June 17, 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

June 11, 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: 7 CFR part 54—Meats, Prepared Meats, and Meat Products (Grading, Certification, and Standards) and 7 CFR part 62—Quality Systems Verification Programs (QSV).

OMB Control Number: 0581-0124.

Summary of Collection: The Agricultural Marketing Act of 1946, as amended, authorizes the Secretary of Agriculture to provide consumers with voluntary Federal meat grading and certification services that facilitate the marketing of meat and meat products. This is accomplished by providing meat and meat products that are uniform in quality. The Meat Grading and Certification (MGC) Branch provides these services under the authority of 7 CFR part 54—Meats, Prepared Meats, and Meat Products (Grading, Certification, and Standards). The Agricultural Marketing Service (AMS) will collect information using forms LS-313 and LS-315.

The Quality Systems Verification Programs are a collection of voluntary, audit-based, user-fee programs that allow applicants to have program documentation and program processes assessed by AMS auditors and other USDA officials. The QSV are user-fees based on the approved hourly rate established under 7 CFR part 62.

Need and Use of the Information: The information AMS collects on LS-313, "Application for Service," and LS-315, "Application for Commitment Grading or Certification Service" will enable the Agency to identify the responsible authorities in establishments requesting services and to initiate billing and collection accounts. A signed LS-313 or LS-315 form serves as a legal agreement between USDA users of the services, assures payment for services provided, and constitutes authorization for any employee of AMS to enter the establishment for the purpose of performing official functions under the regulations. Without a properly signed and approved form, AMS officials would not have the authority to enter the premises to provide grading and/or certification services.

Description of Respondents: Business or other for-profit; Farms.

Number of Respondents: 311.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,352.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8-13546 Filed 6-16-08; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 11, 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 Business-Cooperative Service

Title: 7 CFR Part 1980–E, Business and Industry Loan Program.

OMB Control Number: 0570–0014.

Summary of Collection: Section 310B of the Consolidated Farm and Rural Development Act (Con Act), legislated in 1972 the Business and Industry (B&I) program. The purpose of the program is to improve, develop, or finance businesses, industries, and employment and improve the economic and environmental climate in rural communities, including pollution abatement and control. This purpose is achieved through bolstering the existing private credit structure by making direct loans, thereby providing lasting community benefits. The B&I program is administered by the Agency through Rural Development State and sub-State Offices serving the State.

7 CFR part 1980–E, in conjunction with 7 CFR part 1942–A, and other regulations, is currently used only for making B&I Direct Loans. 7 CFR part 1951–E is used for servicing B&I Direct and Community Facility loans. All reporting and recordkeeping burden estimates for making and servicing B&I Guaranteed Loans have been moved to the B&I Guaranteed Loan Program regulations, 7 CFR parts 4279–A and B and 4287–B. Consequently, only a fraction of the total reporting and recordkeeping burden for making and servicing B&I Direct Loans is reflected in this document.

Need and Use of the Information: RD will collect the minimum information needed from loan applicants and commercial lenders to make determinations regarding program eligibility, the current financial condition of a business and loan security as required by the Con Act. The majority of the information is collected only once and the agency monitors the progress of the business through the analysis of annual borrower financial statements and visits to the borrower.

Description of Respondents: Individuals or households; State, Local or Tribal Government.

Number of Respondents: 152.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 835.

Rural Business Service

Title: 7 CFR 1951–R, Rural Development Loan Servicing.

OMB Control Number: 0570–0015.

Summary of Collection: The Rural Development (RD) Loan Servicing was

legislated in 1985 under Section 1323 of the Food and Security Act of 1985. This action is needed to implement the provision of Section 407 of the Health and Human Services Act of 1986, which amended Section 1323 of the Food and Security Act of 1985. 7 CFR part 1951, Subpart R contains regulations for servicing and liquidating existing loans previously approved and administered by the U.S. Department of Health and Human Services (HHS) under 45 CFR part 1076 and transferred from HHS to the Department of Agriculture. This subpart contains regulations for servicing and liquidating loans made by RD, successor to the Farmers Home Administration under the Intermediary Relending Program to eligible intermediaries and applies to ultimate recipients and other involved parties.

Need and Use of the Information: The Intermediary will provide RD information from, i.e. assets and liabilities, income statement and a summary of its lending and guarantee program. The required financial information provided by the Intermediary is vital to RD for the Agency to make sound credit and financial analysis decisions and monitor the program.

Description of Respondents: Not-for-profit institutions; business or other for-profit.

Number of Respondents: 420.

Frequency of Responses: Reporting: On occasion; quarterly; semi-annually; annually.

Total Burden Hours: 11,235.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–13548 Filed 6–16–08; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

June 12, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be

collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

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

Food and Nutrition Service

Title: National Universal Product Code (NUPC) Database.

OMB Control Number: 0584–NEW.

Summary of Collection: The Food and Nutrition Service (FNS) is authorized by the Child Nutrition and WIC Reauthorization Act of 2004–S.2507 to establish a “National Universal Product Code (NUPC) database for use by all State agencies carrying out the program.” The purpose of this new data collection process is to reduce the current burden on both manufacturers and WIC State agencies. In response to this mandate, FNS has developed a NUPC database to serve as an electronic national repository of Women, Infant, and Children (WIC) eligible foods that have been authorized or approved by FNS and/or WIC State agencies.

Need and Use of the Information: The NUPC database will help streamline the handling of product information for State agencies, retailer and manufacturers; allow more consistent oversight of WIC approved items; reduce the electronic processing needed by State agencies; standardize the way retailers obtain WIC UPC information; and make it easier for State agencies to begin using EBT processing by reducing the need to visit food retailer locations to gather UPC and other product information. The NUPC database will

allow manufacturers to submit product details to the central database for consideration by participating WIC State agencies when they approve products for use.

Description of Respondents: State, Local, or Tribal Government; Business or other for-profit.

Number of Respondents: 1,040.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1,938.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. E8-13610 Filed 6-16-08; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Docket No. AMS-FV-08-0043; FV08-996-1 N]

Peanut Standards Board

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice; request for nominations.

SUMMARY: The Farm Security and Rural Investment Act of 2002 requires the Secretary of Agriculture to establish a Peanut Standards Board (Board) for the purpose of advising the Secretary on quality and handling standards for domestically produced and imported peanuts. The initial Board was appointed by the Secretary and announced on December 5, 2002. USDA seeks nominations for individuals to be considered for selection as Board members for terms of office ending June 30, 2011. Selected nominees sought by this action would replace those six producer and industry representatives who are currently serving for the term of office that ends June 30, 2008. The Board consists of 18 members representing producers and industry representatives.

DATES: Written nominations must be received on or before July 17, 2008.

ADDRESSES: Nominations should be sent to Dawana J. Clark, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, Unit 155, 4700 River Road, Riverdale, MD 20737; Telephone: (301) 734-5243; Fax: (301) 734-5275; E-mail: Dawana.Clark@usda.gov.

SUPPLEMENTARY INFORMATION: Section 1308 of the Farm Security and Rural Investment Act of 2002 (Farm Bill) requires the Secretary of Agriculture to establish a Peanut Standards Board (Board) for the purpose of advising the

Secretary regarding the establishment of quality and handling standards for all domestic and imported peanuts marketed in the United States. The Farm Bill requires the Secretary to consult with the Board before the Secretary establishes or changes quality and handling standards for peanuts.

The Farm Bill provides that the Board consist of 18 members, with three producers and three industry representatives from the States specified in each of the following producing regions: (a) Southeast (Alabama, Georgia, and Florida); (b) Southwest (Texas, Oklahoma, and New Mexico); and (c) Virginia/Carolina (Virginia and North Carolina).

For the initial appointments, the Farm Bill required the Secretary to stagger the terms of the members so that: (a) One producer member and peanut industry member from each peanut producing region serves a one-year term; (b) one producer member and peanut industry member from each peanut producing region serves a two-year term; and (c) one producer member and peanut industry member from each peanut producing region serves a three-year term. The term "peanut industry representatives" includes, but is not limited to, representatives of shellers, manufacturers, buying points, marketing associations and marketing cooperatives. The Farm Bill exempted the appointment of the Board from the requirements of the Federal Advisory Committee Act. The initial Board was appointed by the Secretary and announced on December 5, 2002.

USDA invites those individuals, organizations, and groups affiliated with the categories listed above to nominate individuals for membership on the Board. Nominees sought by this action would replace one producer and one industry member from each peanut producing region who served for the term of office that ends June 30, 2008. New members would serve for a 3-year term of office ending June 30, 2011.

Nominees should complete a Peanut Standards Board Background Information form and submit it to Mrs. Clark. Copies of this form may be obtained at the internet site: www.ams.usda.gov/fv (below the "See Also" section, select "More" then select "Peanut Quality Standards" and below "News" select Background Information Form), or from Mrs. Clark. USDA seeks a diverse group of members representing the peanut industry.

Equal opportunity practices will be followed in all appointments to the Board in accordance with USDA policies. To ensure that the recommendations of the Board have

taken into account the needs of the diverse groups within the peanut industry, membership shall include, to the extent practicable, individuals with demonstrated abilities to represent minorities, women, persons with disabilities, and limited resource agriculture producers.

Authority: 7 U.S.C. 7958.

Dated: June 11, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8-13581 Filed 6-16-08; 8:45 am]

BILLING CODE 3410-02-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: Deep Seabed Mining Regulations for Exploration Licenses.

Form Number(s): None.

OMB Approval Number: 0648-0145.

Type of Request: Regular submission.

Burden Hours: 60.

Number of Respondents: 1.

Average Hours per Response: Annual reports, 20 hours; license extensions, 30 hours (annualized to 10 hours).

Needs and Uses: The Deep Seabed Hard Mineral Resources Act requires applicants for an exploration license to submit information for NOAA to make a determination as to the applicants' eligibility to meet the provisions of the legislation. Information will be used to determine the financial, environmental and technological eligibility of the applicant to meet the requirements of the Act to conduct exploration activities. The licensees are required to submit annual reports, as well as license extensions when applicable.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and on occasion.

Respondent's Obligation: Mandatory.

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: June 11, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8-13439 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-JS-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Galaxy Aviation Trade Company Ltd.; Hooshang Seddigh; Hamid Shakeri Hendi; Hossein Jahan Peyma; Iran Air; Ankair

In the Matter of:

Galaxy Aviation Trade Company Ltd., 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK, NW2 2PJ;

Hooshang Seddigh, 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK, NW2 2PJ;

Hamid Shakeri Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran;

Hossein Jahan Peyma, 2/1 Makran Cross, Heravi Square, Moghan Ave, Pasdaran Cross, Tehran, Iran;

Iran Air, Second Floor, No. 23 Nafisi Avenue, Ekbatan, Tehran, Iran;

Ankair, Yesilkoy Asfalti Istanbul No. 13/4, Florya, Istanbul, Turkey TR-34810; Respondents.

Order Temporarily Denying Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations ("EAR"),¹ the Bureau of Industry and Security ("BIS"), U.S. Department of Commerce, through its Office of Export Enforcement ("OEE"), has requested that I issue an Order temporarily denying, for a period of 180 days, the export privileges under the EAR of:

1. Galaxy Aviation Trade Company LTD, 15 Moreland Court, Lyndale

Avenue, Finchley Road, London, UK, NW2 2PJ.

2. Hooshang Seddigh, 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK, NW2 2PJ.

3. Hamid Shakeri Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran.

4. Hossein Jahan Peyma, 2/1 Markran Cross, Heravi Square, Moghan Ave, Pasdaran Cross, Tehran, Iran.

5. Iran Air, Second Floor, No. 23, Nafisi Avenue, Ekbatan, Tehran, Iran. BIS also has requested that I issue a non-standard Order temporarily denying, for a period of 180 days, certain export privileges under the EAR of:

6. Ankair, Yesilkoy Asfalti Istanbul No. 13/4, Florya, Istanbul, Turkey TR-34810.

Specifically, with regard to Ankair, BIS has requested that I temporarily deny, for a period of 180 days, the export privileges of Ankair relating to a Boeing 747 that has the manufacturer serial number 24134, and current tail number TC-AKZ ("the Boeing 747").

In its request, BIS has presented evidence that Galaxy Aviation Trade Company Ltd. ("Galaxy") is preparing to purchase immediately from Ankair, the Boeing 747, currently located in Turkey, for immediate re-export to Iran, and specifically to Iran Air in Tehran, Iran, without the U.S. Government authorization required by Section 746.7 of the EAR. Additional evidence provided through corporate registration information shows that Hooshang Seddigh is a director and principal shareholder of Galaxy. Hamid Shakeri Hendi also is a principal shareholder of Galaxy and has a listed address in the same building as Iran Air's headquarters in Tehran, Iran. Another Galaxy principal shareholder, Hossein Jahan Peyma, also lists a Tehran, Iran address. Open source information, including aviation Web sites, show the Boeing 747 at issue is registered in Turkey and evidence presented by OEE indicates that Galaxy is seeking to purchase the Boeing 747 from Ankair in the immediate future.

I find that the evidence presented by BIS demonstrates that a violation of the Regulations is imminent in both time and degree of likelihood. As such, a TDO is needed to give notice to persons and companies in the United States and abroad that they should cease dealing with the Respondents in export transactions involving items subject to the EAR. Such a TDO is consistent with the public interest to preclude future violations of the EAR.

Accordingly, I find that a TDO naming Galaxy Aviation Trade

Company Ltd., Hooshang Seddigh, Hamid Shakeri Hendi, Hossein Jahan Peyma, and Iran Air is necessary, in the public interest, to prevent an imminent violation of the EAR. In addition, I find that a non-standard TDO naming Ankair is necessary in the public interest to prevent an imminent violation of the EAR involving the Boeing 747.

This Order is being issued on an *ex parte* basis without a hearing based upon BIS's showing of an imminent violation.

It is therefore ordered:

First, that, Galaxy Aviation Trade Company Ltd., 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK, NW2 2PJ; Hooshang Seddigh, 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK, NW2 2PJ; Hamid Shakeri Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran; Hossein Jahan Peyma, 2/1 Markran Cross, Heravi Square, Moghan Ave, Pasdaran Cross, Tehran, Iran; Iran Air, Second Floor, No. 23, Nafisi Avenue, Ekbatan, Tehran, Iran (each a "Denied Person" and collectively the "Denied Persons") may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Export Administration Regulations ("EAR"), or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR.

Second, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of any Denied Person any item subject to the EAR;

B. Take any action that facilitates the acquisition or attempted acquisition by any Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support

¹ The EAR is currently codified at 15 CFR Parts 730-774 (2008). The EAR are issued under the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401-2420 (2000)) ("EAA"). Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which has been extended by successive presidential notices, the most recent being that of August 15, 2007 (72 FR 46137 (August 16, 2007)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706 (2000)) ("IEEPA").

activities related to a transaction whereby any Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from any Denied Person of any item subject to the EAR that has been exported from the United States;

D. Obtain from any Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by any Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by any Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that, Ankair, Yesilkoy Asfalti Istanbul No. 13/4, Florya, Istanbul, Turkey TR 34810, may not, directly or indirectly, participate in any way in any transaction involving the Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ) including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document involving Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ);

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ);

C. Benefiting in any way from any transaction involving Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ)

Fourth, that no person may, directly or indirectly, do any of the following:

A. Export or re-export on behalf of Ankair the Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ); or

B. Take any action to acquire from, lease, or otherwise facilitate the acquisition or attempted acquisition from Ankair of the Boeing 747 (manufacturer serial number 24134, and current tail number TC-AKZ).

Fifth, that after notice and opportunity for comment as provided in section 766.23 of the EAR, any other

person, firm, corporation, or business organization related to any of the Respondents by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Sixth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

In accordance with the provisions of Section 766.24(e) of the EAR, the Respondents may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202-4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. The Respondents may oppose a request to renew this Order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be served on the Respondents and shall be published in the **Federal Register**.

This Order is effective upon issuance and shall remain in effect for 180 days.

Entered this 6th day of June 2008.

Darryl W. Jackson,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. E8-13571 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-DT-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Proposed Information Collection; Comment Request; Multipurpose Application

AGENCY: Bureau of Industry and Security.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or August 18, 2008.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument and instructions should be directed to Larry Hall, BIS ICB Liaison, (202) 482-4896, lhall@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This collection is required in compliance with U.S. export regulations. The information furnished by U.S. exporters provides the basis for decisions to grant licenses for export, reexport, and classifications of commodities, goods and technologies that are controlled for reasons of national security and foreign policy.

II. Method of Collection

Submitted electronically and on paper.

III. Data

OMB Control Number: 0694-0088.

Form Number(s): BIS-748P.

Type of Review: Business or other for-profit organizations.

Estimated Number of Respondents: 20,489.

Estimated Time Per Response: 30 to 90 minutes.

Estimated Total Annual Burden

Hours: 15,359.

Estimated Total Annual Cost to Public: \$103,747.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: June 11, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief
Information Officer.

[FR Doc. E8-13503 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-831]

Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review

AGENCY: Import Administration,
International Trade Administration,
Department of Commerce.

EFFECTIVE DATE: June 17, 2008.

FOR FURTHER INFORMATION CONTACT:
Matthew Renkey, AD/CVD Operations,
Office 9, Import Administration,
International Trade Administration,
U.S. Department of Commerce, 14th
Street and Constitution Avenue, NW,
Washington, DC 20230; telephone: (202)
482-2312.

SUPPLEMENTARY INFORMATION:

Case History

On December 10, 2007, the Department of Commerce (the "Department") published in the **Federal Register** the preliminary results of the administrative review of the antidumping duty order on fresh garlic from the People's Republic of China ("PRC"). See *Fresh Garlic from the People's Republic of China: Notice of Preliminary Results and Preliminary Partial Rescission of the Twelfth Administrative Review*, 72 FR 69652 (December 10, 2007) ("Preliminary Results"). Since the *Preliminary Results*, the following events have occurred.

On January 9, 2008, The Fresh Garlic Producers Association; Christopher Ranch L.L.C.; The Garlic Company; Valley Garlic; and Vessey and Company, Inc. ("Petitioners"), Jinxiang Dong Yun Freezing Storage Co., Ltd. ("Dong Yun"), Shanghai LJ International Trading Co., Ltd. ("Shanghai LJ"), and Qingdao Saturn International Trade Co., Ltd. ("Qingdao Saturn") submitted case briefs. After reviewing the case briefs, the Department instructed Dong Yun and Shanghai LJ to re-file their case briefs because they contained untimely new factual information. Dong Yun and Shanghai LJ filed the final versions of their redacted case briefs on January 16, 2008. Also on January 16, 2008, the Petitioners, Dong Yun, and Shanghai LJ submitted rebuttal briefs. On January 23,

2008, the Department extended the time limit for completion of the final results of this administrative review by 60 days. See *Fresh Garlic from the People's Republic of China: Extension of Time Limit for Final Results of the Twelfth Administrative Review*, 73 FR 16640 (March 28, 2008). On April 10, 2008, the Department conducted a public hearing, and counsel for the Petitioners, Dong Yun, and Qingdao Saturn participated.

Scope Of The Order

The products covered by this Order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of this order does not include the following: (a) garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the Order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to CBP to that effect.

Analysis Of Comments Received

All issues raised in the case and rebuttal briefs by parties to this proceeding and to which we have responded are listed in the Appendix to this notice and addressed in the Issues and Decision Memorandum ("Final Decision Memo"), which is hereby adopted by this notice. Parties can find a complete discussion of the issues raised in this administrative review and the corresponding recommendations in this public memorandum which is on

file in the Central Records Unit ("CRU"), Room 1117 of the main Department building. In addition, a copy of the *Final Decision Memo* can be accessed directly on our website at <http://www.ia.ita.doc.gov/>. The paper copy and electronic version of the *Final Decision Memo* are identical in content.

Changes Since The Preliminary Results

Based on a review of the record as well as comments received from parties regarding our *Preliminary Results*, we have made revisions to the margin calculations for Dong Yun and Shanghai LJ for the final results. For all changes to the calculations for Dong Yun and Shanghai LJ, see the *Final Decision Memo* and the company-specific analysis memoranda.

Adverse Facts Available

Section 776(a)(2) of the Tariff Act of 1930, as amended ("the Act") provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Furthermore, section 776(b) of the Act provides that, if the Department finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the Department may use information that is adverse to the interests of that party as facts otherwise available. Adverse inferences are appropriate "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action ("SAA") accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Session at 870 (1994). An adverse inference may include reliance on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record. See section 776(b) of the Act.

In the *Preliminary Results*, the Department assigned a rate based on the use of total adverse facts available ("AFA") to the PRC-Wide Entity, including Huaiyang Hongda Dehydrated Vegetable Company ("Huaiyang

Hongda”), and 19 other companies¹, because they failed either to respond to the Department’s two quantity and value questionnaires, or in the case of Huaiyang Hongda, to the Department’s two supplemental questionnaires. *See Preliminary Results*, 73 FR at 69656–57. As no parties provided comments on these issues, we continue to find it appropriate to apply total AFA to the PRC–Wide Entity, including Huaiyang Hongda, and the 19 other companies.

Voluntary Respondent

In the *Preliminary Results*, the Department did not calculate an individual margin for Qingdao Saturn, which requested to be considered as a voluntary respondent. *See Preliminary Results*, 73 FR at 69657–58. For these final results, the Department continues to treat Qingdao Saturn as a separate rate respondent, rather than a voluntary respondent, and is not calculating an individual margin for it. For a full discussion of this issue, *see* Comment 6 of the *Final Decision Memo*.

Final Partial Rescission

In the *Preliminary Results*, the Department preliminarily rescinded this review with respect to the following three companies: Golden Bridge International, Inc. (“Golden Bridge”), Shanghai McCormick Foods Co., Ltd. (“Shanghai McCormick”), and Zhangqiu Qingyuan Vegetable Co., Ltd. (“Zhangqiu Qingyuan”).² Golden Bridge, Shanghai McCormick, and Zhangqiu Qingyuan reported that they had no shipments of subject merchandise to the United States during the POR. *See Preliminary Results*, 73 FR at 69654. As we stated in the

Preliminary Results, our examination of shipment data from CBP for the three no shipment companies confirmed that there were no entries of subject merchandise from them during the POR. *See Preliminary Results* 73 FR at 69654. We also received no comments or information to change our preliminary rescission. Therefore, we are rescinding this administrative review with respect to all three aforementioned companies.

Changes Since The Preliminary Results

We have revised the calculation of the garlic bulb surrogate value. In the *Preliminary Results*, the Department used an average of Grade A and Super–A (from May 2006 to January 2007) prices in its calculations. For these final results, however, using Respondents’ size data on the record (and the July 2007 Foreign Market Research Report’s clarification on the size ranges of Grade A and Super–A), the Department calculated a surrogate value based on the most appropriate Bulletin data. We have concluded that a more accurate analysis would be for the Department to use only Grade Super–A values for all Respondents that reported bulb sizes in ranges of 55 mm and above because bulb sizes that are 55 mm and above are typically classified as Grade Super–A. However, we have also concluded that it is appropriate to average Grade A and Super–A values for all Respondents that reported bulb sizes in ranges below 55 mm because both A and Super–A reflect bulb sizes greater than 40 mm. Moreover, for the final results, we are also only using garlic bulb price data that are contemporaneous with the POR. For a complete explanation of the Department’s analysis, *see the Issues and Decision Memo* at Comment 2. In addition, we are using the updated NME wage rate for the PRC, *see the Issues and Decision Memo* at Comment 4. Lastly, we are calculating the separate rate based on the simple average of the two mandatory respondents because using a weighted average risks disclosure of business proprietary information. *See, e.g., Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31966 (June 5, 2008).

Final Results Of Review

The weighted–average dumping margins for the POR are as follows:

FRESH GARLIC FROM THE PRC

Manufacturer/Exporter	Weighted–Average Margin (Percent)
Jinxiang Dong Yun Freezing Storage Co., Ltd.	19.97
Shanghai LJ International Trading Co., Ltd.	31.15
Qufu Dongbao Import & Export Trade Co., Ltd.	25.56
Weifang Shennong Foodstuff Co., Ltd.	25.56
Jinxiang Shanyang Freezing Storage Co., Ltd.	25.56
Qingdao Xintianfeng Foods	25.56
Shandong Longtai Fruits and Vegetables Co., Ltd.	25.56
Jining Trans–High Trading Co., Ltd.	25.56
Shenzhen Fanhui Import & Export Co., Ltd.	25.56
Taian Ziyang Food Co., Ltd.	25.56
Anqiu Friend Food Co., Ltd.	25.56
Shanghai Ever Rich Trade Company	25.56
Heze Ever–Best International Trade Co., Ltd.	25.56
Qingdao Saturn International Trade Co., Ltd.	25.56
Sunny Import & Export Co., Ltd.	25.56
Henan Weite Industrial Co., Ltd.	25.56
Jinan Farmlady Trading Co., Ltd.	25.56
PRC–Wide Entity ³	376.67

³The PRC–Wide entity includes Huaiyang Hongda, APS Qingdao, Fujian Meitan, Hongchang, Jining Haijiang, Jining Solar, Jinxian County Huaguang, Laiwu Hongyang, Pizhou Guangda, Qingdao Bedow, Qingdao Camel, Qingdao H&T, Qingdao Potenza, Qingdao Shiboliang, Rizhao Xingda, Shandong Chengshun, Shandong Dongsheng, Shandong Garlic, Shanghai Ba–Shi, and T&S.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of these final results of review. For assessment purposes, where possible, we calculated importer–specific assessment rates for subject merchandise from the PRC via *ad valorem* duty assessment rates based on the ratio of the total amount of the dumping margins calculated for the examined sales to the total entered value of those same sales. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

Cash Deposit Requirements

The following cash–deposit requirements will be effective upon publication of the final results of this administrative review for all shipments

¹ APS Qingdao; Fujian Meitan Import & Export Xiamen Corporation (“Fujian Meitan”); Hongchang Fruits & Vegetable Products (“Hongchang”); Jining Haijiang Trading Co., Ltd. (“Jining Haijiang”); Jining Solar Summit Trade Co., Ltd. (“Jining Solar”); Jinxian County Huaguang Food Import & Export Co., Ltd. (“Jinxian County Huaguang”); Laiwu Hongyang Trading Company Ltd. (“Laiwu Hongyang”); Pizhou Guangda Import and Export Co., Ltd. (“Pizhou Guangda”); Qingdao Bedow Foodstuffs Co., Ltd. (“Qingdao Bedow”); Qingdao Camel Trading Co., Ltd. (“Qingdao Camel”); Qingdao H&T Food Co., Ltd. (“Qingdao H&T”); Qingdao Potenza Imp & Exp Co., Ltd. (“Qingdao Potenza”); Qingdao Shiboliang Food Co., Ltd. (“Qingdao Shiboliang”); Rizhao Xingda Foodstuffs Co., Ltd. (“Rizhao Xingda”); Shandong Chengshun Farm Produce Trading Co., Ltd. (“Shandong Chengshun”); Shandong Dongsheng Eastsun Foods Co., Ltd. (“Shandong Dongsheng”); Shandong Garlic Company (“Shandong Garlic”); Shanghai Ba–Shi Yuexin Logistics Development (“Shanghai Ba–Shi”); T&S International, LLC (“T&S”).

² The review requests for Qingdao Tiantaixing Foods Co., Ltd. (“Qingdao Tiantaixing”), Zhengzhou Harmoni Spice Co., Ltd. (“Zhengzhou Harmoni”) were withdrawn, so in the *Preliminary Results* the Department rescinded the review for these two companies and subsequently issued the appropriate liquidation instructions.

of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for each of the reviewed companies that received a separate rate in this review will be the rate listed in the final results of review (except that if the rate for a particular company is *de minimis*, i.e., less than 0.5 percent, a zero cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, including those companies for which this review has been rescinded, the cash deposit rate will be the PRC-wide rate of 376.67 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Reimbursement Of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties has occurred and the subsequent assessment of doubled antidumping duties.

Administrative Protective Orders

This notice also serves as a reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in

accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: June 9, 2008.

Stephen J. Claeys,

Acting Assistant Secretary for Import Administration.

Appendix I

General Issues:

Comment 1: Intermediate Input Methodology

Comment 2: Garlic Bulb Surrogate Value

- A. Product Specificity
- B. Broad Market Average
- C. Public Availability
- D. Contemporaneity
- E. Tax and Duty Exclusivity

Comment 3: Surrogate Financial Ratios

Comment 4: Labor Surrogate Value

Comment 5: By-product Offset

Company-Specific Issues:

Comment 6: Individual Margin Calculation for Qingdao Saturn

[FR Doc. E8-13632 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-DS-S

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 080609747-8749-01]

Market Development Cooperator Program (MDCP)

AGENCY: International Trade Administration (ITA), Department of Commerce.

ACTION: Notice and request for applications.

SUMMARY: ITA is soliciting projects to strengthen U.S. competitiveness to be conducted by eligible entities for periods of up to three years. Project award periods normally begin between October 1, 2008 and January 1, 2009, but may begin as late as April 1, 2009.

MDCP awards help to underwrite the start-up costs of new competitiveness-strengthening ventures that industry groups are often reluctant to undertake without federal support. MDCP aims to develop, maintain and expand foreign markets for non-agricultural goods and services produced in the United States.

DATES: Proposals must be received by ITA no later than 5 p.m. EDT, Thursday, July 31, 2008. A public meeting to discuss the competition will be held on Tuesday, June 24, 2008, at 2 p.m.

ADDRESSES: Proposals must be submitted to ITA, U.S. Department of Commerce, HCHB Rm. 3215; Washington, DC 20230, or via e-mail to Brad.Hess@mail.doc.gov. The full funding opportunity announcement and

the application kit for this request for applications are available at <http://www.trade.gov/mdcp>, or by contacting Brad Hess at 202-482-2969. The public meeting will be held at the U.S. Department of Commerce, HCHB, 14th & Constitution, NW., Washington, DC in Room B 841-B.

FOR FURTHER INFORMATION CONTACT:

Interested parties who are unable to access information via Internet or who have questions may contact Mr. Brad Hess by mail (see **ADDRESSES**), by phone at 202-482-2969, by fax at 202-482-4462, or via Internet at Brad.Hess@mail.doc.gov.

SUPPLEMENTARY INFORMATION:

Electronic Access: The full funding opportunity announcement for MDCP is available at <http://www.trade.gov/mdcp>.

Funding Availability: Approximately \$600,000 will be available through this announcement for fiscal year 2008. No award will exceed \$250,000. ITA anticipates making a minimum of two awards. Additional awards might be made depending on the amounts requested and the availability of funds.

Statutory Authority: 15 U.S.C. 4723.

CFDA: 11.112, Market Development Cooperator Program.

Eligibility: Trade associations, state departments of trade and their regional associations, and non-profit industry organizations, including organizations such as World Trade Centers, centers for international trade development and small business development centers are eligible to apply for an MDCP award. In cases where no entity described above represents the industry, private industry firms or groups of firms may be eligible to apply for an MDCP award. Such private industry firms or groups of firms must provide in their applications, documentation demonstrating that no entity in the first three categories listed below represents their industry.

Cost Sharing Requirements:

Applicants must contribute two dollars for every federal dollar received. At least 50% of the applicant's cost share must be cash. The remaining percentage of the applicant's cost share may be cash or in kind.

Intergovernmental Review:

Applications under this program are not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

Limitation of Liability: In no event will the Department of Commerce or ITA be responsible for proposal preparation costs if this program fails to receive funding or is cancelled because of other agency priorities. Publication of this announcement does not obligate the Department of Commerce or ITA to

award funds for any specific project or to obligate any available funds.

Evaluation and Selection Procedures: After receiving the applications, ITA will screen each one to determine the applicant's eligibility to receive an award. After receiving all applications, a selection panel composed of at least three ITA managers will review the applications using the evaluation criteria below, score them, and forward a ranked funding recommendation to the Assistant Secretary for Manufacturing and Services. The evaluation criteria scores assigned by the panel determine which applications are recommended for funding. The Assistant Secretary makes the final selection of award winners, justifying any deviation from the selection panel's ranked recommendation by application of the selection factors listed below.

Evaluation Criteria: The selection panel reviews each eligible application based on five evaluation criteria. The evaluation criteria are listed below.

(1) **Potential to Strengthen Competitiveness (20%).** This is the likelihood that a project will result in export initiatives by U.S. firms, particularly small- and medium-sized enterprises.

(2) **Performance Measures (20%).** Applicants must provide quantifiable estimates of export and market share increases, explain how they are derived, and detail the methods they will use to gather and report performance information.

(3) **Partnership and Priorities (20%).** This criterion indicates the degree to which the project initiates or enhances partnership with ITA and the degree to which the proposal furthers or is compatible with ITA's priorities.

(4) **Creativity and Capacity (20%).** Applicants demonstrate creativity, innovation, and realism in the project work plan as well as their institutional capacity to carry out the work plan.

(5) **Budget and Sustainability (20%).** This criterion indicates the reasonableness and effectiveness of the itemized budget for project activities, the amount of the cash match that is readily available, and the probability that the project can be continued on a self-sustained basis after the completion of the award.

The five criteria together constitute the application score. At 20 points per criterion, the total possible score is 100.

Selection Factors: The Assistant Secretary may deviate from the selection panel's ranked recommendation only based on the following factors: (1) The selection panel's written assessments, (2) Degree to which applications satisfy ITA priorities, (3) Geographic

distribution of the proposed awards, (4) Diversity of industry sectors and overseas markets covered by the proposed awards, (5) Diversity of project activities represented by the proposed awards, (6) Avoidance of redundancy and conflicts with the initiatives of other federal agencies, and (7) Availability of funds.

The ITA priorities referred to under Evaluation Criteria (3) and Selection Factor (2) are listed below. ITA is interested in receiving proposals to promote U.S. exports that include, but are not limited to, projects that: (1) Improve the competitiveness of U.S. manufacturing and service industries by addressing impediments to innovation and reducing the cost of doing business in foreign countries; (2) Increase competitiveness of U.S. industries in large markets like China, India, and Brazil by addressing non-tariff barriers, especially those related to standards and intellectual property rights; (3) Help U.S. industry to capitalize on effective global supply chain management strategies; (4) Advance market-based approaches to energy, clean development, and commercialization of nuclear and alternative energy technologies; (5) Facilitate ease of travel to the United States and promote U.S. higher education and training opportunities to non-U.S. entities; (6) Capitalize on trade opportunities resulting from trade agreements; (7) Increase overall export awareness and awareness of ITA programs and services among U.S. companies, by making small- and medium-size enterprises export-ready or by facilitating deal-making; and (8) Support the Administration's broader foreign policy objectives through competitiveness-related initiatives.

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements

The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of February 11, 2008 (73 FR 7697) are applicable to this solicitation.

Paperwork Reduction Act

This document contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA). The use of Standard Forms 424 and 424A, 424B, SF-LLL, and CD-346 has been approved by OMB under the respective control numbers 0348-0043, 0348-0044, 0348-0040, 0348-0046, and 0605-0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a

penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

Executive Order 12866

This notice has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13132 (Federalism)

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

Administrative Procedure Act/Regulatory Flexibility Act

Prior notice and an opportunity for public comments are not required by the Administrative Procedure Act for rules concerning public property, grants, benefits, and contracts (5 U.S.C. section 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. section 601 *et seq.*) are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

Dated: June 11, 2008.

Robert W. Pearson,
Director, Office of Planning, Coordination and Management, Manufacturing and Services, International Trade Administration, Department of Commerce.

[FR Doc. E8-13599 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XI41

Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Survey in the Beaufort Sea, Alaska, Summer 2008

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from PGS Onshore, Inc. (PGS) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to an exploratory three-dimensional (3D) marine seismic survey in the Beaufort Sea, Alaska, utilizing an ocean bottom cable/

transition zone (OBC/TZ) technique in summer 2008. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to PGS to incidentally take, by harassment, small numbers of several species of marine mammals between July and September, 2008, during the aforementioned activity.

DATES: Comments and information must be received no later than July 17, 2008.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is PR1.0648X141@noaa.gov. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (**FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

A copy of the 2006 Minerals Management Service's (MMS) Final Programmatic Environmental Assessment (PEA) and/or the NMFS/MMS Draft Programmatic Environmental Impact Statement (DPEIS) are available on the Internet at: <http://www.mms.gov/alaska/>.

FOR FURTHER INFORMATION CONTACT:

Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289 or Brad Smith, NMFS, Alaska Region, (907) 271–3023.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the

taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible impact” in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On May 9, 2008, NMFS received an application from PGS for the taking, by Level B harassment only, of small numbers of several species of marine mammals incidental to conducting an exploratory 3D marine seismic survey in the Alaskan Beaufort Sea, utilizing an OBC/TZ technique. PGS has been contracted by ENI Petroleum (ENI) to conduct the seismic survey. The proposed survey is scheduled to occur from July to mid-September 2008. Because the proposed survey is weather and ice dependent, the exact dates of the survey cannot be determined at this time. However, the proposed survey would begin as soon as ice and weather conditions allow, possibly as soon as July 1. The survey is expected to last for an estimated 75 days of data acquisition, excluding weather days.

The proposed survey location is in the Nikaitchuq Lease Block (see Figure 1 of

PGS' application), north of Oliktok Point and covering Thetis, Spy, and Leavitt Islands, and would extend to the 5-km (3-mi) state/Federal water boundary line and would not go into Federal waters. The water depth in this area ranges from 0–15 m (0–49 ft), and a third of the project waters are shallower than 3 m (10 ft). The total area covered by source or receiver lines is 304.6 km² (117.6 mi²); since the islands comprise approximately 1.7 km² (0.7 mi²) of this, the total marine area is 303 km² (117 mi²).

The work would be divided into two parts. Data acquisition (use of airguns) outside the barrier islands (Thetis, Spy, and Leavitt Islands) would be performed first and would be completed by August 5. This portion of the work would begin in the east and move toward the west. Data acquisition inside the barrier islands would then be conducted and would be completed by September 15. This portion of the work would also move from east to west. No data acquisition (use of airguns) would be conducted outside the barrier islands after August 5.

Description of Activity

The OBC/TZ survey involves deploying cables from small boats, called DIB boats, to the ocean bottom, forming a pattern consisting of three parallel receiver line cables, each a maximum of 17.3 km (10.7 mi) long and spaced approximately 200 m (656 ft) apart. Hydrophones and geophones attached to the cables are used to detect seismic energy reflected back from rock strata below the ocean bottom. The energy is generated from a submerged acoustic source, called a seismic airgun array, that releases compressed air into the water, creating an acoustic energy pulse directed downward toward the seabed. PGS proposes using two shallow water source vessels for this survey. The source vessels will be used sequentially: one vessel will be active while the other travels to its next position. Both source vessels, *M/V Wiley Gunner* and *M/V Little Joe*, will each be equipped with identical airgun arrays with total air discharge volume of 880 in³. The source has a peak to peak amplitude equal to 31.4 bar-meters, giving a source output of approximately 250 dB. These airgun arrays are expected to operate at a depth of between 0.91 m and 2.29 m (3 ft and 7.5 ft). Data acquisition would also require the following instrumentation (instrumentation specifications are included in Appendix A of PGS' application): seismic recording equipment; line equipment; transducers; energy source output; bathymetry; and positioning survey equipment.

Vessel Descriptions

The marine crew would be configured with the following vessels (vessel specifications are included in Appendix A of PGS' application). Vessel usage is subject to availability; however, vessels of similar dimensions will be used if those listed below are unavailable.

- Two source vessels, the *M/V Wiley Gunner* and the *M/V Little Joe*, which are both 13 m (44 ft) long, 5.8 m (19 ft) wide, and 3.5 m (11.5 ft) tall with a weight of 18 metric tons (20 tons) loaded and a draft of 0.69 m (2.2 ft) with the engines down. These boats are able to maneuver in waters less than 1.2 m (4 ft) deep.

- The recording vessel, *M/V William Bradley*, is a self-propelled barge and has hydraulic gravity spuds that can be lowered in water up to 6 m (20 ft) deep. It would be fitted with a Sercel 408 recording system. The *William Bradley* is 45.7 m (150 ft) long and 11 m (36.1 ft) wide with a draft of 1.23 m (4 ft).

- Up to seven shallow-water cable boats (DIB boats) would be available for the survey. The DIB boats are 12.5 m (41 ft) long and 4.3 m (14 ft) wide and have 0.76 m (2.5 ft) draft. The boats are powered by two, 200-horsepower (HP) diesel Volvo Penta engines. The dry weight of each boat is 4.5 metric tons (5 tons) with a working load of 7.7 metric tons (8.5 tons).

- The supply boat *M/V Katmai Spirit* would be used for crew support and supplying marine vessels during the job. The *Katmai Spirit* has dimensions of 12 m (40 ft) long, 5.5 m (18 ft) wide, and 0.6 m (2 ft) draft.

- The Project Manager/Client boat would be available for use by the Project Manager, the client, or other personnel as needed to perform their tasks. The boat may also be used for crew support and supplying marine vessels as required. The Project Manager/Client boat has dimensions of 7.3 m (24 ft) long, 2.4 m (8 ft) wide, and 0.45 m (1.5 ft) draft. The boat is powered by a 90 HP engine.

- The Mechanic's boat would be used to support maintenance and mechanical support for marine vessels used during the project. The Mechanic's boat has dimensions of 7.9 m (26 ft) long, 2.4 m (8 ft) wide, and 0.45 m (1.5 ft) draft. The boat is powered by twin 90 HP engines.

Seismic Recording Equipment

The seismic recording system scheduled to be housed on the *William Bradley* during the proposed 3D marine seismic survey is a Sercel 408. The system would record data using a tape emulator drive hard drive imbedded into the recorder so that verified IBM

3590 archive tapes can be created at the quality control processing laboratory. Digital records would be formatted in SEG D configuration and traced at three lines of 156 per record for every 2-ms periods. The digital filters would be linear or minimum phase, and the anti-alias filters would be high-cut 0.8 Field Nyquist Stop Band Attenuation greater than 120 dB. Record length would be 6 s versus a shot point distance of 34 m (111.5 ft). This Sercel system would be capable of an inter-record delay of equal to or less than 2 s of overhead. The plotter that would also be housed on the *William Bradley* would be a Veritas V-12.

Line Equipment

PGS would have a 2400 Sercel FDU Operative Remote Acquisition Units available. The following equipment would also be available: 125 Sercel line acquisition unit line repeaters/powers; 12 Sercel line acquisition unit crossing line interface; 20 x-line cables; and 1,200 telemetry cables of 67 m (220 ft) each and 1,200 mini cables of 1 m (3.3 ft) each.

Transducers

The transducers used during the proposed seismic survey in the Beaufort Sea would be GeoSpace GS-PV1 sensors. The GS30CT geophone has a sensitivity of 2.55 volts (V) per inch per second ± 2 percent. The pressure phone has a sensitivity of 6.76 V/bar ± 1.5 dB. The hydrophone crystals are configured for acceleration cancellation.

Energy Source Output

PGS would use an airgun energy source for the proposed data acquisition. A minimum of a 10-airgun array is expected to be used as a single output source. The operating source depth for the guns is a maximum of 2.5 m (8.2 ft). Source centers separation will be from 1–1.5 m (3.3–4.9 ft), and the shot point distance is 34 m (110 ft). The single source volume is 880 in³. Although PGS is proposing to use only a 10-airgun array for acquisition, a 12 airgun array would be placed on each vessel. This would provide two spare airguns at all times. The source layout will be 8 m (26 ft) wide by 6 m (20 ft) long. At a depth of 2.5 m (8.2 ft), the point to point output pressure is plus or minus 22 bar meters, giving a signal/bubble ratio of 10:1. The array is designed to direct sound pressure downwards, as shown in Figure 2 of PGS' application.

The power is provided by either a 78 cubic feet per minute (CFM) or 150 CFM diesel air compressor. The air pressure can deliver between 1,750 pounds per

square inch (psi) to 1,900 psi. This system will require a 12–s to 15–s recycle time. The energy source synchronizing system is a Digital Real Time Long Shot Source Controller.

Bathymetry

Bathymetric equipment would be located on each of the source vessels and the shallow-water cable boats. Bathymetric data would be recorded simultaneously with the seismic data acquisition, by employing Interspace Tech DX 150 (or equivalent) instruments, which can operate in water up to 120 m (400 ft) deep. This equipment has an operating frequency of 200 kHz and a sound source of 100 dB re 1 μ Pa. The digitizer and logger system would be a National Marine Electronic Association standard output to Horizon. PGS would use a Gator INM system and a Gator INS system as source firing controllers. For measures of depth, temperature, and salinity, a Valeport TS Dip Meter would be used.

Positioning Survey Equipment

To conduct the proposed 3D seismic survey in the Beaufort Sea, PGS would employ a Novatel system and a global positioning system (GPS) mobile receiver with 8 to 12 channels of dual frequency. For the Novatel system, there would be three onshore reference stations and four valid satellites. As a second main system, PGS has available a Trimble 4700 system and a GPS Mobile Receiver, also with 8 to 12 channels of dual frequency. For the Trimble 4700, there would be two onshore reference stations. PGS will also have 700 active Sonardyne Acoustic transponders available for in-water positioning.

Marine Mammals Affected by the Activity

The Beaufort Sea supports a diverse assemblage of marine mammals, including bowhead, gray, beluga, killer, minke, fin, humpback, and North Pacific right whales, harbor porpoises, ringed, spotted, bearded, and ribbon seals, polar bears, and walruses. These latter two species are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and are not discussed further in this document. Within the project activity areas, only the polar bear is known to occur in significant numbers, and a separate Letter of Authorization request will be submitted by PGS to USFWS for this species.

A total of three cetacean species and three pinniped species are known to occur or may occur in the Beaufort Sea in or near the proposed project area (see

Table 3.0–1 in PGS' application for information on habitat and estimated abundance). Of these species, only the bowhead whale is listed as endangered under the Endangered Species Act (ESA). The killer whale, harbor porpoise, minke whale, fin whale, North Pacific right whale, humpback whale, and ribbon seal could occur in the Beaufort Sea, but each of these species is rare or extralimital and unlikely to be encountered in the proposed seismic survey area.

The marine mammal species expected to be encountered most frequently throughout the seismic survey in the project area is the ringed seal. The bearded and spotted seal can also be observed but to a far lesser extent than the ringed seal. Presence of beluga, bowhead, and gray whales in the shallow water environment within the barrier islands is possible but expected to be very limited as this is not their typical habitat. Descriptions of the biology, distribution, and population status of the marine mammal species under NMFS' jurisdiction can be found in PGS' application, the 2007 NMFS/MMS DPEIS on Arctic Seismic Surveys, and the NMFS Stock Assessment Reports (SARS). The Alaska SAR is available at: <http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2007.pdf>. Please refer to those documents for information on these species.

Potential Effects of Airgun Sounds on Marine Mammals

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory effects (Richardson *et al.*, 1995). As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or

disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. Numerous studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response. That is often true even in cases when the pulsed sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times, mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more

tolerant of exposure to airgun pulses than baleen whales.

Masking

Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are very few specific data of relevance. Some whales are known to continue calling in the presence of seismic pulses. Their calls can be heard between the seismic pulses (e.g., Richardson *et al.*, 1986; McDonald *et al.*, 1995; Greene *et al.*, 1999; Niekirk *et al.*, 2004). Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.*, 1994), a more recent study reports that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.*, 2002). That has also been shown during recent work in the Gulf of Mexico (Tyack *et al.*, 2003; Smulter *et al.*, 2004). Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocete cetaceans, given the intermittent nature of seismic pulses. Dolphins and porpoises commonly are heard calling while airguns are operating (e.g., Gordon *et al.*, 2004; Smulter *et al.*, 2004; Holst *et al.*, 2005a; 2005b). Also, the sounds important to small odontocetes are predominantly at much higher frequencies than are airgun sounds.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on the animals could be significant. Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals were present within a particular distance of industrial activities or exposed to a particular level of industrial sound. That likely overestimates the numbers of marine mammals that are affected in some biologically-important manner.

The following species summaries are provided to facilitate understanding of our knowledge of impulsive noise impacts on the principal marine mammal species that are expected to be affected. The impacts on Beaufort Sea cetaceans and pinnipeds are likely to be short-term and transitory.

Bowhead Whales—Bowhead whales will likely show some behavioral changes during airgun activity, but depending on distance from the noise source, overall displacement should be minimal. Bowhead whales in the Beaufort Sea were observed remaining in a location where they were exposed to seismic, dredging, and drilling sounds. Their social and feeding behavior appeared normal as industry-related noises occurred (Richardson *et al.*, 1987). When observed over multiple years, bowhead whales in the same area also did not appear to avoid seismic locations. MMS did not find a statistical difference in the change of direction for bowhead whales traveling during seismic activity when analyzing fall migration data from 1996 to 1998 (MMS, 2005). Bowhead and gray whales have not appeared bothered when seismic pulses between 160 dB and 170 dB re 1 μ Pa were fired from a seismic vessel within a few km of their locality, but tended to avoid the area when levels exceeded 170 dB (Richardson *et al.*, 1997).

Common behavioral responses of marine mammals include displacement, startle, attraction to sound, altered communication sounds, discontinued feeding, disruption to social behaviors, temporary or permanent habitat abandonment, panic, flight, stampede, and in worse cases stranding, and sometimes death (Nowacek *et al.*, 2007; Southall *et al.*, 2007; Gordon *et al.*, 2004). Behavior ranges from temporary to severe, and the effects can influence foraging, reproduction, or survival. Response level is based on how habituated or sensitive the individual mammal is and whether or not previous interactions with sound was positive, negative, or neutral (Southall *et al.*, 2007). The common behavioral patterns seen in bowhead whales when seismic operations were operated nearby include displacement, avoidance, and altered respiration (Richardson *et al.*, 1999; Ljungland *et al.*, 1988). Whales may also display varied reactions based on the time of year and activity. Bowhead whales migrating in the fall exhibited avoidance at distances up to 20 km (12 mi) or more, while bowheads feeding during summer displayed more subtle reactions and did not show a strong avoidance at distances past 6 km

(3.7 mi) from active airguns (Miller *et al.*, 2005).

It is unclear exactly what causes displacement, but whales have tended to show shorter surface and dive times, fewer blows per surfacing, and longer blow intervals when noise levels were at or above 152 dB and showed avoidance of seismic operations within a 20-km (12-mi) radius (Ljungbald, 1988; Richardson, 1999). Bowhead whales may also flee from or show total avoidance of vessels if they are too close. Bowhead whales showed total avoidance at distances of 1.3 km, 7.2 km, 3.5 km, and 2.9 km (0.8 mi, 4.5 mi, 2.2 mi, and 1.8 mi) when sound levels were 152 dB, 165 dB, 178 dB, and 165 dB, respectively (Ljungbald *et al.*, 1988). Based upon McCauley *et al.* (2000) bowhead whales exhibit a behavioral change at 120 dB when migrating. However, other low-frequency cetaceans, including bowhead whales, exhibit behavioral changes at 140 dB to 160 dB when not migrating, and sometimes higher levels (Miller *et al.*, 2005).

Beluga Whales—Seismic activity is expected to cause temporary displacement of beluga whales, but the impact is not expected to be significant. Belugas have been shown to have greater displacement in response to a moving source (e.g., airgun activity on a moving vessel) and less displacement or behavioral change in response to a stationary source. The presence of belugas has been documented within the ensonified zones of industrial sites near platforms and stationary dredges, and the belugas did not seem to be disturbed by the activity (Richardson *et al.*, 1995). When drilling sounds were played to belugas in industry-free areas, the belugas only showed a behavioral reaction when received levels were high. For example, beluga whales have been observed to show only an initial scare when drilling noises were played with a received level greater than or equal to 153 dB re 1 μ Pa. Richardson (1997) suggested that the effect could be a result of belugas having less sensitivity to low-frequency sounds. Other reports suggested that belugas will remain far away from seismic vessels (Miller *et al.*, 2005). A study in the Beaufort Sea observed low numbers of belugas within 10 km to 20 km (6 mi to 12 mi) of seismic vessels (noted in LGL, 2006).

Gray Whales—Gray whales in the immediate area of seismic activity will likely show some behavioral changes. The changes in behavior, however, depend upon distance from the seismic source and are expected to be minimal. In a study including gray whales,

behavioral responses were observed when the whales were subjected to seismic sounds between 160 and 170 dB re 1 μ Pa. Studies in the Bering Sea by Malme *et al.* (1986, 1988) showed the responses of gray whales to seismic sound pulses from a 100 in³ airgun array. Fifty percent of feeding whales stopped feeding when exposed to sound levels of 173 dB re 1 μ Pa on average, and 10 percent stopped feeding at a received sound level of 163 dB re 1 μ Pa. One whale study found indications of behavioral changes such as increased swim speed and shorter blow periods for seismic activities at a distance of up to 30 km (Wursig *et al.*, 1999). However, when conducting shore-based counts Johnson (2007) did not mention any change in behavior and found no significance between abundance and seismic activity. Also, given the infrequent occurrence of gray whales in the Beaufort Sea east of Point Barrow, recent marine mammal observer (MMO) information from the Beaufort Sea indicating that, at least for bowhead whales, sound pressure levels of 160 dB or less did not result in abandonment of feeding areas, and the incorporation of mitigation and monitoring measures, including the use of MMOs and avoidance of concentrated areas of feeding whales, the number of animals exposed to sound levels that could cause disturbance of feeding or other behaviors should be greatly reduced.

Data on short-term reactions of cetaceans to impulsive noises do not necessarily provide information about long-term effects. It is not known whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years. Gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration (and much ship traffic) in that area for decades (Malme *et al.*, 1984; Richardson *et al.*, 1995; Angliss and Outlaw, 2005).

Ringed Seals—Ringed seals are expected to have only short-term and temporary displacement as a result of the proposed PGS project activities. Seals should not be exposed to source levels higher than 190 dB re 1 μ Pa due to the potential for hearing damage. Though ringed seals have density and estimated take higher than other marine mammals in the project area, ringed seals exposed to sound sources as high as 200 dB, displayed only brief orientation and minor behavioral modifications, and only momentarily left young (Moulton *et al.*, 2005; Southall, 2007; Blackwell, 2004). Any behavioral reactions to activities should only be temporary and not disrupt

reproductive activities. When industrial-related sounds propagated 1–3 km (0.6–1.9 mi) within ringed seal locations, normal behavior such as maintaining active breathing holes and lairs continued, and observed breeding females appeared not to be bothered (Moulton *et al.*, 2005).

In 1998, a total of 252 ringed seals were counted in the project area over a period of 1,331 hours, contributing to 98.5 percent of the total pinniped population during this time. Richardson (1999) found sounds produced from both a 16 - 1,500 in³ sleeve gun array and another 8 - 560 in³ sleeve gun array affected distribution and behavior only when seals were within a few hundred meters of the array, and ringed seals remained in the project area during operations. During seismic activities, whales also remained at a mean radial distance of 223 m (731 ft) during seismic operations and 116 m (381 ft) when seismic operations did not occur (Richardson, 1999). Over time, ringed seals may also show less displacement and fewer behavioral changes. In one study, ringed seals remained distant from activities during the first season of seismic activities, but during the second season, were observed at close proximity of the marine vessel. No observable behavioral changes were accounted for with received levels ranging between 170 and 200 dB (Miller *et al.*, 2005).

Spotted Seals—The total number of spotted seals in Alaska is assumed to be tens of thousands, and their range sometimes includes the Beaufort Sea (MMS, 1996; Rugh *et al.*, 1997). Any impacts on spotted seal populations should also be minimal as high numbers of spotted seals should not occur in the project area. From July–September 1996, Harris *et al.* (2001) counted a total of 422 seals in the Beaufort Sea. Of the seals counted, only 0.9 percent ($n = 4$) were spotted seals. Spotted seal reactions to seismic activities are typically minimal, and spotted seals have demonstrated little or no reaction to scare devices even when linked to areas for feeding or reproduction (Harris *et al.*, 2001).

Bearded Seals—In a study during summer 1996, Harris *et al.* (2001) found bearded seals were 7.3 percent ($n = 31$) of the total number of seals counted. Though bearded seals are bottom feeders and are usually found in water depths less than 200 m (656 ft), if the rarity of an encounter should occur, bearded seals, like other pinnipeds, should demonstrate only minimal displacement and behavioral reaction. Bearded seals did not show reactions to 1,450 in³ to 2,250 in³ airguns when

received levels averaged in the range of 170–200 dB (Richardson, 1999).

Hearing Impairment

When conducting the proposed seismic activities, TTS or permanent threshold shift (PTS) is not expected to occur in marine mammals. When marine mammals located within a vulnerable range (> 180 dB re 1 μ Pa for cetaceans, or > 190 dB re 1 μ Pa for pinnipeds) are impacted by impulsive noises, the noises can lead to TTS or PTS. When TTS occurs, the result is reversible: hearing in exposed mammals is temporarily affected. TTS may result in mammals failing to locate predators or prey and the inability to communicate effectively with other individuals of the same species. When the threshold does not return to the original threshold levels, the damage is classified as PTS. It is unknown what level of sound will cause PTS in marine mammals, but it is reasoned to occur at a much greater level than that caused by TTS (Southall *et al.*, 2007).

TTS and PTS in given species depends upon the frequency sensitivity of that species. Bowhead and gray whales operate at a low frequency, killer whale and beluga at mid frequency, and the harbor porpoise at high frequency (Southall, 2005). Finneran (2002) estimated that sound levels greater than 192 dB re 1 μ Pa will lead to TTS in most cetaceans. There are no data identifying the level of sound intensity that causes TTS in baleen whales, but because most baleen whales show avoidance at certain sound intensities, risk of TTS should be avoided (MMS, 2006; Southall, 2007). Under prolonged exposure, pinnipeds have been shown to exhibit TTS. Kastak *et al.* (1999) investigated the effects of noise on two California sea lions, one northern elephant seal, and one harbor seal. Kastak *et al.* (1999) subjected each pinniped to a noise source (100 to 2,000 Hz) for 20 to 22 min. Each pinniped showed a threshold shift averaging 4.8 dB (harbor seal), 4.9 dB (sea lion), and 4.6 dB (northern elephant seal) until the hearing threshold returned to pre-exposure values (under a 12-hour period). PGS mitigation measures, such as monitoring by MMOs within the safety zone and ramp-up prior to seismic operations, should prevent marine mammals from sound exposure that causes TTS and PTS. Currently NMFS considers 190 dB re 1 μ Pa received level as the onset of TTS for pinnipeds.

Potential Effects of Bathymetric Equipment on Marine Mammals

The bathymetric equipment used to determine depth will operate at a frequency of 200 kHz and sound source of 100 dB. At a frequency of this caliber, any overlap with the functional marine mammal hearing groups and the estimated auditory bandwidth at which they are suspected to hear will be avoided (Southall *et al.*, 2007). Of the marine mammals in the project area, bowhead whales are considered low-frequency mammals, and their estimated bandwidth occurs between 7 and 22 kHz (Southall *et al.*, 2007). Though no direct measurements have been tested directly on the low-frequency cetaceans, such as bowhead whales, hearing sensitivity was determined by observable levels of response to sound levels played at various frequencies, including vocalization frequencies (Southall *et al.*, 2007; Richardson *et al.*, 1995).

The only mid-frequency marine mammal expected within the project area is the beluga whale. Estimated auditory bandwidth for belugas occurs between 150 Hz and 160 kHz (Southall *et al.*, 2007). Beluga hearing is functional and occurs over a low to very high range. Belugas also typically detect signals only within their frequency but have specialized echolocation features that cater to communication and tracking prey (Southall *et al.*, 2007).

No high-frequency cetaceans are expected within the project area; however, pinnipeds, such as the ringed, spotted, and bearded seals will be present. Pinnipeds lack the specialized biosonar systems common to beluga whales. Pinnipeds also communicate in water and air but are expected to be more sensitive to noises in water. Pinnipeds are estimated to have an auditory bandwidth range at 75 Hz to 75 kHz in water and 75 Hz to 30 kHz in air (Southall *et al.*, 2007). Based on information that is available, the bathymetric equipment proposed to be used within the project area will not overlap with the hearing range of marine mammals. Therefore, the likelihood of impacts, if any, are expected to be quite low.

Estimated Take of Marine Mammals by Incidental Harassment

The anticipated harassments from the activities described above may involve temporary changes in behavior and short-term displacement within ensonified areas. There is no evidence that the planned activities could result in injury, serious injury, or mortality, for example due to collisions with

vessels. Disturbance reactions, such as avoidance, are very likely to occur amongst marine mammals in the vicinity of the source vessel. The mitigation and monitoring measures proposed to be implemented (described later in this document) during this survey are based on Level B harassment criteria and will minimize any potential risk to injury or mortality.

The methodology used by PGS to estimate incidental take by harassment by seismic and the numbers of marine mammals that might be affected in the proposed seismic acquisition activity area in the Beaufort Sea is presented here. The bowhead whale, beluga whale, and bearded seal density estimates are based on the estimates developed by LGL (2005) for the University of Alaska IHA and used here for consistency. The ringed seal density estimates are from Frost *et al.* (2002). Spotted seal density estimates were derived from Green *et al.* (2005; 2006; 2007) observations that spotted seals in the Beaufort Sea in the vicinity represent about 5 percent of all phocid seal sightings and then multiplying Frost *et al.*'s (2002) density estimates times 5 percent.

Exposure Calculations for Marine Mammals

In its application, PGS presented the average and maximum estimates of "take," which were calculated by multiplying the expected average and maximum animal densities provided in Table 6.2-1 in the application by the area of ensonification. The area of ensonification was assumed to be the length of trackline in marine waters multiplied by the 160-dB and 170-dB isopleths times 2. The total length of trackline in marine waters is estimated at 1,280 km (795 mi), including 770 km (478 mi) outside the barrier islands and 510 km (317 mi) inside the barrier islands.

In the PGS' application, it provides both average and maximum density data for the marine mammals that are likely to be adversely affected. These density numbers were based on survey and monitoring data of marine mammals in recent years in the vicinity of the proposed action area (LGL, 2005; Frost *et al.*, 2002; Green *et al.*, 2005; 2006; 2007). In addition, PGS also provided maximum density estimates for those marine mammal populations. The average and maximum population density of marine mammals are provided in Table 6.2.1 of the PGS application. However, PGS did not provide a rationale regarding the maximum estimate or a description as to how these maximum density estimates

were calculated. NMFS decides that the average density data of marine mammal populations will be used to calculate estimated take numbers because these numbers are based on surveys and monitoring of marine mammals in the vicinity of the proposed project area.

In its review of PGS' application, NMFS determined that the safety radii calculated by PGS were too small based on the size and source level of the airgun array to be used. Therefore, NMFS requested that PGS submit an addendum to the IHA application, which outlined in greater detail the modeling techniques used. Based on this additional information, NMFS recalculated the distances to the 160-, 170-, 180-, and 190-dB isopleths, using 250 dB as the source output. Based on this new information, the respective radii for the 160-, 170-, 180-, and 190-dB isopleths are: 2,894 m (1.8 mi); 1,194 m (0.74 mi); 492 m (0.31 mi); and 203 m (0.13 mi).

The total area of ensonification using the 160-dB criteria is 7,398.4 km² (2,856.5 mi²; including 4,450.6 km², or 1,718.4 mi² outside the barrier islands; and 2,947.8 km², or 1,138.1 mi² inside the barrier islands) and for the 170-dB criteria is 3,056.6 km² (1,180.2 mi²; including 1,838.8 km², or 710 mi² outside the barrier islands, and 1,217.9 km², or 470.2 mi² inside the barrier islands). However, given that none of the area occurs in waters greater than 15 m (49 ft) deep (and half the area is in waters less than 4 m, 13 ft, deep), which is not suitable habitat for migrating bowhead whales, which has been defined as waters 15–200 m (49–660 ft) deep (Richardson and Thomson, 2002), this calculation provides a very conservative estimate of potential take. Therefore, only the area outside the barrier islands was used in the calculations for bowhead whales.

The "take" estimates were determined by multiplying the various density estimates in Table 6.2-1 by the ensonification area using the 160-dB criteria for cetaceans and the 170-dB criteria for pinnipeds. However, NMFS has noted in the past that it is unaware of any empirical evidence to indicate that pinnipeds do not respond at the lower level (i.e., 160 dB). As a result, NMFS will estimate Level B harassment takes based on the 160-dB criterion. The bowhead and beluga density estimates come from LGL (2005) and the ringed seal estimates from Frost *et al.* (2002). The spotted seal densities were determined by multiplying the ringed seal estimate by 5 percent, a reflection of three years of survey results by Green *et al.* (2005; 2006; 2007), showing that spotted seals represented about 5

percent of several thousand phocid sightings in nearshore waters of the Beaufort Sea.

Based on the calculation of using the average density estimates presented in Table 6.2-1 in PGS' application and the area of ensonification outlined above, it is estimated that up to approximately 28 bowhead whales, 25 beluga whales, 1,467 ringed seals, 73 spotted seals, and 20 bearded seals would be affected by Level B behavioral harassment as a result of the proposed 3D OBC/TZ seismic survey in the Beaufort Sea. These take numbers represent 0.27 percent of the western Arctic stock of bowhead whales, 0.06 percent of the Beaufort Sea stock of beluga whales, and 0.59 percent, 0.12 percent, and 0.008 percent of the Alaska stocks of ringed, spotted, and bearded seals, respectively.

Although gray whales are considered to be an extralimital species in the project area, there have been a few rare sightings in the Beaufort Sea east of Point Barrow in late summer and as far east as Smith Bay (Green *et al.*, 2007). Currently, there are no reliable density or population estimates for gray whales in the project area. A take estimate of two gray whales has been requested. This number is considered minimal based on the population size of the eastern North Pacific stock of gray whales.

PGS plans to continue conducting seismic surveys after August 25, the commencement of annual bowhead whale hunt, and the beginning of the fall bowhead migration. NMFS requires take estimates be evaluated out to the 120-dB isopleth for any operation occurring after August 25, unless the operator can show that their sound source would attenuate to less than 120 dB before reaching the normal bowhead whale migration lanes. Because of the downward sound directionality of the proposed array configuration, the radius to the 120-dB isopleth would extend out to about 10–15 km (6–9 mi). Further, beginning in early August, PGS will move their operations inside the barrier islands and remain there throughout the subsistence hunt and whale migration. Consequently, the closest 120 dB level sounds could reach migrating whales is a point approximately 10 km (6 mi) north of a line between Spy and Thetis islands. At this point the water depth is approximately 6 m (20 ft), less than suitable habitat for migrating bowhead whales. Further, much of the sound emanating from inside the barrier islands would be blocked by Spy, Thetis, and Leavitt Islands, leaving only a fraction of the survey area inside the barrier islands from which the 120-dB radius could even reach a point 10 km

(6 mi) north of barrier islands. During most of the survey inside the barrier islands, it is expected that the 120-dB radii would not extend at all outside the barrier islands since the islands will absorb the sound.

However, the 120-dB radius estimate is based on modeling. Actual field measurements of acoustical signatures for the proposed array are planned at the onset of the surveys. Should these measurements determine that the 120-dB radius could extend into the bowhead whale migration corridor, additional mitigation measures will be proposed in conjunction with consultation with NMFS, the North Slope Borough (NSB), and the Alaska Eskimo Whaling Commission (AEWC).

Because PGS plans to operate inside the barrier islands only during the fall, and these interior habitats typically provide less suitable habitat for marine mammals as compared to outside the barrier islands, no increase in animal densities are expected during the fall seismic survey. Thus, separate take estimates for the fall period were not calculated.

Conclusions

Impacts of seismic sounds on cetaceans are generally expected to be restricted to avoidance of a limited area around the seismic operation and short-term changes in behavior, falling within the MMPA definition of Level B harassment. No Level A takes (including injury, serious injury, or mortality) are expected as a result of the proposed activities. The estimated numbers of cetaceans and pinnipeds potentially exposed to sound levels sufficient to cause behavioral disturbance are very low percentages of the population sizes in the Bering-Chukchi-Beaufort seas.

Mitigation measures such as look outs, non-pursuit, shutdowns or power-downs when marine mammals are seen within defined ranges, and avoiding migration pathways when animals are likely most sensitive to noise will further reduce short-term reactions, and minimize any effects on hearing sensitivity. In all cases, the effects are expected to be short-term, with no lasting biological consequence. Subsistence issues are addressed later in this document.

Potential Impact on Habitat

The proposed seismic survey will not result in any permanent impact on habitats used by marine mammals or their prey sources. Furthermore, seismic activity will take place in shallow, nearshore waters less than 15 m (49 ft) deep, which is not considered to be bowhead whale habitat. No impacts are

expected to the ocean floor or anticipated by placing geophones on the ocean floor.

Relative to toothed whale and pinniped prey, a broad discussion of the various types of potential effects of exposure to seismic activity on fish and invertebrates can be found in LGL (2005). This discussion includes a summary of direct mortality (pathological/physiological) and indirect (behavioral) effects. Mortality to fish, fish eggs, and larvae from seismic energy sources would be expected within a few meters (0.5 m to 3 m, 1.6 ft to 10 ft) from the seismic source. Direct mortality has been observed in cod and plaice within 48 hours after they were subjected to seismic pulses 2 m (6.6 ft) from the source (Matishov, 1992); however other studies did not report any fish kills from seismic source exposure (La Bella *et al.*, 1996; IMG, 2002; Hassel *et al.*, 2003). To date, fish mortalities associated with normal seismic operations are thought to be slight. Saetre and Ona (1996) modeled a worst-case mathematical approach on the effects of seismic energy on fish eggs and larvae and concluded that mortality rates caused by exposure to seismic energy are so low compared to natural mortality that issues relating to stock recruitment should be regarded as insignificant.

Limited studies on physiological effects on marine fish and invertebrates to acoustic stress have been conducted. No significant increases in physiological stress from seismic energy were detected for various fish, squid, and cuttlefish (McCauley *et al.*, 2000) or for male snow crabs (Christian *et al.*, 2003). Behavioral changes in fish associated with seismic exposures from project activities are expected to be minor at best. Because only a small portion of the available foraging habitat would be subjected to seismic pulses at a given time, fish would be expected to return to the area of disturbance within anywhere from 15–30 min (McCauley *et al.*, 2000) to several days (Engas *et al.*, 1996) after cessation of activities.

Available data indicate that mortality and behavioral changes do occur within very close range to the seismic sources; however, the proposed seismic site clearance activity in the Beaufort Sea is predicted to have a negligible effect on the prey resources of the various life stages of fish and invertebrates available to marine mammals. Further, the 880 in³ array, proposed for this project, produces a relatively low energy pulse (250 dB) compared to the seismic systems used in the above studies.

It is estimated that only a small portion of the marine mammals utilizing

the areas of the proposed activities would be temporarily displaced. No loss of habitat is anticipated due to laying cable on the ocean floor.

During the period of seismic surveying (July through mid-September), most marine mammals would be dispersed throughout the area. The peak of the bowhead whale migration through the Alaskan Beaufort Sea typically occurs in September. Starting in late August, bowheads may travel in proximity to the seismic surveys and hear sounds from vessel traffic and seismic activity, which might temporarily displace some whales. In addition, feeding does not appear to be an important activity for bowheads migrating through the Chukchi Sea in most years; however, sightings of bowhead whales do occur in the summer near Barrow (Moore and DeMaster, 2000), and there are suggestions that certain areas near Barrow are important feeding grounds. In the absence of important feeding areas, the potential diversion of a small number of bowheads away from survey activities is not expected to have any significant or long-term consequences for individual bowheads or their population. Bowheads are not expected to be excluded from any habitat.

The numbers of cetaceans and pinnipeds subject to displacement are very small in relation to abundance estimates for the mammals addressed under this IHA request. The proposed activities are not expected to have any habitat-related effects that would produce long-term effects to marine mammals or their habitat due to the limited extent and very nearshore location of the survey area.

Effects of Seismic Noise and Other Related Activities on Subsistence

Subsistence hunting and fishing is historically, and continues to be, an essential aspect of Alaska Native life, especially in rural coastal villages. The Inupiat people participate in subsistence hunting and fishing activities in and around the Beaufort Sea. The animals taken for subsistence provide a significant portion of the food that will feed the people throughout the year. Along with providing the nourishment necessary for survival, subsistence activities strengthen bonds within the culture, provide a means for educating the young, provide supplies for artistic expression, and allow for important celebratory events.

Only minor, temporary effects from the seismic survey project are anticipated on Native subsistence hunting. PGS does not expect any permanent impacts on marine mammals

that will adversely affect subsistence hunting. Mitigation efforts will be implemented to minimize or completely avoid any adverse effects on marine mammals. Additionally, areas being used for subsistence hunting grounds will be avoided. It is anticipated that only minor, temporary displacement of marine mammals will occur.

Alaska Natives, including the Inupiat, legally hunt several species of marine mammals. Marine animals used for subsistence within the Beaufort Sea region include bowhead and beluga whales and ringed, spotted, and bearded seals. Each village along the Beaufort Sea hunts key subsistence species. Hunts for these animals occur during different seasons throughout the year. Depending upon the success of a village's hunt for a certain species, another species may become a priority in order to provide enough nourishment to sustain the village. Communities that participate in subsistence activities potentially affected by seismic surveys within the proposed development area are Nuiqsut and Barrow.

Nuiqsut is the village nearest to the proposed seismic activity area. Bowhead and beluga whales and ringed, spotted, and bearded seals are harvested by residents of Nuiqsut. Because the village is 56 km (35 mi) inland (Alaska community Online Database, 2008), whaling crews travel in aluminum skiffs equipped with outboard motors to offshore areas such as Cross Island (Funk and Galginaitis, 2005). Of the marine mammals harvested, bowhead whales are most commonly harvested. In 1992 an estimated 34,884 kg (76,906 lbs) were harvested (ADF&G, 2008). Seals are also regularly hunted and may account for up to 3,770 kg (8,310 lbs) of harvest, while beluga whale harvests account for little or none (ADF&G, 2008).

Barrow residents' main subsistence focus is concentrated on biannual bowhead whale hunts that take place during the spring and fall. Other animals, such as seals, are hunted outside of the whaling season, but they are not the primary source of the subsistence harvest (URS Corp., 2005).

Bowhead Whales

The bowhead whales that could potentially be affected by seismic activity in the Beaufort Sea come from the Western Arctic stock. The majority of these whales migrate annually during the spring from wintering grounds in the Bering Sea, through the Chukchi Sea, to summer grounds in the Beaufort Sea. During the fall migration, the whales travel back through the Chukchi Sea to their wintering grounds in the

Bering Sea. While on their spring migration route, bowhead whales travel through leads in the ice between the shore-fast ice and pack ice.

In a study of approximately 440 bowhead whales between 1989 and 1994 off the coast of Point Barrow, Richardson *et al.* (1995) documented movements and behaviors in response to playback of sounds similar to those produced by site clearance and shallow hazard surveys. Whale behavior in relation to the sound level being received at the whales' locations was observed. The research team concluded that the sounds emitted did not have a biologically significant effect on bowhead movement, distribution, or behavior.

Ten primary coastal Alaskan villages deploy whaling crews during whale migrations. Of these ten, Nuiqsut has the potential to be affected by the proposed project, as it is the village situated closest to the proposed project area. Barrow is located farther from the proposed seismic activity but has the potential to be affected. These two communities are part of the AEW. The AEW was formed as a response to the International Whaling Commission's past closure of bowhead whale hunting for subsistence purposes. IWC sets a quota for the whale hunt, and AEW allocates the quota between villages. Each of the villages within the AEW is represented by a Whaling Captains' Association. Bowhead whales migrate within the hunting range of whaling crews in the spring (north migration) and the fall (south migration). In the spring, the whales must travel through leads in the ice that tend to occur close to shore. In the fall, the water is much more open, allowing the whales to swim farther from the coast.

Whaling crews in Barrow hunt in both the spring and the fall (Funk and Galginaitis, 2005). In the spring, the whales are hunted along leads that occur when the pack ice starts deteriorating. This tends to occur in Barrow between the first week of April and the first week of June, well before the geophysical surveys will be conducted. The proposed seismic survey is anticipated to start after all the ice melts, in approximately mid-July, and will not affect spring whaling. Fall whaling activities are anticipated to take place east of Point Barrow (BLM, 2005). The project area is located 260 km (160 mi) east of Point Barrow. It is anticipated that the project will not impact the Barrow fall hunt. The Nuiqsut fall whale hunt takes place in the vicinity of Cross Island, ranging from there to approximately 50 km (30 mi) north of the island. The project area

is located approximately 60 km (37 mi) west of Cross Island and is too shallow (less than 15 m, 50 ft deep) to support bowhead whales. It is unlikely that the Nuiqsut fall hunt would extend to the project area. Adverse impacts on the subsistence harvest of bowhead whales as a result of the proposed survey are not anticipated.

Beluga Whales

Beluga whales summer in the waters of the Chukchi and Beaufort Seas and winter in the Bering Sea. Living in areas mostly covered in ice, they are associated with leads and polynyas (Haard, 1988). Beluga whales can be hunted from the first week in April to July or August. It is common for the Inupiat to refrain from hunting beluga during the spring or fall bowhead whale hunt to prevent scaring the larger whales away from hunting locations. Belugas do not account for a majority of the total subsistence harvest in Barrow or Nuiqsut (ADF&G, 2008). Between 1999 and 2003, the annual beluga subsistence "take" was 65 (Frost and Suydam, 1995).

Ringed Seals

Ringed seals are distributed throughout the Arctic Ocean. They inhabit both seasonal and permanent ice. An abundance and distribution study conducted in the Beaufort Sea before, during, and after anthropogenic sound-producing construction found that there were only slight changes near construction activities around British Petroleum's (BP's) Northstar oil development that most likely were caused by environmental factors (Moulton *et al.*, 2005). Harris *et al.* (2001) performed a study using 3D seismic arrays in which the number of seal sightings varied only slightly in periods of no sonar firing, single sonar firing, and multiple-array sonar firing. Seals tended to stay slightly farther away from the vessel at times of full-array sonar firing, but they rarely moved more than 250 m (820 ft) from the vessel. Sonar activity was interrupted when seals came within a certain radius (150 m, 492 ft, to 250 m, 820 ft) of the vessel, in accordance with regulations set by NMFS.

Ringed seals are available to subsistence users year-round, but they are primarily hunted in the winter due to the rich availability of other mammals in the summer. In 2000, the annual estimated subsistence "take" from Alaska of ringed seals was 9,567. Because the bulk of the ringed seal hunting will occur outside the time scope of the proposed project, adverse

impacts on ringed seals as a result of the proposed survey are not anticipated.

Spotted Seals

Spotted seals in Alaska are distributed along the continental shelf of the Beaufort, Chukchi, and Bering Seas. These seals migrate south from the Chukchi Sea, through the Bering Strait, into the Bering Sea beginning in October. They spend the winter in the Bering Sea traveling east and west along the ice edge (Lowry *et al.*, 1998). Because of the numbers of whales and bearded seals and the opportunities for subsistence harvesting of them, spotted and ringed seals are primarily hunted during winter months in the Beaufort Sea. Since this time frame is outside the scope of the proposed project, subsistence activities involving spotted and ringed seals are unlikely to occur during the survey (BLM, 2005). PGS does not anticipate adverse effects to spotted seals as a result of project activities.

Bearded Seals

Bearded seals tend to inhabit relatively shallow water (less than 200 m, 656 ft, deep) that does not have much ice. In Alaska, they are distributed along the continental shelf of the Bering, Chukchi, and Beaufort Seas. Most bearded seals migrate in the spring from the Bering Sea, through the Bering Strait, and into the Chukchi Sea and spend the summer season along the ice edge. Some bearded seals do not migrate and spend all year in the waters of the Bering and Chukchi Seas. According to a subsistence harvest database, the 2000 annual harvest of bearded seals in Alaska was 6,788 (ADF&G, 2000). Bearded seals are an important source of meat and hide for Chukchi Sea villages. They tend to be targeted by subsistence users over ringed and spotted seals because they are very large. This provides a large amount of meat and skins for constructing boats (BLM, 2005).

Bearded seals are primarily hunted during July in the Beaufort Sea; however, in 2007, bearded seals were harvested in the months of August and September at the mouth of the Colville River Delta (Smith, pers. comm., 2008). The proposed project location is not a primary subsistence hunting ground; however, it is occasionally used by residents of Nuiqsut for subsistence hunting of bearded seals. An annual bearded seal harvest occurs in the vicinity of Thetis Island in July through August (J. Nukapigak, Nuiqsut hunter, pers. comm., 2008). Approximately 20 bearded seals are harvested annually through this hunt.

PGS anticipates that there is not a significant potential for the proposed project to affect the bearded seal subsistence hunt. Mitigation measures will be in place to minimize potential impacts.

Plan of Cooperation (POC)

Regulations at 50 CFR 216.104(a)(12) require IHA applicants for activities that take place in Arctic waters to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. PGS developed a Draft POC, which included a timeline of meetings set to occur in the communities identified as potentially being affected by the proposed project. These communities are Nuiqsut and Barrow. The Draft POC document was distributed to the communities, subsistence users groups, NMFS, and USFWS on March 20, 2008. Based upon discussions with communities and subsistence users, PGS has incorporated changes to the project to reduce potential subsistence conflicts. These changes are discussed in Addendum 1 of the Draft POC, which was submitted to the potentially affected communities and subsistence users groups, NMFS, and USFWS on May 7, 2008. Copies were also available during POC meetings in Barrow on May 8, 2008, and in Nuiqsut on May 9, 2008. A Final POC document including all input from potentially affected communities and subsistence users groups will be provided upon completion of the May POC meetings. Meetings that have taken place prior to the survey include:

- February 7, 2008: AEW 2008 Conflict Avoidance Agreement (CAA) meeting with Nuiqsut whalers in Deadhorse to present the proposed project and to gather feedback in support of a 2008 CAA;
- February 11, 2008: AEW 2008 CAA meeting with Barrow whalers in Barrow to present the proposed project and to gather feedback in support of a 2008 CAA;
- February 28, 2008: AEW 2008 CAA meeting in Barrow to discuss the 2008 CAA with the AEW;
- April 1, 2008: Kuukpikmiut Subsistence Oversight Panel, Inc. Meeting and the Nuiqsut POC Meeting/Open House in Nuiqsut to present the proposed project and to gather feedback;
- April 2, 2008: NSB Planning Commission in Barrow to present the proposed project in support of a NSB Development Permit application;
- April 14–16, 2008: Open Water Meeting in Anchorage to present the proposed project to NMFS and other

attendees in support of the IHA application. The Open Water Meeting includes a forum for discussion of potential conflicts between industry activities and subsistence use activities.

- May 8, 2008: Barrow POC Meeting/Open House in Barrow to present the proposed project and to gather feedback from the community; and

- May 9, 2008: Nuiqsut POC Meeting/Open House in Nuiqsut to present the project revisions and gather feedback from the community.

It should be noted that NMFS must make a determination under the MMPA that an activity would not have an unmitigable adverse impact on the subsistence needs for marine mammals. While this includes usage of both cetaceans and pinnipeds, the primary impact by seismic activities is expected to be impacts from noise on bowhead whales during its westward fall feeding and migration period in the Beaufort Sea. NMFS has defined unmitigable adverse impact as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met (50 CFR 216.103).

However, while a signed CAA allows NMFS to make a determination that the activity will not have an unmitigable adverse impact on the subsistence use of marine mammals, if one or both parties fail to sign the CAA, then NMFS will make the determination that the activity will or will not have an unmitigable adverse impact on subsistence uses of marine mammals. This determination may require that the IHA contain additional mitigation measures in order for this decision to be made.

Proposed Mitigation Measures

The introduction of pulsed sounds generated by seismic airguns is the main source of potential impacts on marine mammal species and the focus of this request. The response of the animal depends on various factors, but short-term behavioral responses are the most likely to occur. No serious or lethal injuries are expected. Implementation of the proposed mitigation measures described below will reduce the potential impacts to marine mammals.

Several mitigation measures are proposed to be implemented in order to

cause a minimal adverse impact upon affect marine mammal species. These include:

- The seismic vessel will remain within 5 km (3 mi) of the coastline and is not expected to pass the state/Federal boundary line, avoiding bowhead whale migration routes;

- In response to discussions with the AEWC, PGS has negotiated the following operational windows to further avoid potential impacts to migrating whales. The timing of the proposed survey would be divided into two parts. Data acquisition outside the barrier islands (Thetis, Spy, and Leavitt Islands), the deepest water in the survey area, would be performed first and would be completed by August 5. Data acquisition inside the barrier islands, with maximum water depth of approximately 4.6 m (15 ft), would then be conducted from August 5–September 15. No data acquisition would be conducted outside the barrier islands after August 5.

- Although seismic operations are proposed to be conducted during the fall whale hunt (after August 25), they would not occur within the areas normally used by hunters from Barrow (Point Barrow) or Nuiqsut (Cross Island). The survey area is 60 km (37 mi) west of Cross Island (and downstream of the bowhead fall migration) and 260 km (160 mi) east of Point Barrow.

- Although seismic operations are proposed to be conducted during the fall whale migration, activities would occur in shallow waters within the barrier islands that are not considered whale habitat. The barrier islands are also expected to act as an obstacle to sounds generated by seismic activities, effectively keeping sound propagation from entering the zone of migration.

- MMOs will be stationed on source vessels to ensure that the airguns are not operated in close proximity to marine mammals and will be actively involved in vessel operations during all survey operations.

- PGS has offered to hire Inupiat speakers to perform seismic work on each of the PGS vessels. As part of their duties, the Inupiat speakers will also keep watch for marine mammals and will communicate with the MMOs located on the source vessels.

- PGS will participate in the Com Centers proposed to be operated in Barrow and Deadhorse. Com Centers enable vessel operators to be aware of and avoid marine mammal and subsistence activity in the area. Communications of vessel operations and transit will occur via telephones,

the Internet, and very high frequency radios.

- The proposed airgun energy source is of moderate size, reducing the ensonified zone and the impacts to marine mammals.

- The airgun source will be acoustically measured from all directions and in varying water depths at the start of operations. Using this information, an avoidance radius will be determined within which any marine mammal sighting will cause immediate airgun shutdown.

- Ramp up and soft start methods will be conducted while seismic operations are initiated. This is intended to alert marine mammals in the area so that they may swim away from the source before the full energy source is employed.

- Shutdown safety radii of 203 m (0.13 mi) and 492 m (0.31 mi) for pinnipeds and cetaceans, respectively, will be monitored during operations to ensure that injurious “takes” are avoided. These radii will be adjusted accordingly based on the results of the acoustic measurements mentioned above.

- PGS will participate in an offshore monitoring program that will take place from mid-August until mid- to late September in cooperation with Pioneer Natural Resources, Inc., (Pioneer) and ENI and in coordination with Shell Offshore, Inc. which includes: (1) Monitor in-water sound near and distant from Pioneer’s Oooguruk drill site, ENI’s Spy Island drill pad, and vessel operations using four autonomous seafloor acoustic recorders (ASARs); (2) Monitor and characterize sounds produced from shallow-depth seismic survey planned by PGS using ASARs and directional autonomous seafloor recorders (DASARs); (3) Detect and localize marine mammal vocalizations using an array of DASARs positioned north and northwest of the Pioneer and ENI projects; and (4) Visually survey the coastal Beaufort Sea from an aircraft to search for bowhead whales and characterize behavior of those animals observed.

Establishment and Monitoring of Safety Zones

In-water sounds from support vessels and associated with the Pioneer and ENI projects will be measured and source levels determined. Primary vessels may include crew boats, tugs, and barges. A total of 12 vessels will be associated with the PGS seismic survey, many of these relatively small, outboard powered skiffs. Between all three operations, it is expected that sounds will be measured from 18–20 vessels.

Most measurements will be made using JASCO Research’s Ocean Bottom

Hydrophones (OBH) in early July with methods used previously (Zykov *et al.*, 2008b; Laurinolli *et al.*, 2008).

Measurements will be made with a single OBH system positioned in 4.6–9 m (15–30 ft) of water with the vessel sailing along a line from 10–25 km (6–15.5 mi) away to directly over the OBH. The sail past is conducted at normal operating speed of the vessel. Some vessel measurement may be performed using the ASARs stationed near ODS and SID (instead of the OBHs).

Sound source measurements will be made of the two PGS airgun arrays at two locations (inside and outside the barrier islands in early July and prior to seismic data acquisition). Both airgun array configurations will be measured at each location, leading to four separate measurements. The measurements will be made using four OBH systems (see PGS’ application, Figure 2 in Appendix B). These recorders sample at 48 kHz, using a high-resolution 24-bit digitization systems. They can record autonomously for up to 3 days per deployment. The distances to the important sound level thresholds will vary strongly with operating water depth. In the shallowest depths of near 4 ft, sounds will be rapidly attenuated and the distances will be relatively small. The survey area outside the barrier islands reaches depths that support much better sound propagation, and ENI expects the 120-dB distance could be as great as 10–20 km (6–12 mi). The OBH placement should be made to correspond with the best pre-field estimates of the 190, 180, 160, and 120 dB re 1 μ Pa (rms) thresholds. JASCO will consider previous sound source verification (SSV) measurements near BP’s Liberty prospect in similar water depths, combined with modeling to estimate the appropriate distances prior to the SSV measurements.

The OBH deployment configuration distances will be determined as discussed previously. The optimal deployment configurations will be determined for both the inside barrier island and outside barrier island locations. The OBHs will be deployed and seismic vessels asked to shoot along pre-defined test tracks. The test tracks will be oriented in at least two directions to capture the directivity characteristics of the airgun arrays; airgun arrays typically produce greater sound energy perpendicular to the tow direction than in line with the tow direction.

PGS will apply appropriate adjustments to the estimated safety zones of 203 m (0.13 mi) for the 190-dB isopleth and 492 m (0.31 mi) for the 180-dB isopleth. Results will be used

for the implementation of mitigation measures to power down the sound source and reduce the size of the safety zones when required.

Speed and Course Alterations

If a marine mammal (in water) is detected outside the safety radius and, based on its position and the relative motion, is likely to enter the safety radius, the vessel's speed and/or direct course would be changed in a manner that does not compromise safety requirements. The animal's activities and movements relative to the seismic vessel will be closely monitored to ensure that the individual does not approach within the safety radius. If the mammal appears likely to enter the safety radius, further mitigative actions will be taken, i.e., either further course alterations or power-down or shutdown of the airgun(s).

Power-down Procedure

A power-down involves decreasing the number of airguns in use such that the radii of the 190-dB and 180-dB zones are decreased to the extent that observed marine mammals are not in the applicable safety zone. Situations that would require a power-down are listed below.

(1) When the vessel is changing from one source line to another, one airgun or a reduced number of airguns is operated. The continued operation of one airgun or a reduced airgun array is intended to: (a) alert marine mammals to the presence of the seismic vessel in the area and (b) retain the option of initiating a ramp up to full operations under poor visibility conditions.

(2) If a marine mammal is detected outside the safety radius but is likely to enter the safety radius, and if the vessel's speed and/or course cannot be changed to avoid the animal from entering the safety zone. As an alternative to a complete shutdown, the airguns may be powered-down before the animal is within the safety zone.

(3) If a marine mammal is already within the safety zone when first detected, the airguns would be powered-down immediately if this is a reasonable alternative to a complete shutdown, to have the marine mammal outside the newly established safety zone that would be smaller due to reduced number of operating airguns. This decision will be made by the MMO and can be based on the results obtained from the acoustic measurements for the establishments of safety zones.

Following a power-down, operation of the full airgun array will not resume until the marine mammal has cleared the safety zone. The animal will be

considered to have cleared the safety zone if it:

(1) Is visually observed to have left the safety zone;

(2) Has not been seen within the zone for 15 min in the case of small odontocetes and pinnipeds; or

(3) Has not been seen within the zone for 30 min in the case of mysticetes (large odontocetes do not occur within the study area).

Shutdown Procedure

A shutdown procedure involves the complete turn off of all airguns. Ramp-up procedures will be followed during resumption of full seismic operations. The operating airgun(s) will be shut down completely during the following situations:

(1) If a marine mammal approaches or enters the applicable safety zone, and a power-down is not practical or adequate to reduce exposure to less than 190 dB (rms; pinnipeds) or 180 dB (rms; cetaceans).

(2) If a marine mammal approaches or enters the estimated safety radius around the reduced source that will be used during a power-down.

(3) If a marine mammal is detected within the safety radius and a power down would not keep the animal outside the reduced new safety radius, the airguns will be shut-down.

Airgun activity will not resume until the marine mammal has cleared the safety radius. The animal will be considered to have cleared the safety radius as described above for power-down procedures.

Ramp-up Procedure

A ramp-up procedure will be followed when the airgun array begins operating after a specified duration with no or reduced airgun operations. The specified duration depends on the speed of the source vessel, the size of the airgun array that is being used, and the size of the safety zone, but is often about 10 min.

NMFS requires that, once ramp-up commences, the rate of ramp-up be no more than 6 dB per 5 min period. Ramp-up will likely begin with the smallest airgun, in this case, 80 in³. The precise ramp-up procedure has yet to be determined. A common procedure is to double the number of operating airguns at 5-min intervals. During the ramp-up, the safety zone for the full 8-gun array will be maintained. A ramp-up procedure can be applied only in the following situations:

(1) If, after a complete shutdown, the entire 180 dB safety zone has been visible for at least 30 min prior to the planned start of the ramp-up in either

daylight or nighttime. If the entire safety zone is visible with vessel lights and/or night vision devices, then ramp-up of the airguns from a complete shutdown may occur at night.

(2) If one airgun has operated during a power-down period, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will either be alerted by the sounds from the single airgun and could move away or may be detected by visual observations.

(3) If no marine mammals have been sighted within or near the applicable safety zone during the previous 15 min in either daylight or nighttime, provided that the entire safety zone was visible for at least 30 min.

Proposed Monitoring and Reporting Plan

PGS proposes to sponsor marine mammal monitoring during the seismic survey in order to implement the proposed mitigation measures that require real-time monitoring, to satisfy the anticipated monitoring requirements of the IHA, and to meet any monitoring requirements agreed to as part of the POC/CAA. PGS will meet the requirements by using two techniques: use of MMOs and participating in an acoustics monitoring plan through ENI. The monitoring plan is described here.

Vessel-based Visual Monitoring by MMOs

PGS' approach to monitoring is to station two or more MMOs aboard each seismic vessel to document the occurrence of marine mammals near the vessel, to help implement mitigation requirements, and to record the reactions of marine mammals to the survey. At least one MMO, if not all, will be an Inupiat trained in collecting marine mammal data. Each MMO will, while on duty, scan the area of operation (using 8 to 10 power binoculars) for marine mammals, recording the species, location, distance from survey vessel, and behavior (and associated weather data) of all that are seen. Observer watches will last no more than 4 consecutive hours, and no observer will watch more than 12 total hours in a 24-hr day. Observation will occur while survey operations are conducted. (Use of night-scope for fall monitoring will be explored prior to the fall field season.) Most importantly, however, each MMO will determine that the safety radius is clear of marine mammals prior to operating the high-energy sound equipment, and each will have the authority to suspend active side-scan sonar or sleeve gun operations should a marine mammal be observed

approaching the safety radius. NMFS will be provided with weekly reports of the marine mammal observations as long as the onboard communication systems allow.

In addition to the marine mammal monitoring to be performed by the MMOs located on the source vessels, PGS has offered to hire Inupiat speakers to perform seismic work on each of the PGS vessels. As part of their duties, the Inupiat speakers will also keep watch for marine mammals and will communicate with the MMOs located on the source vessels.

Acoustic Monitoring of Drillsite Activities and Marine Mammal Vocalizations

Acoustic measurements of drillsite activities and marine mammal vocalizations in 2008 will be performed using Greeneridge's autonomous seafloor recorders. For monitoring the near-drillsite sounds, four omnidirectional ASARs (Greene *et al.*, 1997) will be used, which sample at a rate of 5 kHz and have an acoustic bandwidth of 10–2,200 Hz. The ASARs can record ambient and anthropogenic sounds and vocalizations from bowhead whales, beluga whales, seals, and walrus.

For the whale-call acoustic array, five directional DASARs (Greene *et al.*, 2004; see Figure 3 in Appendix B of PGS' application) will be used, which have an acoustic bandwidth of 10–450 Hz. In addition to bowhead whale calls, the DASARs will also detect and record industrial sounds, including those produced by vessels and seismic airguns. Regarding the ability to detect ultra-low frequency sounds that might be produced from drilling, the DASAR and the ASAR can record sounds as low as 1 or 2 Hz but at reduced sensitivity relative to frequencies above 10 Hz. The DASARs will be modified versions of units (DASAR "b") that were used for Shell's 2007 Beaufort Sea Monitoring Program and will be identical to those proposed for monitoring BP's Northstar Island and Shell's five DASAR arrays in 2008. The modification involves a new version of the sensor (a three-channel device). In total, nine recorders will be used for Pioneer/ENI in 2008; four ASARs will be deployed in the vicinity of the ODS and SID and five DASARs will be located approximately 13–20 km (8–12 mi) north of the drillsites in 9–15.2 m (30–50 ft) of water (see Figure 4 in Appendix B of PGS' application).

The acoustic recorders will be deployed/retrieved using a workboat supplied by Pioneer/ENI. Recorders will be retrieved from a tag line and the grapple method. The recorders will be

deployed in mid-August and then allowed to record as long as possible into September, taking weather factors (e.g., sea state and ice formation) into consideration. The NSB Wildlife Department will be informed prior to removing the recorders.

The four ASARs will be placed near the two drillsites to monitor sounds produced from drilling (ODS only), vessel (ODS and SID), and construction activities (primarily SID). Figure 5 in Appendix B of PGS' application provides a finer scale resolution of the acoustic recorders in the vicinity of ODS and SID than in Figure 4. One ASAR will be placed approximately 0.4 km (0.25) mi from each ODS and SID. One ASAR will be placed 6.4 km (4 mi) north of ODS and one 0.6 km (1 mi) north of SID. Similar to the nearby Shell DASAR Site 1 and Site 2 arrays, the DASARs will be spaced 7 km (4.3 mi) from each other and will detect marine mammal vocalizations to the north and south of the array out to 10 to 15 km (6 to 9 mi) from any one recorder.

The acoustic data collected during the summer 2008 near ODS and SID will be suitable to compute sound levels received from: (1) heavy equipment and machinery operating on the drillsites; (2) small vessels and crew change vessels operating around the ODS and SID and between Oliktok Point and the ODS; (3) loaded and empty barges traversing to and from Oliktok Point and ODS and SID; and (4) the process of holding the barges in place at the drillsites while offloading equipment and supplies.

An important aspect to characterizing sounds and correlating them to specific activities will be to maintain an accurate record of all sound-producing activities in the project areas. Time-referenced information of vessel movements and construction activities at and around the drillsites will be required in order to interpret acoustic sound level data. This is especially important in order to determine whether measured sound levels are generated by activities at or near the drillsites. To acquire detailed position information from key sources of in-water sounds, Pioneer/ENI proposes to place GPS units capable of logging position data on selected project vessels during the open-water period. The vessel logs and GPS position data will be used to verify (or exclude) various sources of anthropogenic sounds that are detected on the acoustic recorders and to associate any visual observations of marine mammal behavior from aerial surveys with project activities. Pioneer/ENI will also maintain logs of equipment inventory

and associated daily activities at ODS and SID and the drilling activity at ODS.

Additional information on how the ASARs and DASARs will be utilized is found in Appendix B of the PGS application.

Acoustic Monitoring of Seismic Survey and Ambient Sounds

PGS will use an automated process developed by A. Thode of Scripps to detect airgun pulses in the DASAR data and compute the instantaneous peak pressure, the sound pressure level (rms), the sound exposure level, and the pulse duration. Background sound levels (between the pulses) are also characterized using this automated procedure. These measurements provide time series for the entire study period, expected to be from 4–6 weeks beginning in mid-August. Vessel sounds will be noted and their levels included in the background time series (Blackwell *et al.*, 2008).

Aerial Surveys

Working with NSB scientists in 2006, Pioneer developed an aerial survey program to assess the distribution of bowhead whales within 24–32 km (15–20 mi) of the Pioneer operation during fall whale migration. These surveys were done in 2006 and 2007 and were conducted with two dedicated observers from a Bell 412 helicopter (Reiser *et al.*, 2008; Williams *et al.*, 2008).

For 2008, PGS proposes to collaborate with Shell to expand the temporal coverage of their aerial survey program, which is otherwise planned to start around September 7. These surveys are to be performed in support of Shell's shallow hazard surveys being planned from mid-September through October, 2008. PGS will work to expand the duration of these surveys to start August 25 and be conducted along the survey tracklines.

Weather conditions permitting, surveys will be conducted 3 or more days per week beginning August 25 and continuing through as far into October as Shell continues its operation. The surveys will be conducted from a de Havilland Twin Otter following similar protocols used by Shell in the Beaufort Sea in 2006 and 2007. Survey tracklines will be spaced 8 km (5 mi) apart and will run approximately 64.4 km (40 mi) in a north-south direction. Surveys will be conducted in good survey conditions (i.e., favorable weather and sea state). Four trained and experienced surveyors seated in the rear of the aircraft will make observations from the right and left sides of the airplane. The airplane will be operated by two pilots in the

front seats who will also survey the area ahead of the aircraft.

Standard aerial survey procedures used by LGL and others in many previous marine mammal projects will be followed, including those surveys completed for Shell in the Alaskan Beaufort Sea in 2006 (Thomas *et al.*, 2007) and 2007 (Lyons *et al.*, 2008). Following these procedures will facilitate comparisons and (as appropriate) pooling of results with other datasets (e.g., sighting rates, whale group size and composition). The aircraft will be flown at 100–110 knots ground speed and at an altitude of 457 m (1500 ft). Aerial surveys at an altitude of 457 m (1500 ft) do not provide much information about seals but are suitable for both bowhead and beluga whales. The need for a 457 m (1500 ft) cloud ceiling will limit the dates and times when surveys can be flown. The surveys will follow a GPS-referenced tracklines.

For each marine mammal sighting, the observer will not the species, number, size/age/sex class when determinable, activity, heading, swimming speed category (if traveling), sighting cue, ice conditions (type and percentage), and inclinometer reading. An inclinometer reading (angle from horizontal) will be taken when the animal's location is at a right angle to the side of the aircraft track, allowing calculation of lateral distance from the aircraft trackline. Transect information, sighting data, and environmental data will be entered into a GPS-linked data logger.

Reporting

A report on the preliminary results of the acoustic verification measurements, including as a minimum the measured 190- and 180-dB (rms) radii of the airgun sources, will be submitted within 72-hrs after collection of those measurements at the start of the field season. This report will specify the distances of the safety zones that were adopted for the survey.

A report on PGS' activities and on the relevant monitoring and mitigation results will be submitted to NMFS within 90 days after the end of the seismic survey. The report will describe the operations that were conducted, the measured sound levels, and the cetaceans and seals that were detected near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all acoustic and vessel-based marine mammal monitoring. The 90-day report will summarize the dates and locations of seismic operations, and all whale and seal sightings (dates, times, locations, activities, associated seismic survey

activities). Marine mammal sightings will be reported at species level, however, especially during unfavorable environmental conditions (e.g., low visibility, high sea states) this will not always be possible. The number and circumstances of ramp-up, power-down, shutdown, and other mitigation actions will be reported. The report will also include estimates of the amount and nature of potential impact to marine mammals encountered during the survey.

ESA

NMFS has previously consulted under section 7 of the ESA on the issuance of IHAs for seismic survey activities in the Beaufort and Chukchi Seas. NMFS issued a Biological Opinion on June 16, 2006, regarding the effects of this action on ESA-listed species and critical habitat under the jurisdiction of NMFS. The Opinion concluded that this action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. A copy of the Biological Opinion is available at: <http://www.mms.gov/alaska/ref/BioOpinions/ARBOIII-2.pdf>.

National Environmental Policy Act (NEPA)

In 2006, the MMS prepared Draft and Final Programmatic Environmental Assessments (PEAs) for seismic surveys in the Beaufort and Chukchi Seas. NMFS was a cooperating agency in the preparation of the MMS PEA. On November 17, 2006 (71 FR 66912), NMFS and MMS announced that they were preparing a DPEIS in order to assess the impacts of MMS' annual authorizations under the Outer Continental Shelf Lands Act to the U.S. oil and gas industry to conduct offshore geophysical seismic surveys in the Chukchi and Beaufort Seas off Alaska and NMFS' authorizations under the MMPA to incidentally harass marine mammals while conducting those surveys.

On March 30, 2007 (72 FR 15135), the Environmental Protection Agency (EPA) noted the availability for comment of the NMFS/MMS DPEIS. Based upon several verbal and written requests to NMFS for additional time to review the DPEIS, EPA has twice announced an extension of the comment period until July 30, 2007 (72 FR 28044, May 18, 2007; 72 FR 38576, July 13, 2007). Because NMFS has been unable to complete the PEIS, it determined that the 2006 PEA would need to be updated in order to meet NMFS' NEPA requirements. This approach was warranted as it was reviewing five

proposed Arctic seismic survey IHAs for 2008, well within the scope of the PEA's eight consecutive seismic surveys. To update the 2006 Final PEA, NMFS is currently preparing an EA which incorporates by reference the 2006 Final PEA and other related documents. The necessary NEPA analysis will be concluded prior to making a determination on the issuance of the IHA to PGS.

Preliminary Determinations

Based on the information provided in PGS' application, this document, and the MMS Final PEA, NMFS has preliminarily determined that the impact of PGS conducting seismic surveys in the Beaufort Sea in 2008 may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of six species of marine mammals, will have no more than a negligible impact on the affected species or stocks, and that there will not be any unmitigable adverse impacts to subsistence communities, provided the mitigation measures described previously in this document are implemented.

NMFS has preliminarily determined that the short-term impact of conducting seismic surveys in the U.S. Beaufort Sea may result, at worst, in a temporary modification in behavior by certain species of marine mammals. While behavioral and avoidance reactions may be made by these species in response to the resultant noise, this behavioral change is expected to have a negligible impact on the animals. While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of seismic operations, the number of potential harassment takings is estimated to be small (less than one percent of any of the estimated population sizes) and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document. In addition, no take by death and/or serious injury is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation and monitoring measures proposed above. No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within or near the planned area of operations during the season of operations.

NMFS has preliminarily determined that the proposed seismic activity by PGS in the Beaufort Sea in 2008 will not

have an unmitigable adverse impact on the subsistence uses of bowhead whales and other marine mammals. This determination is supported by the information in this **Federal Register** Notice, including: (1) the fall bowhead whale hunt in the Beaufort Sea will either be governed by a CAA between PGS and the AEWC and village whaling captains or by mitigation measures contained in the IHA; (2) the CAA or IHA conditions will significantly reduce impacts on subsistence hunters to ensure that there will not be an unmitigable adverse impact on subsistence uses of marine mammals; (3) because ringed seals are hunted mainly from October through June, although they are available year-round; however, the seismic survey will not occur during the primary period when these seals are typically harvested; and (4) specific provisions to avoid interference with the seal hunts will be integrated into the survey in compliance with the CAA where applicable.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to PGS for conducting a seismic survey in the Beaufort Sea in 2008, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: June 11, 2008.

James H. Lecky,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. E8-13650 Filed 6-16-08; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF DEFENSE

Office of the Secretary

[Transmittal Nos. 08-06]

36(b)(1) Arms Sales Notification

AGENCY: Department of Defense, Defense Security Cooperation Agency.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing the unclassified text of a section 36(b)(1) arms sales notification. This is published to fulfill the requirements of section 155 of Public Law 104-164 dated 21 July 1996.

FOR FURTHER INFORMATION CONTACT: Ms. B. English, DSCA/DBO/CFM, (703) 601-3740.

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittals 08-06 with attached transmittal, policy justification, and Sensitivity of Technology.

Dated: May 5, 2008.

Patricia L. Toppings,

*OSD Federal Register Liaison Officer,
Department of Defense.*

BILLING CODE 5001-06-M



**DEFENSE SECURITY COOPERATION AGENCY
WASHINGTON, DC 20301-2800**

**JUN 03 2008
In reply refer to:
USP002149-08**

**The Honorable Nancy Pelosi
Speaker of the House of Representatives
Washington, DC 20515-6501**

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 08-06, concerning the Department of the Navy's proposed Letter(s) of Offer and Acceptance to Spain for defense articles and services estimated to cost \$156 million. After this letter is delivered to your office, we plan to issue a press statement to notify the public of this proposed sale.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey A. Wieringa".

**Jeffrey A. Wieringa
Vice Admiral, USN
Director**

Enclosures:

- 1. Transmittal**
- 2. Policy Justification**
- 3. Sensitivity of Technology**

Same ltr to:

House

**Committee on Foreign Affairs
Committee on Armed Services
Committee on Appropriations**

Senate

**Committee on Foreign Relations
Committee on Armed Services
Committee on Appropriations**

Transmittal No. 08-06

**Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act, as amended**

- (i) **Prospective Purchaser:** Spain
- (ii) **Total Estimated Value:**
- | | |
|--------------------------|----------------------|
| Major Defense Equipment* | \$ 30 million |
| Other | <u>\$126 million</u> |
| TOTAL | \$156 million |
- (iii) **Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:** 20 RGM-109E BLOCK IV Surface Ship Vertical Launched TOMAHAWK Land Attack Missiles, 5 Tactical TOMAHAWK weapon control systems hardware and software, canisters, containers, test sets and support equipment, spare and repair parts, personnel training and training equipment, operational flight test and communications equipment, technical assistance, and other related elements of logistics support.
- (iv) **Military Department:** Navy (ANP)
- (v) **Prior Related Cases, if any:** none
- (vi) **Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:** none
- (vii) **Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:** See Annex attached
- (viii) **Date Report Delivered to Congress:** JUN 03 2008

* as defined in Section 47(6) of the Arms Export Control Act.

POLICY JUSTIFICATION

Spain - BLOCK IV TOMAHAWK Land Attack Missiles

The Government of Spain has requested a possible sale of 20 RGM-109E BLOCK IV Surface Ship Vertical Launched TOMAHAWK Land Attack Missiles, 5 Tactical TOMAHAWK weapon control systems hardware and software, canisters, containers, test sets and support equipment, spare and repair parts, personnel training and training equipment, operational flight test and communications equipment, technical assistance, and other related elements of logistics support. The estimated cost is \$156 million.

This sale will enhance the Spanish Navy's ability to engage in coalition warfare with the U.S. Navy. The weapons will be carried on the Spanish Navy F-100 Class Frigates. The missiles will be conventionally armed.

Spain continues to invest in advanced weapons systems to maintain its operational effectiveness within North Atlantic Treaty Organization. The weapon's long range and high degree of accuracy will enable Spain to take action while minimizing collateral damage and to reduce the exposure of Spanish forces to hostile fire.

The sale of this equipment and support will not alter the basic military balance in the region.

Implementation of this sale will not require the assignment of any additional U.S. Government personnel or contractor representatives to Spain.

The prime contractor will be Raytheon Company, Tucson, Arizona. There are no known offset agreements proposed in connection with this potential sale.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 08-06

**Notice of Proposed Issuance of Letter of Offer
Pursuant to Section 36(b)(1)
of the Arms Export Control Act**

**Annex
Item No. vii**

(vii) Sensitivity of Technology:

- 1. The conventionally armed TOMAHAWK BLOCK IV Land Attack Missile (TLAM-E) consists of the following classified components: The TLAM-E missile (Complete) – Missile components consisting of Guidance Set, Digital Scene Matching Area Correlator (DSMAC), Global Positioning System (GPS) when software is installed, Data Link when software/firmware is installed, Common Missile Radar Altimeter (CMRA), Operational Flight Software, DSMAC Flight Software, and GPS flight software.**
- 2. The Tactical Tomahawk Weapon Control System consists of the following classified data when operationally configured: Operational software and tactical data; Platform Mission Library, threat system data, Pre-mission predictive analysis, Tomahawk Command Information Database, strike data, and Launch Platform Planning Mission Planning.**
- 3. If a technologically capable adversary were to obtain knowledge of this highly sensitive equipment, the technology could be easily absorbed; thereby permitting development of countermeasures which could reduce overall weapon system effectiveness.**

[FR Doc. E8-13216 Filed 6-16-08; 8:45 am]
BILLING CODE 5001-06-C

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services Overview Information; National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research Projects and Centers Program—Rehabilitation Engineering Research Centers (RERCs)—Universal Interface and Information Technology Access; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133E-6.

Dates:

Applications Available: June 17, 2008.

Deadline for Transmittal of Applications: August 1, 2008.
Date of Pre-Application Meeting: July 9, 2008.

Full Text of Announcement**I. Funding Opportunity Description**

Purpose of Program: The purpose of the RERC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by conducting advanced engineering research and development on innovative technologies that are designed to solve particular rehabilitation problems, or remove environmental barriers. RERCs also demonstrate and evaluate such technologies, facilitate service delivery system changes, stimulate the production and distribution of new technologies and equipment in the private sector, and provide training opportunities.

Additional information on the RERC program can be found at: <http://www.ed.gov/rschstat/research/pubs/res-program.html#RERC>.

Priority: The *Universal Interface and Information Technology Access* priority is from the notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published in the **Federal Register** on February 1, 2008 (73 FR 6132).

Note: On February 1, 2008, we also published a notice in the **Federal Register** (73 FR 6166) inviting applications for a number of competitions, including one using the *Universal Interface and Information Technology Access* priority. None of the applications we received for the *Universal Interface and Information Technology Access* competition announced in that notice were successful. Accordingly, through this notice, we are inviting applications for another competition using the *Universal Interface and Information Technology Access* priority.

Absolute Priority: For FY 2008, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: *RERC on Universal Interface and Information Technology Access*.

Program Authority: 29 U.S.C. 762(g) and 764(b)(3).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published in the **Federal Register** on February 1, 2008 (73 FR 6132, 6144).

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: \$950,000.

Estimated Range of Awards: \$947,999–\$950,000.

Maximum Award: We will reject any application that proposes a budget exceeding \$950,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Note: The maximum amount includes direct and indirect costs.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. **Eligible Applicants:** States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; IHEs; and Indian tribes and tribal organizations.

2. **Cost Sharing or Matching:** This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. **Address to Request Application Package:** You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs). To obtain a copy via the Internet, use the following address: <http://www.ed.gov/fund/grant/apply/grantapps/index.html>. To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications

Center, P.O. Box 1398, Jessup, MD 20794–1398. Telephone, toll free: 1–877–433–7827. FAX: (301) 470–1244. If you use a telecommunications device for the deaf (TDD), call, toll free: 1–877–576–7734.

You can contact ED Pubs at its Web site, also: <http://www.ed.gov/pubs/edpubs.html> or at its e-mail address: edpubs@inet.ed.gov.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.133E–6.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. **Content and Form of Application Submission:** Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 125 pages, using the following standards:

- A “page” is 8.5” x 11”, on one side only, with 1” margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Single spacing may be used for titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative justification; other required forms; an abstract, Human Subjects narrative, Part III narrative; resumes of staff; and other related materials, if applicable.

3. **Submission Dates and Times:**

Applications Available: June 17, 2008.

Deadline for Transmittal of Applications: August 1, 2008.

Date of Pre-Application Meeting:

Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. The pre-application meeting will be held on July 9, 2008. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1:00 p.m. and 2:30 p.m., Washington, DC time. NIDRR staff also will be available from 3:00 p.m. to 4:00 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate in the meeting via conference call or for an individual consultation, contact Donna Nangle, U.S. Department of Education, Potomac Center Plaza (PCP), room 6029, 550 12th Street, SW., Washington, DC 20202. Telephone: (202) 245–7462 or by e-mail: Donna.Nangle@ed.gov.

Applications for grants under this program may be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV. 6. **Other Submission Requirements** in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. **Intergovernmental Review:** This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. **Funding Restrictions:** We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

To comply with the President's Management Agenda, we are participating as a partner in the Governmentwide *Grants.gov* Apply site. The Rehabilitation Engineering Research Centers competition, CFDA number 84.133E-6, is included in this project. We request your participation in *Grants.gov*.

If you choose to submit your application electronically, you must use the Governmentwide *Grants.gov* Apply site at <http://www.Grants.gov>. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Rehabilitation Engineering Research Centers competition—CFDA number 84.133E-6 at <http://www.Grants.gov>. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.133, not 84.133E-6).

Please note the following:

- Your participation in *Grants.gov* is voluntary.
- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the *Grants.gov* system—after 4:30 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary

depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.

- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* at <http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf>.

- To submit your application via *Grants.gov*, you must complete all steps in the *Grants.gov* registration process (see http://www.grants.gov/applicants/get_registered.jsp). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the *Grants.gov* 3-Step Registration Guide (see <http://www.grants.gov/section910/Grants.govRegistrationBrochure.pdf>). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via *Grants.gov*. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

- If you submit your application electronically, you must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

- If you submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

- Your electronic application must comply with any page-limit requirements described in this notice.

- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. (This notification indicates receipt by *Grants.gov* only, not receipt by the Department.) The Department then will retrieve your application from *Grants.gov* and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1-800-518-4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30 p.m., Washington,

DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the *Grants.gov* system. We will not grant you an extension if you failed to fully register to submit your application to *Grants.gov* before the application deadline date and time or if the technical problem you experienced is unrelated to the *Grants.gov* system.

b. Submission of Paper Applications by Mail.

If you submit your application in paper format by mail (through the U.S. Postal Service or a commercial carrier), you must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service:

U.S. Department of Education,
Application Control Center,
Attention: (CFDA number 84.133E-6),
400, Maryland Avenue, SW.,
Washington, DC 20202-4260

or

By mail through a commercial carrier:

U.S. Department of Education,
Application Control Center, Stop
4260, Attention: (CFDA number
84.133E-6), 7100 Old Landover Road,
Landover, MD 20785-1506.

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery.

If you submit your application in paper format by hand delivery, you (or

a courier service) must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA number 84.133E-6), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202-4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245-6288.

V. Application Review Information

1. Selection Criteria: The selection criteria for this competition are from 34 CFR 350.54 and are listed in the application package.

2. Review and Selection Process: Additional factors we consider in determining the merits of an application are as follows—

The Secretary is interested in outcomes-oriented research or development projects that use rigorous scientific methodologies. To address this interest, applicants are encouraged to articulate goals, objectives, and expected outcomes for the proposed research or development activities. Proposals should describe how results and planned outputs are expected to contribute to advances in knowledge, improvements in policy and practice, and public benefits for individuals with disabilities. Applicants should propose projects that are designed to be consistent with these goals. We encourage applicants to include in their application a description of how results will measure progress towards achievement of anticipated outcomes (including a discussion of measures of effectiveness), the mechanisms that will be used to evaluate outcomes associated with specific problems or issues, and how the proposed activities will support

new intervention approaches and strategies. Submission of the information identified in this section V. **2. Review and Selection Process** is voluntary, except where required by the selection criteria listed in the application package.

VI. Award Administration Information

1. Award Notices: If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. Administrative and National Policy Requirements: We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section in this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. Reporting: At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to <http://www.ed.gov/fund/grant/apply/appforms/appforms.html>.

Note: NIDRR will provide information by letter to grantees on how and when to submit the final performance report.

4. Performance Measures: To evaluate the overall success of its research program, NIDRR assesses the quality of its funded projects through review of grantee performance and products. Each year, NIDRR examines a portion of its grantees to determine:

- The percentage of newly-awarded NIDRR projects that are multi-site, collaborative, controlled studies of interventions and programs.

- The number of accomplishments (e.g., new or improved tools, methods, discoveries, standards, interventions, programs, or devices) developed or tested with NIDRR funding that have been judged by expert panels to be of high quality and to advance the field.

- The number of new or improved NIDRR-funded assistive and universally designed technologies, products, and devices transferred to industry for potential commercialization.

- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.

- The percentage of new grants that include studies funded by NIDRR that assess the effectiveness of interventions, programs, and devices using rigorous methods.

NIDRR uses information submitted by grantees as part of their annual performance reports in support of these performance measures.

Updates on the Government Performance and Results Act of 1993 (GPRA) indicators, revisions, and methods appear on the NIDRR Program Review Web site: <http://www.neweditions.net/pr/commonfiles/pmconcepts.htm>.

Grantees should consult this site on a regular basis to obtain details and explanations on how NIDRR programs contribute to the advancement of the Department's long-term and annual performance goals.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT:

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If you use a TDD, call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

VIII. Other Information

Alternative Format: Individuals with disabilities can obtain this document and a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the Grants and Contracts Services Team, U.S. Department of Education, 400 Maryland Avenue, SW., room 5075, PCP, Washington, DC 20202-2550. Telephone: (202) 245-7363. If you use a TDD, call the FRS, toll-free, at 1-800-877-8339.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-

888-293-6498; or in the Washington, DC, area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: <http://www.gpoaccess.gov/nara/index.html>.

Dated: June 12, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8-13641 Filed 6-16-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Office of Special Education and Rehabilitative Services; Overview Information: National Institute on Disability and Rehabilitation Research (NIDRR)—Disability and Rehabilitation Research, Projects and Centers Program—Rehabilitation Engineering Research Centers (RERCs)—Accessible Public Transportation; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2008

Catalog of Federal Domestic Assistance (CFDA) Number: 84.133E-3.

Dates: Applications Available: June 17, 2008.

Deadline for Transmittal of Applications: August 1, 2008.

Date of Pre-Application Meeting: July 9, 2008.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of the RERC program is to improve the effectiveness of services authorized under the Rehabilitation Act of 1973, as amended, by conducting advanced engineering research and development on innovative technologies that are designed to solve particular rehabilitation problems, or remove environmental barriers. RERCs also demonstrate and evaluate such technologies, facilitate service delivery system changes, stimulate the production and distribution of new technologies and equipment in the private sector, and provide training opportunities.

Additional information on the RERC program can be found at: <http://www.ed.gov/rschstat/research/pubs/res-program.html#RERC>.

Priority: The *Accessible Public Transportation* priority is from the notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published

in the **Federal Register** on February 1, 2008 (73 FR 6132).

Note: On February 1, 2008, we also published a notice in the **Federal Register** (73 FR 6166) inviting applications for a number of competitions, including one using the Accessible Public Transportation priority. None of the applications we received for the *Accessible Public Transportation* competition announced in that notice were successful. Accordingly, through this notice, we are inviting applications for another competition using the *Accessible Public Transportation* priority.

Absolute Priority: For FY 2008, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: *RERC on Accessible Public Transportation*.

Program Authority: 29 U.S.C. 762(g) and 764(b)(3).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 80, 81, 82, 84, 85, 86, and 97. (b) The regulations for this program in 34 CFR part 350. (c) The notice of final priorities for the Disability and Rehabilitation Research Projects and Centers Program, published in the **Federal Register** on February 1, 2008 (73 FR 6132, 6144).

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: \$950,000.

Estimated Range of Awards: \$947,999—\$950,000.

Maximum Award: We will reject any application that proposes a budget exceeding \$950,000 for a single budget period of 12 months. The Assistant Secretary for Special Education and Rehabilitative Services may change the maximum amount through a notice published in the **Federal Register**.

Note: The maximum amount includes direct and indirect costs.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. **Eligible Applicants:** States; public or private agencies, including for-profit agencies; public or private organizations, including for-profit organizations; IHEs; and Indian tribes and tribal organizations.

2. **Cost Sharing or Matching:** This competition does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* You can obtain an application package via the Internet or from the Education Publications Center (ED Pubs).

To obtain a copy via the Internet, use the following address: <http://www.ed.gov/fund/grant/apply/grantapps/index.html>. To obtain a copy from ED Pubs, write, fax, or call the following: Education Publications Center, P.O. Box 1398, Jessup, MD 20794-1398. Telephone, toll free: 1-877-433-7827. FAX: (301) 470-1244. If you use a telecommunications device for the deaf (TDD), call toll free: 1-877-576-7734.

You can contact ED Pubs at its Web site, also: <http://www.ed.gov/pubs/edpubs.html> or at its e-mail address: edpubs@inet.ed.gov.

If you request an application from ED Pubs, be sure to identify this competition as follows: CFDA Number 84.133E-3.

Individuals with disabilities can obtain a copy of the application package in an alternative format (e.g., Braille, large print, audiotope, or computer diskette) by contacting the person or team listed under *Alternative Format* in section VIII of this notice.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you limit Part III to the equivalent of no more than 125 pages, using the following standards:

- A "page" is 8.5" x 11", on one side only, with 1" margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative. Single spacing may be used for titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support.

However, the recommended page limit does apply to all of the application narrative section (Part III).

The application package will provide instructions for completing all components to be included in the application. Each application must include a cover sheet (Standard Form 424); budget requirements (ED Form 524) and narrative justification; other required forms; an abstract, Human Subjects narrative, Part III narrative; resumes of staff; and other related materials, if applicable.

3. *Submission Dates and Times:*
Applications Available: June 17, 2008.

Deadline for Transmittal of Applications: August 1, 2008.

Date of Pre-Application Meeting:

Interested parties are invited to participate in a pre-application meeting and to receive information and technical assistance through individual consultation with NIDRR staff. The pre-application meeting will be held on July 9, 2008. Interested parties may participate in this meeting by conference call with NIDRR staff from the Office of Special Education and Rehabilitative Services between 1:00 p.m. and 2:30 p.m., Washington, DC time. NIDRR staff also will be available from 3:00 p.m. to 4:00 p.m., Washington, DC time, on the same day, by telephone, to provide information and technical assistance through individual consultation. For further information or to make arrangements to participate in the meeting via conference call or for an individual consultation, contact Donna Nangle, U.S. Department of Education, Potomac Center Plaza (PCP), room 6029, 550 12th Street, SW., Washington, DC 20202. Telephone: (202) 245-7462 or by e-mail: Donna.Nangle@ed.gov.

Applications for grants under this program may be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*), or in paper format by mail or hand delivery. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery, please refer to section IV.6. *Other Submission Requirements* in this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides an accommodation or auxiliary aid to an

individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program may be submitted electronically or in paper format by mail or hand delivery.

a. *Electronic Submission of Applications.*

To comply with the President's Management Agenda, we are participating as a partner in the Governmentwide *Grants.gov* Apply site. The Rehabilitation Engineering Research Centers competition, CFDA number 84.133E-3, is included in this project. We request your participation in *Grants.gov*.

If you choose to submit your application electronically, you must use the Governmentwide *Grants.gov* Apply site at <http://www.Grants.gov>. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

You may access the electronic grant application for the Rehabilitation Engineering Research Centers competition—CFDA number 84.133E-3 at <http://www.Grants.gov>. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.133, not 84.133E-3).

Please note the following:

- Your participation in *Grants.gov* is voluntary.
- When you enter the *Grants.gov* site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by *Grants.gov* are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the *Grants.gov* system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time

stamped by the *Grants.gov* system—after 4:30 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from *Grants.gov*, we will notify you if we are rejecting your application because it was date and time stamped by the *Grants.gov* system after 4:30 p.m., Washington, DC time, on the application deadline date.

- The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through *Grants.gov*.

- You should review and follow the Education Submission Procedures for submitting an application through *Grants.gov* that are included in the application package for this competition to ensure that you submit your application in a timely manner to the *Grants.gov* system. You can also find the Education Submission Procedures pertaining to *Grants.gov* at <http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf>.

- To submit your application via *Grants.gov*, you must complete all steps in the *Grants.gov* registration process (see http://www.grants.gov/applicants/get_registered.jsp). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the *Grants.gov* 3-Step Registration Guide (see <http://www.grants.gov/section910/Grants.gov.RegistrationBrochure.pdf>). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via *Grants.gov*. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you submit your application in paper format.

- If you submit your application electronically, you must submit all

documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

- If you submit your application electronically, you must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

- Your electronic application must comply with any page-limit requirements described in this notice.

- After you electronically submit your application, you will receive from *Grants.gov* an automatic notification of receipt that contains a *Grants.gov* tracking number. (This notification indicates receipt by *Grants.gov* only, not receipt by the Department.) The Department then will retrieve your application from *Grants.gov* and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).

- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the *Grants.gov* System: If you are experiencing problems submitting your application through *Grants.gov*, please contact the *Grants.gov* Support Desk, toll free, at 1-800-518-4726. You must obtain a *Grants.gov* Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the *Grants.gov* system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with *Grants.gov*, along with the *Grants.gov* Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the *Grants.gov* system and that that problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

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- The number of new or improved NIDRR-funded assistive and universally designed technologies, products, and devices transferred to industry for potential commercialization.
- The average number of publications per award based on NIDRR-funded research and development activities in refereed journals.
- The percentage of new grants that include studies funded by NIDRR that assess the effectiveness of interventions, programs, and devices using rigorous methods.

NIDRR uses information submitted by grantees as part of their annual performance reports in support of these performance measures.

Updates on the Government Performance and Results Act of 1993 (GPRA) indicators, revisions, and methods appear on the NIDRR Program Review Web site: <http://www.neweditions.net/pr/commonfiles/pmconcepts.htm>.

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FOR FURTHER INFORMATION CONTACT:

Donna Nangle, U.S. Department of Education, 400 Maryland Avenue, SW., room 6029, PCP, Washington, DC 20202. Telephone: (202) 245-7462 or by e-mail: Donna.Nangle@ed.gov.

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Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: <http://www.ed.gov/news/fedregister>.

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC, area at (202) 512-1530.

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Dated: June 12, 2008.

Tracy R. Justesen,

Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. E8-13645 Filed 6-16-08; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC08-512-001, FERC-512]

Commission Information Collection Activities, Proposed Collection; Comment Request; Submitted for OMB Review

June 10, 2008.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice.

SUMMARY: In compliance with the requirements of section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507, the Federal Energy Regulatory Commission (Commission) has submitted the information collection described below to the Office of Management and Budget (OMB) for review of this information collection requirement. Any interested person may file comments directly with OMB and

should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to an earlier **Federal Register** notice of March 13, 2008 (73 FR 13536-13537), and has made this notation in its submission to OMB.

DATES: Comments on the collection of information are due by July 10, 2008.

ADDRESSES: Address comments on the collection of information to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission Desk Officer. Comments to OMB should be filed electronically, c/o oir_submission@omb.eop.gov and include the OMB Control No. (1902-0073) as a point of reference. The Desk Officer may be reached by telephone at 202-395-7345. A copy of the comments should also be sent to the Federal Energy Regulatory Commission, Office of the Executive Director, ED-34, Attention: Michael Miller, 888 First Street, NE., Washington, DC 20426. Comments may be filed either in paper format or electronically. Those persons filing electronically do not need to make a paper filing. For paper filings, such comments should be submitted to the Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 and should refer to Docket No. IC08-512-001. Documents filed electronically via the Internet must be prepared in an acceptable filing format and in compliance with the Federal Energy Regulatory Commission submission guidelines. Complete filing instructions and acceptable filing formats are available at (<http://www.ferc.gov/help/submission-guide/electronic-media.asp>). To file the document electronically, access the Commission's Web site and click on Documents & Filing, E-Filing (<http://www.ferc.gov/docs-filing/efiling.asp>), and then follow the instructions for each screen. First time users will have to establish a user name and password. The Commission will send an automatic acknowledgement to the sender's e-mail address upon receipt of comments.

All comments may be viewed, printed or downloaded remotely via the Internet

through FERC's homepage using the "eLibrary" link. For user assistance, contact fercolinesupport@ferc.gov or toll-free at (866) 208-3676 or for TTY, contact (202) 502-8659.

FOR FURTHER INFORMATION CONTACT:

Michael Miller may be reached by telephone at (202) 502-8415, by fax at (202) 273-0873, and by e-mail at michael.miller@ferc.gov.

SUPPLEMENTARY INFORMATION:

Abstract: The information collected under the requirements of FERC-512, "Application for Preliminary Permit" (OMB No. 1902-0073) is used by the Commission to implement the statutory provisions of sections 4(f), 5 and 7 of the Federal Power Act (FPA), 16 U.S.C. sections 797, 798 & 800. The purpose of obtaining a preliminary permit is to maintain priority of the application for a license for a hydropower facility while the applicant conducts surveys to prepare maps, plans, specifications and estimates; conducts engineering, economic and environmental feasibility studies; and making financial arrangements. The conditions under which the priority will be maintained are set forth in each permit. During the term of the permit, no other application for a preliminary permit or application for a license submitted by another party can be accepted. The term of the permit is three years. The information collected under the designation FERC-512 is in the form of a written application for a preliminary permit which is used by Commission staff to determine an applicant's qualifications to hold a preliminary permit, review the proposed hydro development for feasibility and to issue a notice of the application in order to solicit public and agency comments. The Commission implements these mandatory filing requirements in the Code of Federal Regulations (CFR) under 18 CFR 4.31-33, 4.81-.83.

Action: The Commission is requesting a three-year extension of the current expiration date, with no changes to the existing collection of data.

Burden Statement: Public reporting burden for this collection is estimated as:

No. of respondents	Annual responses per respondent	Average burden hours per response	Total annual burden hours
(1)	(2)	(3)	(1) × (2) × (3)
200	1	37	7,400

Estimated cost burden to respondents is \$508,000; (*i.e.*, 7 hours @\$200 an hour (legal) + 30 hours @\$39 an hour (technical) × 200) per year equals \$514,000).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, or disclose or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than anyone particular function or activity.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) 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 those who are to respond, including 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.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-13533 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2266-096]

Nevada Irrigation District; Notice of Intent To File License Application, Filing of Pre-Application Document, Commencement of Licensing Proceeding and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

June 10, 2008.

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Licensing Proceeding.

b. *Project No.:* 2266-096.

c. *Dated Filed:* April 11, 2008.

d. *Submitted By:* Nevada Irrigation District.

e. *Name of Project:* Yuba-Bear Project.

f. *Location:* The Yuba-Bear Project is located on the west slope of the Sierra Nevada on the Middle Yuba River, Canyon Creek, Fall Creek, Rucker Creek and Bear River, in Nevada, Placer and Sierra counties, California. A large portion of the project is located on the Tahoe National Forest. Some of the project is located on federally-owned land managed by the Bureau of Land Management as part of the Sierra Resource Management Area.

The project consists of four developments—Bowman, Dutch Flat, Chicago Park, and Rollins—which, in total, include: 13 main dams with a combined gross storage capacity of 207,865 acre-feet of water; four water conduits; five diversion dams; four powerhouses with a combined installed capacity of 79.32 megawatts; one 9.0-mile-long, 60-kilovolt transmission line; and appurtenant facilities and structures, including recreation facilities.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations.

h. *Applicant Contact:* Ron Nelson, General Manager, Nevada Irrigation District, 1036 West Main Street, Grass Valley, CA 95945, (530) 271-6824 or e-mail nelson@nid.dst.ca.us.

i. *FERC Contact:* John Mudre at 202-502-8902 or e-mail john.mudre@ferc.gov.

j. We are asking federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in paragraph o

below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See*, 94 FERC ¶ 61,076 (2001).

k. *With this notice, we are initiating informal consultation with:* (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR, Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Nevada Irrigation District as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historical Preservation Act.

m. Nevada Irrigation District filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at <http://ferc.gov/esubscribenow.htm> to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888

First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Yuba-Bear Project) and number (P-2266-096), and bear the heading "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by August 11, 2008.

Comments on the PAD and SD1, study requests, requests for cooperating agency status, and other permissible forms of communications with the Commission may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CF 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-filing" link.

p. Our intent is to prepare an Environmental Impact Statement (EIS) for which the planned meetings will satisfy the NEPA scoping requirements. We anticipate preparing a multi-project EIS that would also consider the proposed relicensing of Pacific Gas & Electric Company's Drum-Spaulding Hydroelectric Project (FERC No. 2310-173) and Rollins Transmission Line Project (FERC No. 2784-003). Because these three projects are located in the same watersheds and have the same license expiration dates, NID and PG&E have decided, to the extent practical, to cooperate and coordinate on their relicensing efforts. The scoping meetings and site visits discussed below will address all three projects.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the times and places noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 9 a.m.

Location: Auburn Holiday Inn Hotel, 120 Grass Valley Highway, Auburn, CA.

Evening Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 7 p.m.

Location: Gold Miners Inn Holiday Inn Express Hotel, 121 Bank Street, Grass Valley, CA.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list on May 22, 2008. Copies of SD1 will be available at the scoping meetings, or may be viewed on the web at <http://www.ferc.gov>, using the "eLibrary" link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as the list of issues identified through the scoping process.

Site Visit

The licensees and Commission staff will visit the project facilities on Tuesday, June 17, Wednesday, June 18, and Thursday, June 19, 2008, starting at 8 a.m. and ending at or about 5 a.m. Participants should meet by the start time as follows: (1) On June 17 at the Discovery Trail in Bear Valley; (2) on June 18 at the Alta Service Center; and (3) on June 19 at Halsey Forebay. Participants are responsible for their own transportation; four-wheel-drive vehicles are recommended. Anyone interested in attending the site visit should contact Mr. James Lynch at (916) 564-4214.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings.

Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-13537 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2784-003]

Pacific Gas and Electric Company; Notice of Intent To File License Application, Filing of Pre-Application Document, Commencement of Licensing Proceeding and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests

June 10, 2008.

a. *Type of Filing:* Notice of Intent To File License Application for a New License and Commencing Licensing Proceeding.

b. *Project No.:* 2784-003.

c. *Dated Filed:* April 11, 2008.

d. *Submitted By:* Pacific Gas and Electric Company (PG&E).

e. *Name of Project:* Rollins Transmission Line Project.

f. *Location:* The Rollins Transmission Line Project is located in Nevada and Placer counties, California, near the Bear River and the town of Colfax. The project consists of consists of a single circuit wood pole line extending from the Rollins Powerhouse switchyard approximately 3,800 feet to PG&E's Drum-Grass Valley-Weimar transmission line. The project is within a 40-foot-wide corridor. The project also includes an access road that is 1,867 feet in length, with project widths between 20 and 60 feet. The project occupies a total of 5.38 acres, all of which is under private ownership.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations.

h. *Applicant Contact:* Forrest Sullivan, Senior Project Manager, Pacific Gas and Electric Company, 5555 Florin Perkins Road, Rm. 100, Sacramento, CA 95826, (916) 386-5580, frs3@pge.com.

i. *FERC Contact:* John Mudre at 202-502-8902 or e-mail john.mudre@ferc.gov.

j. We are asking federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in paragraph o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See*, 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402 and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Pacific Gas and Electric Company as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historic Preservation Act.

m. Pacific Gas and Electric Company filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at <http://ferc.gov/esubscribenow.htm> to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and

SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Rollins Transmission Line Project) and number (P-2784-003), and bear the heading "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by August 11, 2008.

Comments on the PAD and SD1, study requests, requests for cooperating agency status, and other permissible forms of communications with the Commission may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-filing" link.

p. Our intent is to prepare an Environmental Impact Statement (EIS) for which the planned meetings will satisfy the NEPA scoping requirements. We anticipate preparing a multi-project EIS that would also consider the proposed relicensing of Nevada Irrigation District's Yuba-Bear Project (FERC No. 2266-096) and Pacific Gas & Electric Company's Drum-Spaulding Hydroelectric Project (FERC No. 2310-173). Because these three projects are located in the same watersheds and have the same license expiration dates, NID and PG&E have decided, to the extent practical, to cooperate and coordinate on their relicensing efforts. The scoping meetings and site visits discussed below will address all three projects.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the times and places noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings,

and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 9 a.m.

Location: Auburn Holiday Inn Hotel, 120 Grass Valley Highway, Auburn, California.

Evening Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 7 p.m.

Location: Gold Miners Inn Holiday Inn Express Hotel, 121 Bank Street, Grass Valley, California.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list on May 22, 2008. Copies of SD1 will be available at the scoping meetings, or may be viewed on the Web at <http://www.ferc.gov>, using the "eLibrary" link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as the list of issues identified through the scoping process.

Site Visit

The licensees and Commission staff will visit the project facilities on Tuesday, June 17, Wednesday, June 18, and Thursday, June 19, 2008, starting at 8 a.m. and ending at or about 5 p.m. Participants should meet by the start time as follows: (1) On June 17 at the Discovery Trail in Bear Valley; (2) on June 18 at the Alta Service Center; and (3) on June 19 at Halsey Forebay. Participants are responsible for their own transportation; four-wheel-drive vehicles are recommended. Anyone interested in attending the site visit should contact Mr. James Lynch at (916) 564-4214.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination

of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-13531 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2310-173]

Pacific Gas and Electric Company; Notice of Intent to File License Application, Filing of Pre-Application Document, Commencement of Licensing Proceeding and Scoping; Request for Comments on the Pad and Scoping Document, and Identification of Issues and Associated Study Requests

June 10, 2008.

a. *Type of Filing:* Notice of Intent to File License Application for a New License and Commencing Licensing Proceeding.

b. *Project No.:* 2310-173.

c. *Dated Filed:* April 11, 2008.

d. *Submitted By:* Pacific Gas and Electric Company.

e. *Name of Project:* Drum Spaulding Project.

f. *Location:* The Drum-Spaulding Project is located on the west slope of the Sierra Nevada, on the South Yuba River, Bear River, North Fork of the North Fork of the American River and tributaries to the Sacramento River basin, in Nevada and Placer counties, California. A large portion of the project is located on federal-owned lands managed by the Forest Service as part of the Tahoe National Forest. Small portions of the project occupy lands managed by the Bureau of Land Management and the Bureau of Reclamation.

The Project consists of 10 developments: Spaulding No. 3; Spaulding No. 1 and No. 2; Drum No. 1 and No. 2; Dutch Flat No. 1; Halsey; Wise; Newcastle; Deer Creek; Alta; and Wise No. 2. In the 10 developments there are 29 reservoirs with a combined gross storage capacity of 154,388 acre-feet of water; 6 major water conduits; 12 powerhouses with a combined authorized installed capacity of 192.5 megawatts, 7 transmission lines; and appurtenant facilities and structures, including recreation facilities.

g. *Filed Pursuant to:* 18 CFR Part 5 of the Commission's Regulations

h. *Applicant Contact:* Steve Peirano, Relicensing Project Manager, Pacific Gas and Electric Company, 245 Market Street, Room 1103, P.O. Box 770000, San Francisco, CA 94177-0001, (415) 973-4481, or e-mail slp2@pge.com.

i. *FERC Contact:* John Mudre at (202) 502-8902 or e-mail john.mudre@ferc.gov.

j. We are asking federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the environmental document. Agencies who would like to request cooperating status should follow the instructions for filing comments described in paragraph o below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See*, 94 FERC ¶ 61,076 (2001).

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402; and (b) the State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

l. With this notice, we are designating Pacific Gas and Electric Company as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act and section 106 of the National Historical Preservation Act.

m. Pacific Gas and Electric Company filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on

the Commission's Web site (<http://www.ferc.gov>), using the "eLibrary" link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at FERCONlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, (202) 502-8659. A copy is also available for inspection and reproduction at the address in paragraph h.

Register online at <http://ferc.gov/esubscribenow.htm> to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

o. With this notice, we are soliciting comments on the PAD and Scoping Document 1 (SD1), as well as study requests. All comments on the PAD and SD1, and study requests should be sent to the address above in paragraph h. In addition, all comments on the PAD and SD1, study requests, requests for cooperating agency status, and all communications to and from Commission staff related to the merits of the potential application (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Drum-Spaulding Project) and number (P-2310-173), and bear the heading "Comments on Pre-Application Document," "Study Requests," "Comments on Scoping Document 1," "Request for Cooperating Agency Status," or "Communications to and from Commission Staff." Any individual or entity interested in submitting study requests, commenting on the PAD or SD1, and any agency requesting cooperating status must do so by August 11, 2008.

Comments on the PAD and SD1, study requests, requests for cooperating agency status, and other permissible forms of communications with the Commission may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (<http://www.ferc.gov>) under the "e-filing" link.

p. Our intent is to prepare an Environmental Impact Statement (EIS) for which the planned meetings will satisfy the NEPA scoping requirements. We anticipate preparing a multi-project EIS that would also consider the proposed relicensing of Nevada Irrigation District's Yuba-Bear Project

(FERC No. 2266–096) and Pacific Gas and Electric Company's Rollins Transmission Line Project (FERC No. 2784–003). Because these three projects are located in the same watersheds and have the same license expiration dates, NID and PG&E have decided, to the extent practical, to cooperate and coordinate on their relicensing efforts. The scoping meetings and site visits discussed below will address all three projects.

Scoping Meetings

Commission staff will hold two scoping meetings in the vicinity of the project at the times and places noted below. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meeting is primarily for receiving input from the public. We invite all interested individuals, organizations, and agencies to attend one or both of the meetings, and to assist staff in identifying particular study needs, as well as the scope of environmental issues to be addressed in the environmental document. The times and locations of these meetings are as follows:

Daytime Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 9 a.m.,

Location: Auburn Holiday Inn Hotel, 120 Grass Valley Highway, Auburn, CA.

Evening Scoping Meeting

Date and Time: Tuesday, June 24, 2008, 7 p.m.,

Location: Gold Miners Inn Holiday Inn Express Hotel, 121 Bank Street, Grass Valley, California.

Scoping Document 1 (SD1), which outlines the subject areas to be addressed in the environmental document, was mailed to the individuals and entities on the Commission's mailing list on May 22, 2008. Copies of SD1 will be available at the scoping meetings, or may be viewed on the Web at <http://www.ferc.gov>, using the "eLibrary" link. Follow the directions for accessing information in paragraph n. Based on all oral and written comments, a Scoping Document 2 (SD2) may be issued. SD2 may include a revised process plan and schedule, as well as the list of issues identified through the scoping process.

Site Visit

The licensees and Commission staff will visit the project facilities on Tuesday, June 17, Wednesday, June 18, and Thursday, June 19, 2008, starting at 8 a.m. and ending at or about 5 p.m. Participants should meet by the start

time as follows: (1) On June 17 at the Discovery Trail in Bear Valley; (2) on June 18 at the Alta Service Center; and (3) on June 19 at Halsey Forebay. Participants are responsible for their own transportation; four-wheel-drive vehicles are recommended. Anyone interested in attending the site visit should contact Mr. James Lynch at (916) 564–4214.

Meeting Objectives

At the scoping meetings, staff will: (1) Initiate scoping of the issues; (2) review and discuss existing conditions and resource management objectives; (3) review and discuss existing information and identify preliminary information and study needs; (4) review and discuss the process plan and schedule for pre-filing activity that incorporates the time frames provided for in Part 5 of the Commission's regulations and, to the extent possible, maximizes coordination of federal, state, and tribal permitting and certification processes; and (5) discuss the appropriateness of any federal or state agency or Indian tribe acting as a cooperating agency for development of an environmental document.

Meeting participants should come prepared to discuss their issues and/or concerns. Please review the PAD in preparation for the scoping meetings. Directions on how to obtain a copy of the PAD and SD1 are included in item n. of this document.

Meeting Procedures

The meetings will be recorded by a stenographer and will become part of the formal record of the Commission proceeding on the project.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–13538 Filed 6–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

June 10, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC08–86–000.

Applicants: Wabash Valley Power Association, Inc., TPF Generation Holdings, LLC, Holland Energy, LLC.

Description: Wabash Valley Power Association (Inc), *et al.* submits an Addendum to its Application for

Authorization Disposition of Jurisdictional Assets under section 203.
Filed Date: 06/09/2008.

Accession Number: 20080609–5050.

Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Docket Numbers: EC08–99–000.

Applicants: Noble Environmental Power.

Description: Joint Application of Noble Environmental Power, LLC for Authorization of Proposed Transaction under Section 203, and Request for Expedited Consideration, Waiver of Certain Filing Requirements.

Filed Date: 06/05/2008.

Accession Number: 20080605–5046.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG08–75–000.

Applicants: Notrees Windpower, LP.

Description: Self Certification Notice of Exempt Wholesale Generator of Notrees Windpower, LP.

Filed Date: 06/04/2008.

Accession Number: 20080604–5073.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–1767–011; ER07–501–007; ER99–1695–011; ER99–2984–010.

Applicants: Tenaska Frontier Partners, Ltd.; Birchwood Power Partners, L.P.; Elwood Energy, LLC; Green Country Energy, LLC.

Description: Notification of Non-Material Change in Status of J-Power North America Holdings, Ltd.

Filed Date: 06/06/2008.

Accession Number: 20080606–5136.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER96–719–019; ER97–2801–020; ER99–2156–013.

Applicants: Cordova Energy Company LLC, MidAmerican Energy Company.

Description: Cordova Energy Company LLC *et al.* submits information regarding PacificCorp's Blundell Geothermal II Generating Facility.

Filed Date: 06/03/2008.

Accession Number: 20080605–0122.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 24, 2008.

Docket Numbers: ER01–2830–003.

Applicants: Davison Van Cleve, PC.

Description: Application of Roseburg Forest Products for Finding as a Category 1 Seller of Davison Van Cleve, PC.

Filed Date: 06/09/2008.
Accession Number: 20080609–5124.
Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Docket Numbers: ER02–1903–008.
Applicants: FPL Energy Marcus Hook, L.P.

Description: FPL Energy Marcus Hook LP submits a notice of change in status.
Filed Date: 06/06/2008.

Accession Number: 20080610–0219.
Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER02–1903–008.
Applicants: FPL Energy Marcus Hook, L.P.

Description: FPL Energy Marcus Hook LP submits a notice of change in status.
Filed Date: 06/06/2008.

Accession Number: 20080610–0219.
Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER03–9–013; ER98–2157–014.

Applicants: Westar Energy, Inc.; Kansas Gas and Electric Company
Description: Westar Energy, Inc submits Sixth Revised Sheet 1 *et al.* to its FERC Tariff, Third Revised Volume 6, effective 9/18/07.

Filed Date: 06/04/2008.
Accession Number: 20080606–0056.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER07–45–002.
Applicants: Horizon Power & Light LLC.

Description: Horizon Power & Light LLC submits the Amended Updated Market Power Analysis.

Filed Date: 06/04/2008.
Accession Number: 20080609–0070.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–781–001.
Applicants: Central Illinois Light Company, Central Illinois Public Service Company, Illinois Power Company.

Description: The Ameren Illinois Utilities jointly submit a compliance filing of an executed Electric Resource Sharing Agreement for Capacity.

Filed Date: 06/04/2008.
Accession Number: 20080606–0006.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–832–001.
Applicants: ISO New England Inc.
Description: Notice of Withdrawal of Tariff Sheets re ISO New England.

Filed Date: 06/06/2008.
Accession Number: 20080606–5112.
Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08–848–001.
Applicants: GearyEnergy, LLC.

Description: GearyEnergy, LLC submits a revised application for market-based rate authority.

Filed Date: 06/05/2008.
Accession Number: 20080610–0225.
Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08–1025–001.
Applicants: The Connecticut Light and Power Company
Description: The Connecticut Light and Power Co. submits Amendment No. 2 to the Interconnection and Operation Agreement.

Filed Date: 06/05/2008.
Accession Number: 20080610–0224.
Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08–1028–000.
Applicants: Westar Energy, Inc.
Description: Westar Energy, Inc submits Second Revised Sheet 11 and 1 to the Wholesale Electric Service Agreement commencing 2/1/88, designated First Revised Rate Schedule FERC 170 between Kansas Gas and Electric Company etc.

Filed Date: 05/30/2008.
Accession Number: 20080603–0097.
Comment Date: 5 p.m. Eastern Time on Friday, June 20, 2008.

Docket Numbers: ER08–1030–000.
Applicants: Westar Energy, Inc. & Kansas Gas & Electric Co submits Second Revised Sheets 9 & 1 to the Wholesale Electric Service Agreement commencing 2/1/88, designated First Revised Rate Schedule FERC 169 w/City of La Harpe, KS.

Filed Date: 05/30/2008.
Accession Number: 20080603–0096.
Comment Date: 5 p.m. Eastern Time on Friday, June 20, 2008.

Docket Numbers: ER08–1057–001.
Applicants: Entergy Services, Inc.
Description: Entergy Operating Companies submits corrected pages B.1 and B.1.1 and requests that the corrected pages replace those included in the original filing made on 5/30/08.

Filed Date: 06/06/2008.
Accession Number: 20080610–0220.
Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08–1065–000.
Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits amendments to Schedule 12 Appendix of the PJM Tariff to include cost responsibility assignments for four baseline upgrades that will operate at or above 500 kV, etc.

Filed Date: 06/03/2008.
Accession Number: 20080605–0044.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 24, 2008.

Docket Numbers: ER08–1066–000.
Applicants: ISO New England Inc. and New England Power Pool Participants Committee.

Description: ISO New England, Inc and New England Power Pool Participants Committee submits First Revised Sheet 7307D *et al* and supporting testimony of Peter K Wong.

Filed Date: 06/03/2008.
Accession Number: 20080605–0045.
Comment Date: 5 p.m. Eastern Time on Tuesday, June 24, 2008.

Docket Numbers: ER08–1067–000.
Applicants: American Electric Power Service Corporation.

Description: The American Electric Power Service Corp on behalf of the AEP Operating Companies submits the Third Revision to the Interconnection and Local Delivery Service Agreement 1425 with the Village of Plymouth.

Filed Date: 06/04/2008.
Accession Number: 20080605–0046.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–1068–000.
Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits an executed interconnection service agreement with Providence Heights Wind, LLC *et al.*

Filed Date: 06/04/2008.
Accession Number: 20080605–0047.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–1070–000.
Applicants: Coral Power, L.L.C.

Description: Coral Power, LLC submits a Notice of Cancellation of Fourth Revised Rate Schedule FERC 1, effective 6/1/08.

Filed Date: 06/04/2008.
Accession Number: 20080606–0005.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–1071–000.
Applicants: Coral Energy Management, LLC.

Description: Coral Energy Management, LLC submits a Notice of Cancellation of First Revised Rate Schedule FERC 1.

Filed Date: 06/04/2008.
Accession Number: 20080606–0004.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08–1072–000.
Applicants: Nevada Power Company.

Description: Nevada Power Co. submits a Notice of Termination of the Service Agreement for Long-Term Firm Point-to-Point Transmission Service.

Filed Date: 06/04/2008.
Accession Number: 20080606–0003.
Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08-1073-000.
Applicants: Deseret Generation & Transmission Co-op.

Description: Deseret Generation & Transmission Co-operative, Inc submits its annual Informational Filing setting forth updated approved costs for member-owned generation resources for 2008.

Filed Date: 06/04/2008.

Accession Number: 20080606-0002.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08-1074-000.

Applicants: The Midwest Independent Transmission Sys.

Description: Midwest Independent Transmission System Operator, Inc submits an executed Small Generator Interconnection Agreement.

Filed Date: 06/04/2008.

Accession Number: 20080606-0001.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Docket Numbers: ER08-1075-000.

Applicants: Entergy Services, Inc.

Description: Entergy Operating Companies submits proposed amendments to the agreement first executed on 11/17/06 with Southwest Power Pool, Inc.

Filed Date: 06/05/2008.

Accession Number: 20080609-0115.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08-1076-000.

Applicants: The American Electric Power Service Corp.

Description: AEP Operating Companies submits a second revision to the Interconnection and Local Delivery Service Agreement 1429 with Village of Sycamore.

Filed Date: 06/05/2008.

Accession Number: 20080609-0112.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08-1077-000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Co. submits a Large Generator Interconnection Agreement with CPV Sentinel, LLC *et al.*

Filed Date: 06/05/2008.

Accession Number: 20080609-0114.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08-1078-000.

Applicants: Entergy Services, Inc.

Description: Entergy Gulf States Louisiana, LLC submits an amended Interconnection and Operating Agreement between RSC Cogen, LLC and EGS.

Filed Date: 06/06/2008.

Accession Number: 20080610-0204.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1079-000.

Applicants: Entergy Services, Inc.

Description: Entergy Services, Inc submits an amended Interconnection and Operating Agreement between LSP Energy Limited Partnership and EMI.

Filed Date: 06/06/2008.

Accession Number: 20080610-0205.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1086-000.

Applicants: Saracen Energy MB L.P.

Description: Saracen Energy MB LP submits its Cancellation of Rate Schedule and gives notice that Rate Schedule FERC 1 effective 7/1/07, is being cancelled.

Filed Date: 06/05/2008.

Accession Number: 20080610-0213.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08-1088-000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, LLC submits a revised interconnection service agreement and revised construction service agreement.

Filed Date: 06/06/2008.

Accession Number: 20080610-0203.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1089-000.

Applicants: Port Washington Generating Station LLC.

Description: Port Washington Generating Station LLC notifies FERC of the termination of Rate Schedule FERC 1 under which PWGS was authorized to sell test power to Wisconsin Electric Power Company etc.

Filed Date: 06/06/2008.

Accession Number: 20080610-0214.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1089-000.

Applicants: Port Washington Generating Station LLC.

Description: Port Washington Generating Station LLC notifies FERC of the termination of Rate Schedule FERC 1 under which PWGS was authorized to sell test power to Wisconsin Electric Power Company etc.

Filed Date: 06/06/2008.

Accession Number: 20080610-0214.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1090-000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits revisions to its Open Access Transmission Tariff and Market Administration and Control Area Services Tariff.

Filed Date: 06/06/2008.

Accession Number: 20080610-0215.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: ER08-1091-000.

Applicants: West Valley Leasing Company, LLC.

Description: West Valley Leasing Company, LLC submits Notice of Cancellation of its market-based rate tariff, FERC Electric Tariff, Original Volume 1, to become effective 6/10/08.

Filed Date: 06/09/2008.

Accession Number: 20080610-0216.

Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Docket Numbers: ER08-1092-000.

Applicants: The American Electric Power Service Corp.

Description: AEP Operating Companies submits a second revision to the Interconnection and Local Delivery Service agreement 1421 with Village of Cygnet.

Filed Date: 06/09/2008.

Accession Number: 20080610-0218.

Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Docket Numbers: ER08-1093-000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Co. submits notices of termination for two Special Facilities Agreements with City and County of San Francisco.

Filed Date: 06/09/2008.

Accession Number: 20080610-0217.

Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES08-52-000.

Applicants: Monongahela Power Company.

Description: Application of Monongahela Power Company under Section 204 of the Federal Power Act for Authorization under Section 204(a) to issue up to \$410 Million in First Mortgage Bonds or Other Long-Term Debt Instruments.

Filed Date: 06/09/2008.

Accession Number: 20080609-5117.

Comment Date: 5 p.m. Eastern Time on Monday, June 30, 2008.

Take notice that the Commission received the following foreign utility company status filings:

Docket Numbers: FC08-6-000.

Applicants: SunEdison International, LLC.

Description: Notice of Self Certification of Foreign Utility Company, Status of SunEdison International, LLC.

Filed Date: 06/06/2008.

Accession Number: 20080606-5121.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA08–13–003.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits tariff revisions in compliance to FERC's 5/7/08 Order.

Filed Date: 06/06/2008.

Accession Number: 20080610–0223.

Comment Date: 5 p.m. Eastern Time on Friday, June 27, 2008.

Docket Numbers: OA07–88–002.

Applicants: Carolina Power & Light Company d/b/a Pro, Florida Power Corp. d/b/a Progress Energy, Progress Energy, Inc.

Description: Order No. 890 OATT Filing of Carolina Power & Light Company and Florida Power Corporation.

Filed Date: 06/04/2008.

Accession Number: 20080604–5069.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 25, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>.

To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–13559 Filed 6–16–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

June 11, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP99–518–107.

Applicants: Gas Transmission Northwest Corporation.

Description: Gas Transmission Northwest Corp submits Sixteenth Revised Sheet 24 and Fifth Revised Sheet 28 to FERC Gas Tariff, Third Revised Volume 1–A.

Filed Date: 06/09/2008.

Accession Number: 20080610–0232.

Comment Date: 5 p.m. Eastern Time on Monday, June 23, 2008.

Docket Numbers: RP07–570–001. RP07–695–001.

Applicants: CenterPoint Energy—Mississippi River Transmission Corporation.

Description: CenterPoint Energy—Mississippi River Transmission Corporation submits Substitute Sixty-Third Revised Sheet 5 *et al.* to FERC Gas Tariff, Third Revised Volume 1, effective 10/1/07 and 11/1/07.

Filed Date: 06/05/2008.

Accession Number: 20080606–0097.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 17, 2008.

Docket Numbers: RP08–317–001.

Applicants: Columbia Gas Transmission Corporation.

Description: Columbia Gas Transmission Corporation submits Third Revised Sheet 489 to FERC Gas Tariff, Second Revised Volume 1, proposed to become effective 6/1/08.

Filed Date: 06/05/2008.

Accession Number: 20080606–0096.

Comment Date: 5 p.m. Eastern Time on Tuesday, June 17, 2008.

Docket Numbers: RP08–338–001.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits Thirteenth revised Sheet 405C and Original Sheet 405C.01 for inclusion in Tennessee's FERC Gas Tariff, Fifth Revised Volume 1, to become effective 6/1/08.

Filed Date: 06/06/2008.

Accession Number: 20080606–0133.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 18, 2008

Docket Numbers: RP08–402–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits Fifth Revised Sheet 804 of its Gas Tariff Sixth Revised Volume 1, to become effective 7/7/08.

Filed Date: 06/06/2008.

Accession Number: 20080606–0134.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 18, 2008.

Docket Numbers: CP08–54–003.

Applicants: Columbia Gulf Transmission Company.

Description: Columbia Gulf Transmission Company submits compliance filing to cancel Dynegy Marketing and Trade capacity entitlements.

Filed Date: 05/30/2008.

Accession Number: 20080530–5030.

Comment Date: 5 p.m. Eastern Time on Wednesday, June 18, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access

who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8-13560 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

June 11, 2008.

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC08-94-000.

Applicants: Duke Energy Carolinas, LLC.

Description: Application of Duke Energy Carolinas, LLC Seeking Authorization for the Acquisition of Jurisdictional Facilities.

Filed Date: 05/30/2008.

Accession Number: 20080530-4036.

Comment Date: 5 p.m. Eastern Time on Friday, June 20, 2008.

Docket Numbers: EC08-98-000.

Applicants: Nevada Power Company, Reliant Energy Wholesale Generation, LLC.

Description: Nevada Power Company & Reliant Energy Wholesale Generation, LLC's application for authorization to dispose of jurisdictional assets.

Filed Date: 06/02/2008.

Accession Number: 20080610-0275.

Comment Date: 5 p.m. Eastern Time on Monday, June 23, 2008.

Docket Numbers: EC08-100-000.

Applicants: Solios Power LLC.

Description: Application for authorization for disposition of jurisdictional facilities and request for expedited action of Solios Power, LLC.

Filed Date: 06/05/2008.

Accession Number: 20080610-0228.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER08-1084-000.

Applicants: Evergreen Community Power, LLC.

Description: Evergreen Community Power, LLC submits Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority of ECP.

Filed Date: 06/05/2008.

Accession Number: 20080610-0210.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Docket Numbers: ER08-1085-000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits proposed changes to its Open Access Transmission Tariff.

Filed Date: 06/05/2008.

Accession Number: 20080610-0211.

Comment Date: 5 p.m. Eastern Time on Thursday, June 26, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8-13562 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08-72-000]

Northern Border Pipeline Company; Notice of Availability of the Environmental Assessment for the Proposed Des Plaines Project

June 10, 2008.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) of the natural gas compressor station proposed by Northern Border Pipeline Company (Northern Border) in the above-referenced docket.

The EA was prepared to satisfy the requirements of the National Environmental Policy Act. The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The EA assesses the potential environmental effects of the construction and operation of Northern Border's proposed Des Plaines Project, consisting of a new 1,600 horsepower compressor station, meter station, and interconnect facilities at a site along Northern Border's existing pipeline system in Will County, Illinois. The Des Plaines Project would enable Northern Border to receive natural gas from ANR Pipeline Company, for transport to a

delivery point on Northern Border's pipeline system.

The EA has been placed in the public files of the FERC. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502-8371.

Copies of the EA have been mailed to federal, state, and local agencies, interested individuals, newspapers, libraries, and parties to this proceeding.

Any person wishing to comment on the EA may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below.

Please note that the Commission strongly encourages electronic filing of any comments or interventions or protests to this proceeding. See 18 Code of Federal Regulations 385.2001(a)(1)(iii) and the instructions on the Commission's Internet Web site at <http://www.ferc.gov> under the link to "Documents and Filings" and "eFiling." eFiling is a file attachment process and requires that you prepare your submission in the same manner as you would if filing on paper, and save it to a file on your hard drive. New eFiling users must first create an account by clicking on "Sign up" or "eRegister." You will be asked to select the type of filing you are making. This filing is considered a "Comment on Filing." In addition, there is a "Quick Comment" option available, which is an easy method for interested persons to submit text only comments on a project. The Quick-Comment User Guide can be viewed at <http://www.ferc.gov/docs-filing/efiling/quick-comment-guide.pdf>. Quick Comment does not require a FERC eRegistration account; however, you will be asked to provide a valid e-mail address. All comments submitted under either eFiling or the Quick Comment option are placed in the public record for the specified docket.

If you are filing written comments, please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send an original and two copies of your comments to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First St., NE., Room 1A, Washington, DC 20426;
- Reference Docket No. CP08-72-000;
- Label one copy of the comments for the attention of the Gas Branch 3, PJ-11.3; and

- Mail your comments so that they will be received in Washington, DC, on or before June 10, 2008.

Comments will be considered by the Commission but will not serve to make the commentor a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).¹ Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which would not be adequately represented by any other parties. You do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at 1-866-208-FERC or on the FERC Internet Web site (<http://www.ferc.gov>) using the eLibrary link. Click on the eLibrary link, click on "General Search" and enter the docket number excluding the last three digits in the Docket Number field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at FercOnlineSupport@ferc.gov or toll free at 1-866-208-3676, or for TTY, contact (202) 502-8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription, which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to <http://www.ferc.gov/esubscribenow.htm>.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-13532 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

¹ Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID-5728-000]

Kroboth, Michael E.; Notice of Filing

June 10, 2008.

Take notice that on May 28, 2008, Michael E. Kroboth filed an application to hold interlocking positions pursuant to section 305(b) of the Federal Power Act and Part 45 of the regulations of the Commission, 18 CFR Part 45 (2007).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FercOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 p.m. Eastern Time on June 18, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8-13534 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory
Commission****[Docket No. ID-5737-000]****Volk, Stephen R.; Notice of Filing**

June 10, 2008.

Take notice that on June 6, 2008, Stephen R. Volk filed a notice of resignation from holding interlocking positions, pursuant to Part 45 of the regulations of the Commission, 18 CFR Part 45.5.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5 p.m. Eastern Time on June 26, 2008.

Kimberly D. Bose,
Secretary.

[FR Doc. E8-13535 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory
Commission****[Docket No. AD08-9-000]****Review of Wholesale Electricity
Markets; Second Notice of Conference
and Agenda**

June 10, 2008.

On May 12, 2008, the Federal Energy Regulatory Commission (Commission) issued a notice announcing a conference in this proceeding, to be held on July 1, 2008. As mentioned in that notice, the Commission has invited senior management and market monitors from the jurisdictional regional transmission organizations (RTOs) and independent system operators (ISOs) to provide a review of the current and future state of regional wholesale electricity markets. Members of the Commission's staff will provide an overview of the wholesale electricity markets outside of RTOs and ISOs. Attached is the agenda for the conference.

The conference will be held at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 in the Commission Meeting Room (2-C) from 9:30 a.m. until 4 p.m. (EDT). All interested persons are invited, and there is no registration required.

This conference will be transcribed. Transcripts of the conference will be immediately available from Ace Reporting Company (202-347-3700 or 1-800-336-6646) for a fee. It will also be web-cast. Capitol Connection offers the opportunity for remote listening and viewing of the conference. It is available for a fee, live over the Internet, by phone, or via satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703-993-3100) as soon as possible or visit the Capitol Connection Web site at <http://www.capitolconnection.gmu.edu> and click on "FERC".

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to accessibility@ferc.gov or call toll free 1-866-208-3372 (voice) or 202-208-1659 (TTY), or send a FAX to 202-208-2106 with the required accommodations.

Questions about the conference should be directed to Saida Shaalan by

e-mail at Saida.Shaalan@FERC.gov or by phone at 202-502-8278.

Kimberly D. Bose,
Secretary.

Agenda

9:30

Opening Remarks.

9:45

ISO New England, Inc., Gordon Van Welie, President and Chief Executive Officer, Hung-po Chao, Director, Market Monitoring.

New York Independent System Operator, Karen Antion, Interim Chief Executive Officer, David Patton, President, Potomac Economics.

PJM Independent System Operator, Inc., W. Terry Boston, President and Chief Executive Officer, Joseph Bowring, Manager, Market Monitoring Unit.

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Break.

1

California Independent System Operator, Yakout Mansour, President and Chief Executive Officer, Keith Casey, Director, Department of Market Monitoring, Frank Wolak, Chairman, Market Surveillance Committee.

1:45

Midwest Independent Transmission System Operator, T. Graham Edwards, President and Chief Executive Officer, David Patton, President, Potomac Economics.

Southwest Power Pool, Inc., Nick Brown, President and Chief Executive Officer, Richard Dillon, Director, Market Development and Analysis.

3:15

South and West Regions, Charles Whitmore, Senior Market Advisor, Division of Energy Market Oversight, Office of Enforcement.

4

Adjourn.

[FR Doc. E8-13539 Filed 6-16-08; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****Notice of FERC Staff Attendance At Southwest Power Pool Independent Coordinator of Transmission (ICT) Stakeholders' Policy Committee Meeting**

June 10, 2008.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting noted below. Their attendance is part of the Commission's ongoing outreach efforts.

ICT Stakeholders Policy Committee Meeting

June 19, 2008 (9 a.m.–3 p.m. CST), Sheraton North Hilton, 15700 JFK Boulevard, Houston, TX 77032.

The discussions may address matters at issue in the following proceedings:

Docket No. EL07–52: Louisiana Public Service Commission v. Entergy Services, Inc.

Docket No. OA07–32: Entergy Services, Inc.

Docket No. ER05–1065: Entergy Services, Inc.

Docket No. EL00–66: Louisiana Public Service Commission v. Entergy.

Docket No. EL95–33: Louisiana Public Service Commission v. Entergy.

Docket No. ER00–2854: Louisiana Public Service Commission v. Entergy.

Docket No. EL05–15: Arkansas Electric Cooperative, Corp. v. Entergy Arkansas, Inc.

Docket No. ER06–1555: Entergy Services, Inc.

Docket No. ER08–845: Entergy Services, Inc.

Docket No. ER08–844: Entergy Services, Inc.

Docket No. ER08–885: Entergy Gulf States Louisiana, LLC.

Docket No. ER03–583: Entergy Services, Inc.

Docket No. ER08–879: Entergy Services, Inc.

Docket No. ER01–2214: Entergy Services, Inc.

Docket No. ER07–628: Entergy Arkansas, Inc.

Docket No. ER07–629: Entergy Arkansas, Inc.

Docket No. ER07–630: Entergy Arkansas, Inc.

Docket No. EL08–50: Louisiana Public Service Commission v. System Energy Resources.

Docket No. EL08–51: Louisiana Public Service Commission v. Entergy Services, Inc.

Docket No. EL08–59: ConocoPhillips v. Entergy Services, Inc.

Docket No. EL08–60: Union Electric v. Entergy Services, Inc.

Docket No. ER08–750: Entergy Services, Inc.

Docket No. ER08–751: Entergy Services, Inc.

Docket No. ER08–752: Entergy Services, Inc.

Docket No. OA08–92: Entergy Services, Inc.

Docket No. OA08–75: Entergy Services, Inc.

Docket No. ER08–572: Entergy Services, Inc.

Docket No. ER08–927: Entergy Services, Inc.

Docket No. OA08–59: Entergy Services, Inc.

Docket No. ER07–1252: Entergy Services, Inc.

Docket No. EL03–230: ExxonMobil v. Entergy.

Docket No. ER08–774: Entergy Services, Inc.

Docket No. ER08–1006: Entergy Services, Inc.

Docket No. ER08–1040: Entergy Services, Inc.

Docket No. ER08–1041: Entergy Services, Inc.

Docket No. ER08–1056: Entergy Services, Inc.

Docket No. ER08–1057: Entergy Services, Inc.

These meetings are open to the public.

For more information, contact Amy Demetry, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6090 or Amy.Demetry@ferc.gov.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–13536 Filed 6–16–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2007–0716; FRL–8580–5]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; TSCA Section 4 Test Rules, Consent Orders, Test Rule Exemptions, and Voluntary Data Submission; EPA ICR No. 1139.08, OMB No. 2070–0033

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 to renew an existing approved collection. The ICR, which is abstracted below, describes the nature of the information collection activity and its expected burden and costs.

DATES: Additional comments may be submitted on or before July 17, 2008.

ADDRESSES: Submit your comments, referencing docket ID Number EPA–HQ–OPPT–2007–0716 to (1) EPA online using www.regulations.gov (our preferred method), by e-mail to oppt.ncic@epa.gov or by mail to: Document Control Office (DCO), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, Mail Code: 7407T, 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:

Barbara Cunningham, Director, Environmental Assistance Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, Mailcode: 7408–M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–554–1404; e-mail address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On November 14, 2007 (72 FR 64075), EPA sought comments on this renewal ICR pursuant to 5 CFR 1320.8(d). EPA received no substantive comments during the comment period. Any comments related to 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–OPPT–2007–0716 which is available for online viewing at <http://www.regulations.gov>, or in person inspection at the OPPT 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 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 Pollution Prevention and Toxics Docket is 202–566–0280.

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 public 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: TSCA Section 4 Test Rules, Consent Orders, Test Rule Exemptions, and Voluntary Data Submission.

ICR Numbers: EPA ICR No. 1139.08, OMB Control No. 2070-0033.

ICR Status: This ICR is currently scheduled to expire on June 30, 2008. 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: Section 4 of the Toxic Substances Control Act (TSCA) is designed to assure that chemicals that may pose serious risks to human health or the environment undergo testing by manufacturers or processors, and that the results of such testing are made available to EPA. EPA uses the information collected under the authority of TSCA section 4 to assess risks associated with the manufacture, processing, distribution, use or disposal of a chemical, and to support any necessary regulatory action with respect to that chemical.

EPA must assure that appropriate tests are performed on a chemical if it decides: (1) That a chemical being considered under TSCA section 4(a) may pose an "unreasonable risk" or is produced in "substantial" quantities that may result in substantial or significant human exposure or substantial environmental release of the chemical; (2) that additional data are needed to determine or predict the

impacts of the chemical's manufacture, processing, distribution, use or disposal; and (3) that testing is needed to develop such data. Rules and consent orders under TSCA section 4 require that one manufacturer or processor of a subject chemical perform the specified testing and report the results of that testing to EPA. TSCA section 4 also allows a manufacturer or processor of a subject chemical to apply for an exemption from the testing requirement if that testing will be or has been performed by another party. This information collection applies to reporting and recordkeeping activities associated with the information that EPA requires industry to provide in response to TSCA section 4 test rules, consent orders, test rule exemptions and other data submissions.

Responses to the collection of information are mandatory (see 40 CFR part 790). Respondents may claim all or part of a notice as CBI. EPA will disclose information that is covered by a CBI claim only to the extent permitted by, and in accordance with, the procedures in 40 CFR part 2.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 232 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: Entities potentially affected by this action are persons who manufacture, process or import, use, distribute or dispose of one or more specified chemical substances.

Frequency of Collection: On occasion.

Estimated No. of Respondents: 58.

Estimated Total Annual Burden on Respondents: 151,962 hours.

Estimated Total Annual Costs: \$5,845,639.

Changes in Burden Estimates: There is a net decrease of 51,052 hours (from 203,014 hours to 151,962 hours) in the total estimated respondent burden

compared with that currently in the OMB inventory. This decrease reflects EPA's revised estimates of the number of test rules and consent orders that the Agency expects to issue in the future, as well as revised estimates of the amount of testing still to be done under EPA's HPV Challenge program. The Supporting Statement includes detailed analyses of these revised estimates. This change is an adjustment.

Dated: June 9, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8-13612 Filed 6-16-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8580-4]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency Clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). 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 are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Rick Westlund (202) 566-1682, or e-mail at westlund.rick@epa.gov and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses To Agency Clearance Requests

OMB Approvals

EPA ICR Number 1550.07; Conflict of Interest Rule #1 (Renewal); was approved 05/09/2008; OMB Number 2030-0023; expires 05/31/2011.

EPA ICR Number 0186.11; NESHAP for Vinyl Chloride (Renewal); in 40 CFR part 61, subpart F; was approved 05/15/2008; OMB Number 2060-0071; expires 05/31/2011.

EPA ICR Number 1125.05; NESHAP for Beryllium Rocket Motor Fuel Firing (Renewal); in 40 CFR part 61, subpart D; was approved 05/15/2008; OMB Number 2060-0394; expires 05/31/2011.

EPA ICR Number 1681.06; NESHAP for Epoxy Resin and Non-Nylon

Polyamide Production (Renewal); in 40 CFR part 63, subpart W; was approved 05/15/2008; OMB Number 2060-0290; expires 05/31/2011.

EPA ICR Number 1722.05; Emission Certification and Compliance Requirements for Marine Spark-ignition Engines (Renewal); in 40 CFR part 91, and 40 CFR part 805; was approved 05/15/2008; OMB Number 2060-0321; expires 05/31/2011.

EPA ICR Number 1367.08; Regulation of Fuels and Fuel Additives: Gasoline Volatility; in 40 CFR 80.27; was approved 05/15/2008; OMB Number 2060-0178; expires 05/31/2011.

EPA ICR Number 2258.01; PM 2.5 NAAQS Implementation Rule (Final Rule); in 40 CFR 51.100; was approved 05/15/2008; OMB Number 2060-0611; expires 05/31/2011.

EPA ICR Number 1676.05; Clean Air Act Tribal Authority (Renewal); in 40 CFR 35, 40 CFR part 49, 40 CFR part 50, and 40 CFR part 81; was approved 05/15/2008; OMB Number 2060-0306; expires 05/31/2011.

EPA ICR Number 1826.04; Transition Program for Equipment Manufacturers (Renewal); in 40 CFR 89.102 and 40 CFR part 1039; was approved 05/16/2008; OMB Number 2060-0369; expires 05/31/2011.

EPA ICR Number 2260.02; Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency; was approved 05/16/2008; OMB Number 2090-0029; expires 05/31/2011.

EPA ICR Number 0820.10; Hazardous Waste Generator Standards (Renewal); in 40 CFR 262.34, 262.40(c), 262.43, 262.44(c), 262.53-57, 262.60, 265.190-193, and 265.196; was approved 05/22/2008; OMB Number 2050-0035; expires 05/31/2011.

EPA ICR Number 2020.03; Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington (Renewal); in 40 CFR part 49, subpart M; was approved 05/23/2008; OMB Number 2060-0558; expires 05/31/2011.

EPA ICR Number 2130.03; Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs, and Projects (Renewal); in 40 CFR part 93, subpart A; was approved 05/23/2008; OMB Number 2060-0561; expires 05/31/2011.

EPA ICR Number 1596.07; Significant New Alternatives Policy (SNAP) Program (Renewal); in 40 CFR part 82, subpart G; was approved 06/05/2008; OMB Number 2060-0226; expires 06/30/2011.

EPA ICR Number 1655.06; Regulation of Fuels and Fuel Additives: Detergent Gasoline (Renewal); in 40 CFR part 80, subpart G; was approved 06/04/2008; OMB Number 2060-0275; expires 06/30/2011.

Dated: June 6, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8-13613 Filed 6-16-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-2006-0735; FRL-8580-6]

Announcement of Availability for Lead National Ambient Air Quality Standard Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: On or about June 17, 2008, the Office of Air Quality Planning and Standards (OAQPS) of EPA will make available for public review and comment a number of technical documents that discuss monitoring issues being addressed in EPA's review of the national ambient air quality standards (NAAQS) for lead. These technical documents will be used as part of a peer review and consultation with the Clean Air Scientific Advisory Committee (CASAC) Ambient Air Monitoring & Methods (AAMM) Subcommittee (Subcommittee).

DATES: Comments on the technical documents must be received on or before July 17, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2006-0735, by one of the following methods:

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

- *E-mail:* Comments may be sent by electronic mail (e-mail) to *a-and-r-Docket@epa.gov*, Attention Docket ID No. EPA-HQ-OAR-2006-0735.

- *Fax:* Fax your comments to: 202-566-9744, Attention Docket ID. No. EPA-HQ-OAR-2006-0735.

- *Mail:* Send your comments to: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA-HQ-OAR-2006-0735.

- *Hand Delivery or Courier:* Deliver your comments to: EPA Docket Center, 1301 Constitution Ave., NW., Room 3334, Washington, DC. 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-OAR-2006-0735. The 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 Air Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 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 Air Docket is (202) 566–1742; fax (202) 566–9744.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Cavender, Office of Air Quality Planning and Standards (mail code C304–06), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; e-mail: Cavender.kevin@epa.gov; telephone: (919) 541–2364; fax: (919) 541–1903.

SUPPLEMENTARY INFORMATION:

A. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

B. Background

Under section 108(a) of the Clean Air Act (CAA), the Administrator identifies and lists certain pollutants which “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” The EPA then issues air quality criteria for listed pollutants, which are commonly referred to as “criteria pollutants.” The air quality criteria are to “accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air, in varying quantities.” Under section 109 of the CAA, EPA establishes NAAQS for each listed pollutant, with the NAAQS based on the air quality criteria. Section 109(d) of the CAA requires periodic review and, if appropriate, revision of existing air quality criteria. The revised air quality criteria reflect advances in scientific knowledge on the effects of the pollutant on public health or welfare. The EPA is also required to periodically review and revise the NAAQS, if appropriate, based on the revised criteria.

Lead is one of six criteria pollutants for which EPA has established air quality criteria and NAAQS. Presently, EPA is reviewing the air quality criteria and NAAQS for lead.

As part of its review of the NAAQS, EPA is considering revising the associated monitoring requirements for lead (contained in 40 CFR parts 50, 53, and 58). On December 12, 2007, an advanced notice of proposed rulemaking (ANPR) was published (72 FR 71488). The ANPR identified a number of potential revisions to the monitoring requirements. A review of the ANPR was conducted by CASAC in December 2007, and a final report was submitted January 22, 2008 (EPA–CASAC–08–007). A consultation with the CASAC AAMM Subcommittee was held on March 25, 2008, to discuss the associated monitoring issues (73 FR 11113). A proposed rule was published May 20, 2008 (73 FR 29184).

The technical documents discuss the specifications and rationale for a lead in PM₁₀ (Pb–PM₁₀) Federal Reference Method (FRM) and criteria and testing procedures for either a lead in TSP (Pb–TSP) or Pb–PM₁₀ Federal Equivalency Method (FEM). The technical documents will be available online at: <http://www.epa.gov/ttn/amtic/casacinf.html>.

The EPA is soliciting advice and recommendations from the CASAC AAMM Subcommittee by means of a

peer review and consultation at an upcoming public teleconference of the CASAC AAMM Subcommittee. A separate **Federal Register** notice will inform the public of the date and phone number for the public teleconference. Following the CASAC AAMM Subcommittee public teleconference, EPA will consider comments received from the CASAC AAMM Subcommittee and the public in preparing the final revisions to the lead monitoring requirements as part of the lead NAAQS rulemaking.

Dated: June 11, 2008.

Mary E. Henigin,

Acting Director, Office of Air Quality Planning and Standards.

[FR Doc. E8–13619 Filed 6–16–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8580–8]

Clean Water Act Section 303(d): Availability of List Decisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Availability.

SUMMARY: This notice announces the availability of EPA’s final action identifying water quality limited segments and associated pollutants in Arkansas to be listed pursuant to Clean Water Act (CWA) Section 303(d), and request for public comment. Section 303(d) requires that states submit and EPA approve or disapprove lists of waters for which existing technology-based pollution controls are not stringent enough to attain or maintain state water quality standards and for which total maximum daily loads (TMDLs) must be prepared.

On June 6, 2008, EPA partially approved and partially disapproved Arkansas’ 2006 303(d) submittal. Specifically, EPA approved Arkansas’ listing of 321 water body-pollutant combinations, and associated priority rankings. EPA took neither an approval or disapproval action on 36 waters listed for beryllium. EPA disapproved Arkansas’ decisions not to list 79 water body-pollutant combinations. EPA identified these additional water body pollutant-combinations along with priority rankings for inclusion on the 2006 Section 303(d) List.

EPA is providing the public the opportunity to review its final decisions to add water body pollutant-combinations to Arkansas’ 2006 Section 303(d) List, as required by EPA’s Public

Participation regulations (40 CFR Part 25). EPA will consider public comments and if necessary amend its final action on the additional water body pollutant-combinations identified for inclusion on Arkansas' Final 2006 Section 303(d) List.

DATES: Comments must be submitted in writing to EPA on or before July 17, 2008.

ADDRESSES: Comments on the decisions should be sent to Diane Smith, Environmental Protection Specialist, Water Quality Protection Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, TX 75202-2733, telephone (214) 665-2145, facsimile (214) 665-7373, or e-mail: smith.diane@epa.gov. Oral comments will not be considered. Copies of the documents which explain the rationale for EPA's decisions and a list of the 79 water quality limited segments for which EPA disapproved Arkansas' decision not to list can be obtained at EPA Region 6's Web site at <http://www.epa.gov/earth1r6/6wq/tmdl.htm>, or by writing or calling Ms. Smith at the above address. Underlying documents from the administrative record for these decisions are available for public inspection at the above address. Please contact Ms. Smith to schedule an inspection.

FOR FURTHER INFORMATION CONTACT: Diane Smith at (214) 665-2145.

SUPPLEMENTARY INFORMATION: Section 303(d) of the CWA requires that each state identify those waters for which existing technology-based pollution controls are not stringent enough to attain or maintain state water quality standards. For those waters, states are required to establish TMDLs according to a priority ranking.

EPA's Water Quality Planning and Management regulations include requirements related to the implementation of Section 303(d) of the CWA (40 CFR 130.7). The regulations require states to identify water quality limited waters still requiring TMDLs every two years. The list of waters still needing TMDLs must also include priority rankings and must identify the waters targeted for TMDL development during the next two years (40 CFR 130.7).

Consistent with EPA's regulations, Arkansas submitted to EPA its listing decisions under Section 303(d) on April 28, 2008. On June 6, 2008, EPA approved Arkansas' listing of 321 water body-pollutant combinations and associated priority rankings. EPA took neither an approval or disapproval action on 36 waters listed for beryllium.

EPA disapproved Arkansas' decisions not to list 79 water body-pollutant combinations. EPA identified these additional water body pollutant-combinations along with priority rankings for inclusion on the 2006 Section 303(d) List. EPA solicits public comment on its identification of 79 additional water body-pollutant combinations for inclusion on Arkansas' 2006 Section 303(d) List.

Dated: June 6, 2008.

Miguel I. Flores,

Director, Water Quality Protection Division, Region 6.

[FR Doc. E8-13616 Filed 6-16-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8580-9; EPA-HQ-OW-2008-0055 and EPA-HQ-OW-2008-0056]

Draft National Pollutant Discharge Elimination System (NPDES) General Permits for Discharges Incidental to the Normal Operation of a Vessel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed permit issuance and Notice of Public Hearing.

SUMMARY: EPA Regions 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 are proposing an NPDES Vessel General Permit (VGP) to cover discharges incidental to the normal operation of commercial vessels and recreational vessels greater than or equal to 79 feet in length and an NPDES Recreational General Permit (RGP) to cover discharges incidental to the normal operation of recreational vessels less than 79 feet in length. This action is in response to a District Court ruling that vacates, as of September 30, 2008, a long-standing EPA regulation that excludes discharges incidental to the normal operation of a vessel from the need to obtain an NPDES permit. *Nw. Env'tl Advocates et al. v. EPA*, 2005 WL 756614 (N.D. Cal.). Although EPA has filed an appeal with the 9th Circuit Court of Appeals, as a practical matter, the Agency cannot simply await the outcome of that appeal. This is because if the District Court's order remains unchanged, as of September 30, 2008, discharges of pollutants incidental to the normal operation of a vessel that had formerly been exempted from NPDES permitting by the regulation will be subject to the prohibition in CWA section 301(a) against the discharge of pollutants without a permit.

EPA solicited information and data on discharges incidental to normal vessel

operations to assist in developing these proposed NPDES permits in a **Federal Register** Notice published June 21, 2007 (72 FR 32421). The majority of information and data in response to that notice came from seven different groups: Individual citizens, commercial fishing representatives, commercial shipping groups, environmental or outdoor recreation groups, the oil and gas industry, recreational boating-related businesses, and state governments. EPA considered all such resulting information and data along with other available information in developing the two proposed vessel permits.

DATES: Comments must be submitted on or before August 1, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2008-0055 for the VGP or Docket ID No. EPA-HQ-OW-2008-0056 for the RGP, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.

- *E-mail:* ow-docket@epa.gov.

- *Mail:* Original and three copies to: Water Docket, Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA Headquarters West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20460. 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: A copy of the draft RGP and VGP and their respective accompanying fact sheets are available at <http://www.epa.gov/npdes/vessels>. Direct your comments to Docket ID No. EPA-HQ-OW-2008-0055 for the VGP and Docket ID No. EPA-HQ-OW-2008-0056 for the RGP. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket. Do not submit information that you consider to be CBI or otherwise protected through <http://www.epa.gov/npdes/vessels>.

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 FURTHER INFORMATION CONTACT: For further information on the proposed commercial vessel NPDES general permit, including on how to obtain copies of the draft general permit and fact sheet, contact Ryan Albert at EPA Headquarters, Office of Water, Office of Wastewater Management, Mail Code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; or at tel. 202-564-0763; or e-mail: CommercialVesselPermit@epa.gov. For further information on the proposed recreational vessel NPDES general permit, including on how to obtain copies of the draft general permit and fact sheet, contact Juhi Saxena at EPA Headquarters, Office of Water, Office of Wastewater Management, Mail Code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460; or at tel. 202-564-0719; or e-mail: RecreationalVesselPermit@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of These Documents and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. EPA-HQ-OW-2008-0055 for the VGP and Docket ID No. EPA-HQ-OW-2008-0056 for the RGP. The official public docket is the collection of materials, including the administrative record for the draft permit required by 40 CFR 124.9, that is available for public viewing at the Water Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington,

DC 20460. Although all documents in the docket are listed in an index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Publicly available docket materials are available electronically through <http://www.regulations.gov> and in hard copy at the EPA Docket Center Public Reading Room, 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 Water Docket is (202) 566-2426. In addition, the comments and information that EPA received in response to its June 21, 2007, **Federal Register** notice can be found in the public docket at <http://www.regulations.gov> by searching Docket ID No. EPA-HQ-OW-2007-0483.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through the Federal Docket Management System (FDMS) found at <http://www.regulations.gov>. You may use the FDMS to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once at the Web site, enter the appropriate Docket ID No. in the "Search" box to view the docket.

Certain types of information will not be placed in the EPA dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.A.1.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark all of the information that you claim to be CBI. For CBI information on computer disks mailed to EPA, mark the surface of the disk as CBI. Also identify

electronically the specific information contained in the disk or that you claim is CBI. In addition to one complete version of the specific information claimed as CBI, you must submit a copy that does not contain the information claimed as CBI for inclusion in the public document. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the permit by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a section or part of the permit
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible
- Make sure to submit your comments by the comment period deadline identified.

C. How and To Whom Do I Submit Comments?

The opportunity to raise issues and provide information on these general permits is during the public comment period (*see* 40 CFR 124.13 for more information). You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. To ensure that EPA can read, understand, and therefore properly respond to comments, the Agency would prefer that commenters cite, where possible, the paragraph(s) or section in the fact sheet or permit to which each comment refers. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

EPA seeks comment on all aspects of the two proposed general permits and the accompanying fact sheets. In

particular, EPA is soliciting comments on the following specific aspects of the VGP (for more detail on each element see the Permit Fact Sheet):

- Whether uses of Tetrachloroethylene (TCE) other than dry cleaning should be explicitly included or excluded from permit coverage. EPA is also interested in comments on the frequency and nature of the use of TCE-containing products on vessels. (TCE discharges associated with dry-cleaning activities on vessels are not proposed to be eligible for coverage because they are not considered to be incidental to the normal operation of a vessel.)

- The approach for requiring NOIs for commercial vessels.

- Whether the permit should establish numeric discharge limits for discharges incidental to the normal operation of a vessel for which the proposed permit would solely impose Best Management Practices (BMPs). (The proposed permit establishes numeric discharge limits for graywater from Cruise Ships, oily discharges, including oily mixtures, and residual biocide limits from vessels utilizing experimental ballast water treatment standards; for the remainder of the discharges incidental to the normal operation of vessels, the proposed permit imposes BMPs, based on EPA's conclusion that numeric effluent limitations are not feasible for vessel discharges in this permit iteration.) EPA requests that if commenters provide suggested numeric limits, that they should also provide any supporting data that identifies technologies or BMPs are available to meet these limits, and if these limits are more stringent than requirements of this permit, provide the costs and non-water quality impacts of setting those limits, and any other relevant information that would be helpful in setting these limits.

- Whether EPA should limit discharges of bilgewater in embayments such as the Chesapeake Bay for large vessels that regularly leave waters subject to this permit.

- Whether the requirement of mandatory saltwater flushing for all vessels with unpumpable ballast water and residual sediment which sail more than 200 nm (nautical mile) from any shore is appropriate.

- Whether Ballast Water Exchange requirements similar to those proposed for Pacific near shore voyages should be applicable for vessels engaged in coastwise trade on the Atlantic or Gulf Coasts that will discharge to waters subject to this permit. There are several fundamental differences between the Pacific Coasts and the Atlantic and Gulf

Coasts. EPA does not have credible data or analyses as to whether the practice for vessels engaged in Pacific coastwise trade would mitigate or increase the risk for the spread of aquatic nuisance species (ANS) on the Atlantic or Gulf Coasts. Note that the proposed permit would require that all vessels that leave the U.S. Exclusive Economic Zone (EEZ), travel more than 200 nm from any shore, and will discharge to waters subject to this permit must complete a Ballast Water Exchange and all such vessels with unpumpable ballast water and residual sediment must conduct Mandatory Saltwater Flushing.

- Whether the questions developed for a one-time report are appropriate and whether alternative or supplemental questions should be considered. (The proposed permit requires owner/operators to submit a one-time report that contains basic information about the vessel after the 30th month of permit coverage).

- Whether the proposed operational limits for large cruise ships are appropriate and whether the discharge standards proposed for within 1 nm of any shore should be extended to 3 nm from any shore, regardless of the speed of the vessel. (For large cruise ships, the proposed permit would prohibit the discharge of graywater within 1 nautical mile of shore unless the graywater has been treated to treatment standards in part 5.2.1.1.2 of the proposed permit. The proposed permit would also require the discharge to either meet the effluent limits outlined in this proposed permit under Part 5.2.1.1.2 or be discharged while the vessel is moving at least 6 knots for discharges between 1 nm and 3 nm of shore).

- Whether the proposed prohibition on discharges of untreated graywater within 1 nm of shore for large and medium cruise ships, and into nutrient-impaired waters such as the Chesapeake Bay and Puget Sound for large cruise ships, is appropriate and whether EPA's economic analyses are accurate. EPA estimates that most to all large and medium cruise ships have sufficient graywater holding capacity to avoid discharging graywater within 1 nm of shore and so estimates no incremental costs for complying with this requirement. EPA further estimates that some vessels will be able to hold graywater so that they do not have to discharge that graywater into nutrient impaired waters. Those large cruise ships that do not have sufficient holding capacity and do not have the ability to treat graywater to secondary standards may have to install advanced wastewater treatment systems. EPA further estimates that of the total large

cruise ship population of 143 vessels, 30 vessels are certified to operate in Alaskan waters and thus are already equipped to treat graywater or hold sufficient quantities that they would be able to avoid discharging in nutrient impaired waters. EPA separately estimates that approximately 57 vessels have advanced wastewater treatment systems (which likely includes most or all of the vessels certified to operate in Alaskan waters), some to many of which are already equipped to treat graywater (or hold sufficient quantities that they would be able to avoid discharging in nutrient impaired waters or within 1 nm of shore). This leaves a range of 86 to 113 large cruise ships that do not currently treat graywater and might have to install treatment to avoid discharging untreated graywater in nutrient impaired waters. EPA estimates that 30 of these vessels would actually need to install graywater treatment systems to allow discharge of graywater in nutrient-impaired waters. EPA believes that cruise ship operators could arrange their schedules and itineraries such that the remaining 56 to 83 vessels could avoid operating in nutrient impaired waters for prolonged periods or avoid itineraries that would require them to stay within 1 nm of shore for prolonged periods. Based on information previously gathered for Alaskan cruise ships, EPA estimates that the annualized cost for installing and operating such treatment is \$7.09 per passenger/crew berth per season. EPA further estimates that the average capacity of large cruise ships is 3,211 passengers and crew members. EPA thus estimates an average annualized cost of installing graywater treatment of \$22,766 per vessel, or about \$683,000 per year for 30 vessels. (See Section 3.6.1 on p 70 of the Economic and Benefits Analysis for further details.) EPA requests comment on all of these estimates. If commenters disagree with any of these estimates, EPA requests any available data that could form the basis of revised estimates.

- Whether large ferries should be subject to additional graywater treatment standards similar to those proposed for medium and large cruise ships.

EPA is also particularly interested in comments on the following aspects of the RGP (for more detail on each element see the Permit Fact Sheet):

- The approach to not require NOIs for recreational boats and recommendations (and rationale supporting them) where commenters favor NOI submittal for recreational boaters.

- Whether the permit should establish numeric discharge limits for discharges incidental to the normal operation of a vessel for which the proposed permit would solely require BMPs. (The proposed permit establishes one numeric effluent limit in the form of a zero discharge standard for leaching of tributyltin from vessel hulls, a second numeric effluent limit for graywater discharges from Cruise ships when they discharge in certain waters, and a third for residual biocides from experimental ballast water treatment systems. EPA requests that if commenters provide suggested numeric limits, that they should also provide any supporting data that identifies technologies or BMPs available to meet these limits, and if these limits are more stringent than requirements of this permit, provide the costs and non-water quality impacts of setting those limits, and any other relevant information that would be helpful in setting these limits.

- Whether any of the BMPs listed under the 'Encouraged Best Management Practices' Section should be made mandatory under this permit or completely removed as an encouraged practice.

D. Public Hearing

Because EPA anticipates a significant degree of public interest in these draft permits, EPA will hold a public hearing Monday, July 21, 2008, to receive public comment and answer questions concerning the proposed permits. The hearing will be held at EPA East Building, Room 1153, 1201 Constitution Ave., NW., Washington, DC 20004, from 8 a.m. to 4:30 p.m. EST. Any person may provide written or oral statements and data pertaining to the proposed permits at the public hearing. Depending on the number of persons who desire to make an oral statement, EPA may impose limits on the time allowed for oral statements, which may result in the full statement not being heard. Therefore, EPA recommends that all those planning to present an oral statement also submit a written statement. Any person not making an oral statement may also submit a written statement.

E. Public Meetings

EPA and the U.S. Coast Guard are co-hosting three (3) public meetings. The U.S. Coast Guard has vast experience in researching, evaluating and regulating ballast water discharges, as well as expert knowledge of other discharges related to the normal operation of a vessel directly relevant to EPA's proposed vessel permits. The focus of each meeting is to present the proposed

requirements of the VGP and RGP and the basis for those requirements, as well as to answer questions concerning the proposed permits. At these meetings, any person may provide written or oral statements and data pertaining to the proposed permits. The date, time and location of the public meetings are as follows:

- *Washington, DC:* Thursday, June 19, 2008, at the EPA East Building, Room 1153, 1301 Constitution Ave., NW., Washington, DC 20004, from 8 a.m. to 4:30 p.m.

- *Portland, Oregon:* Tuesday, June 24, 2008, at the Red Lion Hotel-Portland Convention Center, 1021 NE Grand Ave., Portland, OR 97232, from 8 a.m. to 4:30 p.m. If you require overnight accommodations, contact the hotel directly to make reservations at Tel: 503-235-2100.

- *Chicago, Illinois:* Thursday, June 26, 2008, at the Avenue Hotel, 160 E. Huron Street, Chicago, IL, 60611, from 8 a.m. to 4:30 p.m. If you require overnight accommodations, contact the hotel directly at Tel: 877-AVE-5110.

EPA encourages interested and potentially affected stakeholders to attend one of the scheduled public meetings and provide oral or written comments. These meetings are open to the public. Please note that the public meeting may close early if all business is finished. Oral or written comments received at the public meeting will be entered into the Docket. If you are unable to attend, you may submit comments to the EPA Water Docket at the address listed under **ADDRESSES**.

F. Web Casts

EPA has scheduled a Web cast to provide information on the proposed permits and to answer questions for interested parties that are unable to attend the public meetings or hearing. The Web cast will be broadcast on July 2, 2008, from 12 p.m. to 1:30 p.m. ET. For information on how to register and attend the Web cast, see EPA's Web site at <http://www.epa.gov/npdes/training> approximately 2 weeks prior to the date of the scheduled Web cast.

G. Finalizing the Permits

After the close of the public comment period, EPA will issue final permit decisions. These decisions will not be made until after all public comments have been considered and appropriate changes made to the permits. EPA's response to comments received will be included in the docket as part of the final permit decisions. For a discussion of the timing of permit finalization, see section III.E of this notice below.

H. Who Are the EPA Regional Contacts for This Proposed Permit?

For EPA Region 1, contact Sara Greene at USEPA REGION 1, 1 Congress Street Suite 1100, Mail Code: CIP, Boston, MA 02114-2023; or at tel.: (617) 918-1574; or e-mail at greenesara@epa.gov.

For EPA Region 2, contact James Olander at USEPA REGION 2, 290 Broadway, New York, NY 10007-1866; or at tel.: (212) 637-3833; or e-mail at olander.james@epa.gov.

For EPA Region 3, contact Mark Smith at USEPA REGION 3, 1650 Arch Street, Mail Code: 3WP41, Philadelphia, PA 19103-2029; or at tel.: (215) 814-3105; or e-mail at smith.mark@epa.gov.

For EPA Region 4, contact Marshall Hyatt at USEPA REGION 4, 61 Forsyth Street, SW., Atlanta, GA 30303-8960; or at tel.: (404) 562-9304; or e-mail at hyatt.marshall@epa.gov.

For EPA Region 5, contact Sean Ramach at USEPA REGION 5, 77 West Jackson Boulevard, Mail Code: WN-16J, Chicago, IL 60604-3507; or at tel.: (312) 886-5284; or e-mail at ramach.sean@epa.gov.

For EPA Region 6, contact J. Scott Wilson at USEPA REGION 6, 1445 Ross Avenue, Suite 1200, Mail Code: 6WQPP, Dallas, TX 75202-2733; or at tel.: (214) 665-7511; or e-mail at wilson.scott@epa.gov.

For EPA Region 7, contact Alex Owutaka at USEPA REGION 7, 901 North Fifth Street, Mail Code: WWPDWIMB, Kansas City, KS 66101; or at tel.: (913) 551-7584; or e-mail at owutaka.alex@epa.gov.

For EPA Region 8, contact Sandy Stavnes at USEPA REGION 8, 1595 Wynkoop St., Mail Code: 8P-W-WW, Denver, CO 80202-1129; or at tel.: (303) 312-6117; or e-mail at stavnes.sandra@epa.gov.

For EPA Region 9, contact Eugene Bromley at USEPA REGION 9, 75 Hawthorne Street, Mail Code: WTR-5, San Francisco, CA 94105; or at tel.: (415) 972-3510; or e-mail at bromley.eugene@epa.gov.

For EPA Region 10, contact Cindi Godsey at USEPA Region 10—Alaska Operations Office, Federal Building Room 537, 222 West 7th Avenue #19 Mail Code: AOO/A, Anchorage, AK 99513-7588; or at tel.: (907) 271-6561; or e-mail at godsey.cindi@epa.gov.

II. Statutory and Regulatory History

A. The Clean Water Act

Section 301(a) of the Clean Water Act (CWA) provides that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other sections of the Act. 33 U.S.C. 1311(a). The CWA

defines “discharge of a pollutant” as “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. 1362(12). A “point source” is a “discernible, confined and discrete conveyance” and includes a “vessel or other floating craft.” 33 U.S.C. 1362(14).

The term “pollutant” includes, among other things, “garbage * * * chemical wastes * * * and industrial, municipal, and agricultural waste discharged into water.” The Act’s definition of “pollutant” specifically excludes “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” as defined in Clean Water Act section 312. 33 U.S.C. 1362(6). One way a person may discharge a pollutant without violating the section 301 prohibition is by obtaining a section 402 National Pollutant Discharge Elimination System (NPDES) permit (33 U.S.C. 1342). Under section 402(a), EPA may “issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)” upon certain conditions required by the Act.

B. The History of the Exclusion of Vessels From the NPDES Program

Less than one year after the CWA was enacted, EPA promulgated a regulation that excluded discharges incidental to the normal operation of vessels from NPDES permitting. 38 FR 13528, May 22, 1973. After Congress re-authorized and amended the CWA in 1977, EPA invited another round of public comment on the regulation. 43 FR 37078, August 21, 1978. In 1979, EPA promulgated the final revision that established the regulation largely in its current form. 44 FR 32854, June 7, 1979. The current regulation identifies several types of vessel discharges as being subject to NPDES permitting, but specifically excludes discharges incidental to the normal operation of a vessel.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured

to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development. 40 CFR 122.3(a).

Although other subsections of 40 CFR 122.3 and its predecessor were the subject of legal challenges (*See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977)), following its promulgation, the regulatory text relevant to discharges incidental to the normal operation of vessels went unchallenged, and has been in effect ever since.

C. The Legal Challenge

In December 2003, the long-standing exclusion of discharges incidental to the normal operation of vessels from the NPDES program became the subject of a lawsuit in the U.S. District Court for the Northern District of California. The lawsuit arose from a January 13, 1999, rulemaking petition submitted to EPA by a number of parties concerned about the effects of ballast water discharges. The petition asked the Agency to repeal its regulation at 40 CFR 122.3(a) that excludes certain discharges incidental to the normal operation of vessels from the requirement to obtain an NPDES permit. The petition asserted that vessels are “point sources” requiring NPDES permits for discharges to U.S. waters; that EPA lacks authority to exclude point source discharges from vessels from the NPDES program; that ballast water must be regulated under the NPDES program because it contains invasive plant and animal species as well as other materials of concern (*e.g.*, oil, chipped paint, sediment and toxins in ballast water sediment); and that enactment of CWA section 312(n) (Uniform National Discharge Standards, also known as the UNDS program) demonstrated Congress’ rejection of the exclusion.

In response to the 1999 petition, EPA first prepared a detailed report for public comment, *Aquatic Nuisance Species in Ballast Water Discharges: Issues and Options* (September 10, 2001). *See*, 66 FR 49381, September 27, 2001. After considering the comments received, EPA declined to reopen the exclusion for additional rulemaking, and denied the petition on September 2, 2003. EPA explained that since enactment of the CWA, EPA has consistently interpreted the Act to provide for NPDES regulation of discharges from industrial operations that incidentally occur onboard vessels (*e.g.*, seafood processing facilities or oil exploration operations at sea) and of discharges overboard of materials such as trash, but not of discharges incidental to the normal operation of a vessel (*e.g.*, ballast water) subject to the 40 CFR

122.3(a) exclusion. EPA further explained that Congress had expressly considered and accepted the Agency’s regulation in the years since its promulgation, and that Congress chose to regulate discharges incidental to the normal operation of vessels through programs other than CWA section 402 permitting. Thus, it was EPA’s understanding that Congress had acquiesced to EPA’s long-standing interpretation of how the CWA applied to vessels. Denial of the petition did not reflect EPA’s dismissal of the significant impacts of aquatic invasive species, but rather the understanding that other programs had been enacted to specifically address the issue and that the CWA does not currently provide an appropriate framework for addressing ballast water and other discharges incidental to the normal operation of non-military vessels.

In the denial of the petition, EPA noted that when Congress specifically focused on the problem of aquatic nuisance species in ballast water, it did not look to or endorse the NPDES program as the means to address the problem. Instead, Congress enacted new statutes which directed and authorized the Coast Guard, rather than EPA, to establish a regulatory program for discharges incidental to the normal operation of vessels, including ballast water (*i.e.*, Nonindigenous Aquatic Nuisance Prevention and Control Act as amended, 16 U.S.C. 4701 *et seq.*; Act to Prevent Pollution from Ships, 33 U.S.C. 1901 *et seq.*). Furthermore, Congress made no effort to legislatively repeal EPA’s interpretation of the NPDES program or to expressly mandate that discharges incidental to the normal operation of vessels be addressed through the NPDES permitting program. EPA reasoned that this Congressional action and inaction in light of Congress’ awareness of the regulatory exclusion confirmed that Congress accepted EPA’s interpretation and chose the Coast Guard as the lead agency under other statutes.

In addition, EPA found significant practical and policy reasons not to reopen the longstanding CWA regulatory exclusion, reasoning that there are a number of ongoing activities within the Federal government related to control of invasive species in ballast water, many of which are likely to be more effective and efficient than use of NPDES permits under the CWA. EPA also noted that nothing in the CWA prevents states from independently regulating ballast water discharges under State law, should they choose to do so, pursuant to CWA section 510.

After EPA's September 2003 denial of the petition, a number of groups filed a complaint in the U.S. District Court for the Northern District of California. *Nw. Env'tl Advocates et al. v. EPA*, 2005 WL 756614 (N.D. Cal.). The complaint was brought pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and set out two causes of action. First, the complaint challenged EPA's promulgation of 40 CFR 122.3(a), an action the Agency took in 1973. The second cause of action challenged EPA's September 2003 denial of their petition to repeal the Sec. 122.3(a) exclusion.

D. District Court Decision

In March 2005, the Court determined that the exclusion exceeded the Agency's authority under the CWA. Specifically, in March 2005 the Court granted summary judgment to the plaintiffs:

"The Court DECLARES that EPA's exclusion from NPDES permit requirements for discharges incidental to the normal operation of a vessel at 40 CFR 122.3(a) is in excess of the Agency's authority under the Clean Water Act * * *".

After this ruling, the Court granted motions to intervene on behalf of the Plaintiffs by the States of Illinois, New York, Michigan, Minnesota, Pennsylvania, and Wisconsin, and on behalf of the Government-Defendant by the Shipping Industry Ballast Water Coalition.

Following submission of briefs and oral argument by the parties and interveners on the issue of a proper remedy, the Court issued a final order in September 2006 providing that:

"The blanket exemption for discharges incidental to the normal operation of a vessel, contained in 40 CFR 122.3(a), shall be vacated as of September 30, 2008."

This means that, effective September 30, 2008 (and assuming the order is not overturned or altered on appeal), discharges incidental to the normal operation of vessels currently excluded from NPDES permitting by that regulation, will become subject to CWA section 301's prohibition against discharging, unless covered under an NPDES permit. The CWA authorizes civil and criminal enforcement for violations of that prohibition and also allows for citizen suits against violators.

Because the Government respectfully disagrees with the District Court's decision, on November 16, 2006, EPA filed an appeal in the U.S. Court of Appeals for the Ninth Circuit. Oral argument was held on August 14, 2007, and a decision is pending. Additional material related to the lawsuit is

contained in the docket accompanying these proposed permits and fact sheets.

If the 9th Circuit reverses or otherwise modifies the District Court's decision on appeal, this proposed permit or any final permit may be terminated, reopened, or modified, as appropriate.

III. Scope and Applicability of the 2008 VGP and RGP

A. Geographic Coverage of VGP and RGP

The proposed VGP and RGP apply to discharges incidental to the normal operation of a vessel identified as being eligible for coverage in the proposed permits, into waters subject to the permits. These waters are "waters of the United States" as defined in 40 CFR 122.2 (extending to the reach of the 3-mile territorial seas as defined in section 502(8) of the CWA). The draft general permits would cover vessel discharges in the waters of the U.S. in all states and territories, regardless of whether a state is otherwise authorized to implement the NPDES permit program within its jurisdiction. For more information on this approach, see the fact sheets accompanying the draft permits.

B. Categories of Vessels Covered Under VGP and RGP

The draft vessel general permit (VGP) applies to owners and operators of commercial vessels and recreational vessels that are greater than 79 feet (24.08 meters) in length. The recreational vessel permit (RGP) applies to all recreational vessels and un-inspected passenger vessels that are less than 79 feet in length, measured from bow to stern, excluding any attachments or extensions. Recreational vessels are vessels manufactured or operated primarily for pleasure or leased, rented, or chartered to another for the latter's pleasure (46 United State Code (U.S.C.) 2101(25)). Recreational vessels include, but are not limited to, motorboats, sailboats, recreational fishing boats, personal watercraft, rowboats, canoes, and kayaks. Vessel owner/operators must only comply with the provisions of the permit that are applicable to them. For instance, non-motorized vessels do not need to do any BMPs for fuel control, or the discharge of oil, including oily mixtures. This permit (RGP) also applies to un-inspected passenger vessels that are less than 79 feet in length, measured from bow to stern, excluding any attachments or extensions, whose operation is substantially similar to that of a recreational vessel of less than 79 feet in length. For purposes of this permit, these vessels include sailboats for-hire,

charter-fishing vessels engaging in hook-and-line fishing, and personal watercraft for hire. For purposes of the RGP, vessels that are not considered "un-inspected passenger vessels" and are not covered by this permit include, but are not limited to, commercial fishing vessels, commercial ferries, tug boats, freighters, water taxis, and small cruise ships. These vessels are covered by the VGP.

C. Summary of VGP Terms and Requirements

The proposed VGP addresses 28 potential vessel discharge streams by establishing effluent limits, including Best Management Practices (BMPs) to control the discharge of the waste streams and constituents found in those waste streams. The discharge streams eligible for coverage under this proposed permit are: ballast water, deck washdown and runoff, bilge water, anti-fouling leachate from anti-fouling hull coatings, aqueous film forming foam (AFFF), boiler/economizer blowdown, cathodic protection, chain locker effluent, controllable pitch propeller hydraulic fluid, distillation and reverse osmosis brine, elevator pit effluent, firemain systems, freshwater layup, gas turbine water wash, graywater, motor gasoline and compensating discharge, non-oily machinery wastewater, refrigeration and air condensate discharge, rudder bearing lubrication discharge, seawater cooling overboard discharge, seawater piping biofouling prevention, small boat engine wet exhaust, stern tube oily discharge, sonar dome discharge, underwater ship husbandry, welldeck discharges, graywater mixed with sewage from vessels, and exhaust gas scrubber wash water discharge.

For each discharge type, the permit establishes effluent limits pertaining to the constituents found in the effluent and BMPs designed to decrease the amount of constituents entering the waste stream. A vessel might not produce all of these discharges, but a vessel owner or operator is responsible for meeting the applicable effluent limits and complying with all the effluent limits for every listed discharge that the vessel produces.

Discharge Authorization Timeframe

To obtain authorization, the owner or operator of a vessel that is either 300 or more gross registered tons or has the capacity to hold or discharge more than 8 cubic meters (2113 gallons) of ballast water is required to submit a Notice of Intent (NOI) to receive permit coverage, beginning six months after the permit's issuance date, but no later than nine

months after the permit's issuance date. For vessels that were delivered to the owner or operator no later than 9 months after the permit's issuance date, the vessel will receive permit coverage on the date that EPA receives the complete NOI. Vessels that are delivered after that date will receive permit coverage 30 days after EPA receives the complete NOI.

Vessels that meet the applicable eligibility requirements for permit coverage but are not required to submit an NOI, including vessels less than 300 gross registered tons with no more than 8 cubic meters of ballast water capacity and recreational vessels subject to the RGP, will be automatically authorized by the proposed permits to discharge according to the permit requirements.

Monitoring and Reporting

The VGP requires routine self-inspection and monitoring of all areas of the vessel that the permit addresses. The routine self-inspection must be documented in the ship's logbook. Analytical monitoring is required for certain types of vessels. The VGP also requires comprehensive annual vessel inspections, to ensure even the hard-to-reach areas of the vessel are inspected for permit compliance. If the vessel is placed in dry dock while covered under this permit, a dry dock inspection and report must be completed. Additional monitoring requirements are imposed on certain classes of vessels, based on unique characteristics not shared by other vessels covered under the VGP.

Vessel Type-Specific Requirements

The permit imposes additional requirements for 8 specific types of vessels which have unique characteristics resulting in discharges not shared by other types of vessels. These vessel types are medium cruise ships, large cruise ships, large ferries, barges, oil or petroleum tankers, research vessels, rescue boats, and vessels employing experimental ballast water treatment systems. The permit requirements are designed to address the discharges from features unique to those vessels, such as parking decks on ferries and overnight accommodations for passengers on cruise ships.

D. Summary of RGP Permit Terms and Requirements

The RGP addresses a smaller range of discharges than the VGP, because recreational vessels produce different types of discharges that are fewer in number and variety than the discharges from commercial and large recreational vessels covered under the VGP. Discharges most likely to occur from

recreational vessels include anti-fouling hull leachate, deck washdown and runoff, graywater, engine cooling water, and bilge water. Constituents found in these discharge streams include aquatic nuisance species (ANS), oil and oily mixtures, nutrients, metals and toxins, and pathogens. The RGP is a much simpler permit than the VGP and primarily includes BMPs designed to minimize the amount of any discharge produced as well as reduce the likelihood the discharge will enter a waterbody. In addition to required BMPs, the permit includes a section of encouraged BMPs. These are recommended practices which can further reduce pollution from vessel discharges.

The RGP does not require the vessel owner or operator to submit an NOI to receive permit coverage. As long as the vessel owner or operator has met the eligibility requirements found in the permit and discharges in accordance with the applicable terms of the permit, the eligible discharges are authorized.

E. Timing of Permit Finalization

As discussed above, if the Northern District of California's order remains unchanged, the exclusion from NPDES permitting for discharges incidental to the normal operation of a vessel will be vacated as of September 30, 2008, which is approximately three and a half months from today's notice seeking public comment on the draft permits. Even for non-controversial and straightforward permits, it normally takes the Agency significantly more time than that to complete all of the tasks required to finalize a draft general permit, such as considering and responding to public comment, completing Coastal Zone Management Act consistency determinations, and completing the Clean Water Act section 401 certification process. Although EPA expects significant public interest and comment on today's proposed permits, EPA will make every effort to finalize today's permits by the date of vacatur.

IV. Regulatory Flexibility Act

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

The legal question of whether a general permit (as opposed to an individual permit) qualifies as a "rule" or as an "adjudication" under the Administrative Procedure Act (APA) has been the subject of periodic litigation. In a recent case, the court held that the CWA Section 404 Nationwide general permit before the court did qualify as a "rule" and therefore that the issuance of the general permit needed to comply with the applicable legal requirements for the issuance of a "rule." *National Ass'n of Home Builders v. U.S. Army Corps of Engineers*, 417 F.3d 1272, 1284–85 (DC Cir.2005) (Army Corps general permits under section 404 of the Clean Water Act are rules under the APA and the Regulatory Flexibility Act; "Each NWP [nationwide permit] easily fits within the APA's definition 'rule.' . . . As such, each NWP constitutes a rule . . .").

As EPA stated in 1998, "the Agency recognizes that the question of the applicability of the APA, and thus the RFA, to the issuance of a general permit is a difficult one, given the fact that a large number of dischargers may choose to use the general permit." 63 FR 36489, 36497 (July 6, 1998). At that time, EPA "reviewed its previous NPDES general permitting actions and related statements in the **Federal Register** or elsewhere," and stated that "[t]his review suggests that the Agency has generally treated NPDES general permits effectively as rules, though at times it has given contrary indications as to whether these actions are rules or permits." *Id.* at 36496. Based on EPA's further legal analysis of the issue, the Agency "concluded, as set forth in the proposal, that NPDES general permits are permits [i.e., adjudications] under the APA and thus not subject to APA rulemaking requirements or the RFA." *Id.* Accordingly, the Agency stated that "the APA's rulemaking requirements are inapplicable to issuance of such permits," and thus "NPDES permitting is not subject to the requirement to publish a general notice of proposed rulemaking under the APA or any other law * * * [and] it is not subject to the RFA." *Id.* at 36497.

However, the Agency went on to explain that, even though EPA had concluded that it was not legally required to do so, the Agency would voluntarily perform the RFA's small-entity impact analysis. *Id.* EPA explained the strong public interest in the Agency following the RFA's requirements on a voluntary basis: "[The notice and comment] process also provides an opportunity for EPA to consider the potential impact of general permit terms on small entities and how

to craft the permit to avoid any undue burden on small entities.” *Id.* Accordingly, with respect to the NPDES permit that EPA was addressing in that **Federal Register** notice, EPA stated that “the Agency has considered and addressed the potential impact of the general permit on small entities in a manner that would meet the requirements of the RFA if it applied.” *Id.*

Subsequent to EPA’s conclusion in 1998 that general permits are adjudications, rather than rules, as noted above, the DC Circuit recently held that nationwide general permits under section 404 are “rules” rather than “adjudications.” Thus, this legal question remains “a difficult one” (*supra*). However, EPA continues to believe that there is a strong public policy interest in EPA applying the RFA’s framework and requirements to the Agency’s evaluation and consideration of the nature and extent of any economic impacts that a CWA general permit could have on small entities (e.g., small businesses). In this regard, EPA believes that the Agency’s evaluation of the potential economic impact that a general permit would have on small entities, consistent with the RFA framework discussed below, is relevant to, and an essential component of, the Agency’s assessment of whether a CWA general permit would place requirements on dischargers that are appropriate and reasonable. Furthermore, EPA believes that the RFA’s framework and requirements provide the Agency with the best approach for the Agency’s evaluation of the economic impact of general permits on small entities. While using the RFA framework to inform its assessment of whether permit requirements are appropriate and reasonable, EPA will also continue to ensure that all permits satisfy the requirements of the Clean Water Act.

Accordingly, EPA has committed that the Agency will operate in accordance with the RFA’s framework and requirements during the Agency’s issuance of CWA general permits (in other words, the Agency commits that it will apply the RFA in its issuance of general permits as if those permits do qualify as “rules” that are subject to the RFA). In satisfaction of this commitment, during the course of this VGP and RGP proceeding, the Agency conducted the analysis and made the appropriate determinations that are called for by the RFA. In addition, and in satisfaction of the Agency’s commitment, EPA will apply the RFA’s framework and requirements in any

future issuance of other NPDES general permits. EPA anticipates that for most general permits the Agency will be able to conclude that there is not a significant economic impact on a substantial number of small entities. In such cases, the requirements of the RFA framework are fulfilled by including a statement to this effect in the permit fact sheet, along with a statement providing the factual basis for the conclusion. A quantitative analysis of impacts would only be required for permits that may affect a substantial number of small entities, consistent with EPA guidance regarding RFA certification¹.

V. Analysis of Economic Impacts of VGP and RGP

EPA determined that, in consideration of the discussion in Section IV above, the issuance of the VGP and RGP may have the potential to affect a substantial number of small entities. Therefore, in order to determine what, if any, economic impact these permits may have on small businesses, EPA conducted an economic assessment of these general permits. This economic analysis is included in the records for these permits. Based on this assessment, EPA concludes that despite a minimal economic impact on all entities, including small businesses, these permits are not likely to have a significant economic impact on a substantial number of small entities. For the RGP, the total annual estimated compliance cost per permittee ranges from \$8.79 to \$25.99 per year for motorboats, \$5.39 to \$22.59 for sailboats, and \$0.29 to \$2.39 per year for non-motorized small craft. Nationally, the draft economic impact analysis indicates that the RGP has an expected cost of \$88.2 million annually.

Including the ballast water and other discharge requirements, the draft economic impact analysis indicates that the best management practices in the VGP would cost between \$5.6 million and \$19.1 million annually. Including paperwork requirements, the permit is estimated to cost between \$7.1 and \$25.0 million annually. Dependent upon sector, median costs per firm range from \$4 to \$795 in the low end

¹ EPA’s current guidance, entitled Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement and Fairness Act, was issued in November 2006 and is available on EPA’s Web site: <http://www.epa.gov/sbrefa/documents/rfafinalguidance06.pdf>. After considering the Guidance and the purpose of CWA general permits, EPA concludes that general permits affecting less than 100 small entities do not have a significant economic impact on a substantial number of small entities.

assumptions and from \$53 to \$1,598 in the high end assumptions. EPA applied a cost-to-revenue test which calculates annualized pre-tax compliance cost as a percentage of total revenues and used a threshold of 1 and 3 percent to identify entities that would be significantly impacted as a result of this Permit. The total number of entities expected to exceed a 1% cost ratio ranges from 285 under low cost assumptions to 389 under high cost assumptions. Of this universe, the total number of entities expected to exceed a 3% cost ratio ranges from 71 under low cost assumptions to 76 under high cost assumptions. The total domestic flagged vessel universe that would be affected by this permit includes approximately 91,000 vessels. Accordingly, EPA concludes that this permit is unlikely to result in a significant economic impact on any businesses and in particular, small businesses. The economic analyses are available in the record for these permits.

Authority: Clean Water Act, 33 U.S.C. 1251 et seq.

Dated: June 9, 2008.

Ira Leighton,

Acting Regional Administrator, EPA, Region 1.

Dated: June 10, 2008.

Kevin Bricke,

Acting Director, Division of Environmental Planning and Protection, EPA, Region 2.

Dated: June 10, 2008.

Carl-Axel P. Soderberg,

Division Director, Caribbean Environmental Protection Division, EPA, Region 2.

Dated: June 9, 2008.

Jon M. Capacasa,

Director, Water Protection Division, EPA Region 3.

Dated: June 9, 2008.

Jim Giattina,

Director, Water Management Division, EPA, Region 4.

Dated: June 10, 2008.

Tinka G. Hyde,

Acting Director, Water Division, EPA, Region 5.

Dated: June 10, 2008.

William Honker,

Acting Director, Water Quality Protection Division, EPA, Region 6.

Dated: June 9, 2008.

William A. Spratlin,

Director, Water, Wetlands and Pesticides Division, EPA, Region 7.

Dated: June 10, 2008.

Stephen S. Tuber,

Assistant Regional Administrator, Office of Partnerships and Regulatory Assistance, EPA, Region 8.

Dated: June 10, 2008.

Alexis Strauss,

Director, Water Division, EPA, Region 9.

Dated: June 11, 2008.

Michael Lidgard,

Acting Director, Office of Water and Watersheds, EPA, Region 10.

[FR Doc. E8-13615 Filed 6-16-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-8580-7]

Notice of Tentative Approval and Solicitation of Request for a Public Hearing for Public Water System Supervision Program Revisions for the State of West Virginia

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Tentative Approval and Solicitation of Requests for a Public Hearing.

SUMMARY: Notice is hereby given that the State of West Virginia is revising their Public Water Supply Supervision (PWSS) program to meet the requirements of Section 1413 of the Safe Drinking Water Act. West Virginia has adopted regulations for the Long Term 2 Enhanced Surface Water Treatment Rule (LT2) to improve public health protection through the control of microbiological contaminants by targeting additional *Cryptosporidium* treatment requirements to higher risk systems, and for the Stage 2 Disinfection By-Products Rule (Stage 2) to reduce exposure to Disinfection By-Products (DBP) by requiring systems to meet maximum contaminant levels as an average at each compliance monitoring location, rather than as a system-wide average, for two groups of DBPs, trihalomethanes (TTHM) and five haloacetic acids (HAA5).

EPA has determined that these revisions are no less stringent than the corresponding Federal regulations. Therefore, EPA has decided to tentatively approve these program revisions. All interested parties are invited to submit written comments on this determination and may request a public hearing.

DATES: Comments or a request for a public hearing must be submitted by July 17, 2008. This determination shall

become effective on July 17, 2008 if no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, and if no comments are received which cause EPA to modify its tentative approval.

ADDRESSES: Comments or a request for a public hearing must be submitted to the U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103-2029. All documents relating to this determination are available for inspection between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, at the following offices:

- Drinking Water Branch, Water Protection Division, U.S. Environmental Protection Agency Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.
- West Virginia Department of Health and Human Resources, Environmental Engineering Division, Capitol and Washington Streets, 1 Davis Square, Suite 200, Charleston, WV 25301-1798.

FOR FURTHER INFORMATION CONTACT:

Michelle Moustakas, Drinking Water Branch (3WP21) at the Philadelphia address given above; telephone (215) 814-5741 or fax (215) 814-2318.

SUPPLEMENTARY INFORMATION:

All interested parties are invited to submit written comments on this determination and may request a public hearing. All comments will be considered, and, if necessary, EPA will issue a response. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by July 17, 2008, a public hearing will be held. A request for public hearing shall include the following: (1) The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; (2) a brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intends to submit at such a hearing; and (3) the signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

Dated: June 5, 2008.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. E8-13614 Filed 6-16-08; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL MARITIME COMMISSION

[Docket No. 08-03]

Maher Terminal, LLC, v. The Port Authority of New York and New Jersey; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission ("Commission") by Maher Terminal, LLC. Complainant asserts that it is a limited liability company registered in the State of Delaware with corporate offices and facilities located in Elizabeth, New Jersey. Complainant asserts that Respondent, The Port Authority of New York and New Jersey ("PANYNJ"), is a body corporate and politic created by Compact between the States of New York and New Jersey and with the consent of the Congress; has offices located in New York, New York; owns marine terminal facilities in the New York-New Jersey area, including in Elizabeth, New Jersey; and is a marine terminal operator within the meaning of the Shipping Act of 1984, as amended ("The Shipping Act"). See 46 U.S.C. 40102(14). Complainant contends that Respondent violated sections 41102(c) and 41106(2) and (3) of The Shipping Act, respectively, by: (1) Failing to establish, observe and enforce just and reasonable practices with respect to Complainant; (2) giving undue or unreasonable preference or advantage to APMT and imposing undue or unreasonable prejudice or disadvantage with respect to Complainant; and (3) unreasonably refusing to deal or negotiate with Complainant. 46 U.S.C. 41102(c), 41106(2)-(3).

Specifically, Complainant alleges that Respondent's lease agreement EP-248 with APM Terminals North America, Inc., formerly known as Maersk Container Service Company, Inc. ("APMT"), grants to APMT unduly and unreasonably more favorable lease terms than Respondent provides to Complainant in lease agreement EP-249. These agreements, Complainant avers, are filed with the Commission as FMC Agreement Nos. 201106 and 201131, respectively. Complainant contends that the lease terms which disadvantage Complainant include, but are not limited to, the annual rental rate per acre, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and the security deposit requirement.

Complainant asserts that it has sustained injuries and damages, as a result of Respondent's actions, including but not limited to higher rents, costs, and other undue and unreasonable payments and obligations

amounting to a sum of millions of dollars. Complainant requests that the Commission require Respondent to: (1) Answer the charges in the subject complaint; (2) cease and desist from the aforementioned violations of the Shipping Act; (3) provide to Complainant the preferences provided to APMT; (4) put in force such practices and as the Commission determines to be lawful and reasonable; and (5) pay to Complainant by way of reparations the amount of the actual injury, plus interest, cost and attorneys fees, and any other damages to be determined. Additionally, Complainant requests that the Commission order any such other relief as it determines appropriate.

This proceeding has been assigned to the Office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by June 11, 2009, and the final decision of the Commission shall be issued by October 9, 2009.

Karen V. Gregory,
Assistant Secretary.

[FR Doc. E8-13547 Filed 6-16-08; 8:45 am]

BILLING CODE 6730-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Decision To Evaluate a Petition To Designate a Class of Employees for Los Alamos National Laboratory, Los Alamos, NM, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees for Los Alamos National Laboratory, Los Alamos, New Mexico, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: Los Alamos National Laboratory.

Location: Los Alamos, New Mexico.

Job Titles and/or Job Duties: All service support workers (which includes, but is not limited to, security guards, firefighters, laborers, custodians, carpenters, plumbers, electricians, pipefitters, sheet metal workers, ironworkers, welders, maintenance workers, truck drivers, delivery persons, radiation technicians, and area work coordinators) who worked in any operational Technical Areas with a history of radioactive material use.

Period of Employment: January 1, 1976 through December 31, 2005.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C-46, Cincinnati, OH 45226, Telephone 513-533-6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to OCAS@CDC.GOV.

Dated: June 5, 2008.

John Howard,
Director, National Institute for Occupational Safety and Health.

[FR Doc. E8-13626 Filed 6-16-08; 8:45 am]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institute for Occupational Safety and Health; Decision To Evaluate a Petition To Designate a Class of Employees for General Steel Industries, Granite City, IL, To Be Included in the Special Exposure Cohort

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) gives notice as

required by 42 CFR 83.12(e) of a decision to evaluate a petition to designate a class of employees for General Steel Industries, Granite City, Illinois, to be included in the Special Exposure Cohort under the Energy Employees Occupational Illness Compensation Program Act of 2000. The initial proposed definition for the class being evaluated, subject to revision as warranted by the evaluation, is as follows:

Facility: General Steel Industries.

Location: Granite City, Illinois.

Job Titles and/or Job Duties: All individuals who worked in any location.

Period of Employment: January 1, 1953 through December 31, 1966, and/or during the residual contamination period from January 1, 1967 through December 31, 1992.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Director, Office of Compensation Analysis and Support, National Institute for Occupational Safety and Health (NIOSH), 4676 Columbia Parkway, MS C-46, Cincinnati, OH 45226, Telephone 513-533-6800 (this is not a toll-free number). Information requests can also be submitted by e-mail to OCAS@CDC.GOV.

Dated: June 5, 2008.

John Howard,
Director, National Institute for Occupational Safety and Health.

[FR Doc. E8-13629 Filed 6-16-08; 8:45 am]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Molecular

Aspects of Neuronal Development, Function and Pathology.

Date: June 25, 2008.

Time: 1:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Lawrence Baizer, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7850, Bethesda, MD 20892, (301) 435-1257, baizerl@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: AIDS and Related Research Integrated Review Group, AIDS Clinical Studies and Epidemiology Study Section.

Date: July 17, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Sofitel Lafayette Square, 806 15th Street, NW., Washington, DC 20005.

Contact Person: Hilary D. Sigmon, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, (301) 594-6377, sigmon@hcsr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Chemistry Small Business Review.

Date: July 22, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: John L. Bowers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4170, MSC 7806, Bethesda, MD 20892, (301) 435-1725, bowersj@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cellular Probes.

Date: July 29, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: One Washington Circle Hotel, One Washington Circle, Washington, DC 20037.

Contact Person: George W. Chacko, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7849, Bethesda, MD 20892, 301-435-1245, chackoge@csr.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 6, 2008.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-13239 Filed 6-16-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Aging Disease.

Date: July 17, 2008.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Room 2C212, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Bitu Nakhai, PhD, Scientific Review Administrator, Scientific Review Office, National Institute on Aging, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7701, nakhaib@nia.nih.gov.

Name of Committee: National Institute on Aging Special Emphasis Panel, Varicella Zoster Virus Infection.

Date: July 22, 2008.

Time: 2 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: William Cruce, PhD, Health Scientist Administrator, Scientific Review Office, National Institute on Aging, National Institutes of Health, Room 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301-402-7704, crucew@nia.nih.gov. (Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: June 6, 2008.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-13238 Filed 6-16-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute on Aging Special Emphasis Panel, July 10, 2008, 12 p.m. to July 10, 2008, 4 p.m., National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Room 2C212, Bethesda, MD 20892 which was published in the **Federal Register** on May 29, 2008, 73 FR 30957-30958.

Meeting will begin at 10 a.m. The meeting is closed to the public.

Dated: June 6, 2008.

Anna Snouffer,

Acting Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-13240 Filed 6-16-08; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Workgroup Meeting

Notice is hereby given of a meeting of the Strategic Planning Workgroup (SPWG) organized by the Interagency Autism Coordinating Committee (IACC).

Audio of this workgroup meeting will be accessible to the public via a teleconference phone link, and there will be Web-based access to information displayed at the meeting via computer/projector. Access information will be posted on the IACC Web site: (<http://www.nimh.nih.gov/research-funding/scientific-meetings/recurring-meetings/iacc/events/index.shtml>). Attendance at the meeting itself will be limited to workgroup members. The purpose of the workgroup meeting is to review an early draft of the IACC Strategic Plan for Autism Spectrum Disorder (ASD) Research. The SPWG comments on the draft plan will be forwarded to the IACC for consideration and discussion at its next meeting on July 15, 2008.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of meeting: Strategic Planning Workgroup.

Date: July 8, 2008.

Time: 10 a.m. to 1 p.m. EST.

Agenda: Review of draft IACC Strategic Plan for ASD Research.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Room 2172, Bethesda, MD.

Contact Person: Tanya Pryor, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Bethesda, MD 20892-9669, 301-443-7153.

Information about the IACC is available on the Web site: <http://www.nimh.nih.gov/research-funding/scientific-meetings/recurring-meetings/iacc/index.shtml>.

Dated: June 10, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8-13508 Filed 6-16-08; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

[Docket Nos. TSA-2006-24191; Coast Guard-2006-24196]

Transportation Worker Identification Credential (TWIC); Enrollment Dates for the Ports of Little Rock, AR and Camden, NJ

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

ACTION: Notice.

SUMMARY: The Department of Homeland Security (DHS) through the Transportation Security Administration (TSA) issues this notice of the dates for the beginning of the initial enrollment for the Transportation Worker Identification Credential (TWIC) for the Ports of Little Rock, AR and Camden, NJ.

DATES: TWIC enrollment begins in Little Rock on June 11, 2008 and Camden on June 12, 2008.

ADDRESSES: You may view published documents and comments concerning the TWIC Final Rule, identified by the docket numbers of this notice, using any one of the following methods.

(1) Searching the Federal Docket Management System (FDMS) Web page at <http://www.regulations.gov>;

(2) Accessing the Government Printing Office's Web page at <http://www.gpoaccess.gov/fr/index.html>; or

(3) Visiting TSA's Security Regulations Web page at <http://www.tsa.gov> and accessing the link for "Research Center" at the top of the page.

FOR FURTHER INFORMATION CONTACT:

James Orgill, TSA-19, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202-4220. Transportation Threat Assessment and Credentialing (TTAC), TWIC Program, (571) 227-4545; e-mail: credentialing@dhs.gov.

Background

The Department of Homeland Security (DHS), through the United States Coast Guard and the Transportation Security Administration (TSA), issued a joint final rule (72 FR 3492; January 25, 2007) pursuant to the Maritime Transportation Security Act (MTSA), Public Law 107-295, 116 Stat. 2064 (November 25, 2002), and the Security and Accountability for Every Port Act of 2006 (SAFE Port Act), Public Law 109-347 (October 13, 2006). This rule requires all credentialed merchant mariners and individuals with unescorted access to secure areas of a regulated facility or vessel to obtain a TWIC. In this final rule, on page 3510, TSA and Coast Guard stated that a phased enrollment approach based upon risk assessment and cost/benefit would be used to implement the program nationwide, and that TSA would publish a notice in the **Federal Register** indicating when enrollment at a specific location will begin and when it is expected to terminate.

This notice provides the start date for TWIC initial enrollment at the Ports of Little Rock, AR, on June 11, 2008; and Camden, NJ, on June 12, 2008. The Coast Guard will publish a separate notice in the **Federal Register** indicating when facilities within the Captain of the Port Zone Lower Miss. River, including those in the Port of Little Rock; and Captain of the Port Zone Delaware Bay, including those in the Port of Camden must comply with the portions of the final rule requiring TWIC to be used as an access control measure. That notice will be published at least 90 days before compliance is required.

To obtain information on the pre-enrollment and enrollment process, and enrollment locations, visit TSA's TWIC Web site at <http://www.tsa.gov/twic>.

Issued in Arlington, Virginia, on June 11, 2008.

Rex Lovelady,

Program Manager, TWIC, Office of Transportation Threat Assessment and Credentialing, Transportation Security Administration.

[FR Doc. E8-13497 Filed 6-16-08; 8:45 am]

BILLING CODE 9110-05-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities

Agency Information Collection Activities: Form I-134, Revision of a Currently Approved Information Collection; Comment Request.

ACTION: 30-Day Notice of Information Collection Under Review: Form I-134, Affidavit of Support; OMB Control No. 1615-0014.

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 April 9, 2008, at 73 FR 19235 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 July 17, 2008. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202-272-8352 or via e-mail at rfs.regs@dhs.gov, and to the OMB USCIS Desk Officer via facsimile at 202-395-6974 or via e-mail at kastrich@omb.eop.gov.

When submitting comments by e-mail please make sure to add OMB Control Number 1615-0014. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a currently approved information collection.

(2) *Title of the Form/Collection:* Affidavit of Support.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-134. 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 and households. This information collection is necessary to determine if at the time of application into the United States, the applicant is likely to become a public charge.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 44,000 responses at 90 minutes (1.5 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 66,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please visit: <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: June 11, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security. [FR Doc. E8-13543 Filed 6-16-08; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I-765, Extension of a Currently Approved Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Form I-756, Application for Employment Authorization; OMB Control No. 1615-0040.

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 April 11, 2008, at 73 FR 19861 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 July 17, 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 to 202-395-6974 or via e-mail at kastrich@omb.eop.gov.

When submitting comments by e-mail please make sure to add OMB Control Number 1615-0040. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the

collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-765. 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 and households. The information collected on this form is used by the USCIS to determine eligibility for the issuance of the employment document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 1,885,296 responses at 3 hours and 25 minutes (3.42 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 6,447,712 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: <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: June 11, 2008.

Stephen Tarragon,

Acting Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security. [FR Doc. E8-13549 Filed 6-16-08; 8:45 am]

BILLING CODE 9111-97-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Photocopying Machines

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that the U.S. Customs and Border Protection (CBP) has issued a final determination concerning the country of origin of certain photocopying machines which may be offered to the United States Government under an undesignated government procurement contract. Based on the facts presented, CBP has concluded that certain goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the finished photocopying machines for government procurement purposes.

DATES: The final determination was issued on June 11, 2008. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination within July 17, 2008.

FOR FURTHER INFORMATION CONTACT: Yuliya A. Gulis, Valuation and Special Programs Branch, Regulations and Rulings, Office of International Trade (202-572-8783).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on June 11, 2008, pursuant to subpart B of part 177, Customs Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of certain photocopying machines which may be offered to the United States Government under an undesignated government procurement contract. This final determination, in HQ H025106, was issued at the request of Ricoh Company, Ltd. under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511-18).

The final determination concluded that, based upon the facts presented, certain goods imported into Japan are substantially transformed in Japan such that Japan is the country of origin of the finished photocopying machines for government procurement purposes.

Section 177.29, Customs Regulations (19 CFR 177.29), provides that notice of final determinations shall be published in the **Federal Register** within 60 days

of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), states that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: June 11, 2008.

Sandra L. Bell,

Executive Director, Office of Regulations and Rulings, Office of International Trade.

Attachment: HQ H025106.

HQ H025106

June 11, 2008

OT:RR:CTF:VS H025106 YAG

Category: Marking.

Mr. Yoshihiro Saito, Manelli Denison & Selter, PLLC, 2000 M Street, NW., Suite 700, Washington, DC 20036-3307

RE: U.S. Government Procurement; Country of Origin of Photocopying Machines; Substantial Transformation; 19 CFR Part 177

Dear Mr. Saito: This is in response to your letter, dated March 20, 2008, requesting a final determination on behalf of Ricoh Company, Ltd. ("Ricoh"), pursuant to subpart B of Part 177, Customs and Border Protection ("CBP") Regulations (19 CFR 177.21 *et seq.*).

Under these regulations, which implement Title III of the Trade Agreements Act of 1979 ("TAA"), as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purpose of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of certain photocopying machines that Ricoh may sell to the U.S. Government. We note that Ricoh is a party-at-interest within the meaning of 19 CFR 177.22(d)(1) and is entitled to request this final determination.

Facts

The products subject to this ruling are certain photocopying machines manufactured by Ricoh, referred to as the "AC1 Series", and to be imported from Japan for the purpose of sales to U.S. government agencies. The AC1 Series have photocopying, printing, faxing, and scanning functions. The AC1 Series is capable of producing 40 or 50 black-and-white copies of documents per minute, depending on

the model. However, some copiers in this series are capable of scanning color images in documents. Ricoh has developed the AC1 Series in Japan and performed the entire engineering, development, design, and art work in Japan.

An AC1 copier is stated to be a complex machine comprising a total of 2,534 pieces of individual parts. You state that at the initial stage of the copier production process, individual parts are assembled into various assemblages of parts called "sections," "systems," "subassemblies," or "units." These part assemblages represent 53 basic building blocks for each AC1 copier. These blocks are in turn incorporated into modularized units or subassemblies with distinct functions. You claim that the primary functional modules of the AC1 copier are: the Scanning Unit, Laser Scanning Unit, Controller Unit ("Controller"), Photoconductor Unit, Developer Unit, Transfer Unit, and Fusing Unit. Additionally, the Main Frame, automatic document feeder (ADF), duplexer, and paper trays perform support functions by supplying power through the electrical systems, driving the engine and feeding/guiding and flipping the paper. You state that Ricoh will conduct the fabrication and/or the final assembly of the Scanning Unit, Laser Scanning Unit, Controller, Photoconductor Unit, and Main Frame in Japan, using blocks and individual parts of Japanese, Chinese, and third-country origins. On the other hand, the Developer Unit, Transfer Unit, Fusing Unit, and Base Engine and Image Control Unit ("BICU") as well as the ADF, paper trays, etc. will be assembled in China by Ricoh Asia Industry, Ltd. ("RAI") or its contractors, using Chinese and Japanese parts. The final assembly of AC1 photocopying machines will take place in Japan. Ricoh will also conduct testing on the subassemblies and finished copiers in Japan. The final assembly process will comprise at least 30 significant steps, not including pre-assembly work, tests or adjustments performed on individual subassemblies. Finally, the finished AC1 Series copiers will undergo final inspection and packing for shipment to the United States.

Scanning Unit

The Scanning Unit performs the initial task of converting the original images into digital signals. An original document is scanned when the xenon lamp irradiates the original document through the exposure glass. The light that reads the document is reflected by three separate mirrors and arrives at a Charge Coupled Device ("CCD") after

passing through an assemblage of small lens pieces. CCD incorporates photo diodes, which convert the light (i.e. photons) on the pixels into analog electronic signals. The analog signals are then converted into digital form through the printed wiring board called sensor board unit ("SBU") and from there transmitted to the DRAM and flash memory boards located in the Controller Unit for storage. The DRAM stores the image memory, while the flash memory stores the program. The xenon lamp is a Japanese part. The reflection mirrors and the lens block are produced in China to Ricoh's specifications and Ricoh designs these optical parts. The CCD is manufactured in Japan by an unaffiliated producer. The first and second carriage sections of the Scanning Unit are pre-assembled by RAI in China by inserting a xenon lamp, a reflector, and mirrors into designated spots. However, after this pre-assembly is complete, the carriage sections are shipped to Ricoh in Japan, where the subsequent assembly is performed by combining the first and second carriages together, installing a set of six lenses into a lens block, and CCD in perfect alignment with each other and with the rest of the components in the Scanning Unit. The exposure and sheet-through glasses are also attached at that stage. The complete Scanning Unit is then tested and a Scanner Validation Tool ("SVT"), which is a software package developed by Ricoh engineers, evaluates the test results against parameters.

Controller Unit Subassembly

The Controller contains a central processing unit ("CPU"), a hard disk drive, a flash memory (ROM), two dual in-line memory modules ("DIMM"), a random access memory (DRAM or SDRAM), a non-volatile random access memory ("NVRAM") and interface cards. The Controller controls all applications of AC1 as a photocopier, as well as its additional/optional functions as a printer, a scanner, or a fax machine. Once the information is stored in the DRAM and flash memory of the Controller, it is transmitted to the three application-specific-integrated circuits ("ASICs"), located on the BICU board in the Main Frame section of the copier. All three ASICs will be manufactured in Japan. The CPU on the Controller Unit will be purchased from a Canadian producer. The DRAM and flash memory will be purchased from multiple countries. However, the Controller Unit itself will be assembled and tested in Japan.

Laser Scanning Unit

The electronic signals processed by the ASICs are transmitted to the Laser Scanning Unit. In the Laser Scanning Unit, two laser diodes convert the electronic signals into pulsed laser beams, which are then sent to the photoconductor drum. On the way to the drum, the laser beams pass through a collimator lens, a cylindrical lens, and barrel troidal lens ("BTL") and are reflected by polygonal and f-theta mirrors. The laser diodes, the f-theta mirror, BTL and the collimator lens will be produced in Japan. The cylindrical lens will be supplied from China. Nonetheless, the assembly of the Laser Scanning Unit will take place in Japan.

Photoconductor Unit

The Photoconductor Unit contains a photoconductive drum and an electron-charging roller. The drum, coated with an Organic Photo Conductor ("OPC") is the main component of the Photoconductor Unit. This unit is charged with electricity and the laser beam sweeps across it to make the electrostatic latent image. The drum is a Japanese product, and the time-consuming and capital intensive assembly of the photoconductor unit will take place in Japan.

Developer Unit

The Developer Unit supplies the toner to the drum. The developer roller and developer doctor are the key components of this Unit and are manufactured in Japan. All other parts will be produced or purchased in China. The Developer Unit will be assembled and tested in China before being shipped to Japan for the final assembly of the copier.

Transfer Unit

The Transfer Unit transfers the visible image from the drum to paper. The Transfer Unit will be assembled in China. The assembly of the Transfer Unit involves two steps. First, a toner sensor and a cleaning blade will be attached to the frame. Second, the Japanese made transfer belt will be installed. The transfer belt is specifically produced in Japan.

Fusing Unit

The Fusing Unit permanently settles toner on the paper by applying heat and pressure to the migrated toner. It is a simple process and the Fusing Unit for the AC1 Series will be entirely assembled in China from Japanese and Chinese parts.

Main Frame

The shell of the main frame will be made from steel sheets formed in China on Japanese dies. The Main Frame will be completely built in Japan. The engine, I/O board, BICU, and operation panels, as well as the exterior covers for the Main Frame, will be installed in Japan. The software for all PCBs will be supplied by Ricoh Japan.

You request an origin determination that the subject photocopying machine is the country of origin Japan i.e., if the "substantial configuration" is performed in Japan.

Issue

What is the country of origin of the subject photocopying machines for the purpose of U.S. Government procurement?

Law and Analysis

Pursuant to Subpart B of Part 177, 19 CFR 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 CFR 177.22(a).

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 573 F. Supp. 1149 (Ct. Int'l Trade 1983), *aff'd*, 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See C.S.D. 80-111, C.S.D. 85-25, C.S.D. 89-110, C.S.D. 89-118, C.S.D. 90-51, and C.S.D. 90-97. In C.S.D. 85-25, 19 Cust. Bull. 844 (1985),

CBP held that for purposes of the Generalized System of Preferences ("GSP"), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

The courts and CBP have also considered the essential character of the imported article in making these determinations. See *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026, 3 CIT 220, 224–225 (1982) (where it was determined that imported uppers were the essence of a completed shoe) and *National Juice Products Association, et al v. United States*, 628 F. Supp. 978, 10 CIT 48, 61 (1986) (where the court addressed each of the factors (name, character, and use) in finding that no substantial transformation occurred in the production of retail juice products from manufacturing concentrate).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

CBP has held in a number of cases involving similar merchandise that complex and meaningful assembly operations involving a large number of components result in a substantial transformation. In Headquarters Ruling Letter ("HRL") 563491 (February 8, 2007), we addressed the country of origin of certain digital color multifunctional systems manufactured

by Sharp and assembled in Japan of various Japanese—and Chinese—origin parts. In that ruling, we determined that color multifunctional systems were a product of Japan based on the fact that "although several subassemblies are assembled in China, enough of the Japanese subassemblies and individual components serve major functions and are high in value, in particular, the transfer belt, control box unit, application-specific integrated circuits, charged couple device, and laser diodes." Further we found that the testing and adjustments performed in Japan were technical and complex and the assembly operations that occurred in Japan were sufficiently complex and meaningful. Thus, through the product assembly and testing and adjustment operations, the individual components and subassemblies of Japanese and foreign-origin were subsumed into a new and distinct article of commerce that had a new name, character, and use. See also HRL 562936, dated March 17, 2004.

In HRL 561734, dated March 22, 2001, CBP held that certain multifunctional machines (consisting of printer, copier, and fax machines) assembled in Japan were a product of that country for the purposes of U.S. government procurement. The multifunctional machines were assembled from 227 parts (108 parts obtained from Japan, 92 from Thailand, 3 from China, and 24 from other countries) and eight subassemblies, each of which was assembled in Japan. See also HRL 561568, dated March 22, 2001.

Based on the facts and law in this case, we find that the assembled AC1 copiers are products of Japan for the purposes of U.S. Government procurement. Out of eight (8) subassemblies, only three (3) will be put together in China. Although the Developer Unit and the Transfer Unit will be assembled in China, we find that enough of the Japanese subassemblies and individual components serve major functions and are high in value, in particular, the transfer belt, Controller, ASCIS, CCD, laser diode, and Photoconductor Unit. In making this determination, we particularly note that the Controller Unit and the Photoconductor Unit are being assembled in Japan, with the Photoconductor Unit made entirely out of Japanese parts and the Controller Unit containing mostly Japanese products. Additionally, AC1's scanning and laser scanning units will be assembled in Japan, using a CCD, laser diodes, f-theta mirror, BTL, and collimator lens of Japanese origin. The Developer Unit subassembly is also

important to the performance of photocopying machines. Although the developer unit will be assembled in China, the developer roller and developer doctor, 2 key components of the unit, are of Japanese origin. Similarly, even though the Transfer Unit is partially assembled in China, the transfer belt itself is a Japanese part. We further note that the testing and adjustments performed in Japan are technical, complex, and time consuming. Based on your submission, it is evident that a large variety of adjustments are made to each subassembly prior to and during the final copier assembly process. These tests and adjustments utilize technologically advanced equipment and firmware, such as the SVT, LD Checker, and LSU Checker. The tests and adjustments will consume nearly one-third of the total final assembly time for AC1 copiers. Finally, the assembly operations that occur in Japan are sufficiently complex and meaningful. Through the product assembly and testing, the individual components and subassemblies of Japanese and foreign origin are subsumed into a new and distinct article of commerce that has a new name, character, and use. Therefore, we find that the country of origin of the AC1 series copiers for the purposes of U.S. Government procurement is Japan.

Holding

Based on the facts of this case, we find that the processing in Japan substantially transforms the non-Japanese components. Therefore, the country of origin of the AC1 Series photocopying machines is Japan for purposes of U.S. Government procurement.

Notice of this final determination will be given in the **Federal Register**, as required by 19 CFR 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 CFR 177.31 that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 CFR 177.30, any party-at-interest may, within 30 days after publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,
Sandra L. Bell,
Executive Director, Office of Regulations and Rulings, Office of International Trade.

[FR Doc. E8–13544 Filed 6–16–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service**

[FWS-R3-ES-2008-N0142; 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 July 17, 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.**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 17). Submit your written data, comments, or request for a copy of the complete application to the address shown in **ADDRESSES**.

Permit Number: TE842313

Applicant: Illinois State Museum, Springfield, Illinois.

The applicant requests a permit renewal to take Hine's emerald dragonfly (*Somatochlora hineana*) throughout the species' range in Alabama, Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. This permit renewal is requested to continue long-term scientific studies to determine the presence or absence of the species within suitable habitats, to document

new population sites through surveys, genetic study, and the taking of voucher specimens to document populations. Proposed research activities are aimed at enhancement of recovery of the species in the wild.

Permit Number: TE184740

Applicant: Theresa Sydney Burke, Beaver, West Virginia.

The applicant requests a permit to take the Indiana bat (*Myotis sodalis*), Gray bat (*Myotis grisescens*), and Virginia big-eared bat (*Corynorhinus townsendii virginianus*) throughout the range of the species. The activities proposed involve capture and marking of 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.

Public Comments

We solicit public review and comments on these permit applications. Please refer to the 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: June 3, 2008.

Lynn M. Lewis,

Assistant Regional Director, Ecological Services, Region 3, Fort Snelling, Minnesota.
[FR Doc. E8-13601 Filed 6-16-08; 8:45 am]

BILLING CODE 4310-55-P**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service**

[FWS-R1-ES-2008-N0141; 10120-1113-0000-F5]

Endangered Wildlife and Plants; Permits**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of receipt of application to amend permit; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on the following application to amend an existing permit to conduct certain activities with endangered species.

DATES: We must receive your written data or comments by July 17, 2008.**ADDRESSES:** Program Manager, Endangered Species, Ecological Services, U.S. Fish and Wildlife Service, 911 NE. 11th Avenue, Portland, OR 97232-4181.

FOR FURTHER INFORMATION CONTACT: Grant Canterbury, Fish and Wildlife Biologist, at the above address or by telephone (503-231-2063) or fax (503-231-6243).

SUPPLEMENTARY INFORMATION: The following applicant has applied to amend an existing scientific research permit to conduct certain activities with endangered species under section 10(a)(1)(A) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*). We solicit review and comment from local, State, and Federal agencies and the public.

Permit No. TE-043638

Applicant: U.S. Army Natural Resources Center, Schofield Barracks, Hawaii

The applicant requests an amendment to an existing permit to remove/reduce to possession (collect pollen and seeds) *Hedyotis coriacea* (kio'ele) and to take (collect eggs, rear in captivity, capture adults, photograph, release, and collect voucher specimens) the Hawaiian picture-wing flies *Drosophila aglaia*, *D. hemipeza*, *D. montgomeryi*, *D. obatai*, *D. substenoptera*, and *D. tarphytrichia*, in conjunction with research on the island of Oahu, Hawaii, for the purpose of enhancing their survival. This permit currently covers removal and reduction to possession of *Chamaescyce herbstii* (akoko), *Hesperomannia arbuscula* (no common name), *Phyllostegia kaalaensis* (no common name), and *Schiedea kaalae* (no common name); and take of the Oahu tree snails (*Achatinella* spp.) and Oahu elepaio (*Chasiempis sandwichensis ibidis*), for which notices were originally published in the **Federal**

Register on July 20, 2005 (70 FR 41786), August 6, 2006 (71 FR 47242), and November 16, 2007 (72 FR 64665).

Public Review of Comments

Please refer to the permit number for the application when submitting comments.

We solicit public review and comment on this recovery permit application. 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.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

Dated: May 23, 2008.

Ren Lohoefer,

Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. E8-13486 Filed 6-16-08; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R4-ES-2008-N0111]; [40120-1113-0000-C2]

Notice of Availability of a Technical Agency Draft Recovery Plan for the Puerto Rican Parrot for Review and Comment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability and opening of public comment period.

SUMMARY: We, the Fish and Wildlife Service, announce the availability of the technical agency draft revised recovery plan for the Puerto Rican Parrot (*Amazona vittata*). The technical agency draft revised recovery plan includes specific recovery objectives and criteria to be met in order to reclassify this species to threatened status and delist it under the Endangered Species Act of 1973, as amended (Act). We solicit review and comment on this technical agency draft recovery plan from local, state, and Federal agencies, and the public.

DATES: In order to be considered, we must receive comments on the technical

agency draft recovery plan on or before August 18, 2008.

ADDRESSES: If you wish to review this technical agency revised draft recovery plan, you may obtain a copy by contacting the Caribbean Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boquerón, Puerto Rico 00622 (telephone (787) 851-7297 Ext. 231) or by visiting our Web site at <http://endangered.fws.gov/recovery/index.html#plans>. If you wish to comment, you may submit your comments by the following methods:

1. You may submit written comments and materials to the Project Leader, at the above address.

2. You may hand-deliver written comments to our Caribbean Field Office, U.S. Fish and Wildlife Service, P.O. Box 491, Boquerón, Puerto Rico 00622, or fax your comments to (787) 851-7440.

3. You may send comments by e-mail to Marelisa Rivera at marelisa_rivera@fws.gov. For directions on how to submit electronic filing of comments, see the "Public Comments Solicited" section.

Comments and materials received are available for public inspection on request, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Marelisa Rivera at the above address (Telephone 787-851-7297, ext. 231).

SUPPLEMENTARY INFORMATION:

Background

Once abundant and widespread on the Puerto Rican archipelago, the Puerto Rican parrot is considered one of the ten most endangered birds in the world. Largely green with a red forehead and blue flight feathers, the parrot is one of nine *Amazona* parrots occurring in the West Indies. The species is one of the smallest in its genus, measuring about 29 centimeters (11 inches) in length and weighing about 270 grams (10 ounces). Presently, a minimum of 25 individuals survive in the wild in the El Yunque National Forest (YNF) in eastern Puerto Rico and 10 in the Río Abajo Forest (RAF) in north central Puerto Rico. Two captive population facilities hold more than 225 individuals: the Iguaca Aviary and the José L. Vivaldi Aviary in eastern and west-central Puerto Rico, respectively.

The Puerto Rican parrot is a fruit-eating cavity nester seldom seen far from forests. The decline of the parrot and its restricted distribution are due to many factors, but mostly due to widespread habitat loss (e.g., deforestation.) Due to its nesting requirements, it depends on mature forests with large cavity-forming trees.

At present, in addition to low numbers and a limited distribution, major threats to this species are nest competition and predation of eggs and chicks by pearly-eyed thrashers (*Margarops fuscatus*), predation of fledglings and adults by red-tailed hawks (*Buteo jamaicensis*), predation by rats (*Rattus rattus* and *R. norvegicus*), parasitism by warble flies (*Philornis pici*), and the impact of hurricanes. Other threats include competition for cavities with European and Africanized honeybees (*Apis mellifera*). Many of the threats are being controlled through management strategies.

Restoring an endangered or threatened animal or plant to the point where it is again a secure, self-sustaining member of its ecosystem is a primary goal of the endangered species program. To help guide the recovery effort, we are preparing recovery plans for most listed species. Recovery plans describe actions considered necessary for conservation of the species, establish criteria for downlisting or delisting, and estimate time and cost for implementing recovery measures.

The Act (16 U.S.C. 1533 *et seq.*) requires the development of recovery plans for listed species, unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires us to provide a public notice and an opportunity for public review and comment during recovery plan development. We will consider all information presented during a public comment period prior to approval of each new or revised recovery plan. We and other Federal agencies will take these comments into account in the course of implementing approved recovery plans.

The objective of this technical agency draft revised plan is to provide a framework for the recovery of the Puerto Rican parrot, so that protection under the Act is no longer necessary. As reclassification and recovery criteria are met, the status of the species will be reviewed and it will be considered for reclassification or removal from the Federal List of Endangered and Threatened Wildlife and Plants.

Public Comments Solicited

We solicit written comments on the recovery plan described. We will consider all comments received by the date specified above prior to final approval of the revised recovery plan.

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.

Authority: The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: April 24, 2008.

Cynthia K. Dohner,

Acting Regional Director.

[FR Doc. E8-13580 Filed 6-16-08; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-025-1110-MR-SSSS; 8-0118]

Notice of Intent To Amend the Three Rivers Resource Management Plan and Conduct Public Scoping

AGENCY: Bureau of Land Management, U.S. Department of the Interior.

ACTION: Notice of Intent.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) Burns District in Burns, Oregon, intends to amend the Three Rivers Resource Management Plan (RMP) with an associated Environmental Assessment (EA) that also analyzes effects of undertaking the Greater Sage-grouse Habitat Improvement Project (GSHIP) located in Harney County, Oregon. The objective of the proposal is to improve sage-grouse habitat and reestablish once open sagebrush habitats encroached upon by western juniper. The BLM also intends to consider allowance for harvest of downed western juniper trees south of U.S. Highway 20 and west of Oregon State Highway 205 for fuel wood, posts and poles, and for commercial harvest of juniper boughs for use in holiday decorating. Allowance for harvest of downed juniper trees and juniper boughs would amend the Three Rivers RMP. By this notice, the BLM is announcing the beginning of the public scoping process.

DATES: Scoping comments will be accepted for 30 days following publication of this notice in the **Federal Register**. Public notice will be provided when the Draft RMP Amendment and associated EA become available later this year (2008). Written comments will also be accepted throughout the planning process at the address below.

ADDRESSES: You may submit comments to GSHIP/RMP Amendment Lead, BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon 97738; fax to (541) 573-4411; or e-mail to Joan_Suther@or.blm.gov. Comments, including the names and addresses of respondents, will be available for public review at the Burns District Office during regular business hours 7:45 a.m. to 4:30 p.m., Monday through Friday, except holidays, and may be published as part of the Decision. 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. Anonymous comments will not be considered. All submissions from organizations and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: GSHIP/RMP Amendment Project Lead, BLM Burns District Office, 28910 Highway 20 West, Hines, Oregon 97738; (541) 573-4503; Fax (541) 573-4411; e-mail Joan_Suther@blm.gov; or visit the Burns District Web site at <http://www.blm.gov/or/districts/burns/plans/index.php>.

SUPPLEMENTARY INFORMATION: The GSHIP project was developed from management objectives identified in the Three Rivers RMP. The Three Rivers Plan directs BLM to: “* * * restore, maintain, or enhance the diversity of plant communities and wildlife habitat in abundances and distributions which prevent the loss of specific native plant community types or indigenous wildlife species habitat within the Resource Area” (WL-7.2); “* * * maintain, restore or enhance the habitat of candidate, State listed and other sensitive species to maintain the populations at a level which will avoid endangering the species and the need to list the species by either State or Federal governments” (SSS-2); and “* * * maintain, restore or enhance the diversity of plant communities and plant species in abundances and distributions, which prevent the loss of specific native plant community types or indigenous plant species within the Resource Area” (V-1).

In addition to direction from the Three Rivers RMP, managers are directed to meet management objectives and guidelines set forth in the Greater Sage-grouse and Sagebrush-Steppe Ecosystems Management Guidelines (2001). These management objectives and guidelines include: “* * * maintain and enhance existing sage-grouse habitats, use mechanical treatment or prescribed fire to remove juniper where it has invaded into * * * sites with mountain big sagebrush and/or low sagebrush; and vegetation manipulations should benefit the long-term health of sage-grouse habitat.”

Greater sage-grouse have been declining across much of their native range for decades due to habitat modification and fragmentation. Changes to habitat and habitat fragmentation have come from both natural and human causes. Human caused habitat change and fragmentation have resulted from urban sprawl, rangeland modification, and infrastructure development (i.e., power lines, highways, etc.). Natural habitat changes have been induced through fire, climate change, and succession; however, even natural causes have been influenced by man to some degree. One cause of sage-grouse habitat loss in the Three Rivers Resource Area is due to western juniper encroachment into what were once sagebrush dominated landscapes.

Historic grazing practices (which removed fine herbaceous fuels) and fire suppression activities at the turn of the century reduced influence of the fire regime in the project area. Fire was the principal factor controlling conifer encroachment into shrub-grassland communities in the Intermountain West prior to Euro-American immigration (110 to 130 years ago) (West 1999; Miller and Tausch 2001). As frequency and size of fires across the landscape lessened, juniper expanded into shrub-grassland communities with an overall loss in ecosystem function and a dramatic alteration in historic biodiversity, hydrologic cycles, fauna, and nutrient cycling (Bates *et al.* 1998).

Recent inventories of western juniper in eastern Oregon indicate juniper woodlands and savannahs cover an area of over five million acres (Gedney *et al.* 1999). Comparisons with data generated by earlier inventories suggest the area supporting western juniper has increased fivefold since 1936. Harney County is one of four counties in Oregon that contain more than one-half million acres of western juniper woodlands.

Sage-grouse are sensitive to juniper encroachment and have been shown to avoid juniper communities for nesting

and winter habitat (Miller *et al.* 2005). Continued expansion of juniper will lead to further losses of suitable sage-grouse habitat. While the problem of juniper encroachment is prevalent across the Resource Area, the Glass Butte/Rye Grass area was selected to expand upon a small-scale project completed there in 2006.

Initial scoping (March 1 to April 1, 2007) for the GSHIP expressed interest from the public in harvesting downed juniper for fuel wood, posts and poles. Additional preliminary issues and management concerns identified by BLM personnel and the public include management of Air Quality, Water Quality, Migratory Birds, Special Status Species fauna and flora, Noxious Weeds, Cultural Heritage and Hazardous Materials.

An interdisciplinary approach will be used to develop the EA in order to consider the variety of resource issues and concerns identified. Disciplines involved in the project will include (but not be limited to) those with expertise in management of the aforementioned resources.

Dated: June 11, 2008.

Dana R. Shuford,

Burns District Manager.

[FR Doc. E8-13582 Filed 6-16-08; 8:45 am]

BILLING CODE 4310-33-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT-922-08-1310-FI-P; NDM 95212]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease NDM 95212

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: Per 30 U.S.C. 188(d), Marathon Oil Company timely filed a petition for reinstatement of oil and gas lease NDM 95212, Mountrail County, North Dakota. The lessee paid the required rental accruing from the date of termination.

No leases were issued that affect these lands. The lessee agrees to new lease terms for rentals and royalties of \$10 per acre and 16⅔ percent or 4 percentages above the existing competitive royalty rate. The lessee paid the \$500 administration fee for the reinstatement of the lease and \$163 cost for publishing this Notice.

The lessee met the requirements for reinstatement of the lease per Sec. 31(d) and (e) of the Mineral Leasing Act of

1920 (30 U.S.C. 188). We are proposing to reinstate the lease, effective the date of termination subject to:

- The original terms and conditions of the lease;
- The increased rental of \$10 per acre;
- The increased royalty of 16⅔ percent or 4 percentages above the existing competitive royalty rate; and
- The \$163 cost of publishing this Notice.

FOR FURTHER INFORMATION CONTACT:

Karen L. Johnson, Chief, Fluids Adjudication Section, BLM Montana State Office, 5001 Southgate Drive, Billings, Montana 59101-4669, 406-896-5098.

Dated: June 11, 2008.

Karen L. Johnson,

Chief, Fluids Adjudication Section.

[FR Doc. E8-13591 Filed 6-16-08; 8:45 am]

BILLING CODE 4310-SS-P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent To Repatriate Cultural Items: The Cleveland Museum of Natural History, Cleveland, OH

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items in the possession of The Cleveland Museum of Natural History, Cleveland, OH, that meet the definition of "unassociated funerary object" and "sacred object" under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations in this notice.

In 1956, cultural items were acquired by The Cleveland Museum of Natural History from the Logan Museum, Beloit College, Beloit, WI. The two cultural items are one ceremonial wood bowl (CMNH 12888/CMNH 19888) and one silver brooch (CMNH 08169). Representatives of the Little Traverse Bay Bands of Odawa Indians, Michigan attributed the cultural items as Ottawa/Odawa.

The bowl is well-made with a carved rim and knobs. The locality and date for

the bowl are recorded as "Michigan, Emmet County, early 1900's." In Odawa spiritual practices, ceremonial bowls have a wide range of use and are utilized in many different ceremonial activities. It is believed that manidok (spirits) reside in each individual bowl and are a part of the community. It is the Tribe's continued responsibility to take care of these bowls and use them in ceremonies for sacred reasons, as such Traditional Religious leaders of the Little Traverse Bay Bands of Odawa Indians, Michigan need to use these bowls in ceremonies for the Tribe.

The one silver brooch (CMNH 08169) is made from German silver in the shape of a disk with punched designs of circles, stars, and ellipses. The locality and date for the brooch are listed as "Michigan, Emmet County, late 1800's." Multiple archeological sites that are Native American burial sites or cemeteries in Michigan from the Historic Period contain an array of European trade goods, such as knives, glass beads and silver brooches (Halsey, 286). It is believed that the silver brooch in the possession of museum came from an Odawa grave based on similar objects found in other Odawa graves from Michigan. In addition, it is believed that the brooch is a grave item because it has been recorded as a Native American item and not just simply a piece of silver since the designation of such simple items to be of Native origin usually originates because it came from a Native American burial.

Officials of The Cleveland Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the one cultural item described above is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and is believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of The Cleveland Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the one cultural item described above is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Lastly, officials of The Cleveland Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary object and the sacred object and the Little Traverse Bay Bands of Odawa Indians, Michigan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary object and/or sacred object should contact Adriann Balok, Curator of Cultural Anthropology, The Cleveland Museum of Natural History, 1 Wade Oval Dr., University Circle, Cleveland, OH 44106, telephone (216) 231-4600, ext. 3294, before July 17, 2008. Repatriation of the unassociated funerary object and sacred object to the Little Traverse Bay Bands of Odawa Indians, Michigan may proceed after that date if no additional claimants come forward.

The Cleveland Museum of Natural History is responsible for notifying the Little Traverse Bay Bands of Odawa Indians, Michigan that this notice has been published.

Dated: May 12, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8-13624 Filed 6-16-08; 8:45 am]

BILLING CODE 4312-50-S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: The Field Museum of Natural History, Chicago, IL

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Field Museum of Natural History, Chicago, IL. The human remains were removed from the area of Omaha, NE.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Field Museum of Natural History professional staff in consultation with representatives of the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South

Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Prairie Island Indian Community in the State of Minnesota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Shakopee Mdewakanton Sioux Community of Minnesota; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Upper Sioux Community, Minnesota; and Yankton Sioux Tribe of South Dakota.

In 1893, the Field Museum of Natural History purchased the skull of one individual from Ward's Natural Science Establishment of Rochester, NY (Field Museum of Natural History catalogue number 41882). Original Field Museum of Natural History records state that the human remains are "Sioux, killed 1861 (Omaha)." No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the specific cultural and geographic attribution in Field Museum of Natural History records. The records identify the human remains as "Sioux" from Omaha, NE. While the Santee Sioux Nation is the only Federally-recognized Sioux Indian tribe in Nebraska at the present time, the 1861 date of death predates the establishment of the Santee Sioux Reservation in Nebraska. Other Sioux groups were present in Nebraska at that time. "Sioux" descendants are represented by the present-day Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Prairie Island Indian Community in the State of Minnesota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Shakopee Mdewakanton Sioux Community of Minnesota; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Upper Sioux Community, Minnesota;

and Yankton Sioux Tribe of South Dakota.

Officials of the Field Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Field Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Prairie Island Indian Community in the State of Minnesota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Shakopee Mdewakanton Sioux Community of Minnesota; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Upper Sioux Community, Minnesota; and Yankton Sioux Tribe of South Dakota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Helen Robbins, Director of Repatriation, Field Museum of Natural History, 1400 South Lake Shore Drive, Chicago, IL 60605-2496, telephone (312) 665-7317, before July 17, 2008. Repatriation of the human remains to the Assiniboiné and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Prairie Island Indian Community in the State of Minnesota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Shakopee Mdewakanton Sioux Community of Minnesota; Sisseton-Wahpeton Oyate of

the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Upper Sioux Community, Minnesota; and Yankton Sioux Tribe of South Dakota may proceed after that date if no additional claimants come forward.

The Field Museum of Natural History is responsible for notifying Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Montana; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Lower Sioux Indian Community in the State of Minnesota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Nation, Nebraska; Shakopee Mdewakanton Sioux Community of Minnesota; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; Upper Sioux Community, Minnesota; and Yankton Sioux Tribe of South Dakota that this notice has been published.

Dated: May 4, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8-13586 Filed 6-16-08; 8:45 am]

BILLING CODE 4312-50-S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Museum of Anthropology, Washington State University, Pullman, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C., 3003, of the completion of an inventory of human remains in the possession and control of the Museum of Anthropology, Washington State University, Pullman, WA. The human remains were removed from various locations in southeastern Washington State.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility

of the museum that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Museum of Anthropology, Washington State University professional staff in consultation with representatives of the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group.

Between approximately 1950 and 1970, human remains representing a minimum of 23 individuals were removed from various sites along the lower Snake and mid-Columbia Rivers by faculty or were donated to the Department of Anthropology at Washington State University. The human remains were assembled and used for a number of years in teaching human osteology. No known individuals have been identified. No associated funerary objects are present.

The collection of human remains has become known as the Former Washington State University Human Osteology Teaching Collection. Institutional history within the department, including conversations with the late Dr. Grover Krantz who assembled and used the collection, indicate that the human remains are from sites along the lower Snake and mid-Columbia Rivers in southeastern Washington State. Osteological evidence indicates that the 845 remains in the Former Washington State University Human Osteology Teaching Collection represent a minimum of 23 individuals of Native American ancestry. Furthermore, the human remains that were removed date to the late prehistoric period and historic sites along the lower Snake and middle Columbia Rivers.

The Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group, are descendants of the communities of the Native American people that used the lower Snake and Columbia Rivers. Based on linguistic, oral tradition, geographic and archeological evidence for the Columbia Plateau from prehistoric through the historic times, as well as consultation evidence, the officials of Museum of Anthropology,

Washington State University have determined that the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group, are culturally affiliated with the human remains in the Former Washington State University Teaching Collection. These above mentioned Indian Tribes have filed a joint claim for repatriation of the human remains.

Officials of the Museum of Anthropology, Washington State University have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains described above represent the physical remains of a minimum of 23 individuals of Native American ancestry. Officials of the Museum of Anthropology, Washington State University also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remain should contact Mary Collins, Director, Museum of Anthropology, Washington State University, P.O. Box 644910, Pullman, WA 99164-4910, telephone (509)335-4314, before July 17, 2008. Repatriation of the human remains to the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group may proceed after that date if no additional claims come forward.

The Museum of Anthropology, Washington State University is responsible for notifying the Confederated Tribes of the Colville Reservation, Washington; Confederated Tribes of the Umatilla Indian Reservation, Oregon; Confederated Tribes and Bands of the Yakama Nation, Washington; Nez Perce Tribe of Idaho; and Wanapum Band, a non-federally recognized Indian group that this notice has been published.

Dated: June 3, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8-13578 Filed 6-16-08; 8:45 am]

BILLING CODE 4312-50-S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Raymond M. Alf Museum of Paleontology, Claremont, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the Raymond M. Alf Museum of Paleontology, Claremont, CA. The human remains were removed from Kern County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Raymond M. Alf Museum of Paleontology professional staff and University of California Los Angeles professional staff member Archeologist Gail Kennedy, in consultation with representatives of the Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe).

In 1968-1969, human remains representing a minimum of one individual were removed from Kern Valley, Bull Run Creek along the west bank of the Kern River and directly west of the River Kern community, or six miles north of Kernville, Kern County, CA, in an attempt to protect the bones from erosion. No known individual was identified. No associated funerary objects are present.

This site has been identified as a habitation site of the Tubatulabal. The Tubatulabal were loosely organized into three discrete bands called Pahkanapil, Palagewan, and Bankalachi (Smithsonian, *Handbook of North American Indians*, Book 8, 1978). The Tubatulabal are considered Kern River Indians, speak an Uto-Aztecan language, and live in the Kern River/Lake Isabella area, which include the

south fork (Palagewan) and the lower Kern River below the south fork (Tubatulabal). Their neighbors are the Kawaiisu and the Yokuts. The Bankalachi, which were a few miles from the Palagewan, resided in Yokuts territory. In 1857, the Kern River gold rush began in Palagewan territory. During 1862, a few Tubatulabal joined the Owens Valley Paiute in hostilities against the Whites, and about this time, a group of Koso Indians settled in the Tubatulabal area, intermarrying with the Kawaiisu. In 1863, American soldiers killed 35-40 Tubatulabal and Palagewan men near Kernville. Between 1865 and 1875, the Tubatulabal began to practice agriculture and in 1893, the majority of them and a few Palagewan survivors were allotted land in South Fork and Kern Valleys. From 1900 to 1972, many Tubatulabals moved to the Tule River Indian Reservation, north of the Kern valley region. It is reasonably believed that those that survived intermarried with the Yokut in the Kern County area. Descendants of these Yokut are members of the federally-recognized Santa Rosa Indian Community of the Santa Rosa Rancheria, California (Tachi Yokut Tribe) and Tule River Indian Tribe of the Tule River Reservation, California.

Officials of the Raymond M. Alf Museum of Paleontology have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Raymond M. Alf Museum of Paleontology also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Santa Rosa Indian Community of the Santa Rosa Rancheria, California and Tule River Indian Tribe of the Tule River Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Don Lofgren, Director, Raymond M. Alf Museum of Paleontology, 1175 West Baseline Road, Claremont, CA 91711, telephone (909) 624-2798, before July 17, 2008.

Repatriation of the human remains to the Santa Rosa Indian Community of the Santa Rosa Rancheria, California may proceed after that date if no additional claimants come forward.

Raymond M. Alf Museum of Paleontology is responsible for notifying the Santa Rosa Indian Community of the Santa Rosa Rancheria, California and Tule River Indian Tribe of the Tule

River Reservation, California that this notice has been published.

Dated: May 4, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8-13569 Filed 6-16-08; 8:45 am]

BILLING CODE 4312-50-S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Rochester Museum & Science Center, Rochester, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Rochester Museum & Science Center, Rochester, NY. The human remains were removed from Point Spencer, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Rochester Museum & Science Center professional staff in consultation with representatives of the Bering Straits Foundation, a non-profit organization representing the interests of the Bering Straits Native Corporation, Native Brevig Mission Native Corporation, Village of Brevig Mission, Native Village of Teller, Teller Native Corporation, Native Village of Wales, and Wales Native Corporation.

At an unknown date, human remains representing a minimum of one individual were recovered from a grave at Point Spencer, near Cape Prince of Wales, AK, by Lt. Phillip J. Launer. The human remains were donated to the Rochester Museum & Science Center in 1945. No known individual was identified. Funerary objects documented as being collected are missing from the museum collection.

Physical examination of the human remains indicates they are of Native American ancestry. Point Spencer is located at the end of a sand spit on the south coast of the Seward Peninsula in Western Alaska. Archeological evidence

indicates a relatively stable population residing on the Seward Peninsula continuously for over 1,000 years. The 1893 U.S. Census listed a collective village on Point Spencer with a population of 485, of which 236 were Alaska Natives and 249 were foreign. The Alaska Native descendants of Point Spencer are members at the Native Village of Brevig Mission, Native Village of Teller, and Native Village of Wales.

Officials of the Rochester Museum & Science Center have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Rochester Museum & Science Center also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Bering Straits Native Corporation, Native Brevig Mission Native Corporation, Village of Brevig Mission, Native Village of Teller, Teller Native Corporation, Native Village of Wales, and Wales Native Corporation.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Gian Carlo Cervone, Rochester Museum & Science Center, 657 East Avenue, Rochester, NY 14607–2177, telephone (585) 271–4552, ext. 310, before July 17, 2008. Repatriation of the human remains to the Bering Straits Foundation on behalf of the Bering Straits Native Corporation, Native Brevig Mission Native Corporation, Village of Brevig Mission, Native Village of Teller, Teller Native Corporation, Native Village of Wales, and Wales Native Corporation may proceed after that date if no additional claimants come forward.

The Rochester Museum & Science Center is responsible for notifying the Bering Straits Foundation, Bering Straits Native Corporation, Native Brevig Mission Native Corporation, Village of Brevig Mission, Native Village of Teller, Teller Native Corporation, Native Village of Wales, and Wales Native Corporation that this notice has been published.

Dated: May 12, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13595 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Rochester Museum & Science Center, Rochester, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Rochester Museum & Science Center, Rochester, NY. The human remains were removed from Walworth County, SD.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Rochester Museum & Science Center professional staff in consultation with representatives of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

In the 1920s, human remains representing a minimum of one individual were removed from the Mobridge site (39WW1), Walworth County, SD, by W.H. Over. Mr. Over sold the human remains to the museum in 1927. No known individual was identified. No associated funerary objects are present.

Osteological examination of the human remains indicates that they are of likely Native American ancestry. In *Mobridge Site Cemeteries: Controversy Concerning the Location of the Over and Stirling Burials*, Douglas W. Owsley identified a number of human remains from the Mobridge site as Arikara based on morphological traits (1981). Diagnostic architecture and artifacts found at the Mobridge site, including circular, semi-subterranean structures and Native-made glass pendants, indicate that the human remains were probably buried by the Arikara during the post-contact Coalescent Traditional period (A.D. 1675–1780). In 1870, the Arikara, Hidatsa, and Mandan tribes were moved to the Fort Berthold Indian Reservation in North Dakota. Descendants of the Arikara, Hidatsa, and Mandan are members of the Three

Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Officials of the Rochester Museum & Science Center have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Rochester Museum & Science Center also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Gian Carlo Cervone, Rochester Museum & Science Center, 657 East Avenue, Rochester, NY 14607–2177, telephone (585) 271–4552, ext. 310, before July 17, 2008. Repatriation of the human remains to the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota may proceed after that date if no additional claimants come forward.

The Rochester Museum & Science Center is responsible for notifying the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota that this notice has been published.

Dated: May 12, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13594 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Slater Museum of Natural History, University of Puget Sound, Tacoma, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Slater Museum of Natural History, University of Puget Sound, Tacoma, WA. The human remains and associated funerary objects were removed from Akun Island, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility

of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Slater Museum of Natural History, University of Puget Sound professional staff and a consultant in consultation with representatives of the Akutan Tribal Council from the Native Village of Akutan.

On July 17, 1974, human remains representing a minimum of one individual were removed from Akun Island, AK. The human remains were donated to the Slater Museum on January 3, 1975. The identity of the donor was recorded only as "Tim." No known individual was identified. The 29 associated funerary objects are 19 nonhuman bones (some with fine cutmarks and others that have been worked), 8 worked stones, and 2 obsidian flakes.

The individual is most likely of Native American ancestry as indicated by the association of the human remains with the worked points and stones. The geographical location where the human remains were recovered is consistent with the historically documented territory of the Native Village of Akutan. Furthermore, based on information provided during consultation with tribal representatives, there is a reasonable belief that the human remains share a common ancestry with members of the Native Village of Akutan.

Officials of the Slater Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Slater Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 29 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Slater Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Native Village of Akutan.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. Peter Wimberger, Slater Museum of Natural History, 1500 N.

Warner, Tacoma, WA 98416, telephone (253) 879–2784, before July 17, 2008. Repatriation of the human remains and associated funerary objects to the Native Village of Akutan may proceed after that date if no additional claimants come forward.

The Slater Museum of Natural History is responsible for notifying the Native Village of Akutan that this notice has been published.

Dated: May 12, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13567 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Slater Museum of Natural History, University of Puget Sound, Tacoma, WA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the possession of the Slater Museum of Natural History, University of Puget Sound, Tacoma, WA. The human remains were removed from Pierce County, WA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Slater Museum of Natural History, University of Puget Sound professional staff and a consultant in consultation with representatives of the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Puyallup Tribe of the Puyallup Reservation, Washington; and Squaxin Island Tribe of the Squaxin Island Reservation, Washington.

In 1933, human remains representing a minimum of two individuals were removed from Day Island in Pierce County, WA. The human remains were found in the Slater Museum collections with a note reading "Day Is., Pierce Co.,

Wn. Indian remains about 1933. Alcorn. To museum. Round Case." No known individuals were identified. No associated funerary objects are present.

The postcranial remains were examined by a contracted physical anthropologist who determined they represent one older adult male and one adult female. Ancestry could not be determined due to the lack of cranial remains. However, there have been at least four Native American burials reportedly found by local residents on Day Island since the early 20th century. Based on the likely provenience from museum records and previous finds of Native American burials in that area, officials of the Slater Museum of Natural History, University of Puget Sound, reasonably believe that the human remains are most likely of Native American ancestry.

Day Island is located in the southeastern Puget Sound region, an area historically utilized by the Steilacoom, Puyallup, and Nisqually tribes. While the Indian Claims Commission (ICC) found Day Island to be outside of the exclusive treaty-time territory of any one Native group, both the Nisqually Indian Tribe and Puyallup Tribe of Indians included Day Island within their original land claims presented to the ICC. While there is no known evidence that an ethnographic village was located on Day Island, evidence reviewed by the museum demonstrates Day Island was used as a resource procurement site by the Nisqually and Puyallup Tribes, as well as the Steilacoom people. There are three recorded ethnographic villages located within four miles of Day Island which were occupied by members of the Steilacoom, Puyallup, and Nisqually peoples.

The Steilacoom are a non-federally recognized tribe who were signatories of the Treaty of Medicine Creek (1854) and who were not granted exclusive reservation land. The Nisqually Indian Tribe provided evidence claiming residents of the Steilacoom villages at Clover Creek and Steilacoom (now Chambers) Creek had joined the Nisqually Indian Tribe after the Treaty of Medicine Creek. Evidence also shows that some residents of the Steilacoom Creek village joined the Puyallup Tribe. To the north of Day Island, across the Narrows in Wollochet Bay, was the third closest ethnographic village; this was considered by the ethnographer Marian Smith to be affiliated with the Puyallup Tribe (1941:207). The multiple affiliations of these nearby villages demonstrate joint use and occupation surrounding Day Island. Additionally, Day Island may have been used for

burials of Native Americans interned at Fox Island during the Treaty Wars. Members of the Nisqually, Puyallup, Squaxin, and Steilacoom Tribes were reported to have been held there (Carpenter 1987). This evidence, in conjunction with the Indian Claim Commission's determination of the area as non-exclusive to any particular tribe, suggests Day Island is within the traditional territory of all three local groups: the Steilacoom, Nisqually, and Puyallup Tribes. The descendants of the Steilacoom, Nisqually, and Puyallup Tribes are members of the federally-recognized Nisqually Indian Tribe of the Nisqually Reservation, Washington, and Puyallup Tribe of the Puyallup Reservation, Washington.

Officials of the Slater Museum have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of two individuals of Native American ancestry. Officials of the Slater Museum also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Nisqually Indian Tribe of the Nisqually Reservation, Washington and Puyallup Tribe of the Puyallup Reservation, Washington.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Peter Wimberger, Slater Museum of Natural History, University of Puget Sound, 1500 N. Warner, Tacoma, WA 98416, telephone (253) 879-2784, before July 17, 2008. Repatriation of the human remains to the Nisqually Indian Tribe of the Nisqually Reservation, Washington and Puyallup Tribe of the Puyallup Reservation, Washington may proceed after that date if no additional claimants come forward.

The Slater Museum is responsible for notifying the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington; Nisqually Indian Tribe of the Nisqually Reservation, Washington; Puyallup Tribe of the Puyallup Reservation, Washington; and Squaxin Island Tribe of the Squaxin Island Reservation, Washington that this notice has been published.

Dated: May 21, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8-13570 Filed 6-16-08; 8:45 am]

BILLING CODE 4312-50-S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Tonto National Forest, Phoenix, AZ, and Arizona State University, School of Evolution and Social Change, Phoenix, AZ

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of Agriculture, Forest Service, Tonto National Forest, Phoenix, AZ, and in the possession of Arizona State University, School of Evolution and Social Change, Phoenix, AZ. The human remains and associated funerary objects were removed from the Dugan Ranch Ruin, Yavapai County, AZ.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Arizona State University, School of Evolution and Social Change (formerly Department of Anthropology) professional staff and Tonto National Forest professional staff in consultation with representatives of the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O'odham Nation of Arizona (collectively known as the "Four Southern Tribes"); Hopi Tribe of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

In 1968 and 1969, human remains representing a minimum of 17 individuals were removed from the Dugan Ranch Ruin [AZ O:13:0004 (ASU); AR-03-12-01-027] in Yavapai County, AZ. The site was excavated under a permit to the Southwestern Society for Indian Archaeology, Walnut City, CA, from the Tonto National Forest. The excavations were carried out by high school students from the Bassett

Unified School District, Los Angeles County, CA, under the supervision of Charles H. Stephens. In the course of an investigation of the activities of Mr. Stephens by Law Enforcement officers of the Forest Service, the collections from the Dugan Ranch Ruin, including all excavated human remains and funerary objects, were recovered and transferred to the Department of Anthropology at Arizona State University for curation. No known individuals were identified. The approximately 50 associated funerary objects are pottery sherds.

Dugan Ranch Ruin is a masonry room block with interior courtyards that was occupied principally in the Late Classical Period (A.D. 1300–1400) and was associated with the Verde Hohokam archeological culture in central Arizona based on the ceramics, architecture, and organization of the site. Based on oral traditions and continuities of artifactual materials, technology and architecture, officials of the Tonto National Forest have determined that the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona; and to, a lesser extent, the Hopi Tribe of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico, have a shared group identity to the Native American human remains and associated funerary objects of the Hohokam archeological culture. In accordance with the *Plan for the Treatment and Disposition of Human Remains and Other Cultural Items from the Tonto National Forest Pursuant to the Native American Graves Protection and Repatriation Act* (as revised in 2001), it has been determined that the primary cultural affiliation of these human remains and associated funerary objects is with the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; and Tohono O'odham Nation of Arizona; and that they will be repatriated to the Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona, as the designated representative of the "Four Southern Tribes" for NAGPRA issues north of the Gila and Salt River Baseline in Arizona, which area includes the location of Dugan Ranch Ruin.

Officials of the Tonto National Forest have determined that, pursuant to 25

U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 17 individuals of Native American ancestry. Officials of the Tonto National Forest also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the approximately 50 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Tonto National Forest have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima–Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O’odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and/or associated funerary objects should contact Dr. Frank E. Wozniak, NAGPRA Coordinator, Southwestern Region, USDA Forest Service, 333 Broadway Blvd., SE, Albuquerque, NM 87102, telephone (505) 842–3238, before July 17, 2008. Repatriation of the human remains and associated funerary objects to the Salt River Pima–Maricopa Indian Community of the Salt River Reservation, Arizona may proceed after that date if no additional claimants come forward.

The Tonto National Forest is responsible for notifying the Ak Chin Indian Community of the Maricopa (Ak Chin) Indian Reservation, Arizona; Gila River Indian Community of the Gila River Indian Reservation, Arizona; Hopi Tribe of Arizona; Salt River Pima–Maricopa Indian Community of the Salt River Reservation, Arizona; Tohono O’odham Nation of Arizona; and Zuni Tribe of the Zuni Reservation, New Mexico that this notice has been published.

Dated: May 21, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13574 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, CA, and Santa Barbara Museum of Natural History, Santa Barbara, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, CA, and in the possession of the Santa Barbara Museum of Natural History, Santa Barbara, CA. The human remains and associated funerary objects were removed from the Sunset Valley Site, Santa Barbara County, CA.

This notice is published as part of the National Park Service’s administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Santa Barbara Museum of Natural History and Los Padres National Forest professional staff in consultation with representatives of the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California.

In 1935, human remains representing a minimum of seven individuals were removed from the Sunset Valley Site in Santa Barbara County, CA, by Milton Snow and David Banks Rogers of the Santa Barbara Museum of Natural History, as part of archeological investigations authorized by the Forest Service. The human remains were curated at the Santa Barbara Museum of Natural History. No known individuals were identified. The approximately 48 associated funerary objects are shell and bone ornaments, glass bead, shell fish hooks, eagle claws, stone vessels and tools, a projectile point, and pieces of pigment.

The Sunset Valley Site consists of a large midden with possible habitation structures. The site was probably occupied in the early historic/mission period in California (A.D. 1769–1823).

Based on the composition of the artifactual collection, site organization, the location of the site in the heart of the aboriginal lands of the Chumash and the probability that the site is one of the named Chumash villages, officials of the Los Padres National Forest have determined that the human remains and associated funerary objects from the Sunset Valley Site are culturally affiliated with the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California. Oral traditions provided by representatives of the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California support cultural affiliation.

Officials of the Los Padres National Forest have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of seven individuals of Native American ancestry. Officials of the Los Padres National Forest also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the approximately 48 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Los Padres National Forest have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Joan Brandoff–Kerr, Forest Archaeologist, Los Padres National Forest, Suite 150, 6755 Hollister Avenue, Goleta, CA 93117, telephone (805) 967–3481, ext. 215, before July 17, 2008. Repatriation of the human remains and associated funerary objects to the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California may proceed after that date if no additional claimants come forward.

Los Padres National Forest is responsible for notifying the Santa Ynez Band of Chumash Indians of the Santa Ynez Reservation, California that this notice has been published.

Dated: May 21, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13604 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR**National Park Service****Notice of Inventory Completion: U.S. Department of Defense, Army Corps of Engineers, Portland District, Portland, OR, and Oregon State University Department of Anthropology, Corvallis, OR****AGENCY:** National Park Service, Interior.**ACTION:** Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the control of the U.S. Department of Defense, Army Corps of Engineers, Portland District, Portland, OR, and in the possession of the Oregon State University Department of Anthropology, Corvallis, OR. The human remains and associated funerary objects were removed from sites on Army Corps of Engineers land within the Lost Creek Lake Dam project area on the Rogue River, Jackson County, OR.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by Oregon State University Department of Anthropology and U.S. Army Corps of Engineers, Portland District professional staff in consultation with representatives of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Coquille Tribe of Oregon; Cow Creek Band of Umpqua Indians of Oregon; Klamath Tribes, Oregon (formerly the Klamath Indian Tribe of Oregon); and Modoc Tribe of Oklahoma.

Native American cultural items described in this notice were excavated under Antiquities Act permits by the Oregon State University Department of Anthropology, Corvallis, OR, on Army Corps of Engineers project lands. Following excavations at the sites described below, and under the provisions of the permits, the Oregon State University Department of Anthropology was allowed to retain the collections for preservation.

In 1972, human remains representing a minimum of one individual were removed from site 35-JA-23, also known as the Fawn Butte Spring Site, Jackson County, OR, during excavations by Oregon State University prior to construction of the proposed Lost Creek Lake Dam. The excavations were conducted on Fawn Butte above an ephemeral branch of Lost Creek, a tributary of the Rogue River. No known individual was identified. The 147 associated funerary objects are 1 chalcedony knife, 1 projectile point, 1 projectile point tip fragment, 5 bifaces, 1 end scraper, 1 graver, 1 burin, 1 burin-like flake tool, 6 utilized flakes, 3 cores, 3 core reduction fragments, 119 debitage flakes and fragments, 1 unidentified lithic item, 1 bag of wood fragments, and 2 bags of burial dirt.

Site 35-JA-23 is a multicomponent village that is believed to have been occupied as early as 1200 years B.P. to approximately A.D. 1800. Based on the location of the human remains within the site and the associated artifacts, the individual has been determined to be Native American.

In 1972-1973, human remains representing a minimum of two individuals were removed from site 35-JA-25, also known as the Far Hills Ranch Site, Jackson County, OR, during excavations conducted by Oregon State University prior to construction of the proposed Lost Creek Lake Dam. The excavations were conducted below the mouth of Long Branch Creek on the west bank of the Rogue River. No known individuals were identified. The 19 associated funerary objects are 8 shell beads, 5 olivella beads, 1 pine nut bead, 2 shell pendants, 1 ulna awl, and 2 lithic fragments.

Site 35-JA-25 is a small cemetery and village dating from before A.D. 1400 to A.D. 1700. The cemetery appears to have been used prior to A.D. 1400 and the village was primarily occupied between A.D. 1500 and A.D. 1700. Ninety-two additional human burials located on private property at the site were exhumed at an undetermined date prior to World War II, during construction of private ranch facilities, and re-interred approximately five miles to the north in Trail, OR. Based on the location of the human remains within the site and the associated artifacts, both individuals removed have been determined to be Native American.

Ethnographic records suggest the areas surrounding sites 35-JA-23 and 35-JA-25 were likely occupied by the Takelma and possibly Southern Molala bands during the early Contact period. However, overlapping territories, shared use of resource gathering areas, possible

territorial realignments through time and, ultimately, tribal conglomerations and mergers resulting from mid-19th Century treaty negotiations with the U.S. Government, make determination of the sites' cultural affiliation uncertain. The sites described above are within or near the traditional lands of the present-day Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Cow Creek Band of Umpqua Indians of Oregon; Klamath Tribes, Oregon; and Modoc Tribe of Oklahoma. The Coquille Tribe of Oregon has indicated both sites are located outside of their ancestral territory.

The Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon traditionally inhabited the headwaters, valleys and estuaries of the Coos, Lower Umpqua and Siuslaw Rivers along the central and south-central Oregon coast. The tribes spoke diverse dialects within the Hanis, Milluk, Athapaskan, Kuitsch, and Siuslaw language groups. The tribes have been operating under a confederated government since signing a treaty with the U.S. Government in 1855. Many tribal members were removed to the Siletz Reservation, the Alsea sub agency, and other federal military encampments along the south-central Oregon coast during the mid to late-19th Century. The Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians of Oregon were terminated from federal recognition in 1954 and restored in 1984.

The Confederated Tribes of the Grand Ronde Community of Oregon, include at least 26 tribes and bands whose ancestral homelands span across western Oregon, southwestern Washington and northern California. The Grand Ronde tribes and bands include the Rogue River, Umpqua, Chasta, Kalapuya, Molala, Clackamas, Salmon River, Tillamook, and Nestucca, as well as other smaller groups. At the time of contact, the individual groups spoke 30 dialects of the Athapaskan, Chinookan, Kalapuyan, Takelman, Molalan, Sahaptin, Salishan, and Shastan language families. In 1856-1857, the U.S. Government forcibly relocated the Grand Ronde peoples to the Grand Ronde Reservation at the headwaters of the South Yamhill River in Yamhill and Polk Counties, OR. The Confederated Tribes of the Grand Ronde Community of Oregon were first incorporated in 1935, terminated from federal recognition in 1954, and restored with tribal recognition in 1983.

The Confederated Tribes of the Siletz Reservation, Oregon, are a confederation of 30 bands whose ancestral territory ranged along the entire Oregon coast and Coast Range, inland to the main divide of the Cascade Range and south to the Rogue River watershed. The principal tribes include the Clatsop, Chinook, Klickitat, Molala, Kalapuya, Tillamook, Alsea, Siuslaw/Lower Umpqua, Coos, Coquille, Upper Umpqua, Tututni, Chetco, Tolowa, Takelma or Upper Rogue River, Galice/Applegate, and Shasta. The ancestors of the confederated tribes spoke at least 10 different base languages, many with strong dialectic divisions even within the same language. In general, five linguistic stocks – Salish, Yakonan, Kusan, Takelman, and Athapascan – are represented by the tribes. The tribes were forcibly removed from their homelands in 1855 by the U.S. Government and placed on the Siletz and Grand Ronde reservations. After having their tribal status terminated from federal recognition in 1954, the Confederated Tribes of the Siletz Reservation, Oregon were officially restored in 1977.

The Cow Creek Band of Umpqua Indians of Oregon traditionally occupied the rugged, forested territory extending from the Cow Creek watershed in the Coast Range to the North and South Forks of the Umpqua River along the western slope of the Cascades. They spoke Takelma, a language in the Takelman-Kalapuyan division of the Penutian language stock. After treaty negotiations with the U.S. Government in 1853 led to subsequent hostilities and the removal of many tribal members to the Grand Ronde Reservation on the Yamhill River, a large group of Umpqua sought safety in remote areas of their traditional homeland. The Cow Creek Band of Umpqua Indians of Oregon was terminated as a recognized tribe by the federal government in 1954, and later restored to federal recognition in 1982.

The Klamath Tribes, Oregon, consist of the Klamath, Modoc and Yahooskin tribes. Their ancestral territory includes much of south-central Oregon from the east slopes of the Cascades to the adjoining desert areas, northward to the Deschutes River headwaters and as far south as Mount Shasta in California. The tribes speak Klamath and Modoc, two closely-related dialects belonging to the Plateau branch of the Penutian language family. The tribes were removed to the Klamath Reservation immediately northeast of Upper Klamath Lake in the mid-1860s, terminated from federal recognition in

1954, and then restored as a federally recognized tribe in 1986.

The Modoc Tribe of Oklahoma and the Klamath Tribes, Oregon, have a shared ancestry. The traditional Modoc homeland consisted of some 5,000 square miles along what is now the California–Oregon border. Following the conclusion of the Modoc War in 1873, the Modoc people were relocated to the Quapaw Reservation in Oklahoma. In 1909, the Modoc were granted permission to return to Oregon. Those who returned became part of the Klamath Tribes, Oregon. The Modoc Tribe of Oklahoma and the Klamath Tribes, Oregon, have formally agreed that repatriation of human remains from the historically documented territory of the Klamath Tribes should go to the Klamath Tribes, Oregon, for reburial.

Officials of the U.S. Army Corps of Engineers, Portland District have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of at least three individuals of Native American ancestry. Officials of the U.S. Army Corps of Engineers, Portland District also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 166 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the U.S. Army Corps of Engineers, Portland District have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Cow Creek Band of Umpqua Indians of Oregon; Klamath Tribes, Oregon; and Modoc Tribe of Oklahoma.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Daniel Mulligan, NAGPRA Coordinator, Environmental Resources Branch, U.S. Army Corps of Engineers, Portland District, P. O. Box 2946, Portland, OR 97208–2946, telephone (503) 808–4768, before July 17, 2008. Repatriation of the human remains and associated funerary objects to the Confederated Tribes of the Grand Ronde Community of Oregon, Cow Creek Band of Umpqua Indians of Oregon, and/or Confederated Tribes of the Siletz Reservation, Oregon, may proceed after

that date if no additional claimants come forward. The Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon, Coquille Tribe of Oregon, and Klamath Tribes, Oregon, in consultation with the U.S. Army Corps of Engineers, Portland District, have indicated their desire to defer their interest to the other mentioned Tribes.

The U.S. Army Corps of Engineers, Portland District is responsible for notifying the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Coquille Tribe of Oregon; Cow Creek Band of Umpqua Indians of Oregon; Klamath Tribes, Oregon; and Modoc Tribe of Oklahoma that this notice has been published.

Dated: May 21, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13577 Filed 6–17–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK, and Alaska Office of History and Archaeology, Anchorage, AK

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains in the control of the U.S. Department of the Interior, Bureau of Land Management, Alaska State Office, Anchorage, AK, and in the possession of the Alaska Office of History and Archaeology, Anchorage, AK. The human remains were removed from Amaknak Island and Unalaska Island, AK.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by the Bureau of

Land Management and U.S. Fish and Wildlife Service contractors working under the supervision of the Alaska Office of History and Archaeology professional staff in consultation with representatives of the Qawalangin Tribe of Unalaska.

In 1950, human remains representing a minimum of 10 individuals were removed from the Eider Point site near Unalaska on Unalaska Island in the Fox Island group of the eastern Aleutian Islands, AK. No known individuals were identified. No associated funerary objects are present.

During the 1950s or 1960s, human remains representing a minimum of one individual were removed from an undetermined site near Unalaska on Amaknak Island in the Fox Island group of the eastern Aleutian Islands, AK. No known individual was identified. No associated funerary objects are present.

According to museum records, the human remains from both sites were excavated by Dr. Ted Bank of Western Michigan University, Kalamazoo, MI, under federal permits. All excavations were done on land managed by the Bureau of Land Management authority at the time. In about 1998, the Museum of the Aleutians received the Western Michigan University archeological collections from Unalaska and Amaknak Islands, AK, including human remains that had been in the possession of the now-deceased Dr. Bank. In about 2003, human remains were moved to the University of Alaska, Anchorage, Anthropology Department. In 2004, the human remains were sent to the State of Alaska Office of History and Archaeology for inventory.

Unalaska Island and nearby Amaknak Island have been inhabited for over 8,000 years by Aleut (Unangan) people. Based on geographical location, oral history, and archeological evidence, the human remains from these two islands are determined to be Native American and ancestors of the Qawalangin Tribe of Unalaska.

Officials of the Bureau of Land Management have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 11 individuals of Native American ancestry. Officials of the Bureau of Land Management also have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Qawalangin Tribe of Unalaska.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Dr. Robert E. King,

Alaska State NAGPRA Coordinator, Bureau of Land Management, 222 W. 7th Avenue, Box 13, Anchorage, AK 99513–7599, telephone (907) 271–5510, before July 17, 2008. Repatriation of the human remains to the Qawalangin Tribe of Unalaska may proceed after that date if no additional claimants come forward.

The Bureau of Land Management is responsible for notifying the Ounalaska Corporation and Qawalangin Tribe of Unalaska that this notice has been published.

Dated: May 21, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–13584 Filed 6–16–08; 8:45 am]

BILLING CODE 4312–50–S

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–990 (Review)]

Non-Malleable Cast Iron Pipe Fittings From China

AGENCY: United States International Trade Commission.

ACTION: Scheduling of an expedited five-year review concerning the antidumping duty order on non-malleable cast iron pipe fittings from China.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)) (the Act) to determine whether revocation of the antidumping duty order on non-malleable cast iron pipe fittings from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* June 6, 2008.

FOR FURTHER INFORMATION CONTACT:

Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION:

Background. On June 6, 2008, the Commission determined that the domestic interested party group response to its notice of institution (73 FR 11440, March 3, 2008) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.¹ Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Act.²

Staff report. A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on June 26, 2008, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

Written submissions. As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,³ and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before July 1, 2008, and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by July 1, 2008. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce's final

¹ A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

² Chairman Daniel R. Pearson and Vice Chairman Shara L. Aranoff determined that the changes in the conditions of competition warranted conducting a full review.

³ The Commission has found the responses submitted by Anvil International, LP, and Ward Manufacturing, LLP, to be individually adequate. Comments from other interested parties will not be accepted (see 19 CFR 207.62(d)(2)).

results is three business days after the issuance of Commerce's results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: June 11, 2008.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E8-13528 Filed 6-16-08; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Notice is hereby given that on June 2, 2008, a proposed Settlement Agreement in the case of *In re ASARCO LLC, et al.*, No. 05-21207, Chapter 11, regarding the Iron Mountain Site located in Mineral County, Montana, near the Town of Superior, Montana, was lodged with the United States Bankruptcy Court for the Southern District of Texas.

The United States, on behalf of the Forest Service, and the Montana Department of Environmental Quality (DEQ) alleged that they incurred past response costs, and will incur future response costs, under CERCLA in connection with the Site for which ASARCO LLC is liable. The Settlement Agreement for the Iron Mountain Site would provide a \$500,000 unsecured claim for the Forest Service and a \$1.7

million unsecured claim for the State of Montana. In addition, ASARCO LLC would agree to negotiate an Administrative Order on Consent with the Montana DEQ for the investigation and analysis of remedial options and to implement the remedy for portions of the Iron Mountain Site currently owned by ASARCO LLC.

For thirty (30) days after the date of this publication, the Department of Justice will receive comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611. In either case, the comments should refer to *In re ASARCO LLC, et al.*, Iron Mountain Site, D.J. Ref. No. 90-11-3-09141.

During the comment period, the Settlement Agreement may be examined on the following Department of Justice Web site: http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$4.75 (25 cents per page reproduction cost) payable to the United States Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Robert E. Maher, Jr.,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8-13637 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE

Notice of Proposed Settlement Agreement Under the Park System Resource Protection Act

Notice is hereby given that the United States Department of Justice, on behalf of the U.S. Department of the Interior, National Park Service ("DOI") has reached a settlement with Thomas G. Mundy, on behalf of himself and the M/V Sea Ya regarding claims for response costs and damages under the Park System Resource Protection Act ("PSRPA"), 16 U.S.C. 19jj.

The United States' claim arises from the grounding of the vessel "Sea Ya" in Everglades National Park on September 3, 2001. The grounding injured Park resources. Pursuant to the Agreement, the United States will recover \$150,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to the Settlement Agreement between the United States and Thomas G. Mundy and the M/V Sea Ya, DOJ Ref. No. 90-5-1-1-08517.

The proposed Settlement Agreement may be examined at Everglades National Park, 40001 State Road 9336, Homestead, FL 33034-6733, and at the Department of the Interior, Office of the Solicitor, Southeast Regional Office, Richard B. Russell Federal Building, 75 Spring Street, SW., Atlanta, Georgia 30303. During the public comment period, the Settlement Agreement may also be examined on the following Department of Justice Web site, http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the Settlement Agreement may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$2.75 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. E8-13635 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF JUSTICE**Antitrust Division****Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cable Television Laboratories, Inc.**

Notice is hereby given that, on May 7, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Cable Television Laboratories, Inc. ("CableLabs"), filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, JetBroadband, Brook, NY, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CableLabs intends to file additional written notifications disclosing all changes in membership.

On August 8, 1988, CableLabs filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 7, 1988 (53 FR 34593).

The last notification was filed with the Department on January 4, 2007. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 12, 2007 (72 FR 6577).

Patricia A. Brink,
Deputy Director of Operations, Antitrust Division.
[FR Doc. E8-13213 Filed 6-16-08; 8:45 am]
BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE**Antitrust Division****Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International-Standards**

Notice is hereby given that, on May 16, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), ASTM International ("ASTM") has filed written notifications simultaneously with the Attorney General and the Federal Trade

Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between February 2008 and May 2008 designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at <http://www.astm.org>.

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on February 29, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 7, 2008 (73 FR 18812).

Patricia A. Brink,
Deputy Director of Operations, Antitrust Division.
[FR Doc. E8-13211 Filed 6-16-08; 8:45 am]
BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE**Antitrust Division****Notice Pursuant to the National Cooperative Research and Production Act of 1993—Institute of Electrical and Electronics Engineers**

Notice is hereby given that, on May 9, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Institute of Electrical and Electronics Engineers ("IEEE") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 20 new standards have been initiated and 11 existing standards are being revised. More detail regarding these changes can be found at <http://standards.ieee.org/standardwire/sba/27-03-08.html>.

On September 17, 2004, IEEE filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal**

Register pursuant to Section 6(b) of the Act on November 3, 2004 (69 FR 64105).

The last notification was filed with the Department on January 11, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on February 25, 2008 (73 FR 10065).

Patricia A. Brink,
Deputy Director of Operations, Antitrust Division.
[FR Doc. E8-13214 Filed 6-16-08; 8:45 am]
BILLING CODE 4410-11-M

DEPARTMENT OF JUSTICE**Drug Enforcement Administration****Craig H. Bammer, D.O.; Denial of Application**

On October 1, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Craig H. Bammer, D.O. (Respondent), of South Gulfport, Florida. The Show Cause Order proposed the revocation of Respondent's Certificate of Registration, BB1336456, as a practitioner, and the denial of any pending applications to renew or modify the registration, on three grounds. Show Cause Order at 1-2.

More specifically, the Show Cause Order alleged that on both February 28 and April 27, 2007, the Pinellas County, Florida Sheriff's Office had arrested Respondent and charged him with prescribing controlled substances without a legitimate medical purpose, and that his conduct constituted acts inconsistent with the public interest. *Id.* at 1 (citing 21 U.S.C. 824(a)(4)). Next, the Show Cause Order alleged that on June 21, 2007, the Florida Department of Health revoked Respondent's state medical license and that Respondent was therefore without authority to handle controlled substances in the State in which he held his DEA registration. *Id.* (citing 21 U.S.C. 824(a)(3)). Finally, the Show Cause Order alleged that in July 2003, Respondent had materially falsified his renewal application for a DEA registration by failing to disclose that in 1999, he had surrendered his DEA registration and Ohio medical license based on allegations that he was "impaired by excessive or habitual use of drugs and alcohol." *Id.* at 1-2 (citing 21 U.S.C. 824(a)(1)).

On October 15, 2007, the Show Cause Order, which also informed Respondent of his right to a hearing, was served on him at the Pinellas County Jail, where

he was then residing.¹ Since that time, neither Respondent, nor any one purporting to represent him, has requested a hearing. Because more than thirty days have passed since the service of the Show Cause Order and no request for a hearing has been received, I find that Respondent has waived his right to a hearing on the allegations. 21 CFR 1301.43(d). Accordingly, I enter this Final Order without a hearing based on relevant material contained in the investigative file and make the following findings. *Id.* § 1301.43(e).

Findings

Respondent held DEA Certificate of Registration, BB1336456, which expired on July 31, 2006. Respondent did not file a renewal application until August 8, 2006. Because Respondent's renewal application was untimely, I find that Respondent does not have a current registration. *See* 5 U.S.C. 558(c). Respondent does, however, have an application which remains pending before the Agency.

On June 9, 1999, Respondent voluntarily surrendered his Ohio medical license to avoid further formal proceedings based on his failure to comply with a consent agreement with the Ohio Medical Board under which he was required to surrender his DEA registration and could not apply for a new registration absent the state board's approval. According to the records of the Ohio board, Respondent had admitted that he "suffered impairment due to excessive or habitual use of drugs and alcohol." *See* Ohio Medical Board Formal Actions Against Craig Howard Bammer, at 2. Respondent eventually did surrender his DEA registration.

On July 24, 2003, Respondent submitted an application to renew his DEA registration.² While on this application Respondent acknowledged that he had been subjected to disciplinary proceedings with respect to both his Ohio and Florida medical licenses, Respondent answered "no" to the question of whether he had "ever surrendered" his DEA registration. Moreover, according to the Agency's registration records, on his August 2006 application, Respondent again acknowledged the prior actions against his state licenses. The registration record does not, however, establish how

Respondent answered the liability question related to his DEA registration.

As for the other allegations, the investigative file establishes that in January 2007, an undercover officer obtained a prescription for Roxicodone, a schedule II controlled substance from Respondent without the latter having performed a physical examination. Moreover, the undercover officer also obtained a prescription for a third person who was not present. The investigative file does not, however, indicate what drug the prescription was for.

The investigative file also indicates that in February 2007, the undercover officer obtained additional prescriptions for Roxicodone in exchange for the officer's agreeing to pay Respondent's electric bill. Shortly thereafter, Respondent was arrested and charged with several counts of trafficking in illegal drugs, a felony offense under Florida law. *See* Fla. Stat. Ann. 893.135. According to the online records of the Pinellas County Courts, Respondent awaits trial on these charges.

Moreover, on May 25, 2007, the Florida Department of Health issued an emergency order suspending Respondent's medical license. Thereafter, on June 21, 2007, the Florida Department of Health revoked Respondent's medical license.

Discussion

Under section 304(a) of the Controlled Substances Act (CSA), a registration "may be suspended or revoked by the Attorney General upon a finding that the registrant * * * has materially falsified any application filed pursuant to or required by this subchapter." 21 U.S.C. 824(a)(1). The Attorney General may also suspend or revoke a registration "upon a finding that the registrant * * * has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the * * * dispensing of controlled substances." *Id.* § 824(a)(3). Under agency precedent, the various grounds for revocation or suspension of an existing registration which Congress enumerated in section 304(a), 21 U.S.C. 824(a), are also properly considered in deciding whether to grant or deny a registration under section 303. *See The Lawsons, Inc.*, 72 FR 74334, 74338 (2007); *Kuen H. Chen*, 58 FR 65401, 65402 (1993).

In this matter, the Order to Show Cause alleged three separate grounds for this proceeding. I conclude that it is unnecessary to address the allegations related to Respondent's prescribing of controlled substances without a

legitimate medical purpose. Instead, I find that because Respondent materially falsified his 2003 application for a DEA registration and lacks authority under state law to prescribe a controlled substance, he is not entitled to hold a DEA registration. Accordingly, his application will be denied.

The Material Falsification Allegation

Respondent materially falsified his 2003 application for a DEA registration when he failed to disclose that he had previously surrendered his DEA registration. As this Agency has repeatedly held, "[t]he provision of truthful information on applications is absolutely essential to effectuating [the] statutory purpose' of determining whether the granting of an application is consistent with the public interest." *The Lawsons*, 72 FR at 74338 (quoting *Peter H. Ahles*, 71 FR 50097, 50098 (2006)). *See also Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005) ("Candor * * * is considered by the DEA to be an important factor when assessing whether a * * * registration is consistent with the public interest.').

A false statement is material if it "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (int. quotation and other citations omitted). Moreover, while the evidence must be "clear, unequivocal, and convincing," the "ultimate finding of materiality turns on an interpretation of the substantive law." *Id.* at 772 (int. quotations and other citation omitted).

This Agency has previously held that "[a]n applicant's answers to the various liability questions are material because [it] 'relies upon such answers to determine whether an investigation is needed prior to granting the application.'" *The Lawsons*, 72 FR at 74338 (quoting *Martha Hernandez*, 62 FR 61145, 61146 (1997)). Notably, in determining whether the granting of an application is in the public interest, the Agency is required to consider "[t]he applicant's experience in dispensing * * * controlled substances," his "[c]ompliance with applicable State, Federal or local laws relating to controlled substances," and "other conduct which may threaten public health and safety." 21 U.S.C. 823(f). And in making determinations with respect to these factors, DEA has repeatedly considered an applicant's or an existing registrant's history of abusing controlled substances. *See, e.g., Patrick K. Riggs*, 72 FR 71959 (2007); *Alan H. Olefsky*, 72 FR 42127 (2007); *Alan H. Olefsky*, 57 FR 928 (1992).

¹ A courtesy copy of the Show Cause Order was also sent to Respondent's counsel.

² By this date, Respondent had already regained a DEA registration, as a renewal application stated that "your current registration expires on 07-31-2003." Renewal Application for Registration (Dtd. July 7, 2003).

I thus conclude that Respondent's failure to disclose the earlier surrender of his DEA registration was a material misrepresentation because it "ha[d] a natural tendency to influence the * * * decision" of the Agency as to whether to grant his application for a new registration.³ Under DEA precedent, this act "provides an independent and adequate ground for denying" Respondent's application. *The Lawsons*, 72 FR at 74338; *Cf. Bobby Watts*, 58 FR 46997 (1993).

The Lack of State Authority Allegation

As found above, on May 25, 2007, the Florida Department of Health issued an order which imposed an emergency suspension of Respondent's state medical license. Shortly thereafter, on June 21, 2007, the Florida Department of Health issued a further order which revoked Respondent's state medical license.

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in "the jurisdiction in which he practices" in order to maintain a DEA registration. See 21 U.S.C. 802(21) ("[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice"). See also *id.* § 823(f) ("The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices."). As these provisions make plain, possessing authority to dispense a controlled substance under the laws of the State in which a physician practices medicine is an essential condition for holding a DEA registration.

Because Respondent's Florida medical license has been revoked, he is without authority under state law to handle controlled substance and does not meet an essential prerequisite under the CSA for obtaining a new DEA registration. See *Richard Carino, M.D.*, 72 FR 71955, 71956 (2007) (citing cases); 21 U.S.C. 823(f). Accordingly, his application will be denied for this reason as well.

³ While Respondent indicated on 2003 application that both his Florida and Ohio licenses had been subjected to discipline, he further stated that the basis of the discipline was his "abuse of a non-controlled substance (Stadol nasal spray)." Stadol nasal spray contains butorphanol tartrate, and is a schedule IV controlled substance. See 21 CFR 1308.14(f). Respondent's statement was thus an additional misrepresentation.

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 hereby order that the application of Craig H. Bammer, D.O., for the renewal of his registration be, and it hereby is, denied. This order is effective July 17, 2008.

Dated: June 6, 2008.

Michele M. Leonhart,
Deputy Administrator.

[FR Doc. E8-13609 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07-52]

Benjamin Levine, M.D.; Dismissal of Proceeding

On August 7, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Benjamin Levine, M.D. (Respondent), of East Brunswick, New Jersey. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BL3612480, as a practitioner, and the denial of any pending applications to renew or modify his registration, on three separate grounds. Show Cause Order at 1. More specifically, the Show Cause Order alleged that: (1) Respondent had materially falsified his renewal application for his current registration; (2) Respondent lacked authority to handle controlled substances under the laws of the State in which he practiced medicine and held his DEA registration; and (3) Respondent had committed acts inconsistent with the public interest. *Id.* at 1-3.

Respondent requested a hearing on the allegations and the case was assigned to Administrative Law Judge (ALJ) Gail A. Randall. Shortly thereafter, the Government moved for summary disposition on the ground that the New Jersey State Board of Medical Examiners had suspended Respondent's state medical license. Motion for Summary Judgment at 1-2.

Respondent requested additional time to respond to the Government's motion. In his motion, Respondent did not deny that his state license had been suspended. Instead, Respondent noted that he was appealing the State board's order. Resp. Br. in Support of Motion for Additional Time at 3-4. Respondent also cited a litany of legal proceedings that he was litigating including a criminal case, a tort action, a motion for

post-conviction relief of a 1996 conviction, a suit for libel and slander, another suit "related to the Medical Board and * * * malpractice insurance lawyers," and a bankruptcy proceeding. *Id.* at 3-4.

The ALJ, however, denied Respondent's motion (as well as his Renewed Request for an extension of time). Applying agency precedent, she also rejected Respondent's argument that the Agency should not revoke his registration because his state license was only temporarily suspended. ALJ Dec. at 6 (citing *Alton E. Ingram, Jr.*, 69 FR 22562, 22563 (2004)). Because "Respondent lack[ed] authority to practice medicine and handle controlled substances in New Jersey," the ALJ held that "DEA lack[ed] authority to continue * * * Respondent's DEA registration." ALJ Dec. at 7. The ALJ thus granted the Government's motion for summary disposition and recommended that I revoke Respondent's registration. The ALJ then forwarded the record to me for final agency action.

Having considered the record as a whole (including Respondent's exceptions), I conclude that this case is now moot. It is undisputed that Respondent's registration expired on March 31, 2008. See Order to Show Cause at 1; see also Respondent's Counter-Statement of Material Facts at 1. Moreover, according to the registration records of this Agency, Respondent has not filed a renewal application.¹ I therefore find that Respondent is not currently registered with this Agency.

Under DEA precedent, "if a registrant has not submitted a timely renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *David L. Wood*, 72 FR 54936, 54937 (2007) (quoting *Ronald J. Riegel*, 63 FR 67132, 67133 (1998)). Moreover, while I have recognized a limited exception to this rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of such a suspension, see *William R. Lockridge*,

¹ Under the Administrative Procedure Act (APA), an agency "may take official notice of facts at any stage in a proceeding—even in the final decision." U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is "entitled on timely request, to an opportunity to show to the contrary." § 5 U.S.C. 556(e); see also 21 CFR 1316.59(e). Respondent can dispute these facts by filing a properly supported motion for reconsideration within fifteen days of service of this order, which shall begin on the date this order is mailed.

71 FR 77791, 77797 (2006), here, no such order was issued. Because there is neither an existing registration nor an application to act upon, and there is no suspension order to review, this case is now moot.²

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to Benjamin L. Levine, M.D., be, and it hereby is, dismissed.

Dated: June 6, 2008.

Michele M. Leonhart,
Deputy Administrator.

[FR Doc. E8-13617 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07-40]

William W. Nucklos, M.D.; Dismissal of Proceeding

On June 18, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to William W. Nucklos, M.D. (Respondent), of Powell, Ohio. The Show Cause Order proposed the revocation of Respondent's registration, BN2037314, as a practitioner, and the denial of any pending application to renew his registration, on two grounds.

First, the Show Cause Order alleged that on March 8, 2006, the State Medical Board of Ohio had suspended Respondent's state medical license. Show Cause Order at 1 (citing 21 U.S.C. 824(a)(3)). Second, the Show Cause Order alleged that on or about February 15, 2006, Respondent had been "convicted of ten felony counts of drug trafficking and the illegal processing of drug documents." *Id.*; see also 21 U.S.C. 824(a)(2) & (a)(4).

Respondent requested a hearing on the allegations; the matter was therefore assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner. Thereafter, the Government moved for summary disposition and to stay the proceeding on the ground that the Ohio board had suspended Respondent's medical license, and Respondent was thus without authority to handle controlled substances in the State in which he maintained his DEA registration. ALJ

Dec. at 1-2. The Government supported its motion with a copy of the Notice of Immediate Suspension which had been issued by the Ohio Board, and which referenced Respondent's indictment and conviction on ten felony counts of trafficking Oxycontin, and ten felony counts of "[i]llegal [p]rocessing of [d]rug [d]ocuments." Notice of Immediate Suspension and Opportunity for Hearing (Mar. 8, 2006) (citing Ohio Rev. Code 2925.03 & 2925.23).

Respondent opposed the Government's motion. Respondent's principal contention was that his convictions had been reversed by the Court of Appeals of Clark County, Ohio, and that he had a pending request with the State Medical Board to vacate the suspension because it had been based on the criminal convictions. Respondent's Resp. at 1.

The ALJ granted the Government's motion. According to the ALJ, there was no dispute that Respondent's state medical license remained suspended and that he was not "currently authorized to handle controlled substances in Ohio." ALJ at 3. The ALJ further explained that although Respondent had requested that the Ohio Board vacate his suspension, he "ha[d] not demonstrated that the suspension will be lifted." *Id.* Reasoning that she was "compelled to grant the Government's motion" because Respondent's license had been suspended, the ALJ recommended that Respondent's registration be revoked and that any pending applications be denied. *Id.* Thereafter, the record was forwarded to me for final agency action.

In reviewing the record, I have taken official notice of the Agency's records pertaining to Respondent's registration status.¹ According to the Agency's records, Respondent's registration expired on October 31, 2007. Moreover, there is no evidence showing that Respondent has filed a renewal application, let alone a timely one. See 21 CFR 1301.36(i). Accordingly, I conclude that there is neither a registration nor an application to act upon. *Id.*

Under DEA precedent, "if a registrant has not submitted a timely

renewal application prior to the expiration date, then the registration expires and there is nothing to revoke." *David L. Wood*, 72 FR 54936, 54937 (2007) (quoting *Ronald J. Riegel*, 63 FR 67132, 67133 (1998)). Moreover, while I have recognized a limited exception to this rule in cases which commence with the issuance of an immediate suspension order because of the collateral consequences which may attach with the issuance of such a suspension, see *William R. Lockridge*, 71 FR 77791, 77797 (2006), here, no such order was issued. Because there is neither an existing registration nor an application to act upon, and there is no suspension order to review, this case is now moot.²

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that the Order to Show Cause issued to William W. Nucklos, M.D., be, and it hereby is, dismissed.

Dated: June 6, 2008.

Michele M. Leonhart,
Deputy Administrator.

[FR Doc. E8-13618 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement—Inmate Behavior Management: Implementation and Evaluation

AGENCY: National Institute of Corrections, Department of Justice.

ACTION: Solicitation for a Cooperative Agreement.

SUMMARY: This project has two areas of focus: Assistance to selected jails in implementing the six elements of inmate behavior management and evaluation of the process and impact of implementation. The project award will be for a two-year period, and the project will be carried out in conjunction with the NIC Jails Division. The awardee will work closely with NIC Jails Division staff.

DATES: Applications must be received by 4 p.m. (EDT) on Friday, July 18, 2008.

ADDRESSES: Mailed applications must be sent to: Director, National Institute of

² The dismissal of a proceeding on mootness grounds does not, however, have collateral estoppel effect in the event that Respondent reapplies for a DEA registration in the future.

¹ Under the Administrative Procedure Act (APA), an agency "may take official notice of facts at any stage in a proceeding-even in the final decision." U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is "entitled on timely request, to an opportunity to show to the contrary." 5 U.S.C. 556(e); see also 21 CFR 1316.59(e). Respondent can dispute these facts by filing a properly supported motion for reconsideration within fifteen days of service of this order, which shall begin on the date this order is mailed.

² The dismissal of a proceeding on mootness grounds does not, however, have collateral estoppel effect in the event that Respondent reapplies for a DEA registration in the future.

Corrections, 320 First Street, NW., Room 5007, Washington, DC 20534.

Applicants are encouraged to use Federal Express, UPS, or similar service to ensure delivery by the due date as mail can be delayed due to security screening. Hand-delivered applications should be brought to 500 First Street, NW., Washington, DC 20534. Persons delivering applications should go to the front desk and call (202) 307-3106, extension 0 for pickup.

Faxed or e-mailed applications will not be accepted. However, electronic applications can be submitted via <http://www.grants.gov>.

FOR FURTHER INFORMATION CONTACT: A copy of this announcement and the required application forms can be downloaded from the NIC Web page at <http://www.nicic.gov>. Hard copies of the announcement can be obtained from Rita Rippetoe. She can be reached by phone at 1-800-995-6423, extension 44222 or by e-mail at rrippetoe@bop.gov. All technical or programmatic questions concerning this announcement should be directed to Fran Zandi, Correctional Program Specialist, National Institute of Corrections. She can be reached by phone at 1-800-995-6423, extension 71070 or by e-mail at fzandi@bop.gov.

SUPPLEMENTARY INFORMATION: *Overview and Background:* The National Institute of Corrections (NIC) has identified the following six key elements in the effective management of inmate behavior in jails:

- Assessing the risks and needs of each inmate at various points during his/her detention;

- Assigning inmates to appropriate housing;

- Meeting inmates' basic needs;

- Defining and conveying expectations for inmate behavior;

- Supervising inmates; and

- Keeping inmates productively occupied.

If a jail fully and properly implements all six elements, it should experience a significant reduction in the negative inmate behavior often experienced in jails, such as vandalism, violence, rule violations, and disrespectful behavior toward staff and other inmates.

In December 2004, the NIC Jails Division published information on these six elements in the Resource Guide for Jail Administrators (available on NIC's Web site <http://www.nicic.gov> and in hard copy on request from the NIC Information Center at 800-077-1461). Also, the NIC Jails Division has conducted related training and technical assistance to a variety of jails over the last few years. This project will allow

NIC to provide targeted assistance to three jails in implementing inmate behavior management and evaluate the implementation process and the impact of implementation on inmate behavior and perceived levels of safety within the jail.

Scope of Work: The work to be accomplished through this cooperative agreement consists of meetings with NIC, selecting participating jails, visiting selected jails, gathering data, assisting jails in implementing inmate behavior management, attending the Inmate Behavior Management Training Program, and preparing and submitting reports. Following is a more thorough description of what is expected in each of these areas.

Meetings with NIC: At the beginning of the project, the awardee (project director) will meet with NIC staff in Washington, DC for one day to discuss all project components, set criteria by which participating jails will be selected, and refine the evaluation strategy proposed in the awardee's application. The awardee will be expected to meet with NIC staff at least three more times during the course of the project. Two of the three remaining meetings may take place in conjunction with other project activities. The third meeting (one day) will take place in Washington, DC.

Selection of participating jails: Based on the criteria set during the initial meeting, the awardee, in conjunction with NIC staff, will identify a variety of jails that are likely to meet the selection criteria. All three jail designs (linear/intermittent surveillance, podular/remote surveillance, and podular/direct supervision) must be represented among the selected jails. The awardee then will travel to 4-5 of these jails to determine final eligibility.

Initial visit to selected jails: The awardee will travel to each selected jail to meet with the sheriff, jail administrator, the heads of the security, classification, and inmate programs functions, and other key officials to discuss the project, detail what will be involved and the potential implications for resources and staff assignments, outline the assistance that may be provided through the cooperative agreement and NIC, and discuss the data gathering and evaluation activities. The awardee will also work with jail officials to design a preliminary plan for the implementation of inmate behavior management.

Data gathering: The awardee will gather data on negative inmate behavior and levels of safety in the jail as perceived by staff and inmates by at least three points: during the initial visit

and meeting with jail staff, during the implementation process, and after inmate behavior management has been fully implemented. This will involve collection and analysis of both quantitative and qualitative data.

Assistance to jails in implementing inmate behavior management: The awardee, in conjunction with NIC, will identify areas in which each jail requires assistance and will conduct up to four short-term technical assistance events for each jail. This may include an overall assessment of the jail's status regarding each element of inmate behavior management; assistance with developing and implementing an inmate classification system and a housing plan; assistance in designing an inmate supervision plan (including meeting inmates' basic needs, setting and conveying behavioral expectations, and developing strategies for increasing the quantity and improving the quality of staff interaction with inmates); assistance in developing strategies for keeping inmates productively occupied; or miscellaneous short-term technical assistance as needed. Each technical assistance event will generally require about 2-3 days onsite, 1-2 days of preparation, and 1-2 days of report writing.

In addition to the assistance provided by the awardee, NIC will also fund teams of staff from each jail to attend its Inmate Behavior Management training program in Aurora, Colorado during the first quarter of the 2009 calendar year. Also, NIC will provide training on inmate behavior management to line staff and first-line supervisors at each jail on dates to be determined jointly by the awardee, NIC, and the jails.

Attendance at the Inmate Behavior Management Training Program: The awardee will attend, at the expense of this project, the Inmate Behavior Management training program in Aurora, Colorado during the first quarter of calendar year 2009. The awardee will work with the teams from the selected jails to further define their preliminary implementation plans for inmate behavior management based on what the teams learn in the program.

Reports: The awardee will submit written reports to NIC at the following times (at a minimum): After the initial meeting with each selected jail (including a description of the jail, an overview of the meeting, a copy of the jail's preliminary implementation plan, types of data collected, and conclusions drawn from the data collection); after the provision of on-site technical assistance to each jail; after each instance of data collection and analysis; and at the end of the project.

The end-of-project report will describe the implementation process in each jail, identify the assistance provided to the jail from the grantee and NIC, and will discuss, at a minimum, factors that hindered or facilitated implementation, the quality of implementation in each jail, and the effects of implementation in terms of negative inmate behavior and levels of safety in the jail as perceived by staff and inmates. All reports will be submitted to NIC on disk in Microsoft Word format and in hard copy (4 copies). Reports of technical assistance provided to the jails will also be sent in hard copy (1 copy) to the jail that received the assistance. The final report must be professionally edited before it is submitted to NIC.

Application Requirements: Applications must be submitted using OMB Standard Form 424, Federal Assistance and attachments. (Copies can be downloaded from the NIC Web page at <http://www.nicic.gov>.) The applications should be concisely written, typed double spaced, and referenced to the project by the "NIC Application Number" and Title referenced in this announcement.

Applicants must submit an original and three copies of the full proposal. The original should have the applicant's signature in blue ink. A cover letter must identify the responsible audit agency for the applicant's financial accounts.

The narrative portion of the application should include, at a minimum: A brief paragraph indicating the applicant's understanding of the purpose of the document and the issues to be addressed; a brief paragraph that summarizes the project goals and objectives; a clear description of the methodology that will be used to complete the project and achieve its goals; a statement or chart of measurable project milestones and timelines for the completion of each milestone; a description of the qualifications of the applicant organization and a resume for the principle and each staff member assigned to the project that documents relevant knowledge, skills, and abilities to carry out the project; and a budget that details all costs for the project, shows consideration for all contingencies for the project; and notes a commitment to work within the proposed budget.

Applicants' Conference: An applicants' conference will be held on Thursday, July 10, 2008 from 1 p.m. to 3 p.m. (EDT) at the NIC office, 500 1st Street NW., Washington, DC, 7th Floor. The conference will give applicants the opportunity to meet with NIC project

staff to ask questions about the project and the application procedures.

Attendance at the conference is optional and provisions can be made for telephone conferencing for those who will be unable to attend in person. Applicants who plan to attend or who would like to participate via telephone should call Fran Zandi, NIC Jails Division, Correctional Program Specialist, at (800) 995-6423 x 71070 by Tuesday, July 8, 2008 to confirm attendance.

Authority: Public Law 93-415.

Funds Available: NIC is seeking the applicant's best ideas regarding accomplishment of the scope of work and the related costs for achieving the goals of this solicitation. The final budget and award amount will be negotiated between NIC and the successful applicant. Funds may be used only for the activities that are linked to the desired outcome of the project. No funds are transferred to state or local governments.

Funds will be awarded based on satisfactory performance of the awardee and upon the availability of funding in future years.

Eligibility of Applicants: An eligible applicant is any private agency, educational institution, organization, individual, or team with expertise the described areas. Applicants or the applicant team must be able to competently address both areas of focus in this project: Assistance to selected jails in implementing the six elements of inmate behavior management and evaluation of the process and impact of implementation. The applicant or applicant team must demonstrate a thorough understanding of jails and common issues in managing inmate behavior; each of the six elements of inmate behavior management, as NIC presents and teaches it; the process of implementing the six elements in a jail; and the design and implementation of a strategy to evaluate both the process and outcomes of implementing the six elements of inmate behavior management.

Review Considerations: Applications will be reviewed by a team of NIC staff. Among the criteria used to evaluate the applications are: Indication of a clear understanding of project requirements; background, experience, and expertise of the proposed project staff, including any subcontractors; clarity of the description of all elements and tasks in the project; practicality and sufficiency of timeframes allotted to complete tasks; technical soundness of project design and methodology; financial and administrative integrity of the proposal,

including adherence to federal financial guidelines and processes; adequacy of budget detail, including consideration of all contingencies for the project and commitment to work within the proposed budget; and availability of project staff for meetings with NIC staff.

Number of Awards: One.

NIC Application Number: 08J65.

This number should appear as a reference line in the cover letter, in box 4a of Standard Form 424, and on the outside of the envelope in which the application is sent.

Catalog of Federal Domestic Assistance Number: 16.601.

Executive Order 12372: This project is not subject to the provisions of the executive order.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. E8-13553 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-36-P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review: Comment Request

June 11, 2008.

The Department of Labor (DOL) hereby announces the submission of the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. chapter 35). A copy of this ICR, with applicable supporting documentation; including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site at <http://www.reginfo.gov/public/do/PRAMain> or by contacting Darrin King on 202-693-4129 (this is not a toll-free number); e-mail: king.darrin@dol.gov.

Interested parties are encouraged to send comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Bureau of Labor Statistics (BLS), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202-395-7316; Fax: 202-395-6974 (these are not toll-free numbers), E-mail: OIRA_submission@omb.eop.gov within 30 days from the date of this publication in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference the OMB Control Number (see below).

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Bureau of Labor Statistics.

Type of Review: Revision of a currently approved collection.

Title: CPS Volunteer Supplement.

OMB Control Number: 1220-0176.

Affected Public: Individuals or households.

Estimated Number of Respondents: 63,000.

Total Estimated Annual Burden Hours: 5,300.

Total Estimated Annual Costs Burden: \$0.

Description: The Volunteer Supplement provides information on the total number of individuals in the U.S. involved in unpaid volunteer activities, measures of the frequency or intensity with which individuals volunteer, types of organizations for which they volunteer, the activities in which volunteers participate, and the prevalence of volunteering more than 120 miles from home or abroad. It will also provide information on civic engagement. For additional information, see related notice published at 73 FR 15539 on March 24, 2008.

Darrin A. King,

Acting Departmental Clearance Officer.

[FR Doc. E8-13556 Filed 6-16-08; 8:45 am]

BILLING CODE 4510-24-P

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Extension of the Approval of Information Collection Requirements

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce

paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning its proposal to extend OMB approval of the information collection: Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements, Construction. A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before August 18, 2008.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S-3201, Washington, DC 20210, telephone (202) 693-0418, fax (202) 693-1451, E-mail Bell.Hazel@dol.gov. Please use only one method of transmission for comments (mail, fax, or E-mail).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Federal Contract Compliance Programs (OFCCP) is responsible for the administration of three equal opportunity programs prohibiting employment discrimination and requiring affirmative action. The OFCCP administers Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), 38 U.S.C. 4212. The regulations implementing the Executive Order program are found at 41 CFR Parts 60-1, 60-2, 60-3, 60-4, 60-20, 60-30, 60-40, and 60-50. The regulations implementing Section 503 are published at 41 CFR Part 60-741. The regulations implementing VEVRAA are found at 41 CFR Part 60-250 and 41 CFR Part 60-300. These regulations require contractors to develop and maintain Affirmative Action Programs (AAP). OFCCP reviews these AAPs

through its compliance evaluation process. For purposes of this clearance request, the programs have been divided functionally into two categories, construction and supply and service. This information collection request covers the recordkeeping and reporting requirements for the functional aspects of the program involving construction. A separate information collection request covers the recordkeeping and reporting requirements for functional aspects of the program involving supply and service, and is approved under the Office of Management and Budget (OMB) Number 1215-0072.

On December 13, 2005, OMB approved without change this Information Collection through December 31, 2008. The December 13, 2005 submission included an internal assessment of the burden hours associated with the construction program. OFCCP updated the internal assessment and included the burden hour results of the internal assessment in this **Federal Register** Notice, for which OFCCP is seeking public comments. The results of the internal study, along with the public comments, will be incorporated in the final information collection requirement seeking a three-year approval.

The Department of Labor invites comments on the accuracy of the estimated universe of 240,534 Federal contractor construction firms. OFCCP developed this estimate through a multi-step process. First, OFCCP obtained the total number of construction firms in the United States from statistics compiled by the U.S. Census Bureau in 2002. The census compilation indicated that there were 601,339 construction firms in the United States.

This total was calculated by adding Nonresidential building construction (NAICS 2362), Heavy and civil engineering construction (NAICS 237), Specialty trade contractors (NAICS 238), and Other specialty trade contractors (NAICS 2389). Because all construction firms are not covered contractors within OFCCP's jurisdiction, OFCCP developed an estimate of the percentage of firms that are covered contractors by examining the percentage of supply and service firms that are covered contractors. Employer Information Report (EEO-1) forms filed annually by many employers provide information on the supply and service universe of Federal contractors. Relying on this EEO-1 data, OFCCP found that there were 25,681 supply and service consolidated EEO-1 Reports filed in FY 2002. This is a reasonable approximation of the total number of supply and service firms in the United

States. Of these firms, 10,498 (40.8%) indicated that they were Federal contractors. For these estimates, we assumed, based on the proportion of Supply and Service contractors that self-identified themselves on the EEO-1 Reports as federal contractors, that 40 percent of the construction firms would hold one or more federal or federally assisted construction contracts. Based on the above process, OFCCP estimated that 40.0% of the 601,339 construction firms, or 240,534 firms, are Federal or federally-assisted construction contractors.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the approval for the extension of this currently approved information collection in order to carry out its responsibility to ensure that contractors develop and maintain Affirmative Action Programs.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: OFCCP Recordkeeping and Reporting Requirements, Construction.
OMB Number: 1215-0163.

Affected Public: Business or other for-profit, not-for-profit institutions.

Total Respondents: 240,534.

Total Annual Responses: 240,534.

Average Time per Response,

Recordkeeping: 10.3 hours.

Average Time per Response,

Reporting: 0 hours.

Affirmative Action Program, Initial Development: 43,290 hours.

Affirmative Action Program, Annual Update: 162,360 hours.

Compliance Reviews: 669 hours.

Total Burden Hours, Recordkeeping and Reporting: 2,491,396.

Frequency: Annually.

Total Burden Cost (capital/startup): \$84,099.

Total Burden Cost (operating/maintenance): \$0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: June 12, 2008.

Hazel M. Bell,

Acting Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. E8-13555 Filed 6-16-08; 8:45 am]

BILLING CODE 4510-CM-P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Arts Advisory Panel to the National Council on the Arts will be held in Room 714 of the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506 as follows (ending time is approximate):

Visual Arts/Rosa Parks Sculpture Design (application review): July 9-10, 2008. This meeting, from 9 a.m. to 5:30 p.m. on July 9th and from 9 a.m. to 3 p.m. on July 10th, will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682-5691.

Dated: June 12, 2008.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. E8-13557 Filed 6-16-08; 8:45 am]

BILLING CODE 7537-01-P

NATIONAL PRISON RAPE ELIMINATION COMMISSION

Notice of Availability for Public Comment on NPREC Draft Standards

AGENCY: National Prison Rape Elimination Commission.

ACTION: Notice.

SUMMARY: The National Prison Rape Elimination Commission announces the release and availability for public comment its Draft Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Lockups, Juvenile and Community Corrections Facilities.

DATES: The comment period begins June 16, 2008 and closes on August 1, 2008. All comments must be received by 5 p.m. E.S.T. on Friday, August 1, 2008.

ADDRESSES: The preferred comment method is via the Microsoft Word form accessible at the NPREC Web site (<http://www.nprec.us>). This form can be downloaded and used to submit comments via mail, e-mail and/or fax. E-mailed comment forms should be sent to comments@nprec.us. To submit via mail, fill out the form, then print and mail to: National Prison Rape Elimination Commission, 1440 New York Avenue, NW., Suite 200, Washington, DC, 20005-2111. Faxed forms should be sent to (202) 233-1089.

FOR FURTHER INFORMATION CONTACT:

Questions regarding the comment process should be directed to the National Prison Rape Elimination Commission at (202) 233-1090.

SUPPLEMENTARY INFORMATION: The National Prison Rape Elimination Commission ("NPREC" or "the Commission") is a bipartisan panel created by Congress as part of the Prison Rape Elimination Act of 2003. The Commission is charged with studying federal, state and local government policies and practices related to the prevention, detection, response and monitoring of sexual abuse in correctional and detention facilities in the United States. Consistent with the Act, the Commission's recommendations will be designed to make the prevention of sexual abuse a top priority in America's jails, prisons, lockups, juvenile facilities, and other detention facilities.

Since its creation, the Commission has undertaken a comprehensive legal and factual study of the penological, physical, mental, medical, social and economic impacts of prison sexual abuse on federal, state and local government functions and on the communities and social institutions in which they operate.

Upon completion of its study, the Commission will report its findings, conclusions and recommendations to the President, Congress, the U.S. Attorney General and other federal and state officials. As a key component of its report, the Commission will include the statutorily required zero-tolerance standards.

This notice is to announce the release of Draft Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Lockups, Juvenile and Community Corrections Facilities, for a public comment period of 45 days. Written comments about these draft standards are invited from the public, as well as affected agencies and organizations.

These drafts can be accessed and downloaded from the NPREC Web site: <http://www.nprec.us>. Hard copies of the NPREC draft standards are available by mailing a request to the NPREC address, by telephoning (202) 233-1090, or by e-mail at nprec@nprec.us.

Dated: June 11, 2008.

Margaret M. Chiara,
General Counsel, National Prison Rape
Elimination Commission.

[FR Doc. E8-13545 Filed 6-16-08; 8:45 am]

BILLING CODE 4410-18-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-282 and 50-306]

Nuclear Management Company, LLC, Prairie Island Nuclear Generating Plant, Units 1 and 2; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR- 42 and DPR-60 for an Additional 20- Year Period

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for the renewal of Operating License Nos. DPR-42 and DPR-60, which authorize Nuclear Management Company (NMC), to operate Prairie Island Nuclear Generating Plant, Units 1 and 2, respectively, at 1650 megawatts thermal for each unit. The renewed licenses would authorize the applicant to

operate Units 1 and 2, for an additional 20 years beyond the period specified in the current licenses. The current operating licenses for Units 1 and 2, expire on August 09, 2013, and October 29, 2014, respectively.

NMC submitted the application dated April 11, 2008 and supplemented May 16, 2008, pursuant to Title 10 of the *Code of Federal Regulations* CFR Part 54 (10 CFR Part 54), to renew Operating License Nos. DPR-42 and DPR-60 for Prairie Island Nuclear Generating Plant, Units 1 and 2, respectively. A Notice of Receipt and Availability of the license renewal application (LRA) was published in the **Federal Register** on May 6, 2008 (73 FR 25034) as corrected on May 27, 2008 (73 FR 30423).

The Commission's staff has determined that NMC has submitted sufficient information in accordance with 10 CFR sections 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c) to enable the staff to undertake a review of the application, and the application is therefore acceptable for docketing. The current Docket Nos. 50-282 and 50-306 for Operating License Nos. DPR-42 and DPR-60, respectively, will be retained. The determination to accept the license renewal application for docketing does not constitute a determination that a renewed license should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of each requested renewed license, the NRC will have made the findings required by the Atomic Energy Act of 1954 (the Act), as amended, and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been, or will be, taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review; and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB), and that any changes made to the plant's CLB in order to comply with 10 CFR 54.29(a) are in accord with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG-1437, "Generic Environmental

Impact Statement for License Renewal of Nuclear Power Plants," dated May 1996. In considering the LRA, the Commission must find that the applicable requirements of Subpart A of 10 CFR Part 51 have been satisfied. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. The notice of intent will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** Notice, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing or a petition for leave to intervene with respect to the renewal of the license. Requests for a hearing or petitions for leave to intervene must be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852 and is accessible from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC's PDR Reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail at pdrr@nrc.gov. If a request for a hearing/petition for leave to intervene is filed within the 60-day period, the Commission, presiding officer, or the designated Atomic Safety and Licensing Board will rule on the request and/or petition. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR Parts 51 and 54, renew the license without further notice.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR Parts 51 and 54. The petition must specifically explain the reasons why intervention should be permitted with particular reference to

the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated in the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alphabetic designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners will be required to jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other

document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail

notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have a good cause for not submitting documents electronically must submit an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's

electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, Participants are requested not to include copyrighted materials in their submission.

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at <http://www.nrc.gov/reactors/operating/licensing/renewal.html> on the NRC's Web site. Copies of the application to renew the operating licenses for Prairie Island Nuclear Generating Plant, Units 1 and 2, are available for public inspection at the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, and at <http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html>, the NRC's Web site while the application is under review.

The application may be accessed in ADAMS through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html> under ADAMS Accession Number ML081130663. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC PDR Reference staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr@nrc.gov.

The NRC staff has verified that a copy of the LRA is also available to local residents near Prairie Island Nuclear Generating Plant, Units 1 and 2, at the Red Wing Public Library, 225 East Avenue, Red Wing, MN 55066.

Attorney for Nuclear Management Company (NMC) LLC, Mr. Peter M. Glass, Assistant General Counsel, Xcel Energy, 414 Nicollet Mall, Minneapolis, MN 55401.

Dated at Rockville, Maryland, this 10th day of June, 2008.

For the Nuclear Regulatory Commission,
Samson Lee,

*Acting Director, Division of License Renewal,
Office of Nuclear Reactor Regulation.*

[FR Doc. E8-13588 Filed 6-16-08; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

Biweekly Notice Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from May 22, 2008 to June 4, 2008. The last biweekly notice was published on June 3, 2008 (73 FR 31717).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-

day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D44, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management

System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/doc-collections/cfr/>. If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one

contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at hearingdocket@nrc.gov, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer(tm) to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>.

Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, *Attention: Rulemaking and Adjudications Staff*; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville, Pike, Rockville, Maryland, 20852, *Attention:*

Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this amendment action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397-4209, (301) 415-4737 or by e-mail to pdr@nrc.gov.

AmerGen Energy Company, LLC, et al., Docket No. 50-219, Oyster Creek Nuclear Generating Station (Oyster Creek), Ocean County, New Jersey.

Date of amendment request: October 18, 2007.

Description of amendment request: The proposed amendment would modify Technical Specification (TS)

4.5.M.1.e.1, "Containment System," concerning the mechanical snubbers functional test acceptance criteria. Specifically, the change would replace the snubber breakaway test with a drag force test.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change modifies Technical Specifications (TS) Section 4.5.M.1.e.1 concerning the Mechanical Snubbers Functional Test Acceptance Criteria, specifically, replacement of the snubber breakaway test with the drag force test. [Title 10 of the Code of Federal Regulations (10 CFR), Part 50.55a(b)(3)(v) permits the use of [American Society of Mechanical Engineers (ASME) Operations and Maintenance (OM) Code], Subsection ISTD, in lieu of the ASME Code, Section XI, for the inservice testing of snubbers. Subsection ISTD of the ASME OM Code, "Preservice and Inservice Examination and Testing of Dynamic Restraints (Snubbers) in Light-Water Reactor Nuclear Power Plants," provides the requirements for snubber testing. A requirement to perform the breakaway test no longer exists in the ASME OM Code. Current ASME OM Code requirements require a drag force test. The drag force test is a more encompassing representation of overall snubber resistance to thermal movement because it is performed over the entire working range of the snubber stroke. Therefore, a drag force test should be used rather than the breakaway or "force that initiated free movement" as currently worded in the [Oyster Creek Generating Station] TS. In addition to the above, the breakaway test is intended to be performed prior to any movement of the snubber. This is an impractical test situation, because the snubber has typically moved while the unit is cooling down, and the piping experiences thermal cycles.

The percentage of snubbers sampled and the period between inspections has not changed. Also, the way the snubber functions has not changed, only the method of testing that ensures continued functionality of it. Elimination of the breakaway test will not reduce the ability of snubbers to perform their intended design function. Drag force testing as defined in the TS will ensure adequate demonstration of snubber performance. Also, this change will not increase the probability of malfunction of plant equipment, or the failure of plant structures, systems, or components. Piping systems that include snubbers in their configuration will still be capable of performing their safety function.

Therefore, the proposed change[s] do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not affect the assumed accident performance of the Reactor Coolant Pressure Boundary, nor any plant structure, system, or component previously evaluated. The proposed change does not involve the installation of new equipment, and installed equipment is not being operated in a new or different manner. The change deletes the breakaway test for snubbers, which is no longer required by the ASME OM Code, and replaces it with a drag force test to ensure snubber functionality consistent with the ASME OM Code. No set points are being changed which would alter the dynamic response of plant equipment, and the design function of systems associated with snubbers will not be altered. Accordingly, no new failure modes or accident initiators are introduced.

Therefore, the proposed change[s] do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not affect the function of any safety systems or response during plant transients. There are no changes proposed which alter the set points at which protective actions are initiated, and there is no change to the operability requirements for equipment assumed to operate for accident mitigation. The snubbers will continue to perform their design function. This change deletes the breakaway test for snubbers, which is no longer required by the ASME OM Code, and replaces it with a drag force test. Therefore, the proposed changes do not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, and with the changes noted above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas S. O'Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

AmerGen Energy Company, LLC, et al., Docket No. 50-219, Oyster Creek Nuclear Generating Station (Oyster Creek), Ocean County, New Jersey.

Date of amendment request: March 10, 2008.

Description of amendment request: The proposed amendment would relocate the pressure and temperature limit curves from the Technical Specifications (TSs) to the licensee controlled "Pressure and Temperature

Limits Report.” Additionally, the proposed change would update other TS references from the TS contained curves to those in the Pressure and Temperature Limits Report.

Basis for proposed no significant

hazards consideration determination:

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change modifies the Technical Specifications (TS) Section 1.0 (“Definitions”), Limiting Conditions for Operation Section 3.3 (“Reactor Coolant”), Surveillance Requirement 4.3 (“Reactor Coolant”), and 6.0 (“Administrative Controls”), to delete reference to the [Pressure–Temperature (P–T)] curves and include reference to the [pressure–temperature limits report (PTLR)]. This change adopts the methodology of SIR–05–044–A, “Pressure–Temperature Limits Report Methodology for Boiling Water Reactors,” dated April 2007 for preparation of the pressure and temperature curves, and incorporates the guidance of TSTF–419–A (“Revised PTLR Definition and References in ISTS 5.6.6, RCS PTLR”). [As stated in] an NRC [safety evaluation report] dated February 6, 2007, “the NRC staff has found that SIR–05–044 is acceptable for referencing in licensing applications for General Electric designed boiling water reactors to the extent specified and under the limitations delineated in the [typical report (TR)] and in the enclosed final [safety evaluation].” As part of this change, the PTLR based on the methodology and template provided in SIR–05–044 is being supplied for review. The P–T curves utilize the methodology of SIR–05–044–A.

The NRC has established requirements in Appendix G to [Title 10 of the Code of Federal Regulations (10 CFR) Part 50] to protect the integrity of [the reactor coolant pressure boundary (RCPB)] in nuclear power plants. Additionally, 10 CFR Part 50, Appendix H, provides the NRC staff’s criteria for the design and implementation of RPV material surveillance programs for operating lightwater reactors. Implementing this NRC-approved methodology does not reduce the ability to protect the RCPB as specified in Appendix G, nor will this change increase the probability of malfunction of plant equipment, or the failure of plant structures, systems, or components. Incorporation of the new methodology for calculating P–T curves from the TS to the PTLR provides an equivalent level of assurance that the RCPB is capable of performing its intended safety functions. Thus, the proposed change does not affect the probability or consequences of an accident previously evaluated.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not affect the assumed accident performance of the RCPB, nor any plant structure, system, or component previously evaluated. The proposed change does not involve the installation of new equipment, and installed equipment is not being operated in a new or different manner. The change in methodology ensures that the RCPB remains capable of performing its safety functions. No setpoints are being changed which would alter the dynamic response of plant equipment. Accordingly, no new failure modes are introduced which could introduce the possibility of a new or different kind of accident from any previously evaluated.

This change adopts the methodology of SIR–05–044–A, “Pressure–Temperature Limits Report Methodology for Boiling Water Reactors,” dated April 2007 for preparation of the pressure and temperature curves, and incorporates the guidance of TSTF–419–A (“Revise PTLR Definition and References in ISTS 5.6.6, RCS PTLR”). In an NRC SER dated February 6, 2007, the NRC staff has found that SIR–05–044 is acceptable for referencing in licensing applications for General Electric designed boiling water reactors.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not affect the function of the RCPB or its response during plant transients. There are no changes proposed which alter the setpoints at which protective actions are initiated, and there is no change to the operability requirements for equipment assumed to operate for accident mitigation. This change adopts the methodology of SIR–05–044–A, “Pressure–Temperature Limits Report Methodology for Boiling Water Reactors,” dated April 2007 for preparation of the P–T curves. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee’s analysis and, based on this review, and with the changes noted above, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas S. O’Neill, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

Dominion Energy Kewaunee, Inc.
Docket No. 50–305, Kewaunee Power Station, Kewaunee County, Wisconsin.

Date of amendment request: April 14, 2008.

Description of amendment request:

The proposed amendment would modify the Technical Specifications to allow the main steam line isolation (SLI) circuitry to be inoperable when both Main Steam Isolation Valves (MSIVs) are closed and de-activated.

Basis for proposed no significant

hazards consideration determination:
As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment would allow the SLI instrumentation to be inoperable when both MSIVs are already closed and de-activated. When both MSIVs are closed, the SLI function is already accomplished and the SLI instrumentation is no longer needed. The proposed amendment does not involve a physical alteration of the plant or a functional change in the methods used to respond to any evaluated plant accident. The isolation function is accomplished either by SLI instrumentation or manually closing the MSIVs. No new or different equipment is being installed and no installed equipment is being removed or modified. The proposed amendment would not alter the parameters within which the plant is normally operated or the setpoints which initiate protective or mitigative actions.

With both MSIVs closed, the SLI instrumentation is not required to be operable since its safety function has already been accomplished. Addition of the proposed new footnote would not adversely impact any of the previously evaluated accidents described in the KPS [Kewaunee Power Station] USAR [Updated Safety Analysis Report].

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed amendment does not involve a physical alteration of the plant or a functional change in the methods used to respond to plant accidents or transients. No new or different equipment is being installed and no installed equipment is being removed or modified. The proposed amendment would not alter the parameters within which the plant is normally operated or the setpoints which initiate protective or mitigative actions. The design function of the SLI instrumentation would not be changed. With both MSIVs closed, the safety function associated with the SLI instrumentation has already been accomplished. Allowing the SLI instrumentation to be inoperable when both

MSIVs are closed and de-activated does not functionally impact how the plant would respond to any previously evaluated accidents. No new failure mechanisms, malfunctions, or accident initiators not considered in the design and licensing bases are introduced by the proposed amendment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is established through the design of the systems, structures, and components, the parameters within which the plant is operated, and the establishment of setpoints for the actuation of equipment relied upon to respond to an event. The proposed TS amendment does not adversely impact any plant structure, system or component that is relied upon for accident mitigation. The design of the SLI function is not affected by the proposed change. Closure and de-activation of the MSIVs represents an increase in functional margin as a deactivated valve has no opportunity to be inadvertently opened. The proposed amendment also does not adversely affect the setpoints or parameters under which the SLI instrumentation is operated. Station operations and the SLI function would not be adversely affected by the proposed change, because the isolation function capability is maintained throughout the applicable modes of operation. The proposed change does not alter any design basis or safety limit established in the KPS USAR.

Therefore, the proposed amendment to the KPS TS does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, Richmond, VA 23219.

NRC Branch Chief: Lois James.

Dominion Nuclear Connecticut Inc., et al., Docket Nos. 50-336 and 50-423, Millstone Power Station, Unit Nos. 2 and 3, New London County, Connecticut.

Date of amendment request: August 15, 2007.

Description of amendment request: The proposed amendment would modify Technical Specification (TS) 3.3.3.1, "Radiation Monitoring," TS 3.4.6.1, "Reactor Coolant System Leakage Detection Systems," and Surveillance Requirements 4.4.6.1, "Reactor Coolant System Leakage Detection Systems." Specifically, the proposed amendment would remove

credit for the gaseous radiation monitor for Reactor Coolant System leakage detection. Improvements in nuclear fuel reliability over time have resulted in the reduction of effectiveness of the monitors in detecting very small leaks and very small changes in the leakrate. The proposed change also addresses the condition when the remaining monitoring systems are all inoperable.

Basis for proposed no significant hazards consideration determination:

As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change has been evaluated and determined to not increase the probability or consequences of an accident previously evaluated. The proposed change does not make any hardware changes and does not alter the configuration of any plant system, structure or component (SSC). The containment atmosphere gaseous radioactivity monitor is not credited for use in the initiation of any protective functions. The proposed change only removes the containment atmosphere gaseous radioactivity monitor for meeting the operability requirement for TS 3.4.6.1. Therefore, the probability of occurrence of an accident is not increased. The TS will continue to require diverse means of leakage detection equipment, thus ensuring that leakage due to cracks would continue to be identified prior to breakage and the plant shutdown accordingly. Additionally, the function of this equipment is not modeled in the MPS2 or MPS3 probabilistic risk assessment and therefore its removal from the Technical Specifications has no impact on core damage frequency or large early release frequency. Therefore, the consequences of an accident are not increased.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve the use or installation of new equipment and the currently installed equipment will not be operated in a new or different manner. No new or different system interactions are created and no new processes are introduced. The proposed changes will not introduce any new failure mechanisms, malfunctions, or accident initiators not already considered in the design and licensing bases. The proposed change does not affect any SSC associated with an accident initiator. Based on this evaluation, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not make any alteration to any RCS [Reactor Coolant System] leakage detection components. The proposed change only removes the gaseous channel of the containment atmosphere radioactivity monitor for meeting the operability requirement for TS 3.4.6.1. The proposed amendment continues to require diverse means of leakage detection equipment with capability to promptly detect RCS leakage. Although not required by TS, additional diverse means of leakage detection capability are available. Based on this evaluation, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above, DNC [Dominion Nuclear Connecticut] concludes that the proposed amendment involves no significant hazards consideration under the standards set forth in 10 CFR 50.92, and a finding of "no significant hazards consideration" is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Waterford, CT 06141-5127.

NRC Branch Chief: Harold K. Chernoff.

Exelon Generation Company, LLC, Docket Nos. STN 50-454 and STN 50-455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois.

Docket Nos. STN 50-456 and STN 50-457, Braidwood Station, Units. 1 and 2, Will County, Illinois.

Date of amendment request: March 18, 2008.

Description of amendment request:

The proposed amendments would revise the technical specification (TS) surveillance requirement (SR) numbering for two engineered safety feature actuation system (ESFAS) instrumentation SRs that were revised in previous license amendments issued by the Nuclear Regulatory Commission (NRC) staff. The revised numbering scheme in the previous amendments introduced inconsistencies within TS 3.3.2. In addition, the proposed amendments request an extension of the 120-day period for implementation of the changes to SRs 3.3.2.6 and 3.3.2.7, approved in the previous license amendments, to 30 days following approval of the proposed amendments.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards

consideration, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed revision to the numbering of two ESFAS instrumentation SRs and extension of a previously approved license amendment implementation period are purely administrative in nature, and as such, do not increase the probability of any accident previously evaluated. The proposed changes do not affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained. The proposed changes will not modify any system interface, nor will they affect the probability of any event initiators. Therefore, the proposed changes do not increase the probability of an accident previously evaluated.

Since the proposed changes are purely administrative, the changes will not alter or prevent structures, systems, and components from performing their intended function to mitigate the consequences of an initiating event, within the assumed acceptance limits. The proposed amendment does not change the response of the plant to any accidents and has no impact on the reliability of the ESFAS signals. The ESFAS will remain highly reliable, and the proposed changes will not result in an increase in the risk of plant operation. There will be no degradation in the performance of, or an increase in the number of challenges imposed on safety-related equipment assumed to function during an accident situation. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated. Therefore, there will not be an increase in the consequences of any accidents.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed revision to the numbering of two ESFAS instrumentation SRs and extension of a previously approved license amendment implementation period are purely administrative in nature. There are no hardware changes nor are there any changes in the method by which any safety-related plant system performs its safety function. The proposed changes will not affect the normal method of plant operation. No performance requirements will be affected or eliminated. The proposed changes will not result in physical alteration to any plant system nor will there be any change in the method by which any safety-related plant system performs its safety function. There will be no setpoint changes or changes to accident analysis assumptions.

No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of these changes. There will be no adverse effect or challenges imposed on any safety-related system as a result of these changes. Therefore, the proposed changes do not

create the possibility of a new or different kind of accident from any [accident] previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The proposed revision to the numbering of two ESFAS instrumentation SRs and extension of a previously approved license amendment implementation period are purely administrative in nature. Therefore, the proposed changes do not affect the acceptance criteria for any analyzed event, nor is there a change to any safety analysis limit. There will be no effect on the manner in which safety limits, limiting safety system settings, or limiting conditions for operation are determined nor will there be any effect on those plant systems necessary to assure the accomplishment of protection functions. There will be no impact on the departure from nucleate boiling limits, fuel centerline temperature, or any other margin of safety.

Redundant ESFAS trains are maintained, and diversity with regard of the signals that provide engineered safety features actuation is also maintained. All signals credited as primary or secondary, and all operator actions credited in the accident analyses will remain the same. The proposed changes will not result in plant operation in a configuration outside the design basis. Therefore, the proposed changes do not involve a significant reduction in [a] margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Bradley J. Fewell, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Russell Gibbs.

FPL Energy Duane Arnold, LLC, Docket No. 50-331, Duane Arnold Energy Center, Linn County, Iowa.

Date of amendment request: December 20, 2007.

Description of amendment request: The proposed amendment would add a Surveillance Requirement to Technical Specification (TS) Section 3.7.2, "RWS [River Water Supply] System and UHS [Ultimate Heat Sink]," to require surveillances of the Cedar River depth to assure UHS operability.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Technical Specifications currently require surveillance of river level elevation and temperature. These surveillance requirements are unchanged. Adding an additional surveillance requirement to measure river depth will not adversely impact the probability or consequences of an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Adding TS Surveillance Requirements to measure river depth does not create the possibility of a new or different kind of accident from any accident previously evaluated and does not represent a change in the methods governing normal plant operation. In addition, the proposed change does not alter or eliminate any existing requirements. The proposed change does not alter assumptions made in the safety analysis. The proposed change is consistent with the safety analysis assumptions and current plant operating practice.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Per the DAEC [Duane Arnold Energy Center] UFSAR [Updated Final Safety Analysis Report], adequate river flow into the Intake Structure must be available to meet emergency cooling requirements and assure UHS OPERABILITY. Adequate river flow can be assured by requiring a minimum river depth of 6.5 inches or greater at the Intake Structure. The proposed Surveillance Requirements ensure margin to the minimum flow by specifying a depth of 12 inches or greater at the Intake Structure. Adding additional surveillance requirements for river depth will not adversely impact any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Marjan Mashhadi, Florida Power & Light Company, 801 Pennsylvania Avenue, Suite 220, Washington, DC 20004.

NRC Branch Chief: Lois M. James.

Omaha Public Power District, Docket No. 50-285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska.

Date of amendment request: April 22, 2008.

Description of amendment request: The amendment would revise the Technical Specifications (TS) 2.7,

“Electrical Systems,” Limiting Condition for Operation (LCO) 2.7(2)j, to clarify that a single period of operability for one emergency diesel generator (DG) is limited to 7 consecutive days and specify that the cumulative total time of inoperability for both DGs during any calendar month cannot exceed 7 days.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed changes clarify the AOT [allowed outage time] of TS 2.7(2)j for DG inoperability but are not less restrictive. Allowed outage times and editorial changes such as these are not an initiator of any accident previously evaluated. As a result, the probability of an accident previously evaluated is not affected. The consequences of an accident during the revised AOT are no different than the consequences of the same accident during the existing AOT. As a result, the consequences of an accident previously evaluated are not affected by these changes. The proposed changes do not alter or prevent the ability of structures, systems, and components from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed changes do not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed changes do not increase the types or amounts of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposures. The proposed changes are consistent with the safety analysis assumptions and resultant consequences. Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. The proposed changes do not alter any assumptions made in the safety analysis. Therefore, the proposed changes do not create the possibility of a new or different accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes clarifying the AOT of TS 2.7(2)j for DG inoperability do not alter

the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by these changes. The proposed changes will not result in plant operation in a configuration outside of the design basis. Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: James R. Curtiss, Esq., Winston & Strawn, 1700 K Street, NW., Washington, DC 20006–3817.

NRC Branch Chief: Thomas G. Hiltz.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the Federal Register as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these

items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397-4209, (301) 415-4737 or by e-mail to pdr@nrc.gov.

AmerGen Energy Company, LLC, Docket No. 50-219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey.

Date of amendment request: May 16, 2007.

Description of amendment request: The amendment revises the Oyster Creek Technical Specifications (TSs) 3.5.A.6, “Primary Containment.” Specifically, the amendment revises the actions taken and applicability of the requirement to inert the primary containment atmosphere to less than 4 percent oxygen (O₂) concentration. Additionally, the amendment introduces definitions for thermal power and rated thermal power including changes for their consistent use within the TSs.

Date of issuance: May 30, 2008.

Effective date: As of its date of issuance, and shall be implemented within 60 days.

Amendment No.: 266.

Facility Operating License No. NPF-86: The amendment revised the License and Technical Specifications

Date of initial notice in Federal

Register: March 11, 2008 (73 FR 13023). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 30, 2008.

No significant hazards consideration comments received: No.

Arizona Public Service Company, et al., Docket Nos. STN 50-528, STN 50-529, and STN 50-530, Palo Verde Nuclear Generating Station, Units No. 2, Maricopa County, Arizona.

Date of application for amendments: November 14, 2007.

Brief description of amendments: The amendments revised the Technical Specifications by adding Limiting Condition for Operation (LCO) 3.0.8 on the inoperability of snubbers using the Consolidated Line Item Improvement Process. The amendments also made conforming changes to TS LCO 3.0.1.

These amendments are consistent with the NRC-approved Industry/Technical Specification Task Force (TSTF) Traveler No. 372, Revision 4, "Addition of LCO 3.0.8, Inoperability of Snubbers."

Date of issuance: May 30, 2008.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment Nos.: Unit 1—170, Unit 2—170, and Unit 3—170.

Facility Operating License No. NPF-41, NPF-51, and NPF-74: The amendments revised the Operating Licenses and Technical Specifications.

*Date of initial notice in **Federal Register**:* January 29, 2008 (73 FR 5217). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 30, 2008.

No significant hazards consideration comments received: No.

Duke Energy Carolinas, LLC, et al., Docket Nos. 50-413 and 50-414, Catawba Nuclear Station, Units 1 and 2, York County, South Carolina.

Date of application for amendments: February 15, 2008.

Brief description of amendments: The amendments authorize a change to the UFSAR requiring an inspection of each ice condenser within 24 hours of experiencing a seismic event greater than or equal to an operating basis earthquake within the 5-week period after ice basket replenishment has been completed to confirm that adverse ice fallout has not occurred which could impede the ability of the ice condenser lower inlet doors to open. This action would be taken, in lieu of requiring a 5-week waiting period following ice basket replenishment, prior to beginning ascension to power operations.

Date of issuance: May 28, 2008.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 241, 236.

Facility Operating License Nos. NPF-35 and NPF-52: Amendments revised the licenses and the technical specifications.

*Date of initial notice in **Federal Register**:* February 26, 2008 (73 FR 10302). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated May 28, 2008.

No significant hazards consideration comments received: No.

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50-458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana.

Date of amendment request: November 15, 2007.

Brief description of amendment: The amendment removed Surveillance Requirement (SR) 3.8.3.6 from the Technical Specifications and relocated the requirement to a licensee-controlled document. SR 3.8.3.6 requires the Emergency Diesel Generator Fuel Oil Storage Tank to be drained, sediment removed, and cleaned on a 10-year interval.

Date of issuance: June 2, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days from the date of issuance.

Amendment No.: 160.

Facility Operating License No. NPF-47: The amendment revised the Facility Operating License and Technical Specifications.

*Date of initial notice in **Federal Register**:* December 31, 2007 (72 FR 74357). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated June 2, 2008.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. 50-352 and 50-353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania.

Date of application for amendment: June 27, 2007.

Brief description of amendment: The amendments consist of changes to the Technical Specifications of each unit to delete the operability and surveillance requirements for the drywell air temperature and suppression chamber air temperature. These post-accident monitoring instrumentation requirements are being re-located to the Limerick Generating Station Technical Requirements Manual.

Date of issuance: May 29, 2008.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment Nos.: 191 and 152.

Facility Operating License Nos. NPF-39 and NPF-85: These amendments revised the license and the technical specifications.

*Date of initial notice in **Federal Register**:* September 11, 2007 (72 FR 51860). The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated May 29, 2008.

No significant hazards consideration comments received: No.

Nine Mile Point Nuclear Station, LLC, Docket No. 50-410, Nine Mile Point Nuclear Station, Unit No. 2, Oswego County, New York.

Date of application for amendment: May 31, 2007, as supplemented by letter dated January 7, 2008.

Brief description of amendment: The amendment revises the accident source

term in the design basis radiological consequence analyses in accordance with Title 10 of the Code of Federal Regulations (10 CFR) Section 50.67. The revised accident source term revision replaces the methodology that is based on Technical Information Document (TID)-14844, "Calculation of Distance Factors for Power and Test Reactor Sites," with the alternate source term methodology described in Regulatory Guide 1.183, "Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors," with the exception that TID-14844 will continue to be used as the radiation dose basis for equipment qualification and vital area access.

Date of issuance: May 29, 2008.

Effective date: As of the date of issuance to be implemented within 120 days.

Amendment No.: 125.

Renewed Facility Operating License No. DPR-69: Amendment revised the License and Technical Specifications.

*Date of initial notice in **Federal Register**:* July 31, 2007 (72 FR 41786).

The supplement dated January 7, 2008, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the Nuclear Regulatory Commission staff's initial proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated May 29, 2008.

No significant hazards consideration comments received: No.

Notice of Issuance of Amendments to Facility Operating Licenses and Final Determination of No Significant Hazards Consideration and Opportunity for a Hearing (Exigent Public Announcement or Emergency Circumstances)

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Because of exigent or emergency circumstances associated with the date

the amendment was needed, there was not time for the Commission to publish, for public comment before issuance, its usual Notice of Consideration of Issuance of Amendment, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing.

For exigent circumstances, the Commission has either issued a **Federal Register** notice providing opportunity for public comment or has used local media to provide notice to the public in the area surrounding a licensee's facility of the licensee's application and of the Commission's proposed determination of no significant hazards consideration. The Commission has provided a reasonable opportunity for the public to comment, using its best efforts to make available to the public means of communication for the public to respond quickly, and in the case of telephone comments, the comments have been recorded or transcribed as appropriate and the licensee has been informed of the public comments.

In circumstances where failure to act in a timely way would have resulted, for example, in derating or shutdown of a nuclear power plant or in prevention of either resumption of operation or of increase in power output up to the plant's licensed power level, the Commission may not have had an opportunity to provide for public comment on its no significant hazards consideration determination. In such case, the license amendment has been issued without opportunity for comment. If there has been some time for public comment but less than 30 days, the Commission may provide an opportunity for public comment. If comments have been requested, it is so stated. In either event, the State has been consulted by telephone whenever possible.

Under its regulations, the Commission may issue and make an amendment immediately effective, notwithstanding the pendency before it of a request for a hearing from any person, in advance of the holding and completion of any required hearing, where it has determined that no significant hazards consideration is involved.

The Commission has applied the standards of 10 CFR 50.92 and has made a final determination that the amendment involves no significant hazards consideration. The basis for this determination is contained in the documents related to this action. Accordingly, the amendments have been issued and made effective as indicated.

Unless otherwise indicated, the Commission has determined that these

amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the application for amendment, (2) the amendment to Facility Operating License, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment, as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397-4209, (301) 415-4737 or by e-mail to pdr@nrc.gov.

The Commission is also offering an opportunity for a hearing with respect to the issuance of the amendment. Within 60 days after the date of publication of this notice, person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-Filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/doc-collections/cfr/>. If there are problems in accessing the document, contact the PDR Reference staff at 1 (800) 397-4209, (301) 415-4737, or by e-

mail to pdr@nrc.gov. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.¹ Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would

¹ To the extent that the applications contain attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel and discuss the need for a protective order.

entitle the petitioner to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Each contention shall be given a separate numeric or alpha designation within one of the following groups:

1. Technical—primarily concerns/issues relating to technical and/or health and safety matters discussed or referenced in the applications.

2. Environmental—primarily concerns/issues relating to matters discussed or referenced in the environmental analysis for the applications.

3. Miscellaneous—does not fall into one of the categories outlined above.

As specified in 10 CFR 2.309, if two or more petitioners/requestors seek to co-sponsor a contention, the petitioners/requestors shall jointly designate a representative who shall have the authority to act for the petitioners/requestors with respect to that contention. If a petitioner/requestor seeks to adopt the contention of another sponsoring petitioner/requestor, the petitioner/requestor who seeks to adopt the contention must either agree that the sponsoring petitioner/requestor shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner/requestor a representative who shall have the authority to act for the petitioners/requestors with respect to that contention.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing. Since the Commission has made a final determination that the amendment involves no significant hazards consideration, if a hearing is requested, it will not stay the effectiveness of the amendment. Any hearing held would take place while the amendment is in effect.

A request for hearing or a petition for leave to intervene must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated in August 28, 2007, (72 FR 49139). The E-Filing process requires participants to submit and serve documents over the internet or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least five (5) days prior to the filing deadline, the petitioner/requestor must contact the

Office of the Secretary by e-mail at HEARINGDOCKET@NRC.GOV, or by calling (301) 415-1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at <http://www.nrc.gov/site-help/e-submittals/install-viewer.html>. Information about applying for a digital ID certificate is available on NRC's public Web site at <http://www.nrc.gov/site-help/e-submittals/apply-certificates.html>.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at <http://www.nrc.gov/site-help/e-submittals.html>. A filing is considered complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the "Contact Us" link located on the NRC Web site at <http://www.nrc.gov/site-help/e-submittals.html> or by calling the NRC technical help line, which is available

between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397-4209 or locally, (301) 415-4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, *Attention: Rulemaking and Adjudications Staff*; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, *Attention: Rulemaking and Adjudications Staff*. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii). To be timely, filings must be submitted no later than 11:59 p.m. Eastern Time on the due date.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at http://ehd.nrc.gov/EHD_Proceeding/home.asp, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Virginia Electric and Power Company, et al., Docket Nos. 50-280 and 50-281, Surry Power Station, Unit No. 2, Surry County, Virginia.

Date of application for amendments: April 14, 2008, as supplemented on May 6, 2008.

Brief Description of amendments: The proposed amendment allowed a one-cycle revision to Surry Power Station, Unit No. 2 Technical Specifications (TSs). Specifically, TS 6.4.Q, "Steam Generator (SG) Program," and TS 6.6.3, "Steam Generator Tube Inspection Report," were revised to incorporate an interim alternate repair criterion (IARC) into the provisions for SG tube repair.

Date of issuance: May 16, 2008.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 258.

Renewed Facility Operating License Nos. DPR-32 and DPR-37: Amendment changed the license and the technical specifications.

Date of initial notice in Federal Register: 73 FR 22443 (April 25, 2008) and *Daily Press* (May 12 and May 13, 2008). No comments have been received.

The supplement dated May 6, 2008 requested approval of the amendment based on exigent circumstances, provided additional information that clarified the application, did not expand the scope of the original proposed no significant hazards consideration (NSHC) determination, and did not change the NRC staff's original proposed NSHC determination.

The Commission's related evaluation of the amendment, finding of exigent circumstances, state consultation, and final NSHC determination are contained in a safety evaluation dated May 16, 2008.

The *Daily Press* notice provided an opportunity to submit comments by May 15, 2008. No comments have been received. The April 25, 2008 notice also provided an opportunity to request a hearing by June 24, 2008, but the *Daily Press* Notice stated that "an opportunity for a hearing will be published at a later date." The *Daily Press* Notice should have stated that "an opportunity for a hearing was previously published."

No significant hazards consideration comments received: No.

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

For The Nuclear Regulatory Commission.

Robert A. Nelson,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8-13218 Filed 6-16-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Office of New Reactors; Notice of Availability of the Final Interim Staff Guidance DC/COL-ISG-03 on Probabilistic Risk Assessment Information To Support Design Certification and Combined License Applications

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of availability.

SUMMARY: The NRC is issuing its Final Interim Staff Guidance (ISG) DC/COL-ISG-03 (ADAMS Accession No. ML081430087). This ISG supplements the guidance provided to the staff in section 19.0, "Probabilistic Risk Assessment and Severe Accident Evaluation for New Reactors," of NUREG-0800, "Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants," concerning the review of probabilistic risk assessment (PRA) information and severe accident assessment submitted to support design certification (DC) and combined license (COL) applications.

The NRC staff issues DC/COL-ISGs to facilitate timely implementation of the current staff guidance and to facilitate activities associated with review of applications for DC and COLs by the Office of New Reactors. The NRC staff will also incorporate the approved DC/COL-ISGs into the next revision to the review guidance documents for new reactor applications.

Disposition: On February 12, 2008, the staff issued the proposed ISG "Probabilistic Risk Assessment Information to Support Design Certification and Combined License Applications," (COL/DC-ISG-003) (ADAMS Accession No. ML080370218) to solicit public and industry comment. The staff received comments (ADAMS Accession Nos. ML080810201, ML080810204 and ML080840432) on the proposed guidance on March 21, 2008. These comments were further discussed in a public meeting held at the NRC on May 8, 2008. This final issuance incorporates changes from the majority of the comments. To the extent that comments are not incorporated in this final issuance, the comments are rejected by the staff or are outside the scope of this guidance.

ADDRESSES: The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the

Internet at <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room reference staff at 1-800-397-4209, 301-415-4737, or by e-mail at pdr@nrc.gov.

FOR FURTHER INFORMATION CONTACT: Ms. Lynn A. Mrowca, Chief, PRA Licensing, Operations Support Maintenance Branch 1, Division of Safety Systems and Risk Assessment, Office of the New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone 301-415-0525 or e-mail at lynn.mrowca@nrc.gov.

SUPPLEMENTARY INFORMATION: The agency posts its issued staff guidance in the agency external Web page <http://www.nrc.gov/reading-rm/doc-collections/isg/>.

Dated at Rockville, Maryland, this 11th day of June 2008.

For the Nuclear Regulatory Commission,
George M. Tartal,

Acting Chief, Rulemaking, Guidance and Advanced Reactor Branch, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8-13572 Filed 6-16-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Sunshine Federal Register Notice

DATES: Weeks of June 16, 23, 30, July 4, 14, 21, 2008.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of June 16, 2008

Tuesday, June 17, 2008

12:55 p.m. Affirmation Session (Public Meeting) (Tentative).

a. U.S. DOE (HLW Repository: Pre-Application Matters), Docket No. PAPO-00—The State of Nevada's Notice of Appeal from the PAPO Board's 1/4/08 and 12/12/07 Orders and The State of Nevada's Motion to File a Limited Reply (Tentative).

b. AmerGen Energy Company, LLC, (License Renewal for Oyster Creek Nuclear Generating Station); Citizens' Motion to Stay proceedings (Tentative).

c. U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), Advisory PAPO Board Request for Additional Authority (Tentative).

Week of June 23, 2008—Tentative

Wednesday, June 25, 2008

1 p.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>.

Week of July 7, 2008—Tentative

There are no meetings scheduled for the week of July 7, 2008.

Week of July 14, 2008—Tentative

Thursday, July 17, 2008

1 p.m. Briefing on Fire Protection Issues (Public Meeting) (Contact: Alex Klein, 301-415-2822).

This meeting will be webcast live at the Web address—<http://www.nrc.gov>.

Week of July 21, 2008—Tentative

Wednesday, July 23, 2008

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1 & 3).

Thursday, July 24, 2008

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1 & 3).

* * * * *

*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.

* * * * *

Additional Information

The “Discussion of Adjudicatory Issues (Closed—Ex. 10)” previously scheduled on Tuesday, June 17, 2008, at 1 p.m. has been cancelled.

* * * * *

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: June 12, 2008.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 08-1365 Filed 6-13-08; 10:47 am]

BILLING CODE 7590-01-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52-018 and 52-019]

Duke Energy Carolinas, LLC; Correction to Notice of Hearing and Opportunity To Petition for Leave To Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the William States Lee III Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Issuance; correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** of April 28, 2008 (73 FR 22978), that incorrectly referenced the name of the applicant. This action is necessary to correct an erroneous name.

FOR FURTHER INFORMATION CONTACT: B. Hughes, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone (301) 415-6582, e-mail: Brian.Hughes@nrc.gov.

SUPPLEMENTARY INFORMATION:

1. The subject heading of the notice of hearing is corrected by changing “Duke Energy” to “Duke Energy Carolinas, LLC.”

2. On page 22978, in the third column, in the first complete paragraph, twentieth line, “Duke Energy” is corrected to read “Duke Energy Carolinas, LLC.”

Dated at Rockville, Maryland, this 11th day of June 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8-13575 Filed 6-16-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Yucca Mountain; Notice of Receipt and Availability of Application

On June 3, 2008, the Department of Energy (DOE, or the Applicant) filed a license application for a geologic repository to be located at Yucca Mountain in Nye County, Nevada with the Nuclear Regulatory Commission (the Commission) pursuant to section 114 of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10134, 10 CFR Part 63 and 10 CFR 2.101.

The information submitted by the Applicant includes information that the Applicant has identified as classified national security information. For informational purposes, the Applicant also provided, in electronic format, copies of primary references, and a matrix that cross-references sections of the application to 10 CFR Part 63 and NUREG-1804.

Subsequent **Federal Register** notices will address the NRC Staff’s determination of the acceptability or non-acceptability of the tendered application for docketing and provisions for participation of the public in the review process.

A copy of the application is available for public inspection at the Commission’s Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and via the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm/adams.html>. The accession number for the application is ML081560408. Future publicly available documents related to the application will also be posted in ADAMS. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room staff by telephone at 1-800-397-4209 or 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The application is also available at <http://www.nrc.gov/waste/hlw-disposal/yucca-lic-app.html>.

Dated at Rockville, Maryland, this 10th day of June 2008.

For the U.S. Nuclear Regulatory Commission.

Lawrence E. Kokajko,

Director, Division of High-Level Waste Repository Safety, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E8-13573 Filed 6-16-08; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-247 and 50-286]

Entergy Nuclear Indian Point 2, Llc, Entergy Nuclear Indian Point 3, Llc, Entergy Nuclear Operations, Inc.; Notice of Withdrawal of Application for Amendment to Facility Operating License Nos. DPR-26 and DPR-64, Indian Point Nuclear Generating Unit Nos. 2 and 3

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Entergy Nuclear Operations, Inc. (the licensee) to withdraw its March 13, 2007, application for proposed amendments to Facility Operating License No. DPR-26 for Indian Point Nuclear Generating Unit No. 2 and Facility Operating License No. DPR-64 for Indian Point Nuclear Generating Unit No. 3, located in Westchester County, New York.

The proposed amendments would have revised the fire protection license conditions by removing the listing of dated Fire Protection Safety Evaluation Reports (SERs) contained within the licenses.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on April 10, 2007 (72 FR 17947). However, by letter dated May 6, 2008, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated March 13, 2007, and the licensee's letter dated May 6, 2008, which withdrew the application for a license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/reading-rm.html>. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1-800-397-4209, or 301-415-4737 or by e-mail to pdr.resource@nrc.gov.

Dated at Rockville, Maryland, this 10th day of June 2008.

For the Nuclear Regulatory Commission.

John P. Boska,

Senior Project Manager, Plant Licensing Branch I-1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8-13590 Filed 6-16-08; 8:45 am]

BILLING CODE 7590-01-P

OFFICE OF MANAGEMENT AND BUDGET

Public Availability of Fiscal Year 2007 Agency Inventories Under the Federal Activities Inventory Reform Act

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of Public Availability of Agency Inventory of Activities That Are Not Inherently Governmental and of Activities That Are Inherently Governmental.

SUMMARY: The Federal Activities Inventory Reform (FAIR) Act, Public Law 105-270, requires agencies to develop inventories each year of activities performed by their employees that are not inherently governmental—i.e., inventories of commercial activities. The FAIR Act further requires OMB to review the inventories in consultation with the agencies and publish a notice of public availability in the **Federal Register** after the consultation process is completed. In accordance with the FAIR Act, OMB is publishing this notice to announce the availability of inventories from the agencies listed below. These inventories identify both commercial activities and activities that are inherently governmental.

This is the first release of the FAIR Act inventories for FY 2007. Interested parties who disagree with the agency's initial judgment may present a challenge to the agency regarding the inclusion or the omission of an activity on the list of activities that are not inherently governmental within 30 working days and, if not satisfied with this review, may appeal to a higher level within the agency.

The Office of Federal Procurement Policy has made available a FAIR Act User's Guide through its Internet site: <http://www.whitehouse.gov/omb/procurement/fair-index.html>. This User's Guide will help interested parties review FY 2007 FAIR Act inventories.

Paul A. Denett,
Administrator.

ATTACHMENT—FIRST FAIR ACT RELEASE FY 2007

Commodity Futures Trading Commission	Ms. Sonda R. Owens, (202) 418-5182, http://www.cftc.gov/files/cftc/fairact2007inventory.pdf .
Department of Agriculture	Ms. Ava Lee, (202) 720-1179, http://www.usda.gov/ocfo .
Department of Agriculture (IG)	Mr. Rod DeSmet, (202) 720-6979, http://www.usda.gov/oig/rptsbulletins.htm .
Department of Commerce	Ms. Delia Davis, (202) 482-4560, http://oamweb.osec.doc.gov/CS_doc_inventories.html .
Department of Education	Mr. Gary Weaver, (202) 245-6138, http://www.ed.gov/about/offices/list/ocfo/2007fair.html .
Department of Health and Human Services	Mr. Michael Tulenko, (202) 690-5803, http://www.hhs.gov/ogam/oam/fair .
Department of Homeland Security	Mr. David Childs, (202) 447-5266, http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0504.xml .
Department of Housing and Urban Development	Mr. Kenneth A. Holland, (202) 402-3828, http://www.hud.gov/offices/CFO/FAIRAct/cover.cfm .
Department of Housing and Urban Development (IG)	Ms. Kisha Allen, (202) 402-8186, http://www.hudoig.gov .
Department of Justice	Mr. Larry Silvis, (202) 616-3754, http://www.usdoj.gov/jmd/pe/preface.htm .
Department of Labor	Mr. Larry Clark, (202) 693-4020, http://www.dol.gov/oasam/programs/boc/ .
Department of State	Ms. Valerie Dumas, (703) 516-1506, http://www.state.gov .
Department of the Interior	Mr. Robert Gordon, (202) 219-0727, http://www.doi.gov/perfmgt/competitivesourcing .
Department of the Treasury	Mr. Jim Sullivan, (202) 622-9395, http://www.treas.gov/fair .
Department of Transportation	Mr. Thomas F. Kaplan, (202) 366-7784, http://www.dot.gov/ost/m60/fairact/ .

ATTACHMENT—FIRST FAIR ACT RELEASE FY 2007—Continued

Environmental Protection Agency	Mr. Ed Murphy, (202) 566-4456, http://www.epa.gov/oarm/inventory/2007/2007inventory.htm .
Equal Employment Opportunity Commission	Ms. Doreen Starkes, (202) 663-4240, http://www.eeoc.gov .
Farm Credit Administration	Mr. Philip Shebest, (703) 883-4146, http://www.fca.gov/FCWeb/fairact.htm .
Federal Communications Commission	Ms. Bonita Tingley, (202) 418-0293, http://www.fcc.gov/omd/reports.html .
Federal Energy Regulatory Commission	Ms. Kimberly Fernandez, (202) 502-8302, http://www.ferc.gov .
Federal Maritime Commission	Mr. Peter King, (202) 523-5800, http://www.fmc.gov .
Federal Trade Commission	Ms. Darlene Cossette, (202) 326-3255, http://www.ftc.gov/fairact .
General Services Administration	Mr. Paul Boyle, (202) 501-0324, http://www.gsa.gov .
National Aeronautics and Space Administration	Ms. Ann Sharpe, (202) 358-0484, http://www.competitivesourcing.nasa.gov .
National Archives and Records Administration	Ms. Susan Ashtianie, (301) 837-1490, http://www.archives.gov/about/plansreports/fairact/ .
National Endowment for the Arts	Mr. Laurence M. Baden, (202) 682-5534, http://www.arts.gov .
Office of Federal Housing Enterprise Oversight	Mr. Mark Laponsky, (202) 414-3832, http://www.ofheo.gov .
Office of Personnel Management	Mr. Ronald C. Flom, (202) 606-3207, http://www.opm.gov/procure/fairactinventory/ .
Office of Special Counsel	Ms. Sharyn Danch, (202) 254-3600, http://www.osc.gov .
Small Business Administration	Mr. Richard Brechbiel, (202) 205-6784, http://www.sba.gov/A76 .
Smithsonian Institution	Mr. Ken Johnson, (202) 633-5211, http://www.si.edu .
Social Security Administration	Mr. Dennis Wilhite, (410) 966-6988, http://www.socialsecurity.gov/fair/FAIRact.htm .
United States Holocaust Memorial Museum	Mr. Lawrence Swiader, (202) 488-6579, http://www.ushmm.org/notices/fair_act/2007.ls .

[FR Doc. E8-13500 Filed 6-16-08; 8:45 am]

BILLING CODE 3110-01-P

**OFFICE OF THE UNITED STATES
TRADE REPRESENTATIVE**

[Docket No. WTO/DS375]

**WTO Dispute Settlement Proceeding
Regarding European Communities—
Tariff Treatment of Certain Information
Technology Products****AGENCY:** Office of the United States
Trade Representative.**ACTION:** Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (“USTR”) is providing notice that on May 28, 2008, in accordance with the World Trade Organization (“WTO”) *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), the United States requested consultations with the European Communities (“EC”) and its member States regarding the tariff treatment accorded to set-top boxes with a communication function, flat panel displays, “input or output units,” and facsimile machines. That request may be found at <http://www.wto.org> contained in a document designated as WT/DS375/1. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute, comments should be submitted on or before July 11, 2008 to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically, to

FR0809@ustr.eop.gov, with “EC Information Technology Products (DS375)” in the subject line, or (ii) by fax, to Sandy McKinzy at (202) 395-3640, with a confirmation copy sent electronically to the electronic mail address above, in accordance with the requirements for submission set out below.

FOR FURTHER INFORMATION CONTACT:

Elissa Alben, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC, (202) 395-3150.

SUPPLEMENTARY INFORMATION: USTR is providing notice that the United States has requested consultations with the EC and its member States pursuant to the DSU. If such consultations should fail to resolve the matter and a dispute settlement panel is established pursuant to the DSU, such panel, which would hold its meetings in Geneva, Switzerland, would be expected to issue a report on its findings and recommendations within nine months after it is established.

Major Issues Raised by the United States

On May 28, 2008, the United States requested consultations with the EC and its member States regarding the tariff treatment the EC and its member States accord to set-top boxes with a communication function, flat panel displays, “input or output units,” and facsimile machines.

• *Set-top boxes with a communication function.* On May 7, 2008, the EC published an amendment to the Explanatory Notes to the EC’s Combined Nomenclature (CN), which provides that the duty-free heading CN 8528 71 13 (“set-top boxes with a

communication function”) no longer includes set-top boxes with modems of certain types (e.g., Ethernet modems) or set-top boxes which “incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).” As a result of this exclusion, the EC and its member States impose a duty on these set-top boxes. In addition, the EC added an explanatory note to CN 8521 90 00 indicating that the subheading includes set-top boxes “which incorporate a device performing a recording or reproducing function (for example, a hard disk or DVD drive).” Products classified in CN 8521 90 00 are subject to an MFN duty of 13.9%.

• *Flat panel displays (including LCD, electro luminescence, plasma and other technologies).* On March 31, 2005, the EC published Council Regulation (EC) No. 493/2005, stating that certain flat panel displays using LCD technology that are “capable of reproducing video images from a source other than an automatic data-processing machine” are not covered by the Information Technology Agreement (ITA) or by the Communication on its implementation (Council Decision 97/359/EC of 24 March 1997). On April 26, 2005, the EC issued Commission Regulation (EC) No. 634/2005, stating that flat panel displays with certain attributes, including DVI, would be classified in a dutiable tariff line. On December 29, 2005, the EC published Commission Regulation (EC) No. 2171/2005, which also provided that certain flat panel displays would be classified in a dutiable tariff line if they had certain attributes, including DVI. On December 30, 2006, the EC published amendments to the Explanatory Notes to accompany CN

8471 60 80 and 8528 21 90. Like the regulations, the Explanatory Notes provide that flat panel displays with certain attributes, such as DVI, may not be classified in the duty-free tariff line 8471 60 80 and would be classified in a dutiable tariff line. EC member States assess duties on flat panel displays. Furthermore, while the EC has temporarily suspended the collection of duties on some flat panel displays, it appears to fail to accord tariff treatment that is no less favorable than that provided for in its Schedule.

- *“Input or output units” and facsimile machines.* In 1999, the EC published Commission Regulation (EC) No. 517/99, which provided that certain “output units” would be classified in a tariff line with a 6% MFN duty. On March 9, 2006, the EC published Commission Regulation (EC) No. 400/2006, which classified certain “output units” or facsimile machines, under CN subheading 9009 12 00, as indirect process electrostatic photocopiers. The EC Customs Code Committee also issued a statement indicating that “if a multifunctional device (fax, printer, scanner, copier) has the capability of photocopying in black and white 12 or more pages per minute (A4 format) this indicates that the product is classifiable in heading 9009 as a photocopying apparatus.” Consistent with that statement, on October 31, 2006, the EC published Commission Regulation (EC) No. 1549/2006, which provides that certain “output units” or facsimile machines capable of copying more than 12 monochrome pages per minute are classified in a dutiable tariff line. EC member States assess duties on certain “input or output units” and facsimile machines.

These measures appear to USTR to be inconsistent with the EC’s obligations under Articles II:1(a) and II:1(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and its Schedule and with the member States’ obligations under Articles II:1(a) and II:1(b) of the GATT 1994 and their Schedules, and they appear to nullify or impair benefits accruing to the United States under the GATT 1994.

In addition, with respect to set-top boxes, the Tariff and Statistical Nomenclature Section of the Customs Code Committee delivered favorable opinions with respect to the proposed amendments to the Explanatory Notes contained in 2008/C 112/03 in October 2006 and May 2007, respectively. It did not publish the amended explanatory notes in the EC Official Journal until May 7, 2008. Furthermore, member States were applying duties to set-top

boxes using the approach specified in 2008/C 112/03 prior to May 7, 2008. These actions appear to USTR to be inconsistent with the EC’s obligations under GATT 1994 Articles X:1 and X:2.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in the dispute. Comments should be submitted (i) electronically, to FR0809@ustr.eop.gov, with “EC Information Technology Products (DS375)” in the subject line, or (ii) by fax, to Sandy McKinzy at (202) 395–3640, with a confirmation copy sent electronically to the electronic mail address above.

USTR encourages the submission of documents in Adobe PDF format as attachments to an electronic mail. Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

Comments must be in English. A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the commenter. Confidential business information must be clearly designated as such and “BUSINESS CONFIDENTIAL” must be marked at the top and bottom of the cover page and each succeeding page. Persons who submit confidential business information are encouraged also to provide a non-confidential summary of the information.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitter believes that information or advice may qualify as such, the submitter—

- (1) Must clearly so designate the information or advice;
- (2) Must clearly mark the material as “SUBMITTED IN CONFIDENCE” at the top and bottom of the cover page and each succeeding page; and
- (3) Is encouraged to provide a non-confidential summary of the information or advice.

USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room, which is located at 1724 F Street, NW., Washington, DC 20508. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; if a dispute settlement panel is convened or in the event of an appeal from such a panel, the U.S. submissions, the submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body. The USTR Reading Room is open to the public, by appointment only, from 10 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday. An appointment to review the public file (Docket WTO/DS–375, EC Information Technology Products Dispute) may be made by calling the USTR Reading Room at (202) 395–6186.

Daniel Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E8–13502 Filed 6–16–08; 8:45 am]

BILLING CODE 3190–W8–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

WTO Dispute Settlement Proceeding Regarding Measures Related to Zeroing and Sunset Reviews

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative (“USTR”) is providing notice that pursuant to a request of Japan, the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) has established a compliance panel under the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”) concerning the dispute *United States—Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan*. That request may be found at <http://www.wto.org> contained in a document designated as WT/DS322/27. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceeding, comments should be submitted on or before July 15, 2008.

ADDRESSES: Comments should be submitted (i) electronically, to

FR0808@ustr.eop.gov, Attn: "Japan Zeroing (21.5)" in the subject line, or (ii) by fax, to Sandy McKinzy at 202-395-3640, with a confirmation copy sent electronically to the e-mail address above.

FOR FURTHER INFORMATION CONTACT:

Ronald J. Baumgarten, Jr., Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508, (202) 395-9583.

SUPPLEMENTARY INFORMATION: USTR is providing notice that the DSB has established, at the request of Japan, a dispute settlement compliance panel pursuant to the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Such panel will hold any hearing in Geneva, Switzerland. It is possible that the public will be able to observe the hearing of the panel. If so, then USTR would intend to provide notice on USTR's Web site (under "Opportunities to View Dispute Settlement Hearings" on the Web page http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html) of the public hearing and the means by which the public may observe.

Major Issues Raised by Japan

In Japan's request for the establishment of a panel in connection with the dispute *United States—Measures Relating to Zeroing and Sunset Reviews; Recourse to Article 21.5 of the DSU by Japan*, Japan challenges the following:

- The consistency with DSU Articles 17.14, 21.1, and 21.3 of the continued use of zeroing in transaction-to-transaction comparisons in original investigations, in any comparison methodology in periodic reviews, and in any comparison methodology in new shipper reviews; Japan also alleges that the failure to eliminate zeroing in these contexts is a breach of Articles 2.4, 2.4.2, 9.3, and 9.5 of the Antidumping Agreement and Articles VI:1 and VI:2 of the GATT 1994;

- The alleged failure to eliminate zeroing in eight periodic reviews, and, since the expiration of the implementation deadline, through the eight periodic reviews at issue and related instructions and notices, the continued imposition, collection, and/or assessment of antidumping duties in excess of the proper margin of dumping; Japan claims that the failure to eliminate zeroing in these periodic reviews is inconsistent with Articles 17.14, 21.1, and 21.3 of the DSU, Articles 2.4 and

9.3 of the Antidumping Agreement, and Article VI:2 of the GATT 1994;

- The consistency of alleged measures taken to comply with the DSB's recommendations and rulings with Articles 2.4, 9.2, and 9.3 of the Antidumping Agreement and Article II:1(a), II:1(b), VI:1, and VI:2 of the GATT 1994;
- The alleged failure by the United States to take any action to bring the sunset review determination of November 4, 1999 regarding the antidumping duty order on Anti-Friction Bearings from Japan, as well as the sunset review determination of the same order of May 4, 2006, into conformity with its WTO obligations; Japan alleges that as a result, the United States acts inconsistently with Articles 17.14, 21.1, and 21.3 of the DSU, and Article 11.3 of the Antidumping Agreement.

Public Comment: Requirements for Submissions

Interested persons are invited to submit written comments concerning the issues raised in this dispute. Persons submitting comments may either send one copy by fax to Sandy McKinzy at (202) 395-3640, or transmit a copy electronically to FR0808@ustr.eop.gov, with "Japan Zeroing (21.5)" in the subject line. For documents sent by fax, USTR requests that the submitter provide a confirmation copy to the electronic mail address listed above.

USTR encourages the submission of documents in Adobe PDF format, as attachments to an electronic mail.

Interested persons who make submissions by electronic mail should not provide separate cover letters; information that might appear in a cover letter should be included in the submission itself. Similarly, to the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

A person requesting that information contained in a comment submitted by that person be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. Confidential business information must be clearly designated as such and the submission must be marked "BUSINESS CONFIDENTIAL" at the top and bottom of the cover page and each succeeding page of the submission.

Information or advice contained in a comment submitted, other than business confidential information, may be determined by USTR to be confidential

in accordance with section 135(g)(2) of the Trade Act of 1974 (19 U.S.C. 2155(g)(2)). If the submitting person believes that information or advice may qualify as such, the submitting person—

(1) Must clearly so designate the information or advice;

(2) Must clearly mark the material as "SUBMITTED IN CONFIDENCE" at the top and bottom of each page of the cover page and each succeeding page; and

(3) Is encouraged to provide a non-confidential summary of the information or advice.

Pursuant to section 127(e) of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. 3537(e)), USTR will maintain a file on this dispute settlement proceeding, accessible to the public, in the USTR Reading Room, which is located at 1724 F Street, NW., Washington, DC 20508. The public file will include non-confidential comments received by USTR from the public with respect to the dispute; for the dispute settlement compliance panel or in the event of an appeal from such a panel, the U.S. submissions; the submissions, or non-confidential summaries of submissions, received from other participants in the dispute; the report of the panel; and, if applicable, the report of the Appellate Body. An appointment to review the public file (Docket No. WT/DS-322) may be made by calling the USTR Reading Room at (202) 395-6186. The USTR Reading Room is open to the public from 9:30 a.m. to noon and 1 p.m. to 4 p.m., Monday through Friday.

Daniel E. Brinza,

Assistant United States Trade Representative for Monitoring and Enforcement.

[FR Doc. E8-13518 Filed 6-16-08; 8:45 am]

BILLING CODE 3190-W8-P

OFFICE OF PERSONNEL MANAGEMENT

[OPM 1153]

Proposed Collection: Comment Request for Review of an Expiring Information Collection: Claim for Unpaid Compensation of Deceased Civilian Employee

AGENCY: U.S. 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 U.S. Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review

of an expiring information collection. Standard Form 1153, Claim for Unpaid Compensation for Deceased Civilian Employee, is used to collect information from individuals who have been designated as beneficiaries of the unpaid compensation of a deceased Federal employee or who believe that their relationship to the deceased entitles them to receive the unpaid compensation of the deceased Federal employee. OPM needs this information in order to adjudicate the claim and properly assign a deceased Federal employee's unpaid compensation to the appropriate individual(s).

The proposed revision to the expiring information collection responds to suggestions received from users. Part B, 1. is changed to clarify a beneficiary may include a legal entity or estate as provided for in 5 CFR 178.203(c) and to provide instructions if more room is needed to list designated beneficiaries.

Approximately 3,000 SF 1153 forms are submitted annually. It takes approximately 15 minutes to complete the form. The annual estimated burden is 750 hours.

Comments are particularly invited on:

- Whether this collection of information is necessary for the proper performance of functions of OPM, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection is accurate, and based on valid assumptions and methodology; and
- Ways in which we can minimize the burden of the collection of information on those who are to respond, through use of the appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey on (202) 606-8358, FAX (202) 418-3251, or e-mail to mbtoomey@opm.gov. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—Robert D. Hendler, Classification and Pay Claim Program Manager, Center for Merit System Accountability, Division for Human Capital Leadership and Merit System Accountability, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6484, Washington, DC 20415.

U.S. Office of Personnel Management.

Howard Weizmann,
Deputy Director.

[FR Doc. E8-13516 Filed 6-16-08; 8:45 am]

BILLING CODE 6325-43-P

OFFICE OF PERSONNEL MANAGEMENT

[OPM FORM 1673; OMB No. 3206-0232]

Proposed Collection: Comment Request for Review of an Expiring Information Collection: Procedures for Submitting Compensation and Leave Claims

AGENCY: U.S. 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 U.S. Office of Personnel Management (OPM) intends to submit to the Office of Management and Budget (OMB) a request for review of a revised information collection. OPM Form 1673, Procedures for Submitting Compensation and Leave Claims, is used to collect information from current and former Federal civilian employees who are submitting a claim for compensation and/or leave. OPM needs this information in order to adjudicate the claim.

Approximately 50 claims are submitted annually. It takes approximately 60 minutes to complete the form. The annual estimated burden is 50 hours.

Comments are particularly invited on:

- Whether this collection of information is necessary for the proper performance of functions of OPM, and whether it will have practical utility;
- Whether our estimate of the public burden of this collection is accurate, and based on valid assumptions and methodology; and
- Ways in which we can minimize the burden of the collection of information on those who are to respond, through use of the appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey at (202) 606-8358, FAX (202) 418-3251, or e-mail to mbtoomey@opm.gov. Please include a mailing address with your request.

DATES: Comments on this proposal should be received within 60 calendar days from the date of this publication.

ADDRESSES: Send or deliver comments to—Robert D. Hendler, Classification and Pay Claim Program Manager, Center for Merit System Accountability, Division for Human Capital Leadership and Merit System Accountability, U.S. Office of Personnel Management, 1900 E Street, NW., Room 6484, Washington, DC 20415.

U.S. Office of Personnel Management.

Howard Weizmann,

Deputy Director.

[FR Doc. E8-13517 Filed 6-16-08; 8:45 am]

BILLING CODE 6325-43-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57945; File No. SR-NASDAQ-2008-051]

Self-Regulatory Organizations; NASDAQ Stock Market, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Listing and Trading on the Exchange of Options on the SPDR Gold Trust

June 10, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 3, 2008, the NASDAQ Stock Market, LLC ("NASDAQ" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. NASDAQ filed the proposal pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to amend certain NASDAQ Rules to enable the listing and trading on the Exchange of options on the SPDR Gold Trust. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nasdaq.com>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange states that the purpose of the proposed rule change is to permit the listing and trading of options on the SPDR Gold Trust.

Currently, Chapter IV, Section 3(i) of the NASDAQ Options Rules permits only certain Fund Shares (also referred to herein as exchange traded funds ("ETFs")) to underlie options traded on the Exchange. Specifically, to be eligible as an underlying security for options traded on the Exchange, an ETF must represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as "national market" securities, and that hold portfolios of securities comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities). The proposed rule change would expand the types of ETFs that may be approved for options trading on the Exchange to include the SPDR Gold Trust.

The Exchange states that apart from allowing the SPDR Gold Trust to be an underlying for options traded on the Exchange as described above, the listing standards for ETFs would remain unchanged from those that apply under current Exchange rules. ETFs on which options may be listed and traded would still have to be listed and traded on a national securities exchange and satisfy the other listing standards set forth in Chapter IV, Section 3(i) of the NASDAQ Options Rules.

Specifically, in addition to satisfying the aforementioned listing requirements, Fund Shares would have to: (1) Meet the criteria and standards set forth in paragraphs (a) and (b) of Chapter IV, Section 3; or (2) be available for creation or redemption each business day from or through the Fund in cash or in kind at a price related to net asset value, and the Fund is obligated to issue Fund Shares in a

specified aggregate number even if some or all of the securities required to be deposited have not been received by the Fund, subject to the condition that the person obligated to deposit the securities has undertaken to deliver the securities as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the Fund, all as described in the Fund's prospectus.

The Exchange proposes that the current continued listing standards for options on ETFs would apply to options on the SPDR Gold Trust. Specifically, under Chapter IV, Section 4(h) of the NASDAQ Options Rules, options on Fund Shares may be subject to the suspension of opening transactions as follows: (1) Following the initial twelve-month period beginning upon the commencement of trading of the Fund Shares, there are fewer than 50 record and/or beneficial holders of the Fund Shares for 30 or more consecutive trading days; (2) the value of the index or portfolio of securities on which Fund Shares are based is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable.

Additionally, the SPDR Gold Trust would not be deemed to meet the requirements for continued approval, and the Exchange would not open for trading any additional series of option contracts of the class covering the SPDR Gold Trust, if the SPDR Gold Trust ceases to be an "NMS stock" as provided for in paragraph (b)(v) of Chapter IV, Section 4 of the NASDAQ Options Rules or if the SPDR Gold Trust is halted from trading on its primary market. The Exchange believes that the addition of the SPDR Gold Trust to Chapter IV, Section 3(i) of the NASDAQ Options Rules would not have any effect on the rules pertaining to position and exercise limits⁵ or margin.⁶

The Exchange represents that its surveillance procedures applicable to trading in options on the SPDR Gold Trust would be similar to those applicable to all other options on other ETFs currently traded on the Exchange. Also, the Exchange may obtain information from the New York Mercantile Exchange, Inc. (a member of the Intermarket Surveillance Group) related to any financial instrument traded there that is based, in whole or

in part, upon an interest in, or performance of, gold.

2. Statutory Basis

The Exchange believes that amending its rules to accommodate the listing and trading of options on the SPDR Gold Trust will benefit investors by providing them with valuable risk management tools. Accordingly, NASDAQ believes that the proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁸ in particular, in that it is designed to remove impediments to and perfect the mechanism of a free and open market in a manner consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange states that written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and Rule 19b-4(f)(6) thereunder.¹⁰

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

⁵ See NASDAQ Options Rules, Chapter III, Sections 7, Position Limits, and 9, Exercise Limits.

⁶ See NASDAQ Options Rule Chapter XIII, Section 3, Margin Requirements.

designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that the Exchange can list and trade the Shares immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest to permit the listing and trading of options on the SPDR Gold Trust without further delay.¹¹ The Commission notes the proposal is substantively identical to proposals that were recently approved by the Commission, and does not raise any new regulatory issues.¹² For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2008-051 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.
- All submissions should refer to File Number SR-NASDAQ-2008-051. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² See Securities Exchange Act Release No. 57894 (May 30, 2008) (SR-Amex-2008-15; SR-CBOE-2005-11; SR-ISE-2008-12; SR-NYSEArca-2008-52; and SR-Phlx-2008-17) (approving the listing and trading of options on the SPDR Gold Trust).

only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2008-051 and should be submitted on or before July 8, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8-13499 Filed 6-16-08; 8:45 am]

BILLING CODE 8010-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11282 and # 11283]

Mississippi Disaster # MS-00020

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Mississippi dated 06/11/2008.

Incident: Severe Storms and Flooding.
Incident Period: 05/28/2008.

DATES: *Effective Date:* 06/11/2008.

Physical Loan Application Deadline Date: 08/11/2008.

Economic Injury (EIDL) Loan Application Deadline Date: 03/11/2009.

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 Administrator's disaster declaration, 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:

Yazoo.

Contiguous Counties:

Mississippi: Attala, Hinds, Holmes, Humphreys, Issaquena, Madison, Sharkey, Warren.

The Interest Rates are:

	Percent
Homeowners With Credit Available Elsewhere	5.375.
Homeowners Without Credit Available Elsewhere	2.687.
Businesses With Credit Available Elsewhere	8.000.
Businesses & Small Agricultural Cooperatives Without Credit Available Elsewhere	4.000.
Other (Including Non-Profit Organizations) With Credit Available Elsewhere	5.250.
Businesses And Non-Profit Organizations Without Credit Available Elsewhere	4.000.

The number assigned to this disaster for physical damage is 11282 6 and for economic injury is 11283 0.

The State which received an EIDL Declaration # is Mississippi.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: June 11, 2008.

Jovita Carranza,

Acting Administrator.

[FR Doc. E8-13647 Filed 6-16-08; 8:45 am]

BILLING CODE 8025-01-P

SMALL BUSINESS ADMINISTRATION

Telegraph Hill Partners SBIC, L.P., License No. 09/79-0453; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Telegraph Hill Partners SBIC, L.P., 360 Post Street, Suite 601, San Francisco, CA, 94108, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection

¹³ 17 CFR 200.30-3(a)(12).

with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financials which Constitute Conflicts of Interest of the Small Business Administration ("SBA") Rules and Regulations (13 CFR 107.730). Telegraph Hill Partners SBIC, L.P. proposes to provide equity/debt security financing to Interface Associates Corporation, 27752 El Lazo Road, Laguna Niguel, CA 92677. The financing is contemplated for working capital and general corporate purposes.

The financing is brought within the purview of § 107.730(a)(1) of the Regulations because Telegraph Hill Partners II, L.P., THP II Affiliates Fund, L.P., all Associates of Telegraph Hill Partners SBIC, L.P., own more than ten percent of Interface Associates Corporation.

Therefore, this transaction is considered a financing of an Associate requiring an exemption. Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

May 7, 2008.

A. Joseph Shepard,

Associate Administrator for Investment.

[FR Doc. E8-13597 Filed 6-16-08; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF STATE

[Public Notice 6261]

60-Day Notice of Proposed Information Collection: Form DS-3057, Medical Clearance Update, OMB 1405-0131

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Medical Clearance Update.
- *OMB Control Number:* 1405-0131.
- *Type of Request:* Extension of Currently Approved Collection.
- *Originating Office:* Office of Medical Services, M/MED/C/MC.
- *Form Number:* DS-3057.

- *Respondents:* Foreign Service Officers, State Department Employees, Other Government Employees and Family Members.

- *Estimated Number of Respondents:* 9,800 per year.

- *Estimated Number of Responses:* 9,800 per year.

- *Average Hours Per Response:* 0.5 hours per response.

- *Total Estimated Burden:* 4,900 hours.

- *Frequency:* On occasion.

- *Obligation to Respond:* Mandatory.

DATES: The Department will accept comments from the public up to 60 days from June 17, 2008.

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

- *E-mail:* herringED@state.gov. You must include the DS form number, information collection title, and OMB control number in the subject line of your message.

- *Mail (paper, disk, or CD-ROM submissions):* Department of State, Office of Medical Services, SA-1 Room L-101, 2401 E St., NW., Washington, DC 20522-0101.

- *Fax:* 202-663-3483.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to Ermie D. Herring, Department of State, Office of Medical Services, SA-1 Columbia Plaza Room L101, 2401 E St., NW., Washington, DC 20052-0101, who may be reached on 202-663-1229 or herringED@state.gov.

SUPPLEMENTARY INFORMATION: We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper performance of our functions.
- Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

Form DS-3057 is designed to collect medical information to provide medical

providers with current and adequate information to base decisions on whether a federal employee and family members will have sufficient medical resources at a diplomatic mission abroad to maintain the health and fitness of the individual and family members.

Methodology

The information collected will be collected through the use of an electronic forms engine or by hand written submission using a pre-printed form.

Dated: June 10, 2008.

Sharon Ludan,

Executive Director, Department of State, Office of Medical Services.

[FR Doc. E8-13621 Filed 6-16-08; 8:45 am]

BILLING CODE 4710-36-P

DEPARTMENT OF STATE

[Public Notice 6262]

In the Matter of the Review of the Designation of Lashkar i Jhangvi as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter, and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the circumstances that were the basis for the 2003 designation of Lashkar i Jhangvi as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation.

Therefore, I hereby determine that the designation of Lashkar i Jhangvi as a foreign terrorist organization, pursuant to Section 219 of the Immigration and Nationality Act, as amended (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register**.

Dated: June 9, 2008.

John D. Negroponte,

Deputy Secretary of State, Department of State.

[FR Doc. E8-13620 Filed 6-16-08; 8:45 am]

BILLING CODE 4710-10-P

DEPARTMENT OF TRANSPORTATION**Surface Transportation Board****[STB Docket No. AB-43 (Sub-No. 181X)]****Illinois Central Railroad Company—
Abandonment Exemption—in Ballard
County, KY**

Illinois Central Railroad Company (IC),¹ has filed a verified notice of exemption under 49 CFR Part 1152 Subpart F—*Exempt Abandonments* to abandon approximately 1.66 miles of its rail line between mileposts 364.54 and 366.20, in Wickliffe, Ballard County, KY.² The line traverses United States Postal Service Zip Code 42087.

IC has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental report), 49 CFR 1105.8 (historic report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 17, 2008, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,³

formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),⁴ and trail use/rail banking requests under 49 CFR 1152.29 must be filed by June 27, 2008. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by July 7, 2008, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to IC's representative: Thomas J. Healey, 17641 S. Ashland Ave., Homewood, IL 60430-4381.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

IC has filed both an environmental report and a historic report that address the effects, if any, of the abandonment on the environment and historic resources. SEA will issue an environmental assessment (EA) by June 20, 2008. Interested persons may obtain a copy of the EA by writing to SEA (Room 1100, Surface Transportation Board, Washington, DC 20423-0001) or by calling SEA, at (202) 245-0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), IC shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by IC's filing of a notice of consummation by June 17, 2009, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>

Decided: June 6, 2008.

exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

⁴ Each OFA must be accompanied by the filing fee, which currently is set at \$1,300. See 49 CFR 1002.2(f)(25).

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Anne K. Quinlan,
Acting Secretary.

[FR Doc. E8-13328 Filed 6-12-08; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION**Surface Transportation Board****[STB Docket No. AB-33 (Sub-No. 266X)]****Union Pacific Railroad Company—
Abandonment Exemption—in Maricopa
County, AZ**

On May 28, 2008, Union Pacific Railroad Company (UP) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903 to abandon a 2.91-mile line of railroad known as the Litchfield Industrial Lead, extending from milepost 889.34 (Litchfield Junction) to milepost 892.25 (Litchfield Park) in Maricopa County, AZ. The line traverses U.S. Postal Service Zip Codes 85338 and 85395.

The line does not contain federally granted rights-of-way. Any documentation in UP's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by September 15, 2008.

Any offer of financial assistance (OFA) under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption. Each offer must be accompanied by a \$1,300 filing fee. See 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking under 49 CFR 1152.29 will be due no later than July 7, 2008. Each trail use request must be accompanied by a \$200 filing fee. See 49 CFR 1002.2(f)(27).

All filings in response to this notice must refer to STB Docket No. AB-33 (Sub-No. 266X), and must be sent to: (1) Surface Transportation Board, 395 E Street, SW., Washington, DC 20423-0001, and (2) Gabriel S. Meyer,

¹ IC is a wholly owned subsidiary of Canadian National Railway Company.

² IC states that the involved line parallels its historic main line and did not provide access to any new shippers upon its acquisition, and that IC has been operating the line as a passing siding for several decades. IC indicates that this filing was made out of an abundance of caution as to whether abandonment authority or an exemption is required prior to removal of the track.

³ The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the

Assistant General Attorney, 1400 Douglas Street, STOP 1580, Omaha, NE 68179. Replies to UP's petition are due on or before July 7, 2008.

Persons seeking further information concerning abandonment procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or refer to the full abandonment or discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Section of Environmental Analysis (SEA) at (202) 245-0305. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

An environmental assessment (EA) (or environmental impact statement (EIS), if necessary) prepared by SEA will be served upon all parties of record and upon any agencies or other persons who commented during its preparation. Other interested persons may contact SEA to obtain a copy of the EA (or EIS). EAs in these abandonment proceedings normally will be made available within 60 days of the filing of the petition. The deadline for submission of comments on the EA will generally be within 30 days of its service.

Board decisions and notices are available on our Web site at <http://www.stb.dot.gov>.

Decided: June 5, 2008.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8-13058 Filed 6-16-08; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1099-C

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is

soliciting comments concerning Form 1099-C, Cancellation of Debt.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622-3634, or at Internal Revenue Service, room 6516, 1111 Constitution Avenue, NW., Washington, DC 20224 or through the Internet at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION: Title: Cancellation of Debt.

OMB Number: 1545-1424.

Form Number: 1099-C.

Abstract: Form 1099-C is used by Federal government agencies, financial institutions, and credit unions to report the cancellation or forgiveness of a debt of \$600 or more, as required by section 6050P of the Internal Revenue Code. The IRS uses the form to verify compliance with the reporting rules and to verify that the debtor has included the proper amount of canceled debt in income on his or her income tax return.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and the Federal government.

Estimated Number of Responses: 647,993.

Estimated Time Per Response: 10 min.

Estimated Total Annual Burden

Hours: 110,159.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of

information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13596 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8582

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8582, Passive Activity Loss Limitations.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Shear, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622-3634, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Passive Activity Loss Limitations.

OMB Number: 1545–1008.

Form Number: 8582.

Abstract: Under Internal Revenue Code section 469, losses from passive activities, to the extent that they exceed income from passive activities, cannot be deducted against nonpassive income. Form 8582 is used to figure the passive activity loss allowed and the loss to be reported on the tax returns.

Current Actions: There are no major changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, and farms.

Estimated Number of Respondents: 2,414,854.

Estimated Time Per Respondent: 4 hours, 43 minutes.

Estimated Total Annual Burden Hours: 11,373,963.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8–13598 Filed 6–16–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY**Internal Revenue Service****Proposed Collection; Comment Request for Form 8453–F and Form 8879–F**

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8453–F, U.S. Estate of Trust Income Tax Declaration and Signature for Electronic and Magnetic Made Filing and Form 8879–F, IRS e-file Signature Authorization for Form 1041.

DATES: Written comments should be received on or before August 18, 2008, to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: U.S. Estate of Trust Income Tax Declaration and Signature for Electronic and Magnetic Media Filing.

OMB Number: 1545–0967.

Form Number: 8453–F.

Abstract: This form is used to secure taxpayer signatures and declarations in conjunction with electronic or magnetic media filing of trust and fiduciary income tax returns, Form 8453–F, together with the electronic or magnetic media transmission, will comprise the taxpayer's income tax return (Form 1041).

Title: IRS e-file Signature Authorization for Form 1041.

OMB Number: 1545–0967.

Form Number: 8879–F.

Abstract: This form has been created to provide e-file signature authorization for Form 1041 to foster IRS policy promoting e-filing of returns. The form is necessary to support modernized e-file initiatives. This form will reduce paper processing and handling of forms 1041, schedule K–1 (Form 1041), and related forms and schedules.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and individuals, or households.

Estimated Number of Respondents: 2,000.

Estimated Time Per Respondent: 53 minutes.

Estimated Total Annual Burden Hours: 1,750.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13600 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8924

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8924, Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral Interests.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622-3634, at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral Interests.

OMB Number: 1545-2099.

Form Number: Form 8924.

Abstract: Form 8924, Excise Tax on Certain Transfers of Qualifying Geothermal or Mineral Interests, is required by Section 403 of the Tax Relief and Health Care Act of 2006 which imposes an excise tax on certain transfers of qualifying mineral or geothermal interests.

Current Actions: There is no change in the paperwork burden previously approved by OMB. This form is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Respondent: 5 hours 33 minutes.

Estimated Total Annual Burden Hours: 555.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13602 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8810

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8810, Corporate Passive Activity Loss and Credit Limitations.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, at (202) 622-3634, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Corporate Passive Activity Loss and Credit Limitations.

OMB Number: 1545-1091.

Form Number: 8810.

Abstract: Under Internal Revenue Code section 469, losses and credits from passive activities, to the extent they exceed passive income (or, in the case of credits, the tax attributable to net passive income), are not allowed. Form 8810 is used by personal service corporations and closely held corporations to figure the passive activity loss and credits allowed and the amount of loss and credit to be reported on their tax return.

Current Actions: There are no changes being made to Form 8810 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 100,000.

Estimated Time per Response: 37 hr., 29 min.

Estimated Total Annual Burden Hours: 3,749,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection

of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13603 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 5498-SA

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 5498-SA, HSA, Archer MSA, or Medicare Advantage MSA Information.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue

Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the form and instructions should be directed to R. Joseph Durbala, (202) 622-3634, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: HSA, Archer MSA, or Medicare Advantage MSA Information.

OMB Number: 1545-1518.

Form Number: 5498-SA.

Abstract: This form is used to report contributions to a medical savings account as required by Internal Revenue Code section 220(h).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Responses: 41,105.

Estimated Time Per Response: 10 min.

Estimated Total Annual Burden

Hours: 6,988.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation,

maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13605 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[CO-25-96]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, CO-25-96 (TD 8824), Limitations on Net Operating Loss Carry-Forwards and Certain Built-In Losses and Credit Following an Ownership Change of a Consolidated Group.

DATES: Written comments should be received on or before August 18, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the regulation should be directed to R. Joseph Durbala, at (202) 622-3634, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at RJoseph.Durbala@irs.gov.

SUPPLEMENTARY INFORMATION:

Title: Limitations on Net Operating Loss Carryforwards and Certain Built-in Losses and Credits Following an Ownership Change of a Consolidated Group.

OMB Number: 1545-1218.

Regulation Project Number: CO-25-96.

Abstract: Section 1502 provides for the promulgation of regulations with

respect to corporations that file consolidated income tax returns. Section 382 limits the amount of income that can be offset by loss carryovers and credits after an ownership change. These final regulations provide rules for applying section 382 to groups of corporations that file a consolidated return.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 12,054.

Estimated Time Per Respondent: 20 minutes.

Estimated Total Annual Burden Hours: 662.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper

performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: June 5, 2008.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. E8-13608 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P

Corrections

Federal Register

Vol. 73, No. 117

Tuesday, June 17, 2008

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF EDUCATION

Federal Pell Grant, Academic Competitiveness Grant, National Science and Mathematics Access To Retain Talent Grant, Federal Perkins Loan, Federal Work-Study, Federal Supplemental Educational Opportunity Grant, Federal Family Education Loan, and William D. Ford Federal Direct Loan Programs

Correction

In notice document E8-11953 beginning on page 30904 in the issue of

Thursday, May 29, 2008 make the following correction:

On page 30906, in the third column, in the last line “which” should read “which considers both income and assets.”.

[FR Doc. Z8-11953 Filed 6-16-08; 8:45 am]

BILLING CODE 1505-01-D



Federal Register

**Tuesday,
June 17, 2008**

Part II

National Credit Union Administration

12 CFR Part 701

**Organization and Operations of Federal
Credit Unions; Proposed Rule**

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AD48

Organization and Operations of Federal Credit Unions

AGENCY: National Credit Union
Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: NCUA seeks public comment on four proposals to modify its Chartering and Field of Membership Manual to update and clarify the process of approving credit union service to “underserved areas.” The first proposal clarifies the procedure for establishing that an “underserved area” qualifies as a local community. The second addresses the application of the economic distress criteria that determine whether an area combining multiple geographic units is sufficiently “distressed” to qualify as “underserved.” The third would update the documentation and clarify the scope requirements for demonstrating that a proposed area has “significant unmet needs” for loans and applicable financial services. The final proposal recognizes that meaningful data from NCUA and the federal banking agencies will be available to assess whether an area is “underserved by other depository institutions.”

DATES: Comments must be received on or before August 18, 2008.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

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

- *NCUA Web Site:* http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html. Follow the instructions for submitting comments.

- *E-mail:* Address to regcomments@ncua.gov. Include “[Your name] Comments on Proposed Rule Part 701.1” in the e-mail subject line.

- *Fax:* (703) 518-6319. Use the subject line described above for e-mail.

- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428.

- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT:

Michael J. McKenna, Deputy General Counsel; John K. Ianno, Associate

General Counsel; or Steven W. Wideman, Trial Attorney, Office of General Counsel, 1775 Duke Street, Alexandria, Virginia 22314 or telephone (703) 518-6540.

SUPPLEMENTARY INFORMATION:

I. Background

In 1998, Congress enacted the Credit Union Membership Access Act (CUMAA), Public Law 105-219, 112 Stat. 914 (1998). Among other things, CUMAA authorized the NCUA Board to allow multiple common bond credit unions to serve members residing in “underserved areas,” provided the credit union establishes and maintains a facility there. 12 U.S.C. 1759(c)(2). For an area to be “underserved,” CUMAA requires the NCUA Board to determine that a local community, neighborhood or rural district is an “investment area” as defined in the Community Development Banking and Financial Institutions Act of 1994 (“CDFI Act”), 12 U.S.C. 4702(16), and also that it is “underserved * * * by other depository institutions.”¹ 12 U.S.C. 1759(c)(2)(A).

The CDFI Act defines an “investment area” as a geographic area that “encompasses or is located in an empowerment zone or enterprise community designated under [26 U.S.C. 1391]”; or that “meets the objective criteria of economic distress developed by the [Community Development Financial Institutions] Fund” (“CDFI Fund”) and also “has significant unmet needs for loans or equity investments.” 12 U.S.C. 4702(16). The Fund established “criteria of economic distress” and implemented the “significant unmet needs” criterion by regulation. 12 CFR 1805.201(d) and (e) (1998); 12 CFR 1805.104(dd) (1998).

To reflect the enactment of CUMAA and its introduction of “underserved areas,” NCUA revised its Chartering and Field of Membership Manual (“Chartering Manual”) in 1998, replacing the previous authority to serve low-income communities and associations. 12 CFR 701.1 (1999). As revised, the Chartering Manual implemented the statutory definition of “underserved area” and incorporated the then-existing CDFI criteria for establishing a “distressed” area. 63 FR 71998 (December 30, 1998). Those criteria addressed median family income, poverty, unemployment, distressed housing, county population loss, and significant unmet needs for loans and equity investments. 63 FR at 72015, 72042.

¹ A “depository institution” is defined to include insured credit unions. 12 U.S.C. 461(b)(1)(A)(iv).

Anticipating the possibility of periodic additions to the then-existing distress criteria, the Chartering Manual incorporated by reference other criteria that the CDFI Fund might establish in the future. 67 FR 20013, 20017 (April 24, 2002). The distress criteria that apply today are the same ones that applied in 1998, except that the “distressed housing” criterion has been replaced by county “net migration loss.” 12 CFR 1805.201(b)(3)(D)(5) (2008).

The proposed rule (Interpretive Ruling and Policy Statement 08-2) is intended to update and clarify the existing process of approving credit union service to “underserved areas.” Public comments on the proposed modifications are welcome. To facilitate the consideration of these comments, the NCUA Board urges commenters to organize and label their comments to correspond to the topics and issues discussed below.

II. Discussion of Proposed Rule

A. Definition of a Local Community

To be eligible for approval as an “underserved area,” a proposed area first must qualify as a “local community, neighborhood or rural district” (“local community”). 12 U.S.C. 1759(c)(2)(A); S. Rep. No. 193, 105th Cong., 2d Sess. 6 (1998); H.R. Rep. No. 105-472, 105th Cong., 2d Sess. 19 (1998). The Chartering Manual’s criteria for establishing a “local community” for “underserved area” purposes deviates somewhat from the “well-defined local community” criteria elsewhere in the Manual.

When a proposed area qualifies as a “presumptive community” (multiple political jurisdictions with a total population of 500,000 or less; or an area within a Metropolitan Statistical Area with a population of 1 million or less) the Chartering Manual’s chapter on community chartering requires a credit union to complete the presumption by submitting a letter “describing how the area meets the standards for community interaction and/or common interests” within in the proposed area.² *Id.* Ch. 2, § V.A.1. The chapter on “underserved areas” does not require an equivalent letter to establish that a proposed “underserved area” is a “presumptive community.” Manual, Ch. 3, § III.A.

The disparity concerning the letter supporting a “presumptive community” provides an opportunity to reconsider

² When the letter supporting a “presumptive community” fails to present sufficient evidence of community interaction and/or common interests, the credit union may be required to provide a full analysis to support that the area is a well-defined local community. Manual, Ch. 2 § V.A.1.

whether the letter is needed at all to establish a local community in the context of either a community charter or an “underserved area.” The original purpose of the letter in the community charter context was to supplement the record with qualitative evidence of interaction and common interests within the community. The NCUA Board invites public comment on whether a supporting letter is necessary to further that purpose when a multiple group credit union seeks to add an “underserved area.” To ensure consistency, the proposed rule revises the chapter on “underserved areas” to incorporate the definition of “well defined local community” set forth in the chapter on community chartering. That definition will be revised depending on the Board’s evaluation of the comments received on the letter requirement.

B. Criteria of Economic Distress

The proposed rule addresses the practical incompatibility between credit union service to a local community and the CDFI Fund’s economic distress criteria that apply to determine whether a proposed area is an “investment area,” thus qualifying it as “underserved.” To qualify as a “local community, neighborhood or rural district,” the proposed area must be a “single, well-defined” area so as to facilitate the mandatory interaction and common interests that signify a common bond among its residents. 65 FR 37065, 37072, 37082 (June 13, 2000). This has always meant that the parts of a proposed area must be contiguous, regardless of any other prerequisites for credit union service that apply. Because of this restriction, NCUA evaluates a “local community, neighborhood or rural district”—whether seeking approval as an “underserved area” or otherwise—strictly as a single, unified entity.

In several respects, the “single unified entity” approach is incompatible with the “geographic units” the CDFI Fund utilizes to apply its economic distress criteria. First, the areas that the CDFI Fund is asked to certify as “investment areas” conform from the outset to prescribed census units (e.g., tracts or blocks) or political subdivisions, allowing each such geographic unit or group of units to be treated as a separate “investment area.” 12 CFR 1805.201(b)(3)(ii)(B) (2008). In contrast, an “underserved area” that a credit union proposes to add may be drawn without regard to prescribed geographic units or political boundaries, reflecting the area’s status as a single unified entity (*i.e.*, a well-defined community).

Second, the proposed area’s boundaries may be nontraditional, consisting of a riverbank, a railroad line or an interstate highway, for example. 63 FR at 72038–72039. Further, the proposed area may even bisect the traditional geographic units and political subdivisions upon which the CDFI Fund relies. Finally, when evaluating an “investment area,” the CDFI Fund considers only the number of persons who reside there. In contrast, when deciding whether to add a proposed area to its field of membership, a credit union considers potential membership from among the persons who reside, work, worship or attend school there. These distinctions tend to complicate the translation of a proposed “underserved area” into the geographic units envisioned by the CDFI Fund’s economic distress criteria.

In the decade since CUMAA, a plethora of economic and demographic data has become available over the Internet, and there has been a manifold increase in the number of people who have Internet access. Convenient on-line access to relevant data has considerably simplified the task of translating an “underserved area” into the geographic units that the CDFI Fund uses to apply the economic distress criteria that define an “investment area.” Therefore, this proposed rule revisits NCUA’s rules for qualifying an “underserved area” primarily to update and conform its approach to present circumstances.

As a preliminary matter, a proposed area qualifies as an “investment area” without regard to the economic distress and “significant unmet needs” criteria if it is presently designated an “Empowerment Zone” or an “Enterprise Community.” 12 CFR 1805.201(b)(3)(ii)(A)(3). Empowerment Zones and Enterprise Communities were designated by the U.S. Department of Housing and Urban Development and the U.S. Department of Agriculture between 1993 and 1996. These designations have since largely expired,³ so most proposed areas will not be able to bypass the economic distress and “significant unmet needs” criteria of an “investment area.”

For proposed areas that do not benefit from an Empowerment Zone or Enterprise Community designation, the availability of certain on-line resources will make it easier to apply the economic distress criteria. The on-line resources that correspond to each step

are discussed below and the internet address of each is cited in the footnotes. In any case, it is useful to understand in a step-by-step progression how the economic distress criteria operate.

Metro or Non-Metro Location. The initial step is to determine whether a proposed area is located within or outside a “Metropolitan Area” as designated by the Office of Management and Budget (“OMB”). 12 CFR 1805.104(ff). In practice, the CDFI Fund deems a proposed area to be located within a Metropolitan Area if it is located within an OMB-designated “Metropolitan Statistical Area” (“MSA”), and vice versa. 44 U.S.C. 3504(e)(3)(E). OMB updates its MSA designations annually; however, to ensure consistency with the CDFI Fund’s distress criteria, which are measured according to the most recent decennial Census, the proposed rule relies solely on the MSA designations that correspond to the same decennial census, rather than on updated designations.⁴

The location within or outside a Metropolitan Area dictates the “geographic unit(s)” into which the proposed area must be translated in order to apply the economic distress criteria. The geographic units prescribed for a Metropolitan area (“Metro units”) are a census tract, a block group, and an American Indian or Alaskan Native area. 12 CFR 1805.201(b)(3)(ii)(B) (2008). The geographic units prescribed for a Non-Metropolitan area (“Non-Metro units”) are a county (or equivalent area), a “minor civil division that is a unit of local government,” an incorporated place, a census tract, a block numbering area, a block group, or an American Indian or Alaskan Native area. *Id.* In either case, the proposed area must consist entirely of whole Metro or Non-Metro units; it cannot consist of fractional units (*e.g.*, half of a census tract or half of a county). A proposed area that is partly within and partly outside a Metropolitan Area (*e.g.*, that straddles an MSA’s boundary) must be evaluated using Metro units because they are the largest permissible unit that is common to all parts of the area.

Single Metro or Non-Metro Unit. To qualify as an “investment area,” a proposed area consisting of a single whole Metro unit (*e.g.*, a single census tract) or a single whole Non-Metro unit (*e.g.*, a single county) must as a whole meet one of the following distress criteria, as reported by the most recent

³ Unexpired Empowerment Zones and Enterprise Communities are identified at: <http://www.hud.gov/offices/cpd/economicdevelopment/programs/rc/tour/index.cfm>. At this link, select a state from the map or list, then select from the “RC/EZ/EC Communities” shown to generate a map of the designated areas.

⁴ For MSA designations that correspond to the 2000 decennial Census, see “Metropolitan Areas and Components, 1999, with FIPS Codes” (6/30/99 revised 1/28/02) at: <http://www.census.gov/population/estimates/metro-city/99mfips.txt>

decennial census published by the U.S. Bureau of the Census (“decennial Census”):

- *Unemployment.* Unemployment rate at least 1.5 times the national average; or
- *Poverty.* At least 20 percent (20%) of the population lives in poverty. 12 CFR 1805.201(b)(3)(ii)(D)(1) and (3) (2008).

If the proposed area consists of a single Metro unit of any kind, it may also meet the following criterion, as reported by the most recent decennial Census:

- *Metro Area Median Family Income.* Median family income (“MFI”) at or below 80 percent (80%) of either the Metro Area’s MFI or the national Metro Area MFI, whichever is greater.

If the proposed area consists of a single Non-Metro unit of any kind, it may also meet the following criterion, as reported by the most recent decennial Census:

- *Non-Metro Area Median Family Income.* MFI at or below 80 percent (80%) of either the statewide Non-Metro Area’s MFI or the national Non-Metro Area MFI, whichever is greater.

12 CFR 1805.201(b)(3)(ii)(D)(2)(i) and (ii) (2008).

Finally, if the proposed area consists of a single Non-Metro county, it may meet one of the following two additional criteria, as reported by the most recent decennial Census:

- *County Population Loss.* County’s population loss of at least 10 percent (10%) between the most recent and the preceding decennial census; or
- *County Migration Loss.* County’s net migration loss of at least 5 percent (5%) in the 5-year period preceding the most recent decennial census.

12 CFR 1805.201(b)(3)(ii)(D)(4) and (5) (2008).

Multiple Contiguous Metro or Non-Metro Units. If a proposed area consists of multiple contiguous Metro units (e.g., a group of adjoining census tracts) or multiple contiguous Non-Metro units (e.g., a group of adjoining counties), the area is subject to a population threshold that does not apply to a proposed area consisting of a single unit. Thus, when a proposed area consists of multiple contiguous units, at least 85 percent (85%) of the area’s total population must reside within the units that “together meet one of the [applicable distress] criteria” set forth above (“the 85% population threshold”). 12 CFR 1805.201(b)(3)(ii)(C)(2) (2008).

The language of the 85% population threshold suggests that all of the “distressed” units must qualify as such under the same criterion, but in practice, the CDFI Fund allows each

“distressed” tract within a group to qualify under any one of the criteria. Also, the decennial Census itself does not apply the 85% population threshold to a proposed area consisting of multiple contiguous units; it only reports whether an individual unit meets an applicable distress criterion.

A proposed area consisting either of a single Metro or Non-Metro unit, or of multiple contiguous units in which the “distressed” units represent at least 85 percent of the area’s population, will meet the definition of an “investment area” provided that, as explained below, it also has “significant unmet needs” for loan products and applicable financial services.

Resources for Determining If Distress Criteria Are Met. The CDFI Fund’s “My CDFI Fund” Web site is an invaluable resource for determining whether a proposed area is “distressed,” but only if the area’s unit(s) conform to one or more census tracts or counties, or to an independent city (which is treated as equivalent to a county); the site is not equipped to analyze any other kind of geographic unit.⁵ Using its “Information and Mapping System” feature, the “My CDFI Fund” Web site allows the user to enter selected units that it then analyzes individually and as a proposed area. The analysis reflects the most recent decennial Census data.⁶ The results are displayed on a comprehensive “Investment Area/Hot Zone Worksheet” (“IA Worksheet”).

For each unit individually, the IA Worksheet shows: Whether it is located within an MSA; its total population; its poverty rate; the percent of benchmark MFI; the unemployment rate; and most importantly, whether the unit is “distressed” under the distress criteria.⁷

⁵ The “My CDFI Fund” Web site’s “Information and Mapping System” (“CIMS”) is available at: <https://www.cdfifund.gov/myCDFI/Organization/Mapping/Mapping.asp> The “Welcome to CIMS” page explains the options for identifying “CDFI Investment Areas” and a “Mapping System Overview and Tutorial.” The “My CDFI Fund” Web site is accessible to registered users through an organizational account holder. For instructions on how to become a registered user, see <http://www.ncua.gov/CreditUnionDevelopment//Underserved/underserved.html>. Under the “Expanding into Investment Areas” section is a link entitled “Instructions to Use the CDFI Web site.”

⁶ Typically, there is an 18-month lag between the taking of a decennial U.S. Census and the publication of the results. Thus, for example, the results of the 2000 census became available when published in 2002 and will remain the most recent census until the results of the 2010 census are published.

⁷ The “My CDFI Fund” Web site implies that it determines whether a proposed area “qualifies as an investment area.” If so, it would not be necessary for an applicant to meet a further criterion—demonstrating “significant unmet needs for loans,” etc., within the proposed area. In fact, it is apparent that the Web site determines only whether a unit

For the proposed area as a whole, the IA Worksheet shows: Whether the population of the non-“distressed” units is less than 15 percent of the whole area’s population (i.e., applies the 85% population threshold); the exact percentage of the area’s population that resides in the non-“distressed” units; the total population of the non-“distressed” units; and whether the combined units are contiguous. When the IA Worksheet indicates that a proposed area does not qualify as “distressed,” none of these details is provided.

At present, the “My CDFI Fund” Web site’s analysis is the most expeditious means of establishing that a proposed area is sufficiently “distressed,” thus conserving credit union resources. To benefit from the convenience of the “My CDFI Fund” Web site, the NCUA Board encourages credit unions to conform their proposed “underserved areas” to the “geographic units” the site is limited to—census tracts and county boundaries, as the case may be.

Approval to Serve an Already Approved “Underserved Area.” Once a credit union is initially approved to serve an area that qualifies as “underserved,” other credit unions may be approved to serve the area provided it is “underserved” at the time they apply. The proposed rule “grandfathers” all credit unions approved to serve an area while it qualifies as “underserved,” allowing them to continue serving that area in the event it no longer qualifies. To terminate the approval to serve an area that no longer is “underserved” would penalize the credit union for its efforts to bring an adequate level of service to the area.

An area that previously was approved as “underserved” may still qualify as “distressed” when the proposed rule is applied using the decennial Census in effect when the new applicant applies. When that is the case, the new applicant must show at the time it applies that the area still has “significant unmet needs for loans and financial services” (to qualify as an “investment area”) and still is “underserved by other depository institutions” (to qualify as “underserved”). These criteria may become more difficult to meet as the number of depository institutions serving the area increases.

Issues for Comment. The NCUA Board invites public comment on the application of the economic distress

or proposed area is “distressed,” meaning that an applicant still must independently demonstrate the proposed area’s “significant unmet needs for loans,” etc., in order to qualify as an “investment area.”

criteria, including whether a proposed area should be required to conform to county or census tract boundaries, as the case may be, so that census tracts apply uniformly to areas located within a Metropolitan Area, and counties apply uniformly to areas located outside a Metropolitan Area.

C. Significant Unmet Needs for Loans or Financial Services

Apart from applying the economic distress criteria, the CDFI Fund definition of an “investment area” requires a showing of “significant unmet needs for loans or equity investments” within the proposed area. 12 U.S.C. 4702(16)(A)(ii). Because credit unions are not authorized to offer equity investments, the scope of this “unmet needs” test initially was limited by definition to the unmet needs for loans.⁸ In implementing the “significant unmet needs test,” the CDFI Fund added the alternative of addressing the unmet needs for a range of financial services including many that credit unions are authorized to offer: Checking accounts, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and other similar services.⁹ 12 CFR 1805.102(b)(3)(ii)(A)(2).

From 1998 through 2000, NCUA permitted the “significant unmet needs” showing to be made through the Business Plan required to be developed by a credit union seeking to add an “underserved area.” 63 FR at 72042. The Business Plan already was required to “identify the credit and depository needs of the community and detail how the credit union plans to serve those needs.” *Id.* For that reason, NCUA revised its policy to recognize that a proposed area that is “distressed” is presumed to have “significant unmet needs.” 65 FR 64512, 64518 (Oct. 27, 2000).

Since the enactment of CUMAA, the CDFI Fund has modified the documentation and scope requirements for a proposed area to meet the “significant unmet needs” test. “Studies or other analyses” were originally required to “adequately demonstrate a pattern of unmet needs for loans and equity investments.” 12 CFR 1805.301(e) (1998). As modified, a “narrative analysis” is the only supporting documentation now required. 12 CFR 1805.201(b)(3)(ii)(E)

(2008). In practice, the CDFI Fund accepts a one-page Narrative Statement describing the significant unmet capital or financial services of a proposed area. “CDFI Certification Application” (June 2007) at 11. The analysis must be supported by relevant statistical evidence. There are no definitive standards of evaluation; the statements are evaluated on a case-by-case basis.

Instead of a presumption of “significant unmet needs,” the proposed rule revises the Chartering Manual to require a credit union to support its “underserved area” application with a one-page “Narrative Statement” demonstrating a pattern of “significant unmet needs” in the proposed area for loans or for one or more of the financial services that credit unions are authorized to offer. However, a credit union may choose which of these services to address and need not address all of them.

Under the proposed rule, the Narrative Statement on “significant unmet needs” must be supported by relevant, objective statistical data reflecting, among other things, loan and financial services activity in the proposed area—much of which is now publicly available over the Internet. The Narrative Statement also may be supplemented by objective testimonial evidence. The supporting data and evidence should be appended to the Narrative Statement.

In addressing a proposed area’s unmet needs, for example, a credit union might focus on the need for cash operations to replace check cashing outlets and on the need for personal loans at reasonable rates to replace pawn brokers, payday lenders and rent-a-centers. To support such a Narrative Statement, the credit union might rely on statistics and conclusions about these needs published by the proposed area’s Chamber of Commerce.

Issues for Comment. Public commenters are invited to address the “significant unmet needs” criterion, including whether the Narrative Statement should be integrated into the Business Plan a credit union is already required to submit. Further, the NCUA Board asks commenters to identify available statistical data that would assist credit unions in demonstrating the unmet needs for loans and credit union services in a proposed area.

D. Underserved by Other Depository Institutions

The CDFI Fund’s “significant unmet needs” test focuses on the need for products and services within a proposed area. In contrast, CUMAA’s demand that a proposed area be “underserved * * * by other depository institutions” focuses on the presence of providers of products and services within the area. CUMAA did not specify a methodology for determining whether a proposed area meets this test; instead, it broadly refers to unspecified “data of the [NCUA] Board and the Federal banking agencies.” 12 U.S.C. 1759(c)(2)(A)(ii).

In the decade since CUMAA, raw data has accumulated within government on branch locations and the volume of business in certain products and services, but meaningful and reliable data on these points has only recently become readily accessible. This data makes it possible to quantify and compare the presence of financial institution facilities in a given area. The proposed rule suggests a flexible methodology that relies on publicly available population data and data on the location of financial institution branches.

Concentration of Facilities. The proposed methodology compares two measures to determine whether an area is adequately served according to the concentration of depository institution facilities within the area. The first measure—which sets a benchmark level of adequate service—is the ratio of depository institution facilities to the population of the non-“distressed” tracts in a proposed area, regardless whether those tracts are contiguous. In cases where there are no non-“distressed” tracts within a proposed area, a non-“distressed” tract or larger unit immediately adjoining the proposed area (e.g., county or city) may be used to set the benchmark ratio. The second measure is the ratio of facilities to the combined population of all of the tracts within the proposed area.

As shown in the example below, if the benchmark ratio of facilities within the non-“distressed” tracts (column A below) exceeds the ratio of facilities within all the tracts of the proposed area as a whole (column B below), the proposed rule deems the area to be “underserved by other depository institutions,” and vice versa (column C below):

⁸ Credit unions are not authorized to offer “equity investments,” which are defined to include “a stock purchase, a purchase of a partnership interest, a purchase of a limited liability company membership interest, a loan made on such terms that it has sufficient characteristics of equity [and]

a purchase of secondary capital.” 12 CFR 1805.104(t) (2008).

⁹ The financial services credit unions are authorized to offer are drawn from the CDFI Fund’s definition of “financial services” that institutions

generally offer. 12 CFR 1805.104(v) (2008). To these financial services, the Fund also added certain “financial products” that, except for loans, credit unions do not offer to their members. 12 CFR 1805.104(u) (2008).

Concentration of Depository Institution Facilities

	A	B	C
<i>Example of:</i>	<i>Benchmark ratio</i>	<i>"Underserved"</i>	<i>Not "Underserved"</i>
	<i>Non-"distressed" census tracts only</i>	<i>All census tracts in proposed area</i>	<i>All census tracts in proposed area</i>
Facilities (numerator)	100	571	800
Population (denominator)	15,000	100,000	100,000
Ratio of facilities to population (concentration)	1:150 (1 facility for every 150 persons)	1:175 (1 facility for every 175 persons)	1:125 (1 facility for every 125 persons)

The proposed methodology does not distinguish between Metro and Non-Metro locations, and need not be limited to census tracts as its unit of measure for each ratio. Census tracts are proposed as the unit of measure, however, because most credit unions are likely to have already used them in determining whether the proposed area is sufficiently "distressed," and thus will be familiar with the data and data sources associated with the tracts within the area.

Data on Population and Location of Facilities. Current tract-by-tract population data is available on-line from the "My CDFI Fund" Web site's IA Worksheet or from the most recent decennial Census itself. Current data on the location of facilities of institutions insured by the Federal Deposit Insurance Corporation ("FDIC") or regulated by the Office of Thrift Supervision is available on-line on the FDIC's "Summary of Deposits" webpage sorted by state, county and MSA.¹⁰ Current data on the location of credit union facilities is collected by NCUA annually from a credit union's "Report of Officials." NCUA plans to organize that data and make it available on-line at the NCUA Web site. This data can be sorted manually on a tract-by-tract basis.

Issues for Comment. Public commenters are invited to address the "underserved by other depository institutions" criterion, including whether the facilities of such institutions should be defined to include ATMs and shared branches. Further, the NCUA Board asks commenters to suggest methodologies other than the concentration of facilities

to assess whether a proposed area is "underserved by other depository institutions," and to identify sources of data on the location depository institution facilities that is sorted by census tract.

E. Service Status Reports

The current rule authorizes NCUA's regional directors to obtain from FCUs adding "underserved areas" reports on their success in serving members in these areas. Manual, Ch. 3, § III.A. Some commenters have in the past recommended that NCUA affirmatively require these reports. That issue is not addressed in this proposed rulemaking because the Board is as a separate matter considering recommendations of NCUA's Outreach Task Force that would call for NCUA to obtain information from credit unions on member income levels and products and services offered to members, and to organize the data by census tract. Consideration of the issue in this rulemaking would therefore be an unnecessary duplication.

F. Pending Applications To Serve an "Underserved Area"

If, as a result of its review of public comments on this proposed rule, the NCUA Board adopts a final rule modifying the current Chartering Manual, the modifications will apply prospectively. Pending applications for approval to serve an "underserved area" and applications received after the date of publication of this rule will be deferred until the rulemaking process is completed.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small credit unions (primarily those under \$10 million in assets). The proposed amendments 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

This proposed rule imposes a requirement that any multiple common bond federal credit union that wishes to add an underserved area must apply for the NCUA Board's written approval to do so. This proposed rule mandates certain specific information that must be included in the application. NCUA requests public comment on all aspects of the collection of information in this proposed rule. Based upon past experience NCUA anticipates approximately 100 applications per year. Given the type of information required to be included in the application, NCUA estimates a burden of 8 hours per application and will revisit this estimate in light of the comments NCUA receives.

NCUA will submit the collection of information requirements contained in this proposed rule to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995. 44 U.S.C. 3507. NCUA will use any comments received to develop its new burden estimates. Comments on the collections of information should be sent to Office of

¹⁰ FDIC Summary of Deposits webpage: <http://www2.fdic.gov/sod/sodSummary.asp?baritem=3>.

Management and Budget, Reports Management Branch, New Executive Office Building, NCUA Desk Officer, Room 10202, 725 17th St., NW., Washington, DC 20503; or by fax to (202) 395-6974; Attention: Desk Officer for NCUA. Please send NCUA a copy of any comments you submit to OMB.

NCUA made the following assumptions about this proposed rule:

- The likely respondents are multiple common bond federal credit unions.
- *Estimated annual number of respondents*: 100.
- *Estimated average annual burden hours per respondent*: 8 hours.
- *Estimated total annual disclosure and recordkeeping burden*: 800 hours.

In addition to comments on the proposed rule, NCUA invites comment on:

- The accuracy of NCUA's estimate of the burden of the information collections;
- Ways to minimize the burden of the information collections on Federal credit unions, including the use of automated collection techniques or other forms of information technology; and
- Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number. NCUA is currently requesting a control number for this information collection from OMB.

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. The proposed rule would not have substantial direct effects on the states, on the connection 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 proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act of

1999, Public Law 105-277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 701

Credit, Credit unions, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board on May 29, 2008.

Mary Rupp,

Secretary of the Board.

For the reasons stated above, 12 CFR Part 701 is proposed to be amended as follows:

PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601, *et seq.*, 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 12 U.S.C. 4311-4312.

2. Section 701.1 is revised to read as follows:

§ 701.1 Federal credit union chartering, field of membership modifications, and conversions.

National Credit Union Administration policies concerning chartering, field of membership modifications, and conversions are set forth in Interpretive Ruling and Policy Statement 08-2, Chartering and Field of Membership Manual (IRPS 08-2) published as Appendix B to this part. The Chartering and Field of Membership Manual also is available on-line at <http://www.ncua.gov>.

3. Appendix B to 12 CFR Part 701 is added to read as follows:

Appendix B To Part 701—Chartering and Field of Membership Manual

Chapter 1

Federal Credit Union Chartering

I—Goals of NCUA Chartering Policy

The National Credit Union Administration's (NCUA) chartering and field of membership policies are directed toward achieving the following goals:

- To encourage the formation of credit unions;
- To uphold the provisions of the Federal Credit Union Act;
- To promote thrift and credit extension;
- To promote credit union safety and soundness; and
- To make quality credit union service available to all eligible persons.

NCUA may grant a charter to single occupational/associational groups, multiple groups, or communities if:

- The occupational, associational, or multiple groups possess an appropriate common bond or the community represents a well-defined local community, neighborhood, or rural district;
- The subscribers are of good character and are fit to represent the proposed credit union; and
- The establishment of the credit union is economically advisable.

Generally, these are the primary criteria that NCUA will consider. In unusual circumstances, however, NCUA may examine other factors, such as other federal law or public policy, in deciding if a charter should be approved.

Unless otherwise noted, the policies outlined in this manual apply only to federal credit unions.

II—Types of Charters

The Federal Credit Union Act recognizes three types of federal credit union charters—single common bond (occupational and associational), multiple common bond (more than one group each having a common bond of occupation or association), and community.

The requirements that must be met to charter a federal credit union are described in Chapter 2. Special rules for credit unions serving low-income groups are described in Chapter 3.

If a federal credit union charter is granted, Section 5 of the charter will describe the credit union's field of membership, which defines those persons and entities eligible for membership. Generally, federal credit unions are only able to grant loans and provide services to persons within the field of membership who have become members of the credit union.

III—Subscribers

Federal credit unions are generally organized by persons who volunteer their time and resources and are responsible for determining the interest, commitment, and economic advisability of forming a federal credit union. The organization of a successful federal credit union takes considerable planning and dedication.

Persons interested in organizing a federal credit union should contact one of the credit union trade associations or the NCUA regional office serving the state in which the credit union will be organized. Lists of NCUA offices and credit union trade associations are shown in the appendices. NCUA will provide information to groups interested in pursuing a federal charter and will assist them in contacting an organizer.

While anyone may organize a credit union, a person with training and experience in chartering new federal credit unions is generally the most effective organizer. However, extensive involvement by the group desiring credit union service is essential.

The functions of the organizer are to provide direction, guidance, and advice on the chartering process. The organizer also provides the group with information about a credit union's functions and purpose as well as technical assistance in preparing and submitting the charter application. Close

communication and cooperation between the organizer and the proposed members are critical to the chartering process.

The Federal Credit Union Act requires that seven or more natural persons—The “subscribers”—present to NCUA for approval a sworn organization certificate stating at a minimum:

- The name of the proposed federal credit union;
- The location of the proposed federal credit union and the territory in which it will operate;
- The names and addresses of the subscribers to the certificate and the number of shares subscribed by each;
- The initial par value of the shares;
- The detailed proposed field of membership; and
- The fact that the certificate is made to enable such persons to avail themselves of the advantages of the Federal Credit Union Act.

False statements on any of the required documentation filed in obtaining a federal credit union charter may be grounds for federal criminal prosecution.

IV—Economic Advisability

IV.A—General

Before chartering a federal credit union, NCUA must be satisfied that the institution will be viable and that it will provide needed services to its members. Economic advisability, which is a determination that a potential charter will have a reasonable opportunity to succeed, is essential in order to qualify for a credit union charter.

NCUA will conduct an independent on-site investigation of each charter application to ensure that the proposed credit union can be successful. In general, the success of any credit union depends on: (a) The character and fitness of management; (b) the depth of the members' support; and (c) present and projected market conditions.

IV.B—Proposed Management's Character and Fitness

The Federal Credit Union Act requires NCUA to ensure that the subscribers are of good “general character and fitness.” Prospective officials and employees will be the subject of credit and background investigations. The investigation report must demonstrate each applicant's ability to effectively handle financial matters. Employees and officials should also be competent, experienced, honest and of good character. Factors that may lead to disapproval of a prospective official or employee include criminal convictions, indictments, and acts of fraud and dishonesty. Further, factors such as serious or unresolved past due credit obligations and bankruptcies disclosed during credit checks may disqualify an individual.

NCUA also needs reasonable assurance that the management team will have the requisite skills—particularly in leadership and accounting—and the commitment to dedicate the time and effort needed to make the proposed federal credit union a success.

Section 701.14 of NCUA's Rules and Regulations sets forth the procedures for NCUA approval of officials of newly

chartered credit unions. If the application of a prospective official or employee to serve is not acceptable to the regional director, the group can propose an alternate to act in that individual's place. If the charter applicant feels it is essential that the disqualified individual be retained, the individual may appeal the regional director's decision to the NCUA Board. If an appeal is pursued, action on the application may be delayed. If the appeal is denied by the NCUA Board, an acceptable new applicant must be provided before the charter can be approved.

IV.C—Member Support

Economic advisability is a major factor in determining whether the credit union will be chartered. An important consideration is the degree of support from the field of membership. The charter applicant must be able to demonstrate that membership support is sufficient to ensure viability.

NCUA has not set a minimum field of membership size for chartering a federal credit union. Consequently, groups of any size may apply for a credit union charter and be approved if they demonstrate economic advisability. However, it is important to note that often the size of the group is indicative of the potential for success. For that reason, a charter application with fewer than 3,000 primary potential members (e.g., employees of a corporation or members of an association) may not be economically advisable. Therefore, a charter applicant with a proposed field of membership of fewer than 3,000 primary potential members may have to provide more support than an applicant with a larger field of membership. For example, a small occupational or associational group may be required to demonstrate a commitment for long-term support from the sponsor.

IV.D—Present and Future Market Conditions—Business Plan

The ability to provide effective service to members, compete in the marketplace, and to adapt to changing market conditions are key to the survival of any enterprise. Before NCUA will charter a credit union, a business plan based on realistic and supportable projections and assumptions must be submitted.

The business plan should contain, at a minimum, the following elements:

- Mission statement;
- Analysis of market conditions, including if applicable, geographic, demographic, employment, income, housing, and other economic data;
- Evidence of member support;
- Goals for shares, loans, and for number of members;
- Financial services needed/desired;
- Financial services to be provided to members of all segments within the field of membership;
- How/when services are to be implemented;
- Organizational/management plan addressing qualification and planned training of officials/employees;
- Continuity plan for directors, committee members and management staff;

- Operating facilities, to include office space/equipment and supplies, safeguarding of assets, insurance coverage, etc.;

- Type of record keeping and data processing system;

- Detailed semiannual pro forma financial statements (balance sheet, income and expense projections) for 1st and 2nd year, including assumptions—e.g., loan and dividend rates;

- Plans for operating independently;

- Written policies (shares, lending, investments, funds management, capital accumulation, dividends, collections, etc.);

- Source of funds to pay expenses during initial months of operation, including any subsidies, assistance, etc., and terms or conditions of such resources; and

- Evidence of sponsor commitment (or other source of support) if subsidies are critical to success of the federal credit union. Evidence may be in the form of letters, contracts, financial statements from the sponsor, and any other such document on which the proposed federal credit union can substantiate its projections.

While the business plan may be prepared with outside assistance, the subscribers and proposed officials must understand and support the submitted business plan.

V—Steps in Organizing a Federal Credit Union

V.A—Getting Started

Following the guidance contained throughout this policy, the organizers should submit wording for the proposed field of membership (the persons, organizations and other legal entities the credit union will serve) to NCUA early in the application process for written preliminary approval. The proposed field of membership must meet all common bond or community requirements.

Once the field of membership has been given preliminary approval, and the organizer is satisfied the application has merit, the organizer should conduct an organizational meeting to elect seven to ten persons to serve as subscribers. The subscribers should locate willing individuals capable of serving on the board of directors, credit committee, supervisory committee, and as chief operating officer/manager of the proposed credit union.

Subsequent organizational meetings may be held to discuss the progress of the charter investigation, to announce the proposed slate of officials, and to respond to any questions posed at these meetings.

If NCUA approves the charter application, the subscribers, as their final duty, will elect the board of directors of the proposed federal credit union. The new board of directors will then appoint the supervisory committee.

V.B—Charter Application Documentation

V.B.1—General

As discussed previously in this Chapter, the organizer of a federal credit union charter must, at a minimum, provide evidence that:

- The group(s) possess an appropriate common bond or the geographical area to be served is a well-defined local community, neighborhood, or rural district;

- The subscribers, prospective officials, and employees are of good character and fitness; and
- The establishment of the credit union is economically advisable.

As part of the application process, the organizer must submit the following forms, which are available in Appendix 4 of this Manual:

- Federal Credit Union Investigation Report, NCUA 4001;
- Organization Certificate, NCUA 4008;
- Report of Official and Agreement to Serve, NCUA 4012;
- Application and Agreements for Insurance of Accounts, NCUA 9500; and
- Certification of Resolutions, NCUA 9501.

Each of these forms is described in more detail in the following sections.

V.B.2—Federal Credit Union Investigation Report, NCUA 4001

The application for a new federal credit union will be submitted on NCUA 4001. State-chartered credit unions applying for conversion to a federal charter will use NCUA 4000. (See Chapter 4 for a full discussion.) The organizer is required to certify the information and recommend approval or disapproval, based on the investigation of the request.

V.B.3—Organization Certificate, NCUA 4008

This document, which must be completed by the subscribers, includes the seven criteria established by the Federal Credit Union Act. NCUA staff assigned to the case will assist in the proper completion of this document.

V.B.4—Report of Official and Agreement to Serve, NCUA 4012

This form documents general background information of each official and employee of the proposed federal credit union. Each official and employee must complete and sign this form. The organizer must review each of the NCUA 4012s for elements that would prevent the prospective official or employee from serving. Further, such factors as serious, unresolved past due credit obligations and bankruptcies disclosed during credit checks may disqualify an individual.

V.B.5—Application and Agreements for Insurance of Accounts, NCUA 9500

This document contains the agreements with which federal credit unions must comply in order to obtain National Credit Union Share Insurance Fund (NCUSIF) coverage of member accounts. The document must be completed and signed by both the chief executive officer and chief financial officer. A federal credit union must qualify for federal share insurance.

V.B.6—Certification of Resolutions, NCUA 9501

This document certifies that the board of directors of the proposed federal credit union has resolved to apply for NCUSIF insurance of member accounts and has authorized the chief executive officer and recording officer to execute the Application and Agreements for Insurance of Accounts. Both the chief executive officer and recording officer of the proposed federal credit union must sign this form.

VI—Name Selection

It is the responsibility of the federal credit union organizers or officials of an existing credit union to ensure that the proposed federal credit union name or federal credit union name change does not constitute an infringement on the name of any corporation in its trade area. This responsibility also includes researching any service marks or trademarks used by any other corporation (including credit unions) in its trade area. NCUA will ensure, to the extent possible, that the credit union's name:

- Is not already being officially used by another federal credit union;
- Will not be confused with NCUA or another federal or state agency, or with another credit union; and
- Does not include misleading or inappropriate language.

The last three words in the name of every credit union chartered by NCUA must be "Federal Credit Union."

The word "community," while not required, can only be included in the name of federal credit unions that have been granted a community charter.

VII—NCUA REVIEW

VII.A—General

Once NCUA receives a complete charter application package, an acknowledgment of receipt will be sent to the organizer. At some point during the review process, a staff member will be assigned to perform an on-site contact with the proposed officials and others having an interest in the proposed federal credit union.

NCUA staff will review the application package and verify its accuracy and reasonableness. A staff member will inquire into the financial management experience and the suitability and commitment of the proposed officials and employees, and will make an assessment of economic advisability. The staff member will also provide guidance to the subscribers in the proper completion of the Organization Certificate, NCUA 4008.

Credit and background investigations may be conducted concurrently by NCUA with other work being performed by the organizer and subscribers to reduce the likelihood of delays in the chartering process.

The staff member will analyze the prospective credit union's business plan for realistic projections, attainable goals, adequate service to all segments of the field of membership, sufficient start-up capital, and time commitment by the proposed officials and employees. Any concerns will be reviewed with the organizer and discussed with the prospective credit union's officials. Additional on-site contacts by NCUA staff may be necessary. The organizer and subscribers will be expected to take the steps necessary to resolve any issues or concerns. Such resolution efforts may delay processing the application.

NCUA staff will then make a recommendation to the regional director regarding the charter application. The recommendation may include specific provisions to be included in a Letter of Understanding and Agreement. In most

cases, NCUA will require the prospective officials to adhere to certain operational guidelines. Generally, the agreement is for a limited term of two to four years. A sample Letter of Understanding and Agreement is found in Appendix 2.

VII.B—Regional Director Approval

Once approved, the board of directors of the newly formed federal credit union will receive a signed charter and standard bylaws from the regional director. Additionally, the officials will be advised of the name of the examiner assigned responsibility for supervising and examining the credit union.

VII.C—Regional Director Disapproval

When a regional director disapproves any charter application, in whole or in part, the organizer will be informed in writing of the specific reasons for the disapproval. Where applicable, the regional director will provide information concerning options or suggestions that the applicant could consider for gaining approval or otherwise acquiring credit union service. The letter of denial will include the procedures for appealing the decision.

VII.D—Appeal of Regional Director Decision

If the regional director denies a charter application, in whole or in part, that decision may be appealed to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reasons for denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal with a recommendation to the NCUA Board.

Before appealing, the prospective group may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

VII.E—Commencement of Operations

Assistance in commencing operations is generally available through the various credit union trade organizations listed in Appendix 5.

All new federal credit unions are also encouraged to establish a mentor relationship with a knowledgeable, experienced credit union individual or an existing, well-operated credit union. The mentor should provide guidance and assistance to the new credit union through attendance at meetings and general oversight. Upon request, NCUA will provide assistance in finding a qualified mentor.

VIII—Future Supervision

Each federal credit union will be examined regularly by NCUA to determine that it

remains in compliance with applicable laws and regulations and to determine that it does not pose undue risk to the NCUSIF. The examiner will contact the credit union officials shortly after approval of the charter in order to arrange for the initial examination (usually within the first six months of operation).

The examiner will be responsible for monitoring the progress of the credit union and providing the necessary advice and guidance to ensure it is in compliance with applicable laws and regulations. The examiner will also monitor compliance with the terms of any required Letter of Understanding and Agreement. Typically, the examiner will require the credit union to submit copies of monthly board minutes and financial statements.

The Federal Credit Union Act requires all newly chartered credit unions, up to two years after the charter anniversary date, to obtain NCUA approval prior to appointment of any new board member, credit or supervisory committee member, or senior executive officer. Section 701.14 of the NCUA Rules and Regulations sets forth the notice and application requirements. If NCUA issues a Notice of Disapproval, the newly chartered credit union is prohibited from making the change.

NCUA may disapprove an individual serving as a director, committee member or senior executive officer if it finds that the competence, experience, character, or integrity of the individual indicates it would not be in the best interests of the members of the credit union or of the public to permit the individual to be employed by or associated with the credit union. If a Notice of Disapproval is issued, the credit union may appeal the decision to the NCUA Board.

IX—Corporate Federal Credit Unions

A corporate federal credit union is one that is operated primarily for the purpose of serving other credit unions. Corporate federal credit unions operate under and are administered by the NCUA Office of Corporate Credit Unions.

X—Groups Seeking Credit Union Service

NCUA will attempt to assist any group in chartering a credit union or joining an existing credit union. If the group is not eligible for federal credit union service, NCUA will refer the group to the appropriate state supervisory authority where different requirements may apply.

XI—Field of Membership Designations

NCUA will designate a credit union based on the following criteria:

Single Occupational: If a credit union serves a single occupational sponsor, such as ABC Corporation, it will be designated as an occupational credit union. A single occupational common bond credit union may also serve a trade, industry, or profession (TIP), such as all teachers.

Single Associational: If a credit union serves a single associational sponsor, such as the Knights of Columbus, it will be designated as an associational credit union.

Multiple Common Bond: If a credit union serves more than one group, each of which has a common bond of occupation and/or

association, it will be designated as a multiple common bond credit union.

Community: All community credit unions will be designated as such, followed by a description of their geographic boundaries (e.g. city or county).

Credit unions desiring to confirm or submit an application to change their designations should contact the appropriate NCUA regional office.

XII—Foreign Branching

Federal credit unions are permitted to serve foreign nationals within their fields of membership wherever they reside provided they have the ability, resources, and management expertise to serve such persons. Before a credit union opens a branch outside the United States, it must submit an application to do so and have prior written approval of the regional director. A federal credit union may establish a service facility on a United States military installation or United States embassy without prior NCUA approval.

Chapter 2

Field of Membership Requirements for Federal Credit Unions

I—Introduction

I.A.1—General

As set forth in Chapter 1, the Federal Credit Union Act provides for three types of federal credit union charters—single common bond (occupational or associational), multiple common bond (multiple groups), and community. Section 109 (12 U.S.C. 1759) of the Federal Credit Union Act sets forth the membership criteria for each of these three types of credit unions.

The field of membership, which is specified in Section 5 of the charter, defines those persons and entities eligible for membership. A single common bond federal credit union consists of one group having a common bond of occupation or association. A multiple common bond federal credit union consists of more than one group, each of which has a common bond of occupation or association. A community federal credit union consists of persons or organizations within a well-defined local community, neighborhood, or rural district.

Once chartered, a federal credit union can amend its field of membership; however, the same common bond or community requirements for chartering the credit union must be satisfied. Since there are differences in the three types of charters, special rules, which are fully discussed in the following sections of this Chapter, may apply to each.

I.A.2—Special Low-Income Rules

Generally, federal credit unions can only grant loans and provide services to persons who have joined the credit union. The Federal Credit Union Act states that one of the purposes of federal credit unions is “to serve the productive and provident credit needs of individuals of modest means.” Although field of membership requirements are applicable, special rules set forth in Chapter 3 may apply to low-income designated credit unions and those credit unions assisting low-income groups or to a

federal credit union that adds an underserved community to its field of membership.

II—Occupational Common Bond

II.A.1—General

A single occupational common bond federal credit union may include in its field of membership all persons and entities who share that common bond. NCUA permits a person’s membership eligibility in a single occupational common bond group to be established in five ways:

- Employment (or a long-term contractual relationship equivalent to employment) in a single corporation or other legal entity makes that person part of a single occupational common bond;
- Employment in a corporation or other legal entity with a controlling ownership interest (which shall not be less than 10 percent) in or by another legal entity makes that person part of a single occupational common bond;
- Employment in a corporation or other legal entity which is related to another legal entity (such as a company under contract and possessing a strong dependency relationship with another company) makes that person part of a single occupational common bond;
- Employment or attendance at a school makes that person part of a single occupational common bond (see Chapter 2, Section III.A.1); or
- Employment in the same Trade, Industry, or Profession (TIP) (see Chapter 2, Section II.A.2).

A geographic limitation is not a requirement for a single occupational common bond. However, for purposes of describing the field of membership, the geographic areas being served may be included in the charter. For example:

- Employees, officials, and persons who work regularly under contract in Miami, Florida, for ABC Corporation and subsidiaries;
- Employees of ABC Corporation who are paid from * * *;
- Employees of ABC Corporation who are supervised from * * *;
- Employees of ABC Corporation who are headquartered in * * *; and/or
- Employees of ABC Corporation who work in the United States.

The corporation or other legal entity (i.e., the employer) may also be included in the common bond—e.g., “ABC Corporation.” The corporation or legal entity will be defined in the last clause in Section 5 of the credit union’s charter.

A charter applicant must provide documentation to establish that the single occupational common bond requirement has been met.

Some examples of single occupational common bonds are:

- Employees of the Hunt Manufacturing Company who work in West Chester, Pennsylvania (common bond—same employer with geographic definition);
- Employees of the Buffalo Manufacturing Company who work in the United States (common bond—same employer with geographic definition);
- Employees, elected and appointed officials of municipal government in Parma,

Ohio (common bond—same employer with geographic definition);

- Employees of Johnson Soap Company and its majority owned subsidiary, Johnson Toothpaste Company, who work in, are paid from, are supervised from, or are headquartered in Augusta and Portland, Maine (common bond—parent and subsidiary company with geographic definition);

- Employees of MMLJS contractor who work regularly at the U.S. Naval Shipyard in Bremerton, Washington (common bond—employees of contractors with geographic definition);

- Employees, doctors, medical staff, technicians, medical and nursing students who work in or are paid from the Newport Beach Medical Center, Newport Beach, California (single corporation with geographic definition);

- Employees of JLS, Incorporated and MJM, Incorporated working for the LKM Joint Venture Company in Catalina Island, California (common bond—same employer—ongoing dependent relationship);

- Employees of and students attending Georgetown University (common bond—same occupation);

- Employees of all the schools supervised by the Timbrook Board of Education in Timbrook, Georgia (common bond—same employer); or

- All licensed nurses in Fairfax County, Virginia (occupational common bond TIP).

Some examples of insufficiently defined single occupational common bonds are:

- Employees of manufacturing firms in Seattle, Washington (no defined occupational sponsor; overly broad TIP);

- Persons employed or working in Chicago, Illinois (no occupational common bond).

II.A.2—Trade, Industry, or Profession

A common bond based on employment in a trade, industry, or profession can include employment at any number of corporations or other legal entities that—while not under common ownership—have a common bond by virtue of producing similar products, providing similar services, or participating in the same type of business.

While proposed or existing single common bond credit unions have some latitude in defining a trade, industry, or profession occupational common bond, it cannot be defined so broadly as to include groups in fields which are not closely related. For example, the manufacturing industry, energy industry, communications industry, retail industry, or entertainment industry would not qualify as a TIP because each industry lacks the necessary commonality. However, textile workers, realtors, nurses, teachers, police officers, or U.S. military personnel are closely related and each would qualify as a TIP.

The common bond relationship must be one that demonstrates a narrow commonality of interests within a specific trade, industry, or profession. If a credit union wants to serve a physician TIP, it can serve all physicians, but that does not mean it can also serve all clerical staff in the physicians' offices. However, if the TIP is based on the health care industry, then clerical staff would be

able to be served by the credit union because they work in the same industry and have the same commonality of interests.

If a credit union wants to include the airline services industry, it can serve airline and airport personnel but not passengers. Clients or customers of the TIP are not eligible for credit union membership (e.g., patients in hospitals). Any company that is involved in more than one industry cannot be included in an industry TIP (e.g., a company that makes tobacco products, food products, and electronics). However, employees of these companies may be eligible for membership in a variety of trade/profession occupational common bond TIPs.

Since a TIP must be narrowly defined, it cannot include third party vendors and other suppliers. For example, the steel suppliers to the automobile industry would not be part of the automobile industry TIP. However, the automobile industry includes manufacturers and their automobile dealerships.

In general, except for credit unions currently serving a national field of membership or operating in multiple states, a geographic limitation is required for a TIP credit union. The geographic limitation will be part of the credit union's charter and generally correspond to its current or planned operational area. More than one federal credit union may serve the same trade, industry, or profession, even if both credit unions are in the same geographic location.

This type of occupational common bond is only available to single common bond credit unions. A TIP cannot be added to a multiple common bond or community field of membership.

To obtain a TIP designation, the proposed or existing credit union must submit a request to the regional director. New charter applicants must follow the documentation requirements in Chapter 1. New charter applicants and existing credit unions must submit a business plan on how the credit union will serve the group with the request to serve the TIP. The business plan also must address how the credit union will verify the TIP. Examples of such verification include state licenses, professional licenses, organizational memberships, pay statements, union membership, or employer certification. The regional director must approve this type of field of membership before a credit union can serve a TIP. Credit unions converting to a TIP can retain members of record but cannot add new members from its previous group or groups, unless it is part of the TIP.

Section II.B on Occupational Common Bond Amendments does not apply to a TIP common bond. Removing or changing a geographical limitation will be processed as a housekeeping amendment. If safety and soundness concerns are present, the regional director may require additional information before the request can be processed.

Section II.H, on Other Persons Eligible for Credit Union Membership, applies to TIP based credit unions except for the corporate account provision which only applies to industry based TIPs. Credit unions with industry based TIPs may include corporations as members because they have the same commonality of interests as all

employees in the industry. For example, an airline service TIP (industry) can serve an airline carrier (corporate account); however, a nurses TIP (profession) could not serve a hospital (corporate account) because not everyone working in the hospital shares the same profession.

If a TIP designated credit union wishes to convert to a different TIP or employer-based occupational common bond, or different charter type, it only retains members of record after the conversion. The regional director, for safety and soundness reasons, may approve a TIP designated credit union to convert to its original field of membership.

II.B—Occupational Common Bond Amendments

II.B.1—General

Section 5 of every single occupational federal credit union's charter defines the field of membership the credit union can legally serve. Only those persons or legal entities specified in the field of membership can be served. There are a number of instances in which Section 5 must be amended by NCUA.

First, a group sharing the credit union's common bond is added to the field of membership. This may occur through various ways including agreement between the group and the credit union directly, or through a merger, corporate acquisition, purchase and assumption (P&A), or spin-off.

Second, if the entire field of membership is acquired by another corporation, the credit union can serve the employees of the new corporation and any subsidiaries after receiving NCUA approval.

Third, a federal credit union qualifies to change its common bond from:

- A single occupational common bond to a single associational common bond;
- A single occupational common bond to a community charter; or
- A single occupational common bond to a multiple common bond.

Fourth, a federal credit union removes a portion of the group from its field of membership through agreement with the group, a spin-off, or because a portion of the group is no longer in existence.

An existing single occupational common bond federal credit union that submits a request to amend its charter must provide documentation to establish that the occupational common bond requirement has been met. The regional director must approve all amendments to an occupational common bond credit union's field of membership.

II.B.2—Corporate Restructuring

If the single common bond group that comprises a federal credit union's field of membership undergoes a substantial restructuring, the result is often that portions of the group are sold or spun off. This requires a change to the credit union's field of membership. NCUA will not permit a single common bond credit union to maintain in its field of membership a sold or spun-off group to which it has been providing service unless the group otherwise qualifies for membership in the credit union or the credit union converts to a multiple common bond credit union.

If the group comprising the single common bond of the credit union merges with, or is acquired by, another group, the credit union can serve the new group resulting from the merger or acquisition after receiving a housekeeping amendment.

II.B.3—Economic Advisability

Prior to granting a common bond expansion, NCUA will examine the amendment's likely effect on the credit union's operations and financial condition. In most cases, the information needed for analyzing the effect of adding a particular group will be available to NCUA through the examination and financial and statistical reports; however, in particular cases, a regional director may require additional information prior to making a decision.

II.B.4—Documentation Requirements

A federal credit union requesting a common bond expansion must submit an Application for Field of Membership Amendment (NCUA 4015-EZ) to the appropriate NCUA regional director. An authorized credit union representative must sign the request.

II.C—NCUA's Procedures for Amending the Field of Membership

II.C.1—General

All requests for approval to amend a federal credit union's charter must be submitted to the appropriate regional director.

II.C.2—Regional Director's Decision

NCUA staff will review all amendment requests in order to ensure compliance with NCUA policy.

Before acting on a proposed amendment, the regional director may require an on-site review. In addition, the regional director may, after taking into account the significance of the proposed field of membership amendment, require the applicant to submit a business plan addressing specific issues.

The financial and operational condition of the requesting credit union will be considered in every instance. NCUA will carefully consider the economic advisability of expanding the field of membership of a credit union with financial or operational problems.

In most cases, field of membership amendments will only be approved for credit unions that are operating satisfactorily. Generally, if a federal credit union is having difficulty providing service to its current membership, or is experiencing financial or other operational problems, it may have more difficulty serving an expanded field of membership.

Occasionally, however, an expanded field of membership may provide the basis for reversing current financial problems. In such cases, an amendment to expand the field of membership may be granted notwithstanding the credit union's financial or operational problems. The applicant credit union must clearly establish that the expanded field of membership is in the best interest of the members and will not increase the risk to the NCUSIF.

II.C.3—Regional Director Approval

If the regional director approves the requested amendment, the credit union will be issued an amendment to Section 5 of its charter.

II.C.4—Regional Director Disapproval

When a regional director disapproves any application, in whole or in part, to amend the field of membership under this chapter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- Options to consider, if appropriate, for gaining approval; and
- Appeal procedure.

II.C.5—Appeal of Regional Director Decision

If a field of membership expansion request, merger, or spin-off is denied by the regional director, the federal credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial, and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

II.D—Mergers, Purchase and Assumptions, and Spin-Offs

In general, other than the addition of common bond groups, there are three additional ways a federal credit union with a single occupational common bond can expand its field of membership:

- By taking in the field of membership of another credit union through a common bond or emergency merger;
- By taking in the field of membership of another credit union through a common bond or emergency purchase and assumption (P&A); or
- By taking a portion of another credit union's field of membership through a common bond spin-off.

II.D.1—Mergers

Generally, the requirements applicable to field of membership expansions found in this chapter apply to mergers where the continuing credit union has a federal charter. That is, the two credit unions must share a common bond.

Where the merging credit union is state-chartered, the common bond rules applicable to a federal credit union apply.

Mergers must be approved by the NCUA regional director where the continuing credit union is headquartered, with the concurrence

of the regional director of the merging credit union, and, as applicable, the state regulators.

If a single occupational credit union wants to merge into a multiple common bond or community credit union, Section IV.D or Section V.D of this Chapter, respectively, should be reviewed.

II.D.2—Emergency Mergers

An emergency merger may be approved by NCUA without regard to common bond or other legal constraints. An emergency merger involves NCUA's direct intervention and approval. The credit union to be merged must either be insolvent or likely to become insolvent, and NCUA must determine that:

- An emergency requiring expeditious action exists;
- Other alternatives are not reasonably available; and
- The public interest would best be served by approving the merger.

If not corrected, conditions that could lead to insolvency include, but are not limited to:

- Abandonment by management;
- Loss of sponsor;
- Serious and persistent record keeping problems; or
- Serious and persistent operational concerns.

In an emergency merger situation, NCUA will take an active role in finding a suitable merger partner (continuing credit union). NCUA is primarily concerned that the continuing credit union has the financial strength and management expertise to absorb the troubled credit union without adversely affecting its own financial condition and stability.

As a stipulated condition to an emergency merger, the field of membership of the merging credit union may be transferred intact to the continuing federal credit union without regard to any common bond restrictions. Under this authority, therefore, a single occupational common bond federal credit union may take into its field of membership any dissimilar charter type.

The common bond characteristic of the continuing credit union in an emergency merger does not change. That is, even though the merging credit union is a multiple common bond or community, the continuing credit union will remain a single common bond credit union. Similarly, if the merging credit union is also an unlike single common bond, the continuing credit union will remain a single common bond credit union. Future common bond expansions will be based on the continuing credit union's original single common bond.

Emergency mergers involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union and, as applicable, the state regulators.

II.D.3—Purchase and Assumption (P&A)

Another alternative for acquiring the field of membership of a failing credit union is through a consolidation known as a P&A. A P&A has limited application because, in most cases, the failing credit union must be placed into involuntary liquidation. In the few

instances where a P&A may be appropriate, the assuming federal credit union, as with emergency mergers, may acquire the entire field of membership if the emergency merger criteria are satisfied. However, if the P&A does not meet the emergency merger criteria, it must be processed under the common bond requirements.

In a P&A processed under the emergency criteria, specified loans, shares, and certain other designated assets and liabilities, without regard to common bond restrictions, may also be acquired without changing the character of the continuing federal credit union for purposes of future field of membership amendments.

If the purchased and/or assumed credit union's field of membership does not share a common bond with the purchasing and/or assuming credit union, then the continuing credit union's original common bond will be controlling for future common bond expansions.

P&As involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the purchased and/or assumed credit union and, as applicable, the state regulators.

II.D.4—Spin-Offs

A spin-off occurs when, by agreement of the parties, a portion of the field of membership, assets, liabilities, shares, and capital of a credit union are transferred to a new or existing credit union. A spin-off is unique in that usually one credit union has a field of membership expansion and the other loses a portion of its field of membership.

All common bond requirements apply regardless of whether the spun-off group becomes a new credit union or goes to an existing federal charter.

The request for approval of a spin-off must be supported with a plan that addresses, at a minimum:

- Why the spin-off is being requested;
- What part of the field of membership is to be spun off;
- Whether the affected credit unions have a common bond (applies only to single occupational credit unions);
- Which assets, liabilities, shares, and capital are to be transferred;
- The financial impact the spin-off will have on the affected credit unions;
- The ability of the acquiring credit union to effectively serve the new members;
- The proposed spin-off date; and
- Disclosure to the members of the requirements set forth above.

The spin-off request must also include current financial statements from the affected credit unions and the proposed voting ballot.

For federal credit unions spinning off a group, membership notice and voting requirements and procedures are the same as for mergers (see Part 708 of the NCUA Rules and Regulations), except that only the members directly affected by the spin-off—those whose shares are to be transferred—are permitted to vote. Members whose shares are not being transferred will not be afforded the opportunity to vote. All members of the group to be spun off (whether they voted in

favor, against, or not at all) will be transferred if the spin-off is approved by the voting membership. Voting requirements for federally insured state credit unions are governed by state law.

Spin-offs involving federally insured credit unions in different NCUA regions must be approved by all regional directors where the credit unions are headquartered and the state regulators, as applicable. Spin-offs in the same region also require approval by the state regulator, as applicable.

II.E—Overlaps

II.E.1—General

An overlap exists when a group of persons is eligible for membership in two or more credit unions. NCUA will permit single occupational federal credit unions to overlap any other charter without performing an overlap analysis.

II.E.2—Organizational Restructuring

A federal credit union's field of membership will always be governed by the common bond descriptions contained in Section 5 of its charter. Where a sponsor organization expands its operations internally, by acquisition or otherwise, the credit union may serve these new entrants to its field of membership if they are part of the common bond described in Section 5. NCUA will permit a complete overlap of the credit unions' fields of membership.

If a sponsor organization sells off a group, new members can no longer be served unless they otherwise qualify for membership in the credit union or it converts to a multiple common bond charter.

Credit unions must submit documentation explaining the restructuring and providing information regarding the new organizational structure.

II.E.3—Exclusionary Clauses

An exclusionary clause is a limitation precluding the credit union from serving the primary members of a portion of a group otherwise included in its field of membership. NCUA no longer grants exclusionary clauses. Those granted prior to the adoption of this new chartering manual will remain in effect unless the credit unions agree to remove them or one of the affected credit unions submits a housekeeping amendment to have it removed.

II.F—Charter Conversion

A single occupational common bond federal credit union may apply to convert to a community charter provided the field of membership requirements of the community charter are met. Groups within the existing charter which cannot qualify in the new charter cannot be served except for members of record, or groups or communities obtained in an emergency merger or P&A. A credit union must notify all groups that will be removed from the field of membership as a result of conversion. Members of record can continue to be served. Also, in order to support a case for a conversion, the applicant federal credit union may be required to develop a detailed business plan as specified in Chapter 2, Section V.A.3.

A single occupational common bond federal credit union may apply to convert to

a multiple common bond charter by adding a non-common bond group that is within a reasonable proximity of a service facility. Groups within the existing charter may be retained and continue to be served. However, future amendments, including any expansions of the original single common bond group, must be done in accordance with multiple common bond policy.

II.G—Removal of Groups From the Field of Membership

A credit union may request removal of a portion of the common bond group from its field of membership for various reasons. The most common reasons for this type of amendment are:

- The group is within the field of membership of two credit unions and one wishes to discontinue service;
- The federal credit union cannot continue to provide adequate service to the group;
- The group has ceased to exist;
- The group does not respond to repeated requests to contact the credit union or refuses to provide needed support; or
- The group initiates action to be removed from the field of membership.

When a federal credit union requests an amendment to remove a group from its field of membership, the regional director will determine why the credit union desires to remove the group. If the regional director concurs with the request, membership will continue for those who are already members under the "once a member, always a member" provision of the Federal Credit Union Act.

II.H—Other Persons Eligible for Credit Union Membership

A number of persons, by virtue of their close relationship to a common bond group, may be included, at the charter applicant's option, in the field of membership. These include the following:

- Spouses of persons who died while within the field of membership of this credit union;
- Employees of this credit union;
- Persons retired as pensioners or annuitants from the above employment;
- Volunteers;
- Members of the immediate family or household;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an "immediate family or household" of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the

immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. Examples include volunteers working at a hospital or school.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as "once a member, always a member." The "once a member, always a member" provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

III—Associational Common Bond

III.A.1—General

A single associational federal credit union may include in its field of membership, regardless of location, all members and employees of a recognized association. A single associational common bond consists of individuals (natural persons) and/or groups (non-natural persons) whose members participate in activities developing common loyalties, mutual benefits, and mutual interests. Separately chartered associational groups can establish a single common bond relationship if they are integrally related and share common goals and purposes. For example, two or more churches of the same denomination, Knights of Columbus Councils, or locals of the same union can qualify as a single associational common bond.

Individuals and groups eligible for membership in a single associational credit union can include the following:

- Natural person members of the association (for example, members of a union or church members);
- Non-natural person members of the association;
- Employees of the association (for example, employees of the labor union or employees of the church); and
- The association.

Generally, a single associational common bond does not include a geographic definition and can operate nationally. However, a proposed or existing federal credit union may limit its field of membership to a single association or geographic area. NCUA may impose a geographic limitation if it is determined that the applicant credit union does not have the ability to serve a larger group or there are other operational concerns. All single associational common bonds should include a definition of the group that may be served based on the association's charter, bylaws, and any other equivalent documentation.

The common bond for an associational group cannot be established simply on the basis that the association exists. In determining whether a group satisfies associational common bond requirements for a federal credit union charter, NCUA will

consider the totality of the circumstances, which includes:

- Whether members pay dues;
- Whether members participate in the furtherance of the goals of the association;
- Whether the members have voting rights. To meet this requirement, members need not vote directly for an officer, but may vote for a delegate who in turn represents the members' interests;
- Whether the association maintains a membership list;
- Whether the association sponsors other activities;
- The association's membership eligibility requirements; and
- The frequency of meetings.

A support group whose members are continually changing or whose duration is temporary may not meet the single associational common bond criteria. Each class of member will be evaluated based on the totality of the circumstances. Individuals or honorary members who only make donations to the association are not eligible to join the credit union.

Educational groups—for example, parent-teacher organizations, alumni associations, and student organizations in any school—and church groups may constitute associational common bonds.

Student groups (e.g., students enrolled at a public, private, or parochial school) may constitute either an associational or occupational common bond. For example, students enrolled at a church sponsored school could share a single associational common bond with the members of that church and may qualify for a federal credit union charter. Similarly, students enrolled at a university, as a group by itself, or in conjunction with the faculty and employees of the school, could share a single occupational common bond and may qualify for a federal credit union charter.

The terminology "Alumni of Jacksonville State University" is insufficient to demonstrate an associational common bond. To qualify as an association, the alumni association must meet the requirements for an associational common bond. The alumni of a school must first join the alumni association, and not merely be alumni of the school to be eligible for membership.

Homeowner associations, tenant groups, consumer groups, and other groups of persons having an "interest in" a particular cause and certain consumer cooperatives may also qualify as an association.

Associations based primarily on a client-customer relationship do not meet associational common bond requirements. However, having an incidental client-customer relationship does not preclude an associational charter as long as the associational common bond requirements are met. For example, a fraternal association that offers insurance, which is not a condition of membership, may qualify as a valid associational common bond.

Applicants for a single associational common bond federal credit union charter or a field of membership amendment to include an association must provide, at the request of the regional director, a copy of the association's charter, bylaws, or other

equivalent documentation, including any legal documents required by the state or other governing authority.

The associational sponsor itself may also be included in the field of membership—e.g., "Sprocket Association"—and will be shown in the last clause of the field of membership.

III.A.2—Subsequent Changes to Association's Bylaws

If the association's membership or geographical definitions in its charter and bylaws are changed subsequent to the effective date stated in the field of membership, the credit union must submit the revised charter or bylaws for NCUA's consideration and approval prior to serving members of the association added as a result of the change.

III.A.3—Sample Single Associational Common Bonds

Some examples of associational common bonds are:

- Regular members of Locals 10 and 13, IBEW, in Florida, who qualify for membership in accordance with their charter and bylaws in effect on May 20, 2001;
- Members of the Hoosier Farm Bureau in Grant, Logan, or Lee Counties of Indiana, who qualify for membership in accordance with its charter and bylaws in effect on March 7, 1997;
- Members of the Shalom Congregation in Chevy Chase, Maryland;
- Regular members of the Corporate Executives Association, located in Westchester, New York, who qualify for membership in accordance with its charter and bylaws in effect on December 1, 1997;
- Members of the University of Wisconsin Alumni Association, located in Green Bay, Wisconsin;
- Members of the Marine Corps Reserve Officers Association; or
- Members of St. John's Methodist Church and St. Luke's Methodist Church, located in Toledo, Ohio.

Some examples of insufficiently defined single associational common bonds are:

- All Lutherans in the United States (too broadly defined); or
- Veterans of U.S. military service (group is too broadly defined; no formal association of all members of the group).

Some examples of unacceptable single associational common bonds are:

- Alumni of Amos University (no formal association);
- Customers of Fleetwood Insurance Company (policyholders or primarily customer/client relationships do not meet associational standards);
- Employees of members of the Reston, Virginia Chamber of Commerce (not a sufficiently close tie to the associational common bond); or
- Members of St. John's Lutheran Church and St. Mary's Catholic Church located in Anniston, Alabama (churches are not of the same denomination).

III.B—Associational Common Bond Amendments

III.B.1—General

Section 5 of every associational federal credit union's charter defines the field of

membership the credit union can legally serve. Only those persons who, or legal entities that, join the credit union and are specified in the field of membership can be served. There are three instances in which Section 5 must be amended by NCUA.

First, a group that shares the credit union's common bond is added to the field of membership. This may occur through various ways including agreement between the group and the credit union directly, or through a merger, purchase and assumption (P&A), or spin-off.

Second, a federal credit union qualifies to change its common bond from:

- A single associational common bond to a single occupational common bond;
- A single associational common bond to a community charter; or
- A single associational common bond to a multiple common bond.

Third, a federal credit union removes a portion of the group from its field of membership through agreement with the group, a spin-off, or a portion of the group is no longer in existence.

An existing single associational federal credit union that submits a request to amend its charter must provide documentation to establish that the associational common bond requirement has been met. The regional director must approve all amendments to an associational common bond credit union's field of membership.

III.B.2—Organizational Restructuring

If the single common bond group that comprises a federal credit union's field of membership undergoes a substantial restructuring, the result is often that portions of the group are sold or spun off. This is an event requiring a change to the credit union's field of membership. NCUA may not permit a single associational credit union to maintain in its field of membership a sold or spun-off group to which it has been providing service unless the group otherwise qualifies for membership in the credit union or the credit union converts to a multiple common bond credit union.

If the group comprising the single common bond of the credit union merges with, or is acquired by, another group, the credit union can serve the new group resulting from the merger or acquisition after receiving a housekeeping amendment.

III.B.3—Economic Advisability

Prior to granting a common bond expansion, NCUA will examine the amendment's likely impact on the credit union's operations and financial condition. In most cases, the information needed for analyzing the effect of adding a particular group will be available to NCUA through the examination and financial and statistical reports; however, in particular cases, a regional director may require additional information prior to making a decision.

III.B.4—Documentation Requirements

A federal credit union requesting a common bond expansion must submit an Application for Field of Membership Amendment (NCUA 4015-EZ) to the appropriate NCUA regional director. An authorized credit union representative must sign the request.

III.C—NCUA Procedures for Amending the Field of Membership

III.C.1—General

All requests for approval to amend a federal credit union's charter must be submitted to the appropriate regional director.

III.C.2—Regional Director's Decision

NCUA staff will review all amendment requests in order to ensure conformance to NCUA policy.

Before acting on a proposed amendment, the regional director may require an on-site review. In addition, the regional director may, after taking into account the significance of the proposed field of membership amendment, require the applicant to submit a business plan addressing specific issues.

The financial and operational condition of the requesting credit union will be considered in every instance. The economic advisability of expanding the field of membership of a credit union with financial or operational problems must be carefully considered.

In most cases, field of membership amendments will only be approved for credit unions that are operating satisfactorily. Generally, if a federal credit union is having difficulty providing service to its current membership, or is experiencing financial or other operational problems, it may have more difficulty serving an expanded field of membership.

Occasionally, however, an expanded field of membership may provide the basis for reversing current financial problems. In such cases, an amendment to expand the field of membership may be granted notwithstanding the credit union's financial or operational problems. The applicant credit union must clearly establish that the expanded field of membership is in the best interest of the members and will not increase the risk to the NCUSIF.

III.C.3—Regional Director Approval

If the regional director approves the requested amendment, the credit union will be issued an amendment to Section 5 of its charter.

III.C.4—Regional Director Disapproval

When a regional director disapproves any application, in whole or in part, to amend the field of membership under this chapter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- Options to consider, if appropriate, for gaining approval; and
- Appeal procedures.

III.C.5—Appeal of Regional Director Decision

If a field of membership expansion request, merger, or spin-off is denied by the regional director, the federal credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the NCUA Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

III.D—Mergers, Purchase and Assumptions, and Spin-Offs

In general, other than the addition of common bond groups, there are three additional ways a federal credit union with a single associational common bond can expand its field of membership:

- By taking in the field of membership of another credit union through a common bond or emergency merger;
- By taking in the field of membership of another credit union through a common bond or emergency purchase and assumption (P&A); or
- By taking a portion of another credit union's field of membership through a common bond spin-off.

III.D.1—Mergers

Generally, the requirements applicable to field of membership expansions found in this section apply to mergers where the continuing credit union is a federal charter. That is, the two credit unions must share a common bond.

Where the merging credit union is state-chartered, the common bond rules applicable to a federal credit union apply.

Mergers must be approved by the NCUA regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union, and, as applicable, the state regulators.

If a single associational credit union wants to merge into a multiple common bond or community credit union, Section IV.D or Section V.D of this Chapter, respectively, should be reviewed.

III.D.2—Emergency Mergers

An emergency merger may be approved by NCUA without regard to common bond or other legal constraints. An emergency merger involves NCUA's direct intervention and approval. The credit union to be merged must either be insolvent or likely to become insolvent, and NCUA must determine that:

- An emergency requiring expeditious action exists;
- Other alternatives are not reasonably available; and
- The public interest would best be served by approving the merger.

If not corrected, conditions that could lead to insolvency include, but are not limited to:

- Abandonment by management;
- Loss of sponsor;
- Serious and persistent record keeping problems; or
- Serious and persistent operational concerns.

In an emergency merger situation, NCUA will take an active role in finding a suitable merger partner (continuing credit union). NCUA is primarily concerned that the continuing credit union has the financial strength and management expertise to absorb the troubled credit union without adversely affecting its own financial condition and stability.

As a stipulated condition to an emergency merger, the field of membership of the merging credit union may be transferred intact to the continuing federal credit union without regard to any common bond restrictions. Under this authority, therefore, a single associational common bond federal credit union may take into its field of membership any dissimilar charter type.

The common bond characteristic of the continuing credit union in an emergency merger does not change. That is, even though the merging credit union is a multiple common bond or community, the continuing credit union will remain a single common bond credit union. Similarly, if the merging credit union is an unlike single common bond, the continuing credit union will remain a single common bond credit union. Future common bond expansions will be based on the continuing credit union's single common bond.

Emergency mergers involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union and, as applicable, the state regulators.

III.D.3—Purchase and Assumption (P&A)

Another alternative for acquiring the field of membership of a failing credit union is through a consolidation known as a P&A. A P&A has limited application because, in most cases, the failing credit union must be placed into involuntary liquidation. In the few instances where a P&A may be appropriate, the assuming federal credit union, as with emergency mergers, may acquire the entire field of membership if the emergency merger criteria are satisfied. However, if the P&A does not meet the emergency merger criteria, it must be processed under the common bond requirements.

In a P&A processed under the emergency criteria, specified loans, shares, and certain other designated assets and liabilities, without regard to common bond restrictions, may also be acquired without changing the character of the continuing federal credit union for purposes of future field of membership amendments.

If the purchased and/or assumed credit union's field of membership does not share a common bond with the purchasing and/or assuming credit union, then the continuing credit union's original common bond will be controlling for future common bond expansions.

P&As involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the purchased and/or assumed credit union and, as applicable, the state regulators.

III.D.4—Spin-Offs

A spin-off occurs when, by agreement of the parties, a portion of the field of membership, assets, liabilities, shares, and capital of a credit union are transferred to a new or existing credit union. A spin-off is unique in that usually one credit union has a field of membership expansion and the other loses a portion of its field of membership.

All common bond requirements apply regardless of whether the spun-off group becomes a new credit union or goes to an existing federal charter.

The request for approval of a spin-off must be supported with a plan that addresses, at a minimum:

- Why the spin-off is being requested;
- What part of the field of membership is to be spun off;
- Whether the affected credit unions have the same common bond (applies only to single associational credit unions);
- Which assets, liabilities, shares, and capital are to be transferred;
- The financial impact the spin-off will have on the affected credit unions;
- The ability of the acquiring credit union to effectively serve the new members;
- The proposed spin-off date; and
- Disclosure to the members of the requirements set forth above.

The spin-off request must also include current financial statements from the affected credit unions and the proposed voting ballot.

For federal credit unions spinning off a group, membership notice and voting requirements and procedures are the same as for mergers (see Part 708 of the NCUA Rules and Regulations), except that only the members directly affected by the spin-off—those whose shares are to be transferred—are permitted to vote. Members whose shares are not being transferred will not be afforded the opportunity to vote. All members of the group to be spun off (whether they voted in favor, against, or not at all) will be transferred if the spin-off is approved by the voting membership. Voting requirements for federally insured state credit unions are governed by state law.

Spin-offs involving federally insured credit unions in different NCUA regions must be approved by all regional directors where the credit unions are headquartered and the state regulators, as applicable. Spin-offs in the same region also require approval by the state regulator, as applicable.

III.E—Overlaps

III.E.1—General

An overlap exists when a group of persons is eligible for membership in two or more credit unions. NCUA will permit single associational federal credit unions to overlap any other charters without performing an overlap analysis.

III.E.2—Organizational Restructuring

A federal credit union's field of membership will always be governed by the common bond descriptions contained in Section 5 of its charter. Where a sponsor organization expands its operations internally, by acquisition or otherwise, the credit union may serve these new entrants to

its field of membership if they are part of the common bond described in Section 5. NCUA will permit a complete overlap of the credit unions' fields of membership. If a sponsor organization sells off a group, new members can no longer be served unless they otherwise qualify for membership in the credit union or it converts to a multiple common bond.

Credit unions must submit documentation explaining the restructuring and providing information regarding the new organizational structure.

III.E.3—Exclusionary Clauses

An exclusionary clause is a limitation precluding the credit union from serving the primary members of a portion of a group otherwise included in its field of membership. NCUA no longer grants exclusionary clauses. Those granted prior to the adoption of this new chartering manual will remain in effect unless the credit unions agree to remove them or one of the affected credit unions submits a housekeeping amendment to have it removed.

III.F—Charter Conversions

A single associational common bond federal credit union may apply to convert to a community charter provided the field of membership requirements of the community charter are met. Groups within the existing charter which cannot qualify in the new charter cannot be served except for members of record, or groups or communities obtained in an emergency merger or P&A. A credit union must notify all groups that will be removed from the field of membership as a result of conversion. Members of record can continue to be served. Also, in order to support a case for a conversion, the applicant federal credit union may be required to develop a detailed business plan as specified in Chapter 2, Section V.A.3.

A single associational common bond federal credit union may apply to convert to a multiple common bond charter by adding a non-common bond group that is within a reasonable proximity of a service facility. Groups within the existing charter may be retained and continue to be served. However, future amendments, including any expansions of the original single common bond group, must be done in accordance with multiple common bond policy.

III.G—Removal of Groups From the Field of Membership

A credit union may request removal of a portion of the common bond group from its field of membership for various reasons. The most common reasons for this type of amendment are:

- The group is within the field of membership of two credit unions and one wishes to discontinue service;
- The federal credit union cannot continue to provide adequate service to the group;
- The group has ceased to exist;
- The group does not respond to repeated requests to contact the credit union or refuses to provide needed support; or
- The group initiates action to be removed from the field of membership.

When a federal credit union requests an amendment to remove a group from its field

of membership, the regional director will determine why the credit union desires to remove the group. If the regional director concurs with the request, membership will continue for those who are already members under the "once a member, always a member" provision of the Federal Credit Union Act.

III.H—Other Persons Eligible for Credit Union Membership

A number of persons by virtue of their close relationship to a common bond group may be included, at the charter applicant's option, in the field of membership. These include the following:

- Spouses of persons who died while within the field of membership of this credit union;
- Employees of this credit union;
- Volunteers;
- Members of the immediate family or household;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an "immediate family or household" of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. One example is volunteers working at a church.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as "once a member, always a member." The "once a member, always a member" provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

IV—Multiple Occupational/Associational Common Bonds

IV.A.1—General

A federal credit union may be chartered to serve a combination of distinct, definable single occupational and/or associational common bonds. This type of credit union is called a multiple common bond credit union. Each group in the field of membership must

have its own occupational or associational common bond. For example, a multiple common bond credit union may include two unrelated employers, or two unrelated associations, or a combination of two or more employers or associations. Additionally, these groups must be within reasonable geographic proximity of the credit union. That is, the groups must be within the service area of one of the credit union's service facilities. These groups are referred to as select groups. A multiple common bond credit union cannot include a TIP or expand using single common bond criteria.

A federal credit union's service area is the area that can reasonably be served by the service facilities accessible to the groups within the field of membership. The service area will most often coincide with that geographic area primarily served by the service facility. Additionally, the groups served by the credit union must have access to the service facility. The non-availability of other credit union service is a factor to be considered in determining whether the group is within reasonable proximity of a credit union wishing to add the group to its field of membership.

A service facility for multiple common bond credit unions is defined as a place where shares are accepted for members' accounts, loan applications are accepted or loans are disbursed. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements. A service facility also includes a shared branch or a shared branch network if either: (1) The credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or (2) the service facility is local to the credit union and the credit union is an authorized participant in the service center. This definition does not include the credit union's Internet Web site.

The select group as a whole will be considered to be within a credit union's service area when:

- A majority of the persons in a select group live, work, or gather regularly within the service area;
- The group's headquarters is located within the service area; or
- The group's "paid from" or "supervised from" location is within the service area.

IV.A.2—Sample Multiple Common Bond Field of Membership

An example of a multiple common bond field of membership is: "The field of membership of this federal credit union shall be limited to the following:

1. Employees of Teltex Corporation who work in Wilmington, Delaware;
2. Partners and employees of Smith & Jones, Attorneys at Law, who work in Wilmington, Delaware;
3. Members of the M&L Association in Wilmington, Delaware, who qualify for membership in accordance with its charter and bylaws in effect on December 31, 1997."

IV.B—Multiple Common Bond Amendments

IV.B.1—General

Section 5 of every multiple common bond federal credit union's charter defines the field of membership and select groups the credit union can legally serve. Only those persons or legal entities specified in the field of membership can be served. There are a number of instances in which Section 5 must be amended by NCUA.

First, a new select group is added to the field of membership. This may occur through agreement between the group and the credit union directly, or through a merger, corporate acquisition, purchase and assumption (P&A), or spin-off.

Second, a federal credit union qualifies to change its charter from:

- A Single occupational or associational charter to a multiple common bond charter;
- A multiple common bond to a single occupational or associational charter;
- A multiple common bond to a community charter; or
- A community to a multiple common bond charter.

Third, a federal credit union removes a group from its field of membership through agreement with the group, a spin-off, or because the group no longer exists.

IV.B.2—Numerical Limitation of Select Groups

An existing multiple common bond federal credit union that submits a request to amend its charter must provide documentation to establish that the multiple common bond requirements have been met. The regional director must approve all amendments to a multiple common bond credit union's field of membership.

NCUA will approve groups to a credit union's field of membership if the agency determines in writing that the following criteria are met:

- The credit union has not engaged in any unsafe or unsound practice, as determined by the regional director, which is material during the one year period preceding the filing to add the group;
- The credit union is "adequately capitalized." NCUA defines adequately capitalized to mean the credit union has a net worth ratio of not less than 6 percent. For low-income credit unions or credit unions chartered less than ten years, the regional director may determine that a net worth ratio of less than 6 percent is adequate if the credit union is making reasonable progress toward meeting the 6 percent net worth requirement. For any other credit union, the regional director may determine that a net worth ratio of less than 6 percent is adequate if the credit union is making reasonable progress toward meeting the 6 percent net worth requirement, and the addition of the group would not adversely affect the credit union's capitalization level;
- The credit union has the administrative capability to serve the proposed group and the financial resources to meet the need for additional staff and assets to serve the new group;
- Any potential harm the expansion may have on any other credit union and its members is clearly outweighed by the

probable beneficial effect of the expansion. With respect to a proposed expansion's effect on other credit unions, the requirements on overlapping fields of membership set forth in Section IV.E of this Chapter are also applicable; and

- If the formation of a separate credit union by such group is not practical and consistent with reasonable standards for the safe and sound operation of a credit union.

A detailed analysis is required for groups of 3,000 or more primary potential members requesting to be added to a multiple common bond credit union. It is incumbent upon the credit union to demonstrate that the formation of a separate credit union by such a group is not practical. The group must provide evidence that it lacks sufficient volunteer and other resources to support the efficient and effective operations of a credit union or does not meet the economic advisability criteria outlined in Chapter 1. If this can be demonstrated, the group may be added to a multiple common bond credit union's field of membership.

IV.B.3—Documentation Requirements

A multiple common bond credit union requesting a select group expansion must submit a formal written request, using the Application for Field of Membership Amendment (NCUA 4015 or NCUA 4015-EZ) to the appropriate NCUA regional director. An authorized credit union representative must sign the request.

The NCUA 4015-EZ (for groups less than 3,000 potential members) must be accompanied by the following:

- A letter, or equivalent documentation, from the group requesting credit union service. This letter must indicate:
 - That the group wants to be added to the applicant federal credit union's field of membership;
 - The number of persons currently included within the group to be added and their locations; and
 - The group's proximity to credit union's nearest service facility.

- The most recent copy of the group's charter and bylaws or equivalent documentation (for associational groups).

The NCUA 4015 (for groups of 3,000 or more primary potential members) must be accompanied by the following:

- A letter, or equivalent documentation, from the group requesting credit union service. This letter must indicate:
 - That the group wants to be added to the federal credit union's field of membership;
 - Whether the group presently has other credit union service available;
 - The number of persons currently included within the group to be added and their locations;
 - The group's proximity to credit union's nearest service facility; and
 - Why the formation of a separate credit union for the group is not practical or consistent with safety and soundness standards. A credit union need not address every item on the list, simply those issues that are relevant to its particular request:

Member location—whether the membership is widely dispersed or concentrated in a central location.

Demographics—the employee turnover rate, economic status of the group's members, and whether the group is more apt to consist of savers and/or borrowers.

Market competition—the availability of other financial services.

Desired services and products—the type of services the group desires in comparison to the type of services a new credit union could offer.

Sponsor subsidies—the availability of operating subsidies.

The desire of the sponsor—the extent of the sponsor's interest in supporting a credit union charter.

Employee interest—the extent of the employees' interest in obtaining a credit union charter.

Evidence of past failure—whether the group previously had its own credit union or previously filed for a credit union charter.

Administrative capacity to provide services—will the group have the management expertise to provide the services requested.

- If the group is eligible for membership in any other credit union, documentation must be provided to support inclusion of the group under the overlap standards set forth in Section IV.E of this Chapter; and
- The most recent copy of the group's charter and bylaws or equivalent documentation (for associational groups).

IV.B.4—Corporate Restructuring

If a select group within a federal credit union's field of membership undergoes a substantial restructuring, a change to the credit union's field of membership may be required if the credit union is to continue to provide service to the select group. NCUA permits a multiple common bond credit union to maintain in its field of membership a sold, spun-off, or merged select group to which it has been providing service. This type of amendment to the credit union's charter is not considered an expansion; therefore, the criteria relating to adding new groups are not applicable.

When two groups merge and each is in the field of membership of a credit union, then both (or all affected) credit unions can serve the resulting merged group, subject to any existing geographic limitation and without regard to any overlap provisions. However, the credit unions cannot serve the other multiple groups that may be in the field of membership of the other credit union.

IV.C—NCUA'S Procedures for Amending the Field of Membership

IV.C.1—General

All requests for approval to amend a federal credit union's charter must be submitted to the appropriate regional director.

IV.C.2—Regional Director's Decision

NCUA staff will review all amendment requests in order to ensure conformance to NCUA policy.

Before acting on a proposed amendment, the regional director may require an on-site review. In addition, the regional director may, after taking into account the significance of the proposed field of membership amendment, require the

applicant to submit a business plan addressing specific issues.

The financial and operational condition of the requesting credit union will be considered in every instance. An expanded field of membership may provide the basis for reversing adverse trends. In such cases, an amendment to expand the field of membership may be granted notwithstanding the credit union's adverse trends. The applicant credit union must clearly establish that the approval of the expanded field of membership meets the requirements of Section IV.B.2 of this Chapter and will not increase the risk to the NCUSIF.

IV.C.3—Regional Director Approval

If the regional director approves the requested amendment, the credit union will be issued an amendment to Section 5 of its charter.

IV.C.4—Regional Director Disapproval

When a regional director disapproves any application, in whole or in part, to amend the field of membership under this chapter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- Options to consider, if appropriate, for gaining approval; and
- Appeal procedure.

IV.C.5—Appeal of Regional Director Decision

If a field of membership expansion request, merger, or spin-off is denied by the regional director, the federal credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial, and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

IV.D—Mergers, Purchase and Assumptions, and Spin-Offs

In general, other than the addition of select groups, there are three additional ways a multiple common bond federal credit union can expand its field of membership:

- By taking in the field of membership of another credit union through a merger;
- By taking in the field of membership of another credit union through a purchase and assumption (P&A); or
- By taking a portion of another credit union's field of membership through a spin-off.

IV.D.1—Voluntary Mergers

a. All Select Groups in the Merging Credit Union's Field of Membership Have Less Than 3,000 Primary Potential Members.

A voluntary merger of two or more federal credit unions is permissible as long as each select group in the merging credit union's field of membership has less than 3,000 primary potential members. While the merger requirements outlined in Section 205 of the Federal Credit Union Act must still be met, the requirements of Chapter 2, Section IV.B.2 of this manual are not applicable.

b. One or More Select Groups in the Merging Credit Union's Field of Membership Has 3,000 or More Primary Potential Members.

If the merging credit unions serve the same group, and the group consists of 3,000 or more primary potential members, then the ability to form a separate credit union analysis is not required for that group. If the merging credit union has any other groups consisting of 3,000 or more primary potential members, special requirements apply. NCUA will analyze each group of 3,000 or more primary potential members, except as noted above, to determine whether the formation of a separate credit union by such a group is practical. If the formation of a separate credit union by such a group is not practical because the group lacks sufficient volunteer and other resources to support the efficient and effective operations of a credit union or does not meet the economic advisable criteria outlined in Chapter 1, the group may be merged into a multiple common bond credit union. If the formation of a separate credit union is practical, the group must be spun-off before the merger can be approved.

c. Merger of a Single Common Bond Credit Union Into a Multiple Common Bond Credit Union.

A financially healthy single common bond credit union with a primary potential membership of 3,000 or more cannot merge into a multiple common bond credit union, absent supervisory reasons, unless the continuing credit union already serves the same group.

d. Merger Approval.

If the merger is approved, the qualifying groups within the merging credit union's field of membership will be transferred intact to the continuing credit union and can continue to be served.

Where the merging credit union is state-chartered, the field of membership rules applicable to a federal credit union apply.

Mergers must be approved by the NCUA regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union, and, as applicable, the state regulators.

IV.D.2—Supervisory Mergers

The NCUA may approve the merger of any federally insured credit union when safety and soundness concerns are present without regard to the 3,000 numerical limitation. The credit union need not be insolvent or in danger of insolvency for NCUA to use this statutory authority. Examples constituting appropriate reasons for using this authority

are: abandonment of the management and/or officials and an inability to find replacements, loss of sponsor support, serious and persistent record keeping problems, sustained material decline in financial condition, or other serious or persistent circumstances.

IV.D.3—Emergency Mergers

An emergency merger may be approved by NCUA without regard to field of membership rules, the 3,000 numerical limitation, or other legal constraints. An emergency merger involves NCUA's direct intervention and approval. The credit union to be merged must either be insolvent or likely to become insolvent, and NCUA must determine that:

- An emergency requiring expeditious action exists;
- Other alternatives are not reasonably available; and
- The public interest would best be served by approving the merger.

If not corrected, conditions that could lead to insolvency include, but are not limited to:

- Abandonment by management;
- Loss of sponsor;
- Serious and persistent record keeping problems; or
- Serious and persistent operational concerns.

In an emergency merger situation, NCUA will take an active role in finding a suitable merger partner (continuing credit union). NCUA is primarily concerned that the continuing credit union has the financial strength and management expertise to absorb the troubled credit union without adversely affecting its own financial condition and stability.

As a stipulated condition to an emergency merger, the field of membership of the merging credit union may be transferred intact to the continuing federal credit union without regard to any field of membership restrictions including numerical limitation requirements. Under this authority, any single occupational or associational common bond, multiple common bond, or community charter may merge into a multiple common bond credit union and that credit union can continue to serve the merging credit union's field of membership. Subsequent field of membership expansions of the continuing multiple common bond credit union must be consistent with multiple common bond policies.

Emergency mergers involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union and, as applicable, the state regulators.

IV.D.4—Purchase and Assumption (P&A)

Another alternative for acquiring the field of membership of a failing credit union is through a consolidation known as a P&A. Generally, the requirements applicable to field of membership expansions found in this chapter apply to purchase and assumptions where the purchasing credit union is a federal charter.

A P&A has limited application because, in most cases, the failing credit union must be placed into involuntary liquidation.

However, in the few instances where a P&A may occur, the assuming federal credit union, as with emergency mergers, may acquire the entire field of membership if the emergency criteria are satisfied. Specified loans, shares, and certain other designated assets and liabilities, without regard to field of membership restrictions, may also be acquired without changing the character of the continuing federal credit union for purposes of future field of membership amendments. Subsequent field of membership expansions must be consistent with multiple common bond policies.

P&As involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the purchased and/or assumed credit union and, as applicable, the state regulators.

IV.D.5—Spin-Offs

A spin-off occurs when, by agreement of the parties, a portion of the field of membership, assets, liabilities, shares, and capital of a credit union are transferred to a new or existing credit union. A spin-off is unique in that usually one credit union has a field of membership expansion and the other loses a portion of its field of membership.

All common bond requirements apply regardless of whether the spun-off group becomes a new charter or goes to an existing federal charter.

The request for approval of a spun-off group must be supported with a plan that addresses, at a minimum:

- Why the spin-off is being requested;
- What part of the field of membership is to be spun off;
- Which assets, liabilities, shares, and capital are to be transferred;
- The financial impact the spin-off will have on the affected credit unions;
- The ability of the acquiring credit union to effectively serve the new members;
- The proposed spin-off date; and
- Disclosure to the members of the requirements set forth above.

The spin-off request must also include current financial statements from the affected credit unions and the proposed voting ballot.

For federal credit unions spinning off a group, membership notice and voting requirements and procedures are the same as for mergers (see Part 708 of the NCUA Rules and Regulations), except that only the members directly affected by the spin-off—those whose shares are to be transferred—are permitted to vote. Members whose shares are not being transferred will not be afforded the opportunity to vote. All members of the group to be spun off (whether they voted in favor, against, or not at all) will be transferred if the spin-off is approved by the voting membership. Voting requirements for federally insured state credit unions are governed by state law.

Spin-offs involving federally insured credit unions in different NCUA regions must be approved by all regional directors where the credit unions are headquartered and the state regulators, as applicable. Spin-offs in the same region also require approval by the state regulator, as applicable.

*IV.E—Overlaps**IV.E.1—General*

An overlap exists when a group of persons is eligible for membership in two or more credit unions, including state charters. An overlap is permitted when the expansion's beneficial effect in meeting the convenience and needs of the members of the group proposed to be included in the field of membership clearly outweighs any adverse effect on the overlapped credit union.

Credit unions must investigate the possibility of an overlap with federally insured credit unions prior to submitting an expansion request if the group has 3,000 or more primary potential members. If cases arise where the assurance given to a regional director concerning the unavailability of credit union service is inaccurate, the misinformation may be grounds for removal of the group from the federal credit union's charter.

When an overlap situation requiring analysis does arise, officials of the expanding credit union must ascertain the views of the overlapped credit union. If the overlapped credit union does not object, the applicant must submit a letter or other documentation to that effect. If the overlapped credit union does not respond, the expanding credit union must notify NCUA in writing of its attempt to obtain the overlapped credit union's comments.

NCUA will approve an overlap if the expansion's beneficial effect in meeting the convenience and needs of the members of the group clearly outweighs any adverse effect on the overlapped credit union.

In reviewing the overlap, the regional director will consider:

- The view of the overlapped credit union(s);
- Whether the overlap is incidental in nature—the group of persons in question is so small as to have no material effect on the original credit union;
- Whether there is limited participation by members or employees of the group in the original credit union after the expiration of a reasonable period of time;
- Whether the original credit union fails to provide requested service;
- Financial effect on the overlapped credit union;
- The desires of the group(s);
- The desire of the sponsor organization; and
- The best interests of the affected group and the credit union members involved.

Generally, if the overlapped credit union does not object, and NCUA determines that there is no safety and soundness problem, the overlap will be permitted.

Potential overlaps of a federally insured state credit union's field of membership by a federal credit union will generally be analyzed in the same way as if two federal credit unions were involved. Where a federally insured state credit union's field of membership is broadly stated, NCUA will exclude its field of membership from any overlap protection.

NCUA will permit multiple common bond federal credit unions to overlap community charters without performing an overlap analysis.

IV.E.2—Overlap Issues as a Result of Organizational Restructuring

A federal credit union's field of membership will always be governed by the field of membership descriptions contained in Section 5 of its charter. Where a sponsor organization expands its operations internally, by acquisition or otherwise, the credit union may serve these new entrants to its field of membership if they are part of any select group listed in Section 5. Where acquisitions are made which add a new subsidiary, the group cannot be served until the subsidiary is included in the field of membership through a housekeeping amendment.

Overlaps may occur as a result of restructuring or merger of the parent organization. When such overlaps occur, each credit union must request a field of membership amendment to reflect the new groups each wishes to serve. The credit union can continue to serve any current group in its field of membership that is acquiring a new group or has been acquired by a new group. The new group cannot be served by the credit union until the field of membership amendment is approved by NCUA.

Credit unions affected by organizational restructuring or merger should attempt to resolve overlap issues among themselves. Unless an agreement is reached limiting the overlap resulting from the corporate restructuring, NCUA will permit a complete overlap of the credit unions' fields of membership. When two groups merge, or one group is acquired by the other, and each is in the field of membership of a credit union, both (or all affected) credit unions can serve the resulting merged or acquired group, subject to any existing geographic limitation and without regard to any overlap provisions. This is accomplished through a housekeeping amendment.

Credit unions must submit to NCUA documentation explaining the restructuring and provide information regarding the new organizational structure.

IV.E.3—Exclusionary Clauses

An exclusionary clause is a limitation precluding the credit union from serving the primary members of a portion of a group otherwise included in its field of membership. NCUA no longer grants exclusionary clauses. Those granted prior to the adoption of this new chartering manual will remain in effect unless the credit unions agree to remove them or one of the affected credit unions submits a housekeeping amendment to have it removed.

IV.F—Charter Conversion

A multiple common bond federal credit union may apply to convert to a community charter provided the field of membership requirements of the community charter are met. Groups within the existing charter which cannot qualify in the new charter cannot be served except for members of record, or groups or communities obtained in an emergency merger or P&A. A credit union must notify all groups that will be removed from the field of membership as a result of conversion. Members of record can continue to be served. Also, in order to support a case

for a conversion, the applicant federal credit union may be required to develop a detailed business plan as specified in Chapter 2, Section V.A.3.

A multiple common bond federal credit union may apply to convert to a single occupational or associational common bond charter provided the field of membership requirements of the new charter are met. Groups within the existing charter, which do not qualify in the new charter, cannot be served except for members of record, or groups or communities obtained in an emergency merger or P&A. A credit union must notify all groups that will be removed from the field of membership as a result of conversion.

IV.G—Removal of Groups From the Field of Membership

A credit union may request removal of a group from its field of membership for various reasons. The most common reasons for this type of amendment are:

- The group is within the field of membership of two credit unions and one wishes to discontinue service;
- The federal credit union cannot continue to provide adequate service to the group;
- The group has ceased to exist;
- The group does not respond to repeated requests to contact the credit union or refuses to provide needed support;
- The group initiates action to be removed from the field of membership; or
- The federal credit union wishes to convert to a single common bond.

When a federal credit union requests an amendment to remove a group from its field of membership, the regional director will determine why the credit union desires to remove the group. If the regional director concurs with the request, membership will continue for those who are already members under the "once a member, always a member" provision of the Federal Credit Union Act.

IV.H—Other Persons Eligible for Credit Union Membership

A number of persons, by virtue of their close relationship to a common bond group, may be included, at the charter applicant's option, in the field of membership. These include the following:

- Spouses of persons who died while within the field of membership of this credit union;
- Employees of this credit union;
- Persons retired as pensioners or annuitants from the above employment;
- Volunteers;
- Members of the immediate family or household;
- Organizations of such persons; and
- Corporate or other legal entities in this charter.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an

“immediate family or household” of a credit union member. It is not necessary for the primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person’s immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Volunteers, by virtue of their close relationship with a sponsor group, may be included. Examples include volunteers working at a hospital or church.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as “once a member, always a member.” The “once a member, always a member” provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

V—Community Charter Requirements

V.A.1—General

Community charters must be based on a single, geographically well-defined local community, neighborhood, or rural district where individuals have common interests and/or interact. More than one credit union may serve the same community.

NCUA recognizes four types of affinity on which a community charter can be based—persons who live in, worship in, attend school in, or work in the community. Businesses and other legal entities within the community boundaries may also qualify for membership.

NCUA has established the following requirements for community charters:

- The geographic area’s boundaries must be clearly defined;
- The area is a “well-defined local, community, neighborhood, or rural district;” and
- Individuals must have common interests and/or interact.

V.A.2—Documentation Requirements

In addition to the documentation requirements set forth in Chapter 1 to charter a credit union, a community credit union applicant must provide additional documentation addressing the proposed area to be served and community service policies.

A community credit union must meet the statutory requirements that the proposed community area is (1) well-defined, and (2) a local community, neighborhood, or rural district.

“Well-defined” means the proposed area has specific geographic boundaries. Geographic boundaries may include a city, township, county (or its political equivalent), or a clearly identifiable neighborhood. Although congressional districts and state boundaries are well-defined areas, they do not meet the requirement that the proposed area be a local community.

The well-defined local community, neighborhood, or rural district requirement *is met if*:

- The area to be served is in a recognized single political jurisdiction, i.e., a city, county, or their political equivalent, or any contiguous portion thereof.

The well-defined local community, neighborhood, or rural district requirement *may be met if*:

- The area to be served is in multiple contiguous political jurisdictions, i.e., a city, county, or their political equivalent, or any contiguous portion thereof and if the population of the requested well-defined area does not exceed 500,000; or
- The area to be served is a Metropolitan Statistical Area (MSA) or its equivalent, or a portion thereof, where the population of the MSA or its equivalent does not exceed 1,000,000.

If the proposed area meets either the multiple political jurisdiction or MSA criteria, the credit union must submit a letter describing how the area meets the standards for community interaction and/or common interests.

If NCUA does not find sufficient evidence of community interaction and/or common interests or if the area to be served does not meet the MSA or multiple political jurisdiction requirements of the preceding paragraph, the application must include documentation to support that it is a well-defined local community, neighborhood, or rural district.

It is the applicant’s responsibility to demonstrate the relevance of the documentation provided in support of the application. This must be provided in a narrative summary. The narrative summary must explain how the documentation demonstrates interaction and/or common interests. For example, simply listing newspapers and organizations in the area is not sufficient to demonstrate that the area is a local community, neighborhood, or rural district.

Examples of acceptable documentation may include:

- The defined political jurisdictions;
- Major trade areas (shopping patterns and traffic flows);
- Shared/common facilities (for example, educational, medical, police and fire protection, school district, water, etc.);
- Organizations and clubs within the community area;
- Newspapers or other periodicals published for and about the area;
- A local map designating the area to be served and locations of current and proposed service facilities and a regional or state map with the proposed community outlined; or
- Other documentation that demonstrates that the area is a community where individuals have common interests and/or interact.

An applicant need not submit a narrative summary or documentation to support a proposed community charter, amendment or conversion as a well-defined local community, neighborhood or rural district if the NCUA has previously determined that the same exact geographic area meets that requirement in connection with

consideration of a prior application since IRPS 99–1, as amended. Applicants may contact the appropriate regional office to find out if the area they are interested in has already been determined to meet the community requirements. If the area is the same as a previously approved area, an applicant need only include a statement to that effect in the application. Applicants may be required to submit their own summary and documentation regarding the community requirements if NCUA has reason to believe that prior submissions are no longer accurate.

A community credit union is frequently more susceptible to competition from other local financial institutions and generally does not have substantial support from any single sponsoring company or association. As a result, a community credit union will often encounter financial and operational factors that differ from an occupational or associational charter. Its diverse membership may require special marketing programs targeted to different segments of the community. For example, the lack of payroll deduction creates special challenges in the development of savings promotional programs and in the collection of loans.

Accordingly, it is essential for the proposed community credit union to develop a detailed and practical business and marketing plan for at least the first two years of operation. The proposed credit union must not only address the documentation requirements set forth in Chapter 1, but also focus on the accomplishment of the unique financial and operational factors of a community charter.

Community credit unions will be expected to regularly review and to follow, to the fullest extent economically possible, the marketing and business plan submitted with their application.

V.A.3—Special Documentation Requirements for a Converting Credit Union

An existing federal credit union may apply to convert to a community charter. Groups currently in the credit union’s field of membership but outside the new community credit union’s boundaries may not be included in the new community charter. Therefore, the credit union is required to notify groups that will be removed from the field of membership as a result of the conversion. Members of record can continue to be served.

The documentation requirements set forth in Section V.A.2 of this Chapter must be met before a community charter can be approved. In order to support a case for a conversion to community charter, the applicant federal credit union must develop a business plan incorporating the following data:

- Pro forma financial statements for the first two years after the proposed conversion, including assumptions—e.g., member, share, loan, and asset growth;
- Marketing plan addressing how the community will be served;
- Financial services to be provided to members;
- A local map showing current and proposed service facilities; and
- Anticipated financial impact on the credit union in terms of need for additional employees and fixed assets.

Before approval of an application to convert to a community credit union, NCUA must be satisfied that the institution will be viable and capable of providing services to its members.

V.A.4—Community Boundaries

The geographic boundaries of a community federal credit union are the areas defined in its charter. The boundaries can usually be defined using political borders, streets, rivers, railroad tracks, etc.

A community that is a recognized legal entity, may be stated in the field of membership—for example, “Gus Township, Texas” or “Kristi County, Virginia.”

A community that is a recognized MSA must state in the field of membership the political jurisdiction(s) that comprise the MSA.

V.A.5—Special Community Charters

A community field of membership may include persons who work or attend school in a particular industrial park, shopping mall, office complex, or similar development. The proposed field of membership must have clearly defined geographic boundaries.

V.A.6—Sample Community Fields of Membership

A community charter does not have to include all four affinities (i.e., live, work, worship, or attend school in a community). Some examples of community fields of membership are:

- Persons who live, work, worship, or attend school in, and businesses located in the area of Johnson City, Tennessee, bounded by Fern Street on the north, Long Street on the east, Fourth Street on the south, and Elm Avenue on the west;
- Persons who live or work in Green County, Maine;
- Persons who live, worship, or work in and businesses and other legal entities located in Independent School District No. 1, DuPage County, Illinois;
- Persons who live, worship, work (or regularly conduct business in), or attend school on the University of Dayton campus, in Dayton, Ohio;
- Persons who work for businesses located in Clifton Country Mall, in Clifton Park, New York; or
- Persons who live, work, or worship in the Binghamton, New York, MSA, consisting of Broome and Tioga Counties, New York.

Some examples of insufficiently defined community field of membership definitions are:

- Persons who live or work within and businesses located within a 10-mile radius of Washington, DC (using a radius does not establish a well-defined area);
- Persons who live or work in the industrial section of New York, New York. (not a well-defined neighborhood, community, or rural district); or
- Persons who live or work in the greater Boston area. (not a well-defined neighborhood, community, or rural district).

Some examples of unacceptable local communities, neighborhoods, or rural districts are:

- Persons who live or work in the State of California. (does not meet the definition of

local community, neighborhood, or rural district).

- Persons who live in the first congressional district of Florida. (does not meet the definition of local community, neighborhood, or rural district).

V.B—Field of Membership Amendments

A community credit union may amend its field of membership by adding additional affinities or removing exclusionary clauses. This can be accomplished with a housekeeping amendment.

A community credit union also may expand its geographic boundaries. Persons who live, work, worship, or attend school within the proposed well-defined local community, neighborhood or rural district must have common interests and/or interact. The credit union must follow the requirements of Section V.A.3 of this chapter.

V.C—NCUA Procedures for Amending the Field of Membership

V.C.1—General

All requests for approval to amend a community credit union's charter must be submitted to the appropriate regional director. If a decision cannot be made within a reasonable period of time, the regional director will notify the credit union.

V.C.2—NCUA's Decision

The financial and operational condition of the requesting credit union will be considered in every instance. The economic advisability of expanding the field of membership of a credit union with financial or operational problems must be carefully considered.

In most cases, field of membership amendments will only be approved for credit unions that are operating satisfactorily. Generally, if a federal credit union is having difficulty providing service to its current membership, or is experiencing financial or other operational problems, it may have more difficulty serving an expanded field of membership.

Occasionally, however, an expanded field of membership may provide the basis for reversing current financial problems. In such cases, an amendment to expand the field of membership may be granted notwithstanding the credit union's financial or operational problems. The applicant credit union must clearly establish that the expanded field of membership is in the best interest of the members and will not increase the risk to the NCUSIF.

V.C.3—NCUA Approval

If the requested amendment is approved by NCUA, the credit union will be issued an amendment to Section 5 of its charter.

V.C.4—NCUA Disapproval

When NCUA disapproves any application to amend the field of membership, in whole or in part, under this chapter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- If appropriate, options or suggestions that could be considered for gaining approval; and
- Appeal procedures.

V.C.5—Appeal of Regional Director Decision

If a field of membership expansion request, merger, or spin-off is denied by the regional director, the federal credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the NCUA Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

V.D—Mergers, Purchase and Assumptions, and Spin-Offs

There are three additional ways a community federal credit union can expand its field of membership:

- By taking in the field of membership of another credit union through a merger;
- By taking in the field of membership through a purchase and assumption (P&A); or
- By taking a portion of another credit union's field of membership through a spin-off.

V.D.1—Standard Mergers

Generally, the requirements applicable to field of membership expansions apply to mergers where the continuing credit union is a community federal charter.

Where both credit unions are community charters, the continuing credit union must meet the criteria for expanding the community boundaries. A community credit union cannot merge into a single occupational/associational, or multiple common bond credit union, except in an emergency merger. However, a single occupational or associational, or multiple common bond credit union can merge into a community charter as long as the merging credit union has a service facility within the community boundaries or a majority of the merging credit union's field of membership would qualify for membership in the community charter. While a community charter may take in an occupational, associational, or multiple common bond credit union in a merger, it will remain a community charter.

Groups within the merging credit union's field of membership located outside of the community boundaries may not continue to be served. The merging credit union must notify groups that will be removed from the field of membership as a result of the merger. However, the credit union may continue to serve members of record.

Where a state-chartered credit union is merging into a community federal credit union, the continuing federal credit union's field of membership will be worded in accordance with NCUA policy. Any subsequent field of membership expansions must comply with applicable amendment procedures.

Mergers must be approved by the NCUA regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union, and, as applicable, the state regulators.

V.D.2—Emergency Mergers

An emergency merger may be approved by NCUA without regard to field of membership requirements or other legal constraints. An emergency merger involves NCUA's direct intervention and approval. The credit union to be merged must either be insolvent or likely to become insolvent, and NCUA must determine that:

- An emergency requiring expeditious action exists;
- Other alternatives are not reasonably available; and
- The public interest would best be served by approving the merger.

If not corrected, conditions that could lead to insolvency include, but are not limited to:

- Abandonment by management;
- Loss of sponsor;
- Serious and persistent record keeping; or
- Serious and persistent operational concerns.

In an emergency merger situation, NCUA will take an active role in finding a suitable merger partner (continuing credit union). NCUA is primarily concerned that the continuing credit union has the financial strength and management expertise to absorb the troubled credit union without adversely affecting its own financial condition and stability.

As a stipulated condition to an emergency merger, the field of membership of the merging credit union may be transferred intact to the continuing federal credit union without regard to any field of membership restrictions, including the service facility requirement. Under this authority, a federal credit union may take in any dissimilar field of membership.

Even though the merging credit union is a single common bond credit union or multiple common bond credit union or community credit union, the continuing credit union will remain a community charter. Future community expansions will be based on the continuing credit union's original community area.

Emergency mergers involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the merging credit union and, as applicable, the state regulators.

V.D.3—Purchase and Assumption (P&A)

Another alternative for acquiring the field of membership of a failing credit union is through a consolidation known as a P&A. Generally, the requirements applicable to community expansions found in this chapter

apply to purchase and assumptions where the purchasing credit union is a federal charter.

A P&A has limited application because, in most instances, the failing credit union must be placed into involuntary liquidation. However, in the few instances where a P&A may occur, the assuming federal credit union, as with emergency mergers, may acquire the entire field of membership if the emergency criteria are satisfied.

In a P&A processed under the emergency criteria, specified loans, shares, and certain other designated assets and liabilities may also be acquired without regard to field of membership restrictions and without changing the character of the continuing federal credit union for purposes of future field of membership amendments.

If the P&A does not meet the emergency criteria, then only members of record can be obtained unless they otherwise qualify for membership in the community charter.

P&As involving federally insured credit unions in different NCUA regions must be approved by the regional director where the continuing credit union is headquartered, with the concurrence of the regional director of the purchased and/or assumed credit union and, as applicable, the state regulators.

V.D.4—Spin-Offs

A spin-off occurs when, by agreement of the parties, a portion of the field of membership, assets, liabilities, shares, and capital of a credit union are transferred to a new or existing credit union. A spin-off is unique in that usually one credit union has a field of membership expansion and the other loses a portion of its field of membership.

All field of membership requirements apply regardless of whether the spun-off group goes to a new or existing federal charter.

The request for approval of a spin-off must be supported with a plan that addresses, at a minimum:

- Why the spin-off is being requested;
- What part of the field of membership is to be spun off;
- Whether the field of membership requirements are met;
- Which assets, liabilities, shares, and capital are to be transferred;
- The financial impact the spin-off will have on the affected credit unions;
- The ability of the acquiring credit union to effectively serve the new members;
- The proposed spin-off date; and
- Disclosure to the members of the requirements set forth above.

The spin-off request must also include current financial statements from the affected credit unions and the proposed voting ballot.

For federal credit unions spinning off a portion of the community, membership notice and voting requirements and procedures are the same as for mergers (see Part 708 of the NCUA Rules and Regulations), except that only the members directly affected by the spin-off—those whose shares are to be transferred—are permitted to vote. Members whose shares are not being transferred will not be afforded the opportunity to vote. All members of the group to be spun off (whether they voted in

favor, against, or not at all) will be transferred if the spin-off is approved by the voting membership. Voting requirements for federally insured state credit unions are governed by state law.

V.E—Overlaps

V.E.1—General

Generally, an overlap exists when a group of persons is eligible for membership in two or more credit unions. NCUA will permit community credit unions to overlap any other charters without performing an overlap analysis.

V.E.2—Exclusionary Clauses

An exclusionary clause is a limitation precluding the credit union from serving the primary members of a portion of a group or community otherwise included in its field of membership. NCUA no longer grants exclusionary clauses. Those granted prior to the adoption of this new chartering manual will remain in effect unless the credit unions agree to remove them or one of the affected credit unions submits a housekeeping amendment to have it removed.

V.F—Charter Conversions

A community federal credit union may convert to a single occupational or associational, or multiple common bond credit union. The converting credit union must meet all occupational, associational, and multiple common bond requirements, as applicable. The converting credit union may continue to serve members of record of the prior field of membership as of the date of the conversion, and any groups or communities obtained in an emergency merger or P&A. A change to the credit union's field of membership and designated common bond will be necessary.

A community credit union may convert to serve a new geographical area provided the field of membership requirements of V.A.3 of this chapter are met. Members of record of the original community can continue to be served.

V.G—Other Persons With a Relationship to the Community

A number of persons who have a close relationship to the community may be included, at the charter applicant's option, in the field of membership. These include the following:

- Spouses of persons who died while within the field of membership of this credit union;
- Employees of this credit union;
- Volunteers in the community;
- Members of the immediate family or household; and
- Organizations of such persons.

Immediate family is defined as spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Household is defined as persons living in the same residence maintaining a single economic unit.

Membership eligibility is extended only to individuals who are members of an "immediate family or household" of a credit union member. It is not necessary for the

primary member to join the credit union in order for the immediate family or household member of the primary member to join, provided the immediate family or household clause is included in the field of membership. However, it is necessary for the immediate family member or household member to first join in order for that person's immediate family member or household member to join the credit union. A credit union can adopt a more restrictive definition of immediate family or household.

Under the Federal Credit Union Act, once a person becomes a member of the credit union, such person may remain a member of the credit union until the person chooses to withdraw or is expelled from the membership of the credit union. This is commonly referred to as "once a member, always a member." The "once a member, always a member" provision does not prevent a credit union from restricting services to members who are no longer within the field of membership.

Chapter 3

Low-Income Credit Unions and Credit Unions Serving Underserved Areas

I—Introduction

One of the primary reasons for the creation of federal credit unions is to make credit available to people of modest means for provident and productive purposes. To help NCUA fulfill this mission, the agency has established special operational policies for federal credit unions that serve low-income groups and underserved areas. The policies provide a greater degree of flexibility that will enhance and invigorate capital infusion into low-income groups, low-income communities, and underserved areas. These unique policies are necessary to provide credit unions serving low-income groups with financial stability and potential for controlled growth and to encourage the formation of new charters as well as the delivery of credit union services in low-income communities.

II—Low-Income Credit Union

II.A—Defined

A credit union serving predominantly low-income members may be designated as a low-income credit union. Section 701.34 of NCUA's Rules and Regulations defines the term "low-income members" as those members:

- Who make less than 80 percent of the average for all wage earners as established by the Bureau of Labor Statistics; or
- Whose annual household income falls at or below 80 percent of the median household income for the nation as established by the Census Bureau.

The term "low-income members" also includes members who are full-time or part-time students in a college, university, high school, or vocational school.

To obtain a low-income designation from NCUA, an existing credit union must establish that a majority of its members meet the low-income definition. An existing community credit union that serves a geographic area where a majority of residents meet the annual income standard is

presumed to be serving predominantly low-income members. A low-income designation for a new credit union charter may be based on a majority of the potential membership.

II.B—Special Programs

A credit union with a low-income designation has greater flexibility in accepting nonmember deposits insured by the NCUSIF, are exempt from the aggregate loan limit on business loans, and may offer secondary capital accounts to strengthen its capital base. It also may participate in special funding programs such as the Community Development Revolving Loan Program for Credit Unions (CDRLP) if it is involved in the stimulation of economic development and community revitalization efforts.

The CDRLP provides both loans and grants for technical assistance to low-income credit unions. The requirements for participation in the revolving loan program are in Part 705 of the NCUA Rules and Regulations. Only operating credit unions are eligible for participation in this program.

II.C—Low-Income Documentation

A federal credit union charter applicant or existing credit union wishing to receive a low-income designation should forward a separate request for the designation to the regional director, along with appropriate documentation supporting the request.

For community charter applicants, the supporting material should include the median household income or annual wage figures for the community to be served. If this information is unavailable, the applicant should identify the individual zip codes or census tracts that comprise the community and NCUA will assist in obtaining the necessary demographic data.

Similarly, if single occupational or associational or multiple common bond charter applicants cannot supply income data on its potential members, they should provide the regional director with a list which includes the number of potential members, sorted by their residential zip codes, and NCUA will assist in obtaining the necessary demographic data.

An existing credit union can perform a loan or membership survey to determine if the credit union is primarily serving low-income members.

II.D—Third Party Assistance

A low-income federal credit union charter applicant may contract with a third party to assist in the chartering and low-income designation process. If the charter is granted, a low-income credit union may contract with a third party to provide necessary management services. Such contracts should not exceed the duration of one year subject to renewal.

II.E—Special Rules for Low-Income Federal Credit Unions

In recognition of the unique efforts needed to help make credit union service available to low-income groups, NCUA has adopted special rules that pertain to low-income credit union charters, as well as field of membership additions for low-income credit unions. These special rules provide additional latitude to enable underserved,

low-income individuals to gain access to credit union service.

NCUA permits credit union chartering and field of membership amendments based on associational groups formed for the sole purpose of making credit union service available to low-income persons. The association must be defined so that all of its members will meet the low-income definition of Section 701.34 of the NCUA Rules and Regulations. Any multiple common bond credit union can add low-income associations to their fields of membership.

A low-income designated community federal credit union has additional latitude in serving persons who are affiliated with the community. In addition to serving members who live, work, worship, or attend school in the community, a low-income community federal credit union may also serve persons who participate in programs to alleviate poverty or distress, or who participate in associations headquartered in the community.

Examples of a low-income designated community and an associational-based low-income federal credit union are as follows:

- Persons who live in [the target area]; persons who work, worship, attend school, or participate in associations headquartered in [the target area]; persons participating in programs to alleviate poverty or distress which are located in [the target area]; incorporated and unincorporated organizations located in [the target area] or maintaining a facility in [the target area]; and organizations of such persons.

- Members of the Canarsie Economic Assistance League, in Brooklyn, NY, an association whose members all meet the low-income definition of Section 701.34 of the NCUA Rules and Regulations.

III—Service to Underserved Communities

A multiple common bond federal credit union may include in its field of membership, without regard to location, an "underserved area" as defined by the Federal Credit Union Act. 12 U.S.C. 1759(c)(2). The addition of an "underserved area" will not change the charter type of the multiple common bond federal credit union. More than one multiple common-bond federal credit union can serve the same "underserved area," if approved as provided below.

The Federal Credit Union Act defines an "underserved area" as (1) a "local community, neighborhood, or rural district" that (2) meets the definition of an "investment area" under section 103(16) of the Community Development Banking and Financial Institutions Act of 1994 ("CDFI"), 12 U.S.C. 4702(16), and (3) is "underserved by other depository institutions" based on data of the NCUA Board and the federal banking agencies.

(1) *Local Community*. To be eligible for approval as "underserved," a proposed area must be a well-defined local community, neighborhood, or rural district as defined in Chapter 2, sections V.A.1. and V.A.2. of this Manual.

(2) *Investment Area*. To be approved as an "underserved area," the proposed area must

meet the CDFI definition of an “investment area.” 12 U.S.C. 4702(16). A proposed area that, at the time the credit union applies, is designated in its entirety as an Empowerment Zone or Enterprise Community (12 U.S.C. 1391) automatically qualifies as an “investment area”; no further criteria must be met. 12 U.S.C. 4702(16)(B).

Otherwise, to qualify as an “investment area,” the proposed area must meet “the objective criteria of economic distress” developed by the CDFI Fund (“distress criteria”), and also must demonstrate that the area has “significant unmet needs” for loans and financial services credit unions are authorized to offer to their members. 12 U.S.C. 4702(16)(A).

(3) *Location of Proposed “Underserved Area”*. The location of a proposed area either within or outside of a Metropolitan Area determines the geographic unit(s) a credit union must apply to determine whether the area meets the distress criteria. An area is deemed to be Metropolitan if it is located, in whole or in part, within a “metropolitan statistical area” (“MSA”) that corresponds to the most recent completed decennial census published by the U.S. Bureau of the Census (“decennial Census”); an area that is located entirely outside such an MSA is deemed to be Non-Metropolitan.

For a Metropolitan proposed area, the permissible units (“Metro units”) for implementing the economic distress criteria are: a census tract, a block group, and an American Indian or Alaskan Native area. 12 CFR 1805.201(b)(3)(ii)(B) (2008). For a Non-Metropolitan proposed area, the permissible units (“Non-Metro units”) are: a county (or equivalent area), a minor civil division that is a unit of local government, an incorporated place, a census tract, a block numbering area, a block group, or an American Indian or Alaskan Native area. *Id.* When possible, it is advisable to use a census tract as the proposed area’s Metro unit and either a census tract or county as its Non-Metro unit, as the case may be.

(4) *Proposed Area Consisting of a Single Metro Unit*. A proposed area consisting of a single whole unit, either Metro (e.g., a single census tract) or Non-Metro (e.g., a single county), must meet one of the following distress criteria, as reported by the most recent decennial Census:

- *Unemployment*. Unemployment rate at least 1.5 times the national average; or
- *Poverty*. At least 20 percent (20%) of the population lives in poverty.
- *Other Criterion*. Any other economic distress criterion the CDFI Fund may adopt in the future.

12 CFR 1805.201(b)(3)(ii)(D)(1) and (3) (2008).

If the proposed area consists of a single Metro unit of any kind, it may also meet the following criterion, as reported by the most recent decennial Census:

- *Metro Area Median Family Income*. Median family income (“MFI”) at or below 80 percent (80%) of either the Metro Area’s MFI or the national Metro Area MFI, whichever is greater.

If the proposed area consists of a single Non-Metro unit of any kind, it may also meet the following criterion, as reported by the most recent decennial Census:

- *Non-Metro Area Median Family Income*. MFI at or below 80 percent (80%) of either the statewide Non-Metro Area’s MFI or the national Non-Metro Area MFI, whichever is greater.

- 12 CFR 1805.201(b)(3)(ii)(D)(2)(i) and (ii) (2008).

Finally, if a Non-Metro proposed area consists of a single county, it may meet one of the following two criteria, as reported by the decennial Census:

- *County Population Loss*. County’s population loss of at least 10 percent (10%) between the most recent and the preceding decennial census; or

- *County Migration Loss*. County’s net migration loss of at least 5 percent (5%) in the 5-year period preceding the most recent decennial census.

12 CFR 1805.201(b)(3)(ii)(D)(4)–(5) (2008).

(5) *Proposed Area Consisting of Multiple Contiguous Units*. A proposed area consisting of multiple contiguous units, either Metro (e.g., a group of adjoining census tracts) or Non-Metro (e.g., a group of adjoining counties), is subject to a population threshold when implementing the economic distress criteria. At least 85 percent (85%) of the area’s total population must reside within the units that are “distressed,” *i.e.*, meet one of the applicable economic distress criteria above, as reported by the decennial Census (Unemployment, Poverty and MFI for census tracts plus, for counties only, Population Loss and Migration Loss). The population threshold is met, and the whole proposed area qualifies as “distressed,” when the “distressed” units represent at least 85 percent of the area’s total population.

(6) *Proposed Area’s “Significant Unmet Needs” for Loans and Financial Services*. A proposed area that is “distressed” also must display “significant unmet needs” for loans or one or more of the following financial services credit unions are authorized to offer: Share draft accounts, savings accounts, check cashing, money orders, certified checks, automated teller machines, deposit taking, safe deposit box services, and other similar services (“credit union services”). To meet this criterion, the credit union must submit for NCUA approval a one-page “Narrative Statement of Unmet Needs” (“Narrative Statement”) indicating a pattern of unmet needs in the proposed area for loans or one or more credit union services. The credit union may choose which credit union services to address and need not address all of them.

The Narrative Statement must be supported by relevant, objective statistical data reflecting, among other things, financial, demographic, economic or loan activity pertaining to the proposed area. The supporting statistical data (which should be appended to the Narrative Statement) may be supplemented by objective testimonial evidence.

(7) *Underserved by Other Depository Institutions*. A proposed area that meets the CDFI definition of an “investment area” (*i.e.*, is “distressed” and has “significant unmet needs”) must also be underserved by other depository institutions, including credit unions. 12 U.S.C. 1759(c)(2)(A)(ii). This statutory criterion is met when the

concentration of depository institution facilities among the population of the proposed area’s non-“distressed” tracts—which sets a benchmark level of adequate service—is greater than the concentration of facilities among the population of all of the proposed area’s census tracts combined. If there are no non-“distressed” tracts within a proposed area, an immediately adjoining non-“distressed” census tract or larger unit (e.g., city or county) may be used to set the benchmark concentration ratio.

Without regard to a proposed area’s location, this process compares two ratios: The ratio of facilities to the population of the non-“distressed” tracts (the benchmark) versus the same ratio in the proposed area as a whole. If the benchmark ratio is greater than the whole area’s ratio, then the area meets the “underserved by other depository institutions” criterion, and vice versa.

(8) *Approval To Serve an Area Already Approved as “Underserved”*. Once a credit union is initially approved to serve an “underserved area,” other credit unions that subsequently apply may be approved to serve the same area. To be approved, the area must qualify as “underserved” at the time the new applicant applies. Thus, that applicant will have to demonstrate as provided above that the area still is “distressed” according to the decennial Census then in effect, and still has “significant” unmet needs for loans or credit union services (to qualify as an “investment area”). Finally, the new applicant must demonstrate that the area still is “underserved by other depository institutions” (to qualify as “underserved”).

(9) *Service Facility*. Once an “underserved area” has been added to a federal credit union’s field of membership, the credit union must establish within two years, and maintain, an office or service facility in the community. A service facility is defined as a place where shares are accepted for members’ accounts, loan applications are accepted and loans are disbursed. By definition, a service facility includes a credit union-owned branch, a shared branch, a mobile branch, or an office operated on a regularly scheduled weekly basis or a credit union owned electronic facility that meets, at a minimum, the above requirements. This definition does not include an ATM or the credit union’s Internet Web site.

(10) *Business Plan*. A federal credit union that desires to include an underserved community in its field of membership must first develop a business plan specifying how it will serve the community. The business plan, at a minimum, must explain how the credit union plans to fulfill the unmet needs for loans and credit union services identified in its Narrative Statement. The credit union will be expected to regularly review the business plan to determine if the community is being adequately served. The regional director may require periodic service status reports from a credit union about the “underserved area” to ensure that the needs of the community are being met as well as requiring such reports before NCUA allows a multiple common bond federal credit union to add an additional “underserved area.”

(11) *Low Income Benefits*. A multiple common bond federal credit union that

serves an “underserved area” will not be able to receive the benefits afforded to low-income designated credit unions, such as expanded use of nonmember deposits and access to the Community Development Revolving Loan Program for Credit Unions.

IV—Appeal Procedures for Underserved Areas

IV.A—NCUA Approval

If the requested underserved area is approved by NCUA, the credit union will be issued an amendment to Section 5 of its charter.

IV.B—NCUA Disapproval

When NCUA disapproves any application to add an underserved area, in whole or in part, under this chapter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- Options to consider, if appropriate, for gaining approval; and
- Appeal procedures.

IV.C—Appeal of Regional Director Decision

If the regional director denies an underserved area request, the federal credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the NCUA Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. A reconsideration will contain new and material evidence addressing the reasons for the initial denial. The regional director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A second request for reconsideration will be treated as an appeal to the NCUA Board.

Chapter 4

Charter Conversions

I—Introduction

A charter conversion is a change in the jurisdictional authority under which a credit union operates.

Federal credit unions receive their charters from NCUA and are subject to its supervision, examination, and regulation.

State-chartered credit unions are incorporated in a particular state, receiving their charter from the state agency responsible for credit unions and subject to the state’s regulator. If the state-chartered credit union’s deposits are federally insured, it will also fall under NCUA’s jurisdiction.

A federal credit union’s power and authority are derived from the Federal Credit Union Act and NCUA Rules and Regulations. State-chartered credit unions are governed by state law and regulation. Certain federal laws

and regulations also apply to federally insured state chartered credit unions.

There are two types of charter conversions: Federal charter to state charter and state charter to federal charter. Common bond and community requirements are not an issue from NCUA’s standpoint in the case of a federal to state charter conversion. The procedures and forms relevant to both types of charter conversion are included in Appendix 4.

II—Conversion of a State Credit Union to a Federal Credit Union

II.A—General Requirements

Any state-chartered credit union may apply to convert to a federal credit union. In order to do so it must:

- Comply with state law regarding conversion and file proof of compliance with NCUA;
- File the required conversion application, proposed federal credit union organization certificate, and other documents with NCUA;
- Comply with the requirements of the Federal Credit Union Act, e.g., chartering and reserve requirements; and
- Be granted federal share insurance by NCUA.

Conversions are treated the same as any initial application for a federal charter, including an on-site examination by NCUA where appropriate. NCUA will also consult with the appropriate state authority regarding the credit union’s current financial condition, management expertise, and past performance. Since the applicant in a conversion is an ongoing credit union, the economic advisability of granting a charter is more readily determinable than in the case of an initial charter applicant.

A converting state credit union’s field of membership must conform to NCUA’s chartering policy. The field of membership will be phrased in accordance with NCUA chartering policy. However, if the converting credit union is a multiple group charter and the new federal charter is a multiple group, then the new federal charter may retain in its field of membership any group that the state credit union was serving at the time of conversion. Subsequent changes must conform to NCUA chartering policy in effect at that time.

If the converting credit union is a community charter and the new federal charter is community-based, it must meet the community field of membership requirements set forth in Chapter 2, Section V of this manual. If the state-chartered credit union’s community boundary is more expansive than the approved federal boundary, only members of record outside of the new community boundary may continue to be served.

The converting credit union, regardless of charter type, may continue to serve members of record. The converting credit union may retain in its field of membership any group or community added pursuant to state emergency provisions.

II.B—Submission of Conversion Proposal to NCUA

The following documents must be submitted with the conversion proposal:

- Conversion of State Charter to Federal Charter (NCUA 4000);
 - Organization Certificate (NCUA 4008). Only Part (3) and the signature/notary section should be completed and, where applicable, signed by the credit union officials.
 - Report of Officials and Agreement To Serve (NCUA 4012);
 - The Application to Convert From State Credit Union To Federal Credit Union (NCUA 4401);
 - The Application and Agreements for Insurance of Accounts (NCUA 9500);
 - Certification of Resolution (NCUA 9501);
 - Written evidence regarding whether the state regulator is in agreement with the conversion proposal; and
 - Business plan, as appropriate, including the most current financial report and delinquent loan schedule.
- If the state charter is applying to become a federal community charter, it must also comply with the documentation requirements included in Chapter 2, Section V.A.2 of this manual.

II.C—NCUA Consideration of Application To Convert

II.C.1—Review by the Regional Director

The application will be reviewed to determine that it is complete and that the proposal is in compliance with Section 125 of the Federal Credit Union Act. This review will include a determination that the state credit union’s field of membership is in compliance with NCUA’s chartering policies. The regional director may make further investigation into the proposal and may require the submission of additional information to support the request to convert.

II.C.2—On-Site Review

NCUA may conduct an on-site examination of the books and records of the credit union. Non-federally insured credit unions will be assessed an insurance application fee.

II.C.3—Approval by the Regional Director and Conditions to the Approval

The conversion will be approved by the regional director if it is in compliance with Section 125 of the Federal Credit Union Act and meets the criteria for federal insurance. Where applicable, the regional director will specify any special conditions that the credit union must meet in order to convert to a federal charter, including changes to the credit union’s field of membership in order to conform to NCUA’s chartering policies. Some of these conditions may be set forth in a Letter of Understanding and Agreement (LUA), which requires the signature of the officials and the regional director.

II.C.4—Notification

The regional director will notify both the credit union and the state regulator of the decision on the conversion.

II.C.5—NCUA Disapproval

When NCUA disapproves any application to convert to a federal charter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- Options to consider, if appropriate, for gaining approval; and
- Appeal procedures.

II.C.6—Appeal of Regional Director Decision

If a conversion to a federal charter is denied by the regional director, the applicant credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the NCUA Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. The request will not be considered as an appeal, but a request for reconsideration by the regional director. The regional director will have 30 business days from the date of the receipt of the request for reconsideration to make a final decision. If the application is again denied, the credit union may proceed with the appeal process to the NCUA Board within 60 days of the date of the last denial by the regional director.

II.D—Action by Board of Directors**II.D.1—General**

Upon being informed of the regional director's preliminary approval, the board must:

- Comply with all requirements of the state regulator that will enable the credit union to convert to a federal charter and cease being a state credit union;
- Obtain a letter or official statement from the state regulator certifying that the credit union has met all of the state requirements and will cease to be a state credit union upon its receiving a federal charter. A copy of this document must be submitted to the regional director;
- Obtain a letter from the private share insurer (includes excess share insurers), if applicable, certifying that the credit union has met all withdrawal requirements. A copy of this document must be submitted to the regional director; and
- Submit a statement of the action taken to comply with any conditions imposed by the regional director in the preliminary approval of the conversion proposal and, if applicable, submit the signed LUA.

II.D.2—Application for a Federal Charter

When the regional director has received evidence that the board of directors has satisfactorily completed the actions described above, the federal charter and new Certificate of Insurance will be issued.

The credit union may then complete the conversion as discussed in the following section. A denial of a conversion application can be appealed. Refer to Section II.C.6 of this chapter.

II.E—Completion of the Conversion**II.E.1—Effective Date of Conversion**

The date on which the regional director approves the Organization Certificate and the Application and Agreements for Insurance of Accounts is the date on which the credit union becomes a federal credit union. The regional director will notify the credit union

and the state regulator of the date of the conversion.

II.E.2—Assumption of Assets and Liabilities

As of the effective date of the conversion, the federal credit union will be the owner of all of the assets and will be responsible for all of the liabilities and share accounts of the state credit union.

II.E.3—Board of Directors' Meeting

Upon receipt of its federal charter, the board will hold its first meeting as a federal credit union. At this meeting, the board will transact such business as is necessary to complete the conversion as approved and to operate the credit union in accordance with the requirements of the Federal Credit Union Act and NCUA Rules and Regulations.

As of the commencement of operations, the accounting system, records, and forms must conform to the standards established by NCUA.

II.E.4—Credit Union's Name

Changing of the credit union's name on all signage, records, accounts, investments, and other documents should be accomplished as soon as possible after conversion. The credit union has 180 days from the effective date of the conversion to change its signage and promotional material. This requires the credit union to discontinue using any remaining stock of "state credit union" stationery immediately, and discontinue using credit cards, ATM cards, etc., within 180 days after the effective date of the conversion, or the reissue date, whichever is later. The regional director has the discretion to extend the timeframe for an additional 180 days. Member share drafts with the state-chartered name can be used by the members until depleted.

II.E.5—Reports to NCUA

Within 10 business days after commencement of operations, the recently converted federal credit union must submit to the regional director the following:

- Report of Officials (NCUA 4501); and
- Financial and Statistical Reports, as of the commencement of business of the federal credit union.

III—Conversion of a Federal Credit Union to a State Credit Union**III.A—General Requirements**

Any federal credit union may apply to convert to a state credit union. In order to do so, it must:

- Notify NCUA prior to commencing the process to convert to a state charter and state the reason(s) for the conversion;
- Comply with the requirements of Section 125 of the Federal Credit Union Act that enable it to convert to a state credit union and to cease being a federal credit union; and
- Comply with applicable state law and the requirements of the state regulator.

It is important that the credit union provide an accurate disclosure of the reasons for the conversion. These reasons should be stated in specific terms, not as generalities. The federal credit union converting to a state charter remains responsible for the entire operating fee for the year in which it converts.

III.B—Special Provisions Regarding Federal Share Insurance

If the federal credit union intends to continue federal share insurance after the conversion to a state credit union, it must submit an Application for Insurance of Accounts (NCUA 9600) to the regional director at the time it requests approval of the conversion proposal. The regional director has the authority to approve or disapprove the application.

If the converting federal credit union does not intend to continue federal share insurance or if its application for continued insurance is denied, insurance will cease in accordance with the provisions of Section 206 of the Federal Credit Union Act.

If, upon its conversion to a state credit union, the federal credit union will be terminating its federal share insurance or converting from federal to non-federal share insurance, it must comply with the membership notice and voting procedures set forth in Section 206 of the Federal Credit Union Act and Part 708 of NCUA's Rules and Regulations, and address the criteria set forth in Section 205(c) of the Federal Credit Union Act.

Where the state credit union will be non-federally insured, federal insurance ceases on the effective date of the charter conversion. If it will be otherwise uninsured, then federal insurance will cease one year after the date of conversion subject to the restrictions in Section 206(d)(1) of the Federal Credit Union Act. In either case, the state credit union will be entitled to a refund of the federal credit union's NCUSIF capitalization deposit after the final date on which any of its shares are federally insured.

The NCUA Board reserves the right to delay the refund of the capitalization deposit for up to one year if it determines that payment would jeopardize the NCUSIF.

III.C—Submission of Conversion Proposal to NCUA

Upon approval of a proposition for conversion by a majority vote of the board of directors at a meeting held in accordance with the federal credit union's bylaws, the conversion proposal will be submitted to the regional director and will include:

- A current financial report;
- A current delinquent loan schedule;
- An explanation and appropriate documents relative to any changes in insurance of member accounts;
- A resolution of the board of directors;
- A proposed Notice of Special Meeting of the Members (NCUA 4221);
- A copy of the ballot to be sent to all members (NCUA 4506);
- If the credit union intends to continue with federal share insurance, an application for insurance of accounts (NCUA 9600);
- Evidence that the state regulator is in agreement with the conversion proposal; and
- A statement of reasons supporting the request to convert.

III.D—Approval of Proposal To Convert**III.D.1—Review by the Regional Director**

The proposal will be reviewed to determine that it is complete and is in compliance with Section 125 of the Federal

Credit Union Act. The regional director may make further investigation into the proposal and require the submission of additional information to support the request.

III.D.2—Conditions to the Approval

The regional director will specify any special conditions that the credit union must meet in order to proceed with the conversion.

III.D.3—Approval by the Regional Director

The proposal will be approved by the regional director if it is in compliance with Section 125 and, in the case where the state credit union will no longer be federally insured, the notice and voting requirements of Section 206 of the Federal Credit Union Act.

III.D.4—Notification

The regional director will notify both the credit union and the state regulator of the decision on the proposal.

III.D.5—NCUA Disapproval

When NCUA disapproves any application to convert to a state charter, the applicant will be informed in writing of the:

- Specific reasons for the action;
- If appropriate, options or suggestions that could be considered for gaining approval; and
- Appeal procedures.

III.D.6—Appeal of Regional Director Decision

If the regional director denies a conversion to a state charter, the applicant credit union may appeal the decision to the NCUA Board. An appeal must be sent to the appropriate regional office within 60 days of the date of denial and must address the specific reason(s) for the denial. The regional director will then forward the appeal to the NCUA Board. NCUA central office staff will make an independent review of the facts and present the appeal to the NCUA Board with a recommendation.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the regional director for reconsideration. The request will not be considered as an appeal, but a request for reconsideration by the regional director. The regional director will have 30 business days from the date of the receipt of the request for reconsideration to make a final decision. If the application is again denied, the credit union may proceed with the appeal process to the NCUA Board within 60 days of the date of the last denial by the regional director.

III.E—Approval of Proposal by Members

The members may not vote on the proposal until it is approved by the regional director. Once approval of the proposal is received, the following actions will be taken by the board of directors:

- The proposal must be submitted to the members for approval and a date set for a meeting to vote on the proposal. The proposal may be acted on at the annual meeting or at a special meeting for that purpose. The members must also be given the opportunity to vote by written ballot to be filed by the date set for the meeting.
- Members must be given advance notice (NCUA 4221) of the meeting at which the proposal is to be submitted. The notice must:

- Specify the purpose, time and place of the meeting;
- Include a brief, complete, and accurate statement of the reasons for and against the proposed conversion, including any effects it could have upon share holdings, insurance of member accounts, and the policies and practices of the credit union;
- Specify the costs of the conversion, i.e., changing the credit union's name, examination and operating fees, attorney and consulting fees, tax liability, etc.;
- Inform the members that they have the right to vote on the proposal at the meeting, or by written ballot to be filed not later than the date and time announced for the annual meeting, or at the special meeting called for that purpose;
- Be accompanied by a Federal to State Conversion—Ballot for Conversion Proposal (NCUA 4506); and
- State in bold face type that the issue will be decided by a majority of members who vote.

• The proposed conversion must be approved by a majority of all of the members who vote on the proposal, a quorum being present, in order for the credit union to proceed further with the proposition, provided federal insurance is maintained. If the proposed state-chartered credit union will not be federally insured, 20 percent of the total membership must participate in the voting, and of those, a majority must vote in favor of the proposal. Ballots cast by members who did not attend the meeting but who submitted their ballots in accordance with instructions above will be counted with votes cast at the meeting. In order to have a suitable record of the vote, the voting at the meeting should be by written ballot as well.

- The board of directors shall, within 10 days, certify the results of the membership vote to the regional director. The statement shall be verified by affidavits of the Chief Executive Officer and the Recording Officer on NCUA 4505.

III.F—Compliance With State Laws

If the proposal for conversion is approved by a majority of all members who voted, the board of directors will:

- Ensure that all requirements of state law and the state regulator have been accommodated;
- Ensure that the state charter or the license has been received within 90 days from the date the members approved the proposal to convert; and
- Ensure that the regional director is kept informed as to progress toward conversion and of any material delay or of substantial difficulties which may be encountered.

If the conversion cannot be completed within the 90-day period, the regional director should be informed of the reasons for the delay. The regional director may set a new date for the conversion to be completed.

III.G—Completion of Conversion

In order for the conversion to be completed, the following steps are necessary:

- The board of directors will submit a copy of the state charter to the regional director within 10 days of its receipt. This will be

accompanied by the federal charter and the federal insurance certificate. A copy of the financial reports as of the preceding month-end should be submitted at this time.

- The regional director will notify the credit union and the state regulator in writing of the receipt of evidence that the credit union has been authorized to operate as a state credit union.

- The credit union shall cease to be a federal credit union as of the effective date of the state charter.

• If the regional director finds a material deviation from the provisions that would invalidate any steps taken in the conversion, the credit union and the state regulator shall be promptly notified in writing. This notice may be either before or after the copy of the state charter is filed with the regional director. The notice will inform the credit union as to the nature of the adverse findings. The conversion will not be effective and completed until the improper actions and steps have been corrected.

- Upon ceasing to be a federal credit union, the credit union shall no longer be subject to any of the provisions of the Federal Credit Union Act, except as may apply if federal share insurance coverage is continued. The successor state credit union shall be immediately vested with all of the assets and shall continue to be responsible for all of the obligations of the federal credit union to the same extent as though the conversion had not taken place. Operation of the credit union from this point will be in accordance with the requirements of state law and the state regulator.

- If the regional director is satisfied that the conversion has been accomplished in accordance with the approved proposal, the federal charter will be canceled.

• There is no federal requirement for closing the records of the federal credit union at the time of conversion or for the manner in which the records shall be maintained thereafter. The converting credit union is advised to contact the state regulator for applicable state requirements.

- The credit union shall neither use the words "Federal Credit Union" in its name nor represent itself in any manner as being a federal credit union.

• Changing of the credit union's name on all signage, records, accounts, investments, and other documents should be accomplished as soon as possible after conversion. Unless it violates state law, the credit union has 180 days from the effective date of the conversion to change its signage and promotional material. This requires the credit union to discontinue using any remaining stock of "federal credit union" stationery immediately, and discontinue using credit cards, ATM cards, etc., within 180 days after the effective date of the conversion, or the reissue date, whichever is later. The regional director has the discretion to extend the timeframe for an additional 180 days. Member share drafts with the federal chartered name can be used by the members until depleted. If the state credit union is not federally insured, it must change its name and must immediately cease using any credit union documents referencing federal insurance.

- If the state credit union is to be federally insured, the regional director will issue a new insurance certificate.

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APPENDIX 1

GLOSSARY

These definitions apply only for use with this Manual. Definitions are not intended to be all inclusive or comprehensive. This Manual, the Federal Credit Union Act, and NCUA Rules and Regulations, as well as state laws, may be used for further reference.

Adequately capitalized - A credit union is considered adequately capitalized when it has a net worth ratio of at least 6 percent. A multiple common bond credit union must be adequately capitalized in order to add new groups to its charter. The regional director may determine that a net worth ratio of less than 6 percent is adequate if the credit union is making reasonable progress toward meeting the 6 percent net worth requirement, and the addition of the group would not adversely affect the credit union's capitalization level.

Affinity - A relationship upon which a community charter is based. Acceptable affinities include living, working, worshiping, or attending school in a community.

Appeal - The right of a credit union or charter applicant to request a formal review of a regional director's adverse decision by the National Credit Union Administration Board.

Associational common bond - A common bond comprised of members and employees of a recognized association. It includes individuals (natural persons) and/or groups (non-natural persons) whose members participate in activities developing common loyalties, mutual benefits, and mutual interests.

Business plan - Plan submitted by a charter applicant or existing federal credit union addressing the economic advisability of a proposed charter or field of membership addition.

Charter - The document which authorizes a group to operate as a credit union and defines the fundamental limits of its operating authority, generally including the persons the credit union is permitted to accept for membership. Charters are issued by the National Credit Union Administration for federal credit unions and by the designated state chartering authority for credit unions organized under the laws of that state.

Common bond - The characteristic or combination of characteristics which distinguishes a particular group of persons from the general public. There are two common bonds which can serve as a basis for a group forming a federal credit union or being included in an existing federal credit union's field of membership: occupational - employment by the same company, related companies or in a trade, industry, or profession (TIP); and associational - membership in the same association.

Community credit union - A credit union whose field of membership consists of persons who live, work, worship, or attend school in the same well-defined local community, neighborhood, or rural district.

Credit union - A member-owned, not-for-profit cooperative financial institution formed to permit those in the field of membership specified in the charter to save, borrow, and obtain related financial services.

Economic advisability - An overall evaluation of the credit union's or charter applicant's ability to operate successfully.

Emergency merger - Pursuant to Section 205(h) of the Federal Credit Union Act, authority of NCUA to merge two credit unions without regard to common bond policy.

Exclusionary clause - A limitation, written in a credit union's charter, which precludes the credit union from serving a portion of a group which otherwise could be included in its field of membership.

Federal share insurance - Insurance coverage provided by the National Credit Union Share Insurance Fund and administered by the National Credit Union Administration. Coverage is provided for qualified accounts in all federal credit unions and participating state credit unions.

Field of membership - The persons (including organizations and other legal entities) a credit union is permitted to accept for membership.

Household - Persons living in the same residence maintaining a single economic unit.

Housekeeping Amendment - A field of membership amendment to delete groups, change group names, change group locations, remove exclusionary clauses, and to add other persons eligible for credit union membership by virtue of their close relationship to a common bond group or the community for community charters.

Immediate family member - A spouse, child, sibling, parent, grandparent, or grandchild. This includes stepparents, stepchildren, stepsiblings, and adoptive relationships.

Letter of Understanding and Agreement - Agreement between NCUA and federal credit union officials not to engage in certain activities and/or to establish reasonable operational goals. These are normally entered into with new charter applicants for a limited time.

Mentor - An individual who provides guidance and assistance to newly chartered, small, or low-income credit unions. All new federal credit unions are encouraged to establish a mentor relationship with a trained, experienced credit union individual or an existing credit union.

Metropolitan Statistical Area (MSA) - The Office of Management and Budget defines a metropolitan statistical area as an urbanized area that has at least one urbanized area in excess of 50,000 and "comprises the central county or counties containing the core, plus adjacent

outlying counties having a high degree of social and economic integration with the central county as measured through commuting.”

Merger - Absorption by one credit union of all of the assets, liabilities and equity of another credit union. Mergers must be approved by the National Credit Union Administration and by the appropriate state regulator whenever a state credit union is involved.

Multiple common bond credit union - A credit union whose field of membership consists of more than one group, each of which has a common bond of occupation or association.

Occupational common bond - Employment by the same entity or related entities or a Trade, Industry, or Profession.

Once a member, always a member - A provision of the Federal Credit Union Act which permits an individual to remain a member of the credit union until he or she chooses to withdraw or is expelled from the membership of the credit union. Under this provision, leaving a group that is named in the credit union's charter does not terminate an individual's membership in the credit union.

Organizations of such persons - An organization or organizations composed exclusively of persons who are within the field of membership of the credit union.

Overlap - The situation which results when a group is eligible for

membership in more than one credit union.

Primary potential members - Members or employees who belong to an associational or occupational group.

Purchase and assumption - Purchase of all or part of the assets of and assumption of all or part of the liabilities of one credit union by another credit union. The purchased and assumed credit union must first be placed into involuntary liquidation.

Service area - The area that can reasonably be served by the service facilities accessible to the groups within the field of membership.

Service facility - A place where shares are accepted for members' accounts, loan applications are accepted or loans are disbursed. This definition includes a credit union owned branch, a mobile branch, an office operated on a regularly scheduled weekly basis, a credit union owned ATM, or a credit union owned electronic facility that meets, at a minimum, these requirements. A service facility also includes a shared branch or a shared branch network if either: (1) the credit union has an ownership interest in the service facility either directly or through a CUSO or similar organization; or (2) the service facility is local to the credit union and the credit union is an authorized participant in the service center. This definition does not include the credit union's Internet . A service facility does not include an ATM or interest in a shared branch network for purposes of serving an underserved area.

Single associational common

bond credit union - A credit union whose field of membership includes members and employees of a recognized association.

Single common bond credit union

- A credit union whose field of membership consists of one group which has a common bond of occupation or association.

Single occupational common

bond credit union - A credit union whose field of membership consists of employees of the same entity or related entities or part of a Trade, Industry, or Profession (TIP).

Spin-off - The transfer of a portion of the field of membership, assets, liabilities, shares, and capital of one credit union to a new or existing credit union.

Subscribers - For a federal credit union, at least seven individuals who sign the charter application and pledge at least one share.

Trade, Industry, or Profession

(TIP) - A single occupational common bond credit union based on employment in a trade, industry, or profession including employment at any number of corporations or other legal entities that while not under common ownership – have a common bond by virtue of producing similar products, providing similar services, or participating in the same type of business.

Underserved community - A local community, neighborhood, or rural district that is an “investment area” as defined in Section 103(16) of the Community Development Banking

and Financial Institutions Act of 1994. The area must also be underserved based on other NCUA and federal banking agency data.

Unsafe or unsound practice - Any action, or lack of action, which would result in an abnormal risk or loss to the credit union, its members, or the National Credit Union Share Insurance Fund.

APPENDIX 2**LETTER OF UNDERSTANDING AND AGREEMENT**

To the Board of Directors and Other Officials
_____ Federal Credit Union

Since the purposes of credit unions are to promote thrift and to make funds available for loans to credit union members for provident and productive purposes, and since newly chartered credit unions do not generally have sufficient reserves to cover large losses on loans or meet unduly large liquidity requirements, Federal insurance coverage of member accounts under the National Credit Union Share Insurance Fund will be granted to the above named credit union subject to the conditions listed in this Letter of Understanding and Agreement and in the Organization Certificate and Application and Agreements for Insurance of Accounts. These terms are listed below and are subject to acceptance by authorized credit union officials.

1. The credit union will refrain from soliciting or accepting brokered fund deposits from any source without the prior written approval of the Regional Director.
2. The credit union will refrain from the making of large loans, that is, loans in excess of 5 percent of unimpaired capital and surplus, to any one member or group of members without the prior written approval of the Regional Director.
3. The credit union will not establish or invest in a Credit Union Service Organization (CUSO) without the prior written approval of the Regional Director.
4. The credit union will not enter into any insurance programs whereby the credit union member finances the payment of insurance premiums through loans from the credit union.
5. Any special insurance plan/program, that is, insurance other than usual and normal surety bonding or casualty or liability or loan protection and life savings insurance coverage, which the credit union officials intend to undertake, will be submitted to the Regional Director of the National Credit Union Administration for written approval prior to the officials committing the credit union thereto.
6. The credit union will prepare and mail to the district examiner financial and statistical reports as required by the Federal Credit Union Act and Bylaws by the 20th of each month following that for which the report is prepared.
7. As the credit union's officials gain experience and the credit union achieves target levels of growth and profitability, the above terms and conditions may be renegotiated by the two parties.

We, the undersigned officials of the _____ Federal Credit Union, as authorized by the board of directors, acknowledge receipt of and agree to the attached Letter of Understanding and Agreement dated _____.

This Letter of Understanding and Agreement has been voluntarily entered into with the National Credit Union Administration. We agree to comply with all terms and conditions expressed in this Letter of Understanding and Agreement.

Should the NCUA Board determine that these terms and conditions have not been complied with or that the board of directors or other officials have not conducted the affairs of the credit union in a sound and prudent manner, the NCUA Board may terminate insurance coverage of the credit union. If actions by the officials, in violation of this Letter of Understanding and Agreement, cause the credit union to become insolvent, the officials assume such personal liability as may result from their actions.

The term of this Letter of Understanding and Agreement shall be for the period of at least 24 months from the date the credit union is insured. This Letter of Understanding and Agreement may, at the option of the Regional Director, be extended for an additional 24 months at the end of the initial term of this agreement.

Dated this _____ of _____
(day) (month) (year).

NATIONAL CREDIT UNION ADMINISTRATION BOARD
ON BEHALF OF THE NATIONAL CREDIT UNION SHARE INSURANCE FUND

Regional Director

Federal Credit Union

By:

Chief Executive Officer Date

Chief Financial Officer Date

Secretary Date

APPENDIX 3**NCUA OFFICES****CENTRAL OFFICE**

1775 Duke Street
Alexandria, VA 22314-3428

Commercial: 703-518-6300

REGION I - Albany

9 Washington Square
Washington Avenue Extension
Albany, NY 12205-5512

Commercial: 518-862-7400
FAX: 518-862-7420

Connecticut	Maine
Massachusetts	Michigan
New Hampshire	New York
Rhode Island	Vermont

REGION II - Capital

1775 Duke Street, Suite 4206
Alexandria, VA 22314-3437

Commercial: 703-519-4600
FAX: 703-519-4620

Delaware	District of Columbia
Maryland	New Jersey
Pennsylvania	Virginia
West Virginia	

REGION III - Atlanta

7000 Central Parkway, Suite 1600Atlanta,
GA 30328-4598

Commercial: 678-443-3000
FAX: 678-443-3020

Alabama	Florida
Georgia	Indiana
Kentucky	Mississippi
North Carolina	Ohio
Puerto Rico	South Carolina
Tennessee	Virgin Islands

REGION IV - Austin

4807 Spicewood Springs Road, Suite
5200
Austin, TX 78759-8490

Commercial: 512-342-5600
FAX: 512-342-5620

Arkansas	Illinois
Iowa	Kansas
Louisiana	Minnesota
Missouri	Nebraska
North Dakota	Oklahoma
South Dakota	Texas
Wisconsin	

REGION V - Tempe

1230 W. Washington Street, Suite 301
Tempe, AZ 85281

Commercial: 602-302-6000

FAX: 602-302-6024

Alaska	Arizona
American Samoa	California
Colorado	Guam
Hawaii	Idaho
Montana	Nevada
New Mexico	Oregon
Utah	Washington
Wyoming	

APPENDIX 4**NCUA FORMS**

<u>Form Number</u>	<u>Form Title</u>
NCUA 4000	Conversion of State Charter to a Federal Charter – Federal Credit Union Investigation Report
NCUA 4001	Federal Credit Union Investigation Report
NCUA 4008	Organization Certificate
NCUA 4009	Approval of Organization Certificate and Certification of Insurance
NCUA 4012	Report of Official and Agreement to Serve
NCUA 4015	Application for Field of Membership Amendment
NCUA 4015-EZ	Application for Field of Membership Amendment (use for all single common bond expansions and multiple common bond expansions of less than 3,000)
NCUA 4221	Notice of Meeting of Members to Convert from a Federal to State Chartered Credit Union
NCUA 4401	Application to Convert from a State to a Federal Credit Union
NCUA 4505	Affidavit - Proof of Results of Membership Vote - Proposed Conversion From Federal Credit Union to State Credit Union
NCUA 4506	Federal to State Conversion - Ballot for Conversion Proposal
NCUA 9500	Application and Agreements for Insurance of Accounts
NCUA 9501	Certification of Resolutions
NCUA 9600	Information to be Provided in Support of the Application of a State Chartered Credit Union for Insurance of Accounts

CONVERSION OF STATE CHARTER TO FEDERAL CHARTER**FEDERAL CREDIT UNION INVESTIGATION REPORT**

This report must be filled in completely and submitted with the other completed forms listed in Chapter 4 and in the instructions for this form.

A. INFORMATION FOR CHARTER AND BYLAWS

1. Proposed Name: _____ **Federal Credit Union**
Second Choice of Name: _____ **Federal Credit Union**

2. Contact Person _____
Bus. Tel. No./Area Code: _____ **Res. Tel. No./Area Code** _____

3. The credit union will maintain its office at:

(City) (County) (State) (Zip)

4. Permanent mailing address of credit union:

5. Define proposed field of membership (Attach a copy of current state charter field of membership):

6. The board will have (an odd number 5 to 15) _____ members; the credit committee (an odd number, 3 to 7) _____ members; the supervisory committee (3 to 5) _____ members. Each official must complete a Report of Official and Agreement to Serve (NCUA 4012) which is to be submitted with this investigation report.

B. CHARACTER AND FITNESS OF SUBSCRIBERS

7. Type or print the list of the subscribers who have signed the organization certificate (7 not more than 10 persons). Names should be IDENTICAL to signatures on the Organization Certificate (NCUA 4008). Each subscriber listed below has subscribed to at least one share in accordance with Section 103 of the Federal Credit Union Act:

<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>
<i>Name:</i>	<i>Address:</i>
<i>Occupation:</i>	<i>Years of Membership:</i>

ANY ADDITIONAL COMMENTS OR INFORMATION THAT IS DEEMED PERTINENT OR HELPFUL IN GIVING CONSIDERATION TO THIS APPLICATION SHOULD BE INCLUDED AS AN ATTACHMENT.

The undersigned certifies that to the best of his/her knowledge and belief the above information is true and correct.

I do (do not) recommend that a charter be granted to this group.

Signature _____, Organizer

***Organizer's Address:* _____**

FORM 4000 INSTRUCTIONS**A. INFORMATION FOR CHARTERS AND BYLAWS**

The subscriber should select a name for the proposed credit union. It is the responsibility of the federal credit union organizers to ensure that the proposed federal credit union name does not constitute an infringement on the name of any corporation in its trade area. The last three words in the name must be "Federal Credit Union." Since the name selected should not duplicate exactly the name of an existing credit union, item 1 provides space for a second choice.

The territory of operations of a Federal credit union is described in the field of membership, item 5. The principal office of the credit union will usually be maintained at a location described in the field of membership.

The proposed field of membership should be defined so clearly that it leaves no room for any doubt as to whom the credit union is to serve or the area which it is to operate. Corporations and other organizations referred to in the definition of the field of membership should be designated by the exact names rather than by some local or popular contraction of these names. Any segment of a larger organization should be identified with the parent. The field of membership for each type of common bond and samples are discussed in detail in Chapter 2 of the *"Chartering and Field of Membership Manual."*

With the guidance of the organizer, the subscribers to the Organization Certificate decide on the number of directors and credit committee members. The board and credit committee must be composed of an odd number of members. The supervisory committee is appointed by the board of directors.

B. CHARACTER AND FITNESS OF SUBSCRIBERS

The names and address of the subscribers should be recorded legibly and completely in item 7 of this report. It is from this information that the National Credit Union Administration prepares Section 3 of the charter. The names of the subscribers must be **IDENTICAL** to their signatures on the Organization Certificate.

C. SUBMITTAL OF CHARTER APPLICATION

In addition to this Investigation Report, the following should be submitted to the appropriate regional director of NCUA:

- 1. Application to Convert, NCUA 4401 – one original;**
- 2. Written evidence regarding whether the state regulator is in agreement with the conversion proposal;**
- 3. Application and Agreements for Insurance of Accounts, NCUA 9500 - one original;**
- 4. Certificate of Resolution, NCUA 9501 - one original;**
- 5. Organization Certificate, NCUA 4008 - one notarized original. At least seven, *but no more than ten persons*, must sign the organization certificate. The person administering the oath must not be one of the subscribers. The oath on the organization certificate must be executed and show the notary's seal and date the commission expires as required by State law;**
- 6. Report of Official and Agreement to Serve, NCUA 4012 – one original for each board member, credit committee member, and supervisory committee member;**
- 7. Most current financial report and delinquent loan schedule; and**
- 8. Business Plan - refer to Chapter 1 of the *Chartering and Field of Membership Manual* for a discussion of the components of an acceptable business plan.**

FEDERAL CREDIT UNION INVESTIGATION REPORT

This form must be filled in completely and submitted with the other completed forms listed in the instructions to this form.

A. INFORMATION FOR CHARTER AND BYLAWS

1. Proposed name: _____ Federal Credit Union

Second choice: _____ Federal Credit Union

2. Contact Person: _____

Business Tel.: _____

Residence Tel.: _____

Address: _____

3. The credit union will maintain its offices at:

(City, State, County, Zip Code)

3a. Proposed permanent mailing address of credit union:

4. Define proposed field of membership: _____

5. The board will have (an odd number, 5 to 15) _____ members; the credit committee will have (an odd number, 3 to 7) _____ members; the supervisory committee will have (3 to 5) _____ members. Each official must complete a Report of Official and Agreement to Serve (NCUA 4012) which is to be submitted with this investigation report.

B. ECONOMIC ADVISABILITY OF ORGANIZING PROPOSED CREDIT UNION

(Attach a separate sheet if space available is not adequate.)

GENERAL INFORMATION**1. Potential membership: _____**

NOTE: Number of employees for occupational, active members for associational (or families for religious groups), or population per most recent census for community-type fields of membership.

2. Potential interest (survey results).

NOTE: Sample must consist of a minimum of 250 potential members. Copy of survey form(s) utilized should be attached.

Number of people surveyed: _____

Number of people responding to survey: _____

Number of people pledging an initial deposit: _____

Total dollars pledged: \$ _____

Number pledging systematic savings: _____

Total dollars pledged (per month): \$ _____

3. Number of persons attending the charter-organization meeting: _____**4. Attach a business plan containing, at a minimum, the following elements:**

- mission statement;
- analysis of market conditions, including if applicable, geographic, demographic, employment, income, housing, and other economic data;
- evidence of member support;
- goals for shares, loans, and for number of members;
- financial services needed/desired;
- financial services to be provided to members of all segments within the field of membership;
- how/when services are to be implemented;
- organizational/management plan addressing qualification and planned training of officials/employees;

- continuity plan for directors, committee members, and management staff;
- operating facilities, to include office space/equipment and supplies, safeguarding of assets, insurance coverage, etc.;
- type of record keeping and data processing system;
- detailed semiannual pro forma financial statements (balance sheet, income and expense projections) for 1st and 2nd year, including assumptions - e.g., loan and dividend rates;
- plans for operating independently;
- written policies (shares, lending, investments, funds management, capital accumulation, dividends, collections, etc.);
- source of funds to pay expenses during initial months of operation, including any subsidies, assistance, etc., and terms or conditions of such resources; and
- evidence of sponsor commitment (or other source of support) if subsidies are critical to success of the federal credit union. Evidence may be in the form of letters, contracts, financial statements from the sponsor, and any other such document on which the proposed federal credit union can substantiate its projections.

5. What potential difficulties do you detect in the elected officials carrying out their management responsibilities or in the FCU achieving its stated objectives?

6. What provisions have been made to overcome potential difficulties?

Dates of planned contacts by organizer to determine progress and to assist the group:

First Contact Date: _____
Second Contact Date: _____
Third Contact Date: _____

SPECIFIC INFORMATION - OCCUPATIONAL (same company) CHARTER APPLICANTS

1. How long has the sponsor company been in existence? _____
2. What was the highest number of employees during the past three years?
_____ Lowest number during the past three years? _____ If a large variance, please explain. _____

3. Are there any contemplated changes in the corporate structure of the company? _____
If yes, explain. _____

4. Have there been any significant changes in the corporate structure in the past three years? _____ If yes, please explain. _____

5. Are there any negotiations now in progress between management and labor that could lead to work stoppages? _____ If yes, please explain. _____

6. If the credit union cannot operate on the employer's property, explain how the credit union will be able to transact business effectively with the members.

7. If the employees to be served by the credit union work in more than one location or city, identify each location with the corresponding number of employees working at each.

8. Are there other employees of the company who are not being included in the proposed field of membership? _____. If so, give the number and location of the other employees and explain why they are not included in the proposed credit union's field of membership.

**SPECIFIC INFORMATION - OCCUPATIONAL (trade, industry or profession)
CHARTER APPLICANTS**

1. Explain how the credit union will be able to transact business effectively with the members. _____

SPECIFIC INFORMATION - ASSOCIATIONAL CHARTER APPLICANTS**1. State the purpose and goals of the organization sponsoring this charter.**

2. List the types of activities and their frequency, which the organization sponsors that provide contact among the members and from which common loyalties, mutual benefits, and mutual interests are developed.

3. In what year was the organization established? _____ Is it incorporated? _____ Where is the headquarters located? _____**4. Give statistics as to trends in membership during the last five years.**

5. What is the frequency of membership meetings? _____**Average attendance: _____ Dues required: \$_____****6. State the geographic territory where members reside.**

7. Submit a copy of the current bylaws of the association, the constitution, articles of incorporation, or equivalent documentation and recent financial statements, i.e. balance sheet, and income and expense statement, with this application.

8. If the bylaws, constitution, articles of incorporation, or equivalent documentation provide for more than one type of membership and if all classes of membership are to be included in the credit union's field of membership, provide justification for the inclusion of other than "regular" members.

SPECIFIC INFORMATION – MULTIPLE COMMON BOND CHARTER APPLICANTS

1. Explain how the credit union will be able to transact business effectively with the members. _____

1. Community charters must be based on a well-defined local community, neighborhood, or rural district where individuals have common interests and/or interact. Please refer to Chapter 2, Section V of the “*Chartering and Field of Membership Manual*” when answering this question.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

PAGE 10

C. CHARACTER AND FITNESS OF SUBSCRIBERS

1. List of subscribers who have signed the Organization Certificate (7 not more than 10 persons). Names should be IDENTICAL to signature on the Organization Certificate (NCUA 4008). Each subscriber listed below has subscribed to at least one share in accordance with Section 103 of the Federal Credit Union Act:

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

Name: _____

Address: _____

Occupation: _____

Years of Residence: _____

2. Are all of the subscribers within the field of membership? _____ Do they appear to be representative of the group described in the definition of the field of membership? _____ If not, explain. _____

3. Does your investigation indicate that the subscribers are persons of good character? _____ If not, explain. _____

4. From your investigation, is it your judgment that the directors and committee members are persons of good character, and that they have the ability and determination to operate a credit union satisfactorily? ____ If not, explain. ____

5. Does it appear that there are any factions within the group which may render smooth and efficient credit union operations difficult? ____ If so, explain. ____

6. Is there any indication that the proposed credit union would be used for selfish gain by any person or group of persons within the group to be served? ____

7. Is an application for a State Charter now pending? ____

8. Has the group ever had a credit union? ____ If so, when did it liquidate or merge?

ANY ADDITIONAL COMMENTS OR INFORMATION THAT IS DEEMED PERTINENT OR HELPFUL IN GIVING CONSIDERATION TO THIS APPLICATION SHOULD BE INCLUDED AS AN ATTACHMENT.

The undersigned certifies that to the best of their knowledge and belief the above information is true and correct.

I do (do not) recommend that a charter be granted to this group.

Signature: _____, Organizer

Organizer's Address:

Telephone No.: _____ Date: _____

FORM 4001 INSTRUCTIONS

A. INFORMATION FOR CHARTER AND BYLAWS

The subscriber should select a name for the proposed credit union. It is the responsibility of the federal credit union organizers to ensure that the proposed federal credit union name does not constitute an infringement on the name of any corporation in its trade area. The last three words in the name must be "Federal Credit Union." Since the name selected should not duplicate exactly the name of an existing credit union, Item 1 provides space for a second choice.

The territory of operations of a Federal Credit Union is described in the field of membership, item 4. The principal office of the credit union will usually be maintained at a location described in the field of membership.

The proposed field of membership should be defined so clearly that it leaves no room for any doubt as to whom the credit union is to serve or the area which it is to operate. Corporations and other organizations referred to in the definition of the field of membership should be designated by the exact names rather than by some local or popular contraction of these names. The field of membership for each type of common bond and samples are discussed in detail in Chapter 2 of the *"Chartering and Field of Membership Manual."*

With the guidance of the organizer, the subscribers to the Organization Certificate decide on the number of directors and credit committee members. The board and credit committee must be composed of an odd number of members. The supervisory committee is appointed by the board of directors.

B. ECONOMIC ADVISABILITY OF ORGANIZING PROPOSED CREDIT UNION

This section of the report contains information on the required business plan elements and other information needed to make a decision on the economic advisability of chartering the proposed credit union.

C. CHARACTER AND FITNESS OF SUBSCRIBERS

The names and addresses of the subscribers should be recorded legibly and completely in item C. 1. of this report. It is from this information that the National Credit Union Administration prepares Section 3 of the charter. The names of the subscribers must be IDENTICAL to their signatures on the Organization Certificate.

D. SUBMITTAL OF CHARTER APPLICATION

In addition to this Investigation Report, the following should be submitted to the appropriate regional director of NCUA:

- 1. Organization Certificate, NCUA 4008 - one notarized original. At least seven, *but no more than ten persons*, must sign the organization certificate. The person administering the oath must not be one of the subscribers. The oath on the organization certificate must be executed and show the notary's seal and date the commission expires as required by State law;**
- 2. Report of Official and Agreement to Serve, NCUA 4012 – one original for each board member, credit committee member, and supervisory committee member;**
- 3. Business Plan - refer to Part B, question 4 of this form and Chapter 1 of the *Chartering and Field of Membership Manual* for a discussion of the components of an acceptable business plan;**
- 4. Application and Agreements for Insurance of Accounts, NCUA 9500 - one original; and**
- 5. Certification of Resolutions, NCUA 9501 - one original.**

NATIONAL CREDIT UNION ADMINISTRATION

FEDERAL CREDIT UNION

**(A corporation chartered under
the laws of the United States)**

CHARTER NO. _____

ORGANIZATION CERTIFICATE

_____ **FEDERAL CREDIT UNION**

Charter No. _____

TO NATIONAL CREDIT UNION ADMINISTRATION:

We, the undersigned, do hereby associate ourselves as a Federal Credit Union for the purposes indicated in and in accordance with the provisions of the Federal Credit Union Act, (12 U.S.C. 1751 et seq.). We hereby request approval of this organization certificate; we hereby apply for insurance of member accounts; we agree to comply with the requirements of said Act, with the terms of this organization certificate and with all laws, rules, and regulations now or hereafter applicable to Federal Credit Unions.

- (1) **The name of this credit union shall be _____ Federal Credit Union.**
- (2) **This credit union will maintain its office and will operate in the territory de-scribed in the field of membership.**

- (3) The names and addresses of the subscribers to this certificate and the number of shares subscribed by each are as follows:

NAME	ADDRESS	SHARES

- (4) The par value of the shares of this credit union will be stated in the bylaws.
- (5) The field of membership shall be limited to those having the following common bond:_____

- (6) The term of this credit union's existence shall be perpetual: Provided, however, that upon the finding that this credit union is bankrupt or insolvent or has violated any provision of this organization certificate, of the bylaws, of the Federal Credit Union Act including any amendments thereto or thereof, or of any regulations issued thereunder, this organization certificate may be suspended or revoked under the provisions of Section 120(b) of the Federal Credit Union Act.
- (7) This certificate is made to enable the undersigned to avail themselves of the advantages of said Act.
- (8) The management of this credit union, the conduct of its affairs, and the powers, duties, and privileges of its directors, officers, committees and membership shall be set forth in the approved bylaws and any approved amendments thereto or thereof.

IN WITNESS THEREOF we¹ have here unto subscribed our names this

(day)	(month)	(year)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Subscribed before me, an officer competent to

administer oaths, at _____
CITY/STATE

this _____
(day) (month) (year)

Signed _____

Title _____
(Notary public or other competent officer)

¹ At least seven signers none of whom should administer the oath.

**APPROVAL OF ORGANIZATION CERTIFICATE
AND
CERTIFICATION OF INSURANCE**

Pursuant to the provisions of the Federal Credit Union Act (12 U.S.C. 1751 et. Seq.), the foregoing organization certificate and insurance of member accounts of _____ Federal Credit Union are approved this

(day)

(month)

(year)

**CHAIRPERSON
NATIONAL CREDIT UNION ADMINISTRATION**

REPORT OF OFFICIAL AND AGREEMENT TO SERVE**TO: NATIONAL CREDIT UNION ADMINISTRATION****Proposed** _____ **Federal Credit Union****Title of Prospective Position:** _____**Name:** _____
Mr./Ms./Mrs. Last, First, Middle**Maiden Name (If Different From Above):** _____**Address (Res.):** _____
Street, City, State, Zip Code**Telephone Number: ()** _____**Place of Birth:** _____ **Date of Birth:** _____
City/State/Country**Employer:** _____**Social Security Number (Optional):** _____**Type of Business:** _____**Number of years with present employer:** _____ **Your position title:** _____**Education background (enter highest grade completed)****High School:** _____ **College:** _____ **Major Field of Study:** _____**Other training or experience:**

Are you willing to accept the position of trust for which you have been selected and to remain in office until a qualified successor is found? ____ YES ____ NO**Have you been informed as to the general duties and responsibilities of an official of the proposed Federal Credit Union and are you willing to devote the time necessary to familiarize yourself with and to perform your duties?****____ YES ____ NO**

Estimated number of hours per month you will be able to volunteer:_____

IF THE ANSWER IS YES TO THE FOLLOWING QUESTION, PLEASE PROVIDE INFORMATION AS INSTRUCTED ON THE FOLLOWING PAGE:

Have you ever been convicted of any CRIMINAL OFFENSE involving dishonesty or a breach of trust? ___ YES ___ NO

To facilitate the process of obtaining a credit and background check, please provide the following:

1. Any other names which you have used: _____ and,

2. Previous address, (if your address changed over the past 2 years):

3. Name of Spouse: _____

READ THE FOLLOWING CAREFULLY BEFORE SIGNING

CERTIFICATION AND AGREEMENT TO SERVE

I certify that the information provided on this form is true and correct. Further, I, the undersigned, having been duly designated to occupy the position(s) indicated above, do hereby agree to serve in the above-stated office(s) of this proposed credit union until the first annual meeting held in accordance with the Federal Credit Union Act and the bylaws of this credit union and until the election of my successor(s). I further pledge to carry out the duties and responsibilities commensurate with said office(s) as promulgated by the Federal Credit Union Act and the bylaws of this credit union. I have read the Privacy Act Notice that follows.

Date

Signature

Witness

PRIVACY ACT NOTICE

The Privacy Act of 1974 (Public Law 93-579) requires that you be advised as to the legal authority, purpose and uses of the information solicited by this form. Pursuant to Sections 104 and 205(d) of the Federal Credit Union Act, the information in this form is requested for the purpose of completing the investigation required for a new Federal credit union. The information in this form will be primarily used in considering the soundness of the management for the proposed Federal credit union. However, this form may be disclosed to any of the following sources: a congressional office in response to your inquiry to that office; an appropriate Federal, state or local authority in the investigation or enforcement of a statute or regulation; or employees of a Federal agency for audit purposes. Failure to complete this form or omission of any item of information, except for disclosure of your social security number, may result in a delay in the process for chartering the proposed Federal credit union. In accordance with Section 792.68 of NCUA's regulations, you are not required to furnish your social security number on this form. Your social security number, if voluntarily provided, will be used to more easily verify the information required by this form. No penalty will result to you as a management official or to the chartering of the proposed Federal credit union if you do not provide your social security number.

Further information needed if answer to CRIMINAL OFFENSE question on the previous page was YES:

CRIMINAL OFFENSE:

Nature of offense: _____
Date of occurrence: _____ Date of conviction: _____
Sentence conferred: _____
(Attach a separate sheet if space provided is not adequate)

CRIMINAL OFFENSE GUIDELINES

The Federal Credit Union Act, Subchapter II, Section 205(d), requires that, except with the written consent of the NCUA Board, no person shall serve as director, officer, committee member, or employee of an insured credit union who has been convicted or who is hereafter convicted, of any criminal offense involving dishonesty or breach of trust. To assist the NCUA Board in making a determination of the fitness of a person who is selected to serve and who the organizer believes is qualified to serve as an official, the specific information above will need to be furnished.

If the NCUA Board believes that, in view of the facts presented and the date of the offense, they can give their consent to the appointment they will so advise that person in writing. If on the other hand, the NCUA Board believes after careful consideration that they cannot in good conscience give their written consent to the appointment they will contact the organizer and ask that another person be selected for the position. The person selected will have to complete a Report of Official and Agreement to Serve.

An indication of whether the bonding company would agree to provide coverage should be included if the person is to serve as treasurer. Bonding company agrees to provide coverage: ___ YES ___ NO

AUTHORIZATION TO OBTAIN A CREDIT REPORT

The National Credit Union Administration (NCUA) may evaluate the competence, experience, character, and integrity of any individual who is to serve as an official, employee, or committee member of a federally insured credit union, in accordance with §1790a of the Federal Credit Union Act and Chapter 1, §V.B.4 of the NCUA Chartering and Field of Membership Manual.

NCUA may disapprove any individual whose employment it believes will not be in the best interest of the credit union or of the public. To assist in the evaluation process, NCUA may obtain and review an individual's credit report.

Your signature on this document authorizes NCUA to obtain a copy of your credit report.

_____ v
Last First Middle

Social Security Number: _____

Date of Birth: _____

Signature Date

APPLICATION FOR FIELD OF MEMBERSHIP AMENDMENT NCUA FORM 4015

**USE FOR MULTIPLE COMMON BOND EXPANSION FOR GROUPS OF
3,000 OR MORE PERSONS**

Attach a separate application for each group included in your request for expansion. The application must be complete or it will be returned unprocessed.

1. Name and address of credit union: _____ Telephone Number: _____
Charter Number: _____

2. Name and address of group: _____ Telephone Number: _____

***If the group is an association, include a copy of the association's
Charter/Bylaws or other equivalent organizational documentation.***

3. Provide the proposed field of membership wording. Use the example wording found in NCUA's *Chartering and Field of Membership Manual*, Chapter 2, Section IV.A.2.

4. How many primary potential members (excluding immediate family and household members) are in the group:

5. (a) What is the distance between the group's location and your credit union's nearest service facility¹ to which the group has access (Reference Chapter 2, Section IV.A.1):

- (b) What is the address of this service facility:

¹ A service facility is defined as a place where shares are accepted for members' accounts, loan applications are accepted or loans are disbursed.

(c) Describe the service area² primarily served by the above service facility:

6. Is the group in the field of membership of any other credit union? Yes ____
No ____

If yes, and the overlapped credit union is not a community credit union or a non-federally insured credit union, please address the following:

☐ Provide the name and location of the other servicing credit union:

☐ Include a letter from the overlapped credit union indicating whether it concurs or objects to the overlap. If the overlapped credit union objects or fails to respond, document attempts to resolve the issue:

☐ Explain how the expansion's beneficial effect in meeting the convenience and needs of the members of the group clearly outweighs any adverse effect on the overlapped credit union:

² A federal credit union's service area is the area that can reasonably be served by the service facility accessible to the groups within the field of membership. It will most often coincide with that geographic area primarily served by the service facility.

7. Attach a letter, or equivalent documentation, from the group requesting credit union service indicating:

- ☐ that the group wants to be added to the federal credit union's field of membership;
- ☐ whether the group presently has other credit union service available;
- ☐ the number of persons currently included within the group to be added and the group's location(s);
- ☐ the group's proximity to the credit union's nearest service facility; and
- ☐ why the formation of a separate credit union for the group is not practical or consistent with safety and soundness standards. *The formation of a separate credit union may not be practical if the group lacks sufficient volunteers or resources to support the operation of a credit union or does not meet the economic advisability criteria outlined in Chapter 1 of NCUA's Chartering and Field of Membership Manual.*

8. Other comments:

Name and title of credit union board-authorized representative (e.g., President/CEO):

(Typed/Printed Name)	(Signature)	(Date)

APPLICATION FOR FIELD OF MEMBERSHIP AMENDMENT**NCUA FORM 4015-EZ****USE FOR MULTIPLE COMMON BOND EXPANSIONS OF LESS THAN 3,000
PERSONS AND ALL SINGLE COMMON BOND EXPANSIONS**

*Attach a separate application for each group included in your request for expansion.
The application must be complete or it will be returned unprocessed.*

1. Name and address of credit union: _____ Telephone Number: _____

_____ Charter Number: _____

2. Name and address of group: _____ Telephone Number: _____

***If the group is an association, include a copy of the association's
Charter/Bylaws or other equivalent organizational documentation.***

3. Provide the proposed field of membership wording: _____

4. **Multiple Common Bond Expansions Only:** Attach a letter, or equivalent documentation, from the group requesting credit union service indicating:

- ☐ that the group wants to be added to the federal credit union's field of membership;
- ☐ the number of persons to be added and the group's location(s); and
- ☐ the group's distance to the credit union's nearest service facility.

5. **Single Common Bond Expansions Only:** How the group shares the occupational or associational common bond _____
How many primary potential members (excluding immediate family and household members) are in the group: _____

Name and title of credit union board-authorized representative (e.g., President/CEO):

(Typed/Printed Name and Title) (Signature) (Date)

NOTICE OF MEETING OF MEMBERS TO CONVERT FROM A FEDERAL TO A STATE CHARTERED CREDIT UNION

_____ **FEDERAL CREDIT UNION**

(City)

(State)

THIS PROPOSITION WILL BE DECIDED BY A MAJORITY OF THE MEMBERS WHO VOTE.

Notice is hereby given that a meeting of the members of _____ Federal Credit Union has been called and will be held at _____ on _____, at _____ o'clock, __.M. for the purpose of considering and voting upon the following resolution:

"RESOLVED, That the _____ Federal Credit Union be converted to a credit union chartered under the laws of the State of _____ and that its operation under Federal charter be discontinued.

RESOLVED FURTHER, That the board of directors and the officers of this credit union and are hereby authorized and directed to do all things necessary to effect and to complete the conversion of this credit union from a Federal to State-chartered credit union."

The board of directors of this credit union has given careful consideration to the advantages and the disadvantages of the proposed conversion and believes it to be in the best interest of the members for the following reasons:

The proposed conversion would result in the following disadvantages or adverse changes in services and benefits to the members of the credit union:

The proposed conversion would result in the following costs of conversion (i.e. changing the credit unions name, examination and operating fees, attorney and consulting fees, tax liability, etc):

The board of directors recommends that the members approve the proposal to convert to a State charter.

The members' accounts will ☐ will not ☐ continue to be insured by the National Credit Union Share Insurance Fund.

Attached is your ballot. You are urged to bring your ballot to the meeting and to cast your vote after hearing the discussion of the proposal. If you cannot attend the meeting, you are urged to mark your vote, date and sign your ballot, and return it to the following address by no later than the date and the time announced for the meeting of the members:

BY ORDER OF THE BOARD OF DIRECTORS

TITLE: _____
(CHAIRPERSON)

TITLE: _____
(BOARD SECRETARY)

Issued _____ **(Date)**

APPLICATION TO CONVERT FROM A STATE TO A FEDERAL CREDIT UNION

The _____ Credit Union of _____ (city), _____ (State), incorporated under the laws of the State of _____ on _____ by decision of its board of directors, hereby makes application to the National Credit Union Administration to convert to a Federal credit union.

1. Field of membership. Provide a copy of the credit union's charter, articles of incorporation or bylaws, as amended to date.

2. Is proposed Federal charter to cover same field of membership? Yes ☐ No ☐ If answer is "No," explain fully: _____

3. Standard financial and statistical reports as of _____ or comparable forms of reports, certified correct by the treasurer and verified by the affidavit of the president or vice-president, are attached.

4. A schedule of delinquent loans classified 2 to 6 months, 6 to 12 months, and 12 months and over delinquent is attached.

5. The following policies on loans to members are currently in effect in this credit union:

a. Interest rates on loans: _____

b. Charges incident to making loans which are passed on to borrowers: _____

c. Maturity limits: _____

d. Unsecured loan limit: _____

e. Secured loan limit: _____

f. Types of security accepted: _____

g. Requirements of amortization (Repayment requirements): _____

6. Attached is a list of unsecured loans in excess of the amounts stipulated in the Act. (For each loan show account number, original amount, terms, and unpaid balance.)

7. Attached is a list of loans with maturities in excess of periods stipulated in the Act and the NCUA Rules and Regulations. (For each loan show account number, original amount, terms, unpaid balance, and security.)
8. Types of accounts which members are required or are permitted to maintain: Share ☐ Deposit ☐ Other ☐ (describe): _____

9. Describe any real estate owned by credit union, including a list of its current market value: _____

10. Describe and list any investments which are outside of the investment powers of Federal credit unions (Refer to Section 107(7), Federal Credit Union Act): _____

11. Names and locations of any depository institutions in which the credit union deposits its funds but which are beyond the purview of deposit powers authorized by Section 107(8) of the Federal Credit Union Act: _____

12. Describe any services rendered to or on behalf of members or of the public, other than accepting and maintaining accounts of members and making loans to members: _____

13. Describe what you propose to do about any policies, procedures, assets or liabilities which do not comply with the Federal Credit Union Act: _____

14. Give specific reasons as to why you desire to convert to a Federal credit union: _____

We hereby authorize the National Credit Union Administration to examine our books and our records.

We, the undersigned _____ Chief Executive Officer and
_____ Chief Financial Officer of the
_____ Credit Union of
_____ State of

_____ certify: That we are the duly elected Chairperson
and the Chief Financial Officer, respectfully, of said credit union; that the statements made
in this Application to Convert from a State to a Federal Credit Union and the schedules
attached hereto are true, complete, and correct to the best of our knowledge and belief and
are made in good faith.

TITLE: _____
(CHAIRPERSON)

TITLE: _____
(CHIEF FINANCIAL OFFICER)

**AFFIDAVIT
PROOF OF RESULTS OF MEMBERSHIP VOTE - PROPOSED CONVERSION FROM
FEDERAL CREDIT UNION TO STATE CREDIT UNION**

**We, the undersigned _____ chairperson and
_____ secretary of the _____ Federal
Credit Union, hereby swear or affirm as follows:**

1. That the conversion proposal as set forth in the attached Notice of Meeting of the Members was fully explained to the members present at said meeting of members.

2. That on the date of the said meeting of members there were _____ members of this credit union qualified to vote; _____ members were present at said meeting; of those members present, _____ members voted in favor of the conversion and _____ members voted against the conversion; of those members not present at the meeting but who filed ballots, _____ members voted in favor of the conversion and _____ members voted against the conversion; and that, without duplication of the votes of any member, a total of _____ members voted in favor of the conversion and _____ members voted against the conversion.

3. That the action of the members of this credit union at said meeting is fully and completely recorded in the minutes of said meeting and all ballots cast by the members on the question of conversion, either at the meeting or by delivery to the credit union, are on file with the secretary of this credit union.

TITLE: _____
(CHAIRPERSON)

TITLE: _____
(BOARD SECRETARY)

FEDERAL CREDIT UNION

Subscribed before me, an officer competent to administer oaths, at _____

_____, this _____
(day) (month) (year)

Signed _____

(SEAL)

Title _____
(Notary Public or other competent officer)

My Commission Expires __, _____
(year)

**FEDERAL TO STATE CONVERSION
BALLOT FOR CONVERSION PROPOSAL**

I have read the notice concerning the meeting of the members of the _____
Federal Credit Union called for _____ to consider and to vote upon the following
proposition:

"RESOLVED, That the _____ Federal Credit
Union be converted to a credit union chartered under the laws of the State of
_____ and operation under Federal Charter Number _____ be
discontinued.

**RESOLVED FURTHER, That the board of directors and the officers of this credit
union are hereby authorized and directed to do all things necessary to effect and
to complete the conversion of this credit union from a Federal to State-chartered
credit union."**

I hereby cast my vote on the proposition: (Place an X in the square opposite the
appropriate statement.)

I vote for the conversion ☐

I vote against the conversion ☐

(Account Number)

(Signature of Member)

Date: _____

APPLICATION AND AGREEMENTS FOR INSURANCE OF ACCOUNTS

Date: _____

TO: The National Credit Union Administration Board (Board)

The proposed _____ Federal Credit Union

(Street Address)

(City)

(State)

(Zip Code)

applies for insurance of its accounts as provided in Title II of the Federal Credit Union Act, and in consideration of the granting of insurance, hereby agrees:

- 1. To pay the reasonable cost of such examinations as the Board may deem necessary in connection with determining the eligibility of the application for insurance.**
- 2. To permit and pay the reasonable cost of such examinations as in the judgment of the Board may from time to time be necessary for the protection of the fund and other insured credit unions.**
- 3. To permit the Board to have access to any information or report with respect to any examination made by or for any public regulatory authority and furnish such additional information with respect thereto as the Board may require.**
- 4. To provide protection and indemnity against burglary, defalcation, and other similar insurable losses, of the type, in the form, and in an amount at least equal to that required by the laws under which the credit union is organized and operates.**
- 5. To maintain such special reserves as the Board, by regulation or in special cases, may require for protecting the interest of members.**
- 6. Not to issue or have outstanding any account or security the form of which, by regulation or in special cases, has not been approved by the Board.**
- 7. To pay and maintain the capitalization deposit required by Title II of the Federal Credit Union Act.**
- 8. To pay the premium charges for insurance imposed by Title II of the Federal Credit Union Act.**

9. To comply with the requirements of Title II of the Federal Credit Union Act and of regulations prescribed by the Board pursuant thereto.
10. To permit the Board to have access to all records and information concerning the affairs of the credit union and to furnish such information pertinent thereto that the Board may require.
11. To comply with Title 18 of the United States Code and other pertinent Federal statutes as they may exist or may be hereafter promulgated or amended.

We, the undersigned, certify to the correctness of the information submitted. We, the undersigned, further certify that to the best of our knowledge and belief no proposed officer, committee member, or employee of this credit union has been convicted of any criminal offense involving dishonesty or a breach of trust, except as noted in attachments to this application. We further agree to notify the Board if any proposed or future officer commits a criminal offense.

Chairperson

Chief Financial Officer

Note: A willfully false certification is a criminal offense. U.S. Code, Title 18, Sec. 1001.

CERTIFICATION OF RESOLUTIONS

FEDERAL CREDIT UNION (PROPOSED)

We certify that we are the duly elected and qualified chief executive officer and recording officer of the above-named proposed Federal credit union and that at the charter-organization meeting, the board of directors passed the following resolution and recorded it in its minutes:

"Be it resolved that this credit union apply to the National Credit Union Administration Board for insurance of its accounts as provided in Title II of the Federal Credit Union Act.

Be it further resolved that the president and treasurer be authorized and directed to execute the Application and Agreements for Insurance of Accounts as prescribed by the Board and any other papers and documents required in connection therewith; to pay all expenses and do all other things necessary or proper to secure and continue in force such insurance."

Chief Executive Officer

Recording Officer, Board of Directors

**INFORMATION TO BE PROVIDED IN SUPPORT OF THE APPLICATION OF A
STATE CHARTERED CREDIT UNION FOR INSURANCE OF ACCOUNTS**

Existing credit unions must complete the entire application. All other applicants do not have to complete questions 8, 11, 12, 13, 15, and 16.

_____ Credit Union

1. Show below the location of the credit union's books and records.

(Street Address)

(City)

(State)

(Zip)

(Telephone)

2. Show the date (month, day, year) in which the credit union was chartered. _____
3. Attach a copy of the credit union's field of membership as shown in the charter, articles of incorporation and/or bylaws, as amended to date. Please identify it as the first schedule in the consecutive number sequence as discussed in the instructions. Schedule No. _____
4. Potential membership (total number of persons who could be served including present members). _____
5. Identify charter type (e.g., single common bond, multiple common bond, community).

6. Does the credit union operate under standard bylaws provided by the state supervisory authority? Yes ☐ No ☐ (Complete a.)
- a. Attach a copy of the current official bylaws under which the credit union operated. Schedule No. _____
7. Is the credit union under any administrative restraints by the State Supervisory Authority? Yes ☐ No ☐ (Complete a.)
- a. Explain fully on an attached schedule. Schedule No. _____

8. **Attach a copy of the latest State supervisory authority examination. Copies of any correspondence from the accountant's report if made in lieu of a State supervisory authority examination. Copies of any correspondence from the State supervisory authority which accompanied the examination report should also be included.**
9. **Attach copies of the Balance Sheet and Statement of Income and Expense (or Financial and Statistical Report) for the month preceding the date of this application and for the same month of the preceding year.**
Schedule Nos. _____
10. **Reserves**

Show below the requirements of the State law and/or your bylaws for transfer of earnings to reserves (either monthly or at the end of each accounting period).

11. Delinquent Loans and Charged-off Loans

a. Attach a copy of the delinquent loan list as of the month-end preceding the date of this application. See instructions pertaining to Item No. 11a. Schedule No. _____

b. List below the requested information on delinquent loans for the latest four calendar quarters preceding the date of the application (March 31, June 30, September 30 and December 31). Also show total share and loan balances for all members for the same period.

(a) *Other Delinquent Categories	(b) Delinquent Categories	Date	Date	Date	Date
	2 to less than 6 mos.	\$ _____	\$ _____	\$ _____	\$ _____
	6 to less than 12 mos.	\$ _____	\$ _____	\$ _____	\$ _____
	12 mos. and over	\$ _____	\$ _____	\$ _____	\$ _____
	Totals	\$ _____	\$ _____	\$ _____	\$ _____
	Share Balances	\$ _____	\$ _____	\$ _____	\$ _____
	Loan Balances	\$ _____	\$ _____	\$ _____	\$ _____

***See instructions pertaining to Item No. 11 b.**

c. List below the requested information on loans charged off during the last three years and the current year. List total of all reserves both revocable and irrevocable for the same period as (balance at year-end and or current period).

	Year	Year	Year	Current Yr. To Date	*Totals Since Organization
Total Charged Off					
Total Recovered					
Net Charged Off					

*If this information is available.

12. Does the credit union have any unrecorded or contingent liabilities, (including pending law suits or civil actions)? Yes ☐ No ☐ Complete a.

a. List on an attached schedule the complete description of such liabilities, including amounts, status of the items, and a description of the circumstances creating the liabilities or contingent liabilities. Schedule No. _____

13. Do any asset accounts other than loans to members, investments, and real estate have actual values less than the book values shown on the Balance Sheet?

List on a separate schedule a description of such assets, showing at least the following information; account number, description of item, book value and actual value. Schedule No. _____

14. List below or on an attached schedule, any investments or real estate as discussed in the instructions pertaining to Item No. 14. Schedule No. _____. Attach a copy of the credit union's current investment policies. Investments/Loans to Credit Union Service Organization (CUSO) should be listed separately.

<u>Description of Item</u>	<u>Current Market Value</u>	<u>Current Book Value</u>
	\$	\$
	\$	\$
	\$	\$

15. Individual Share and Loan Ledgers:

a. Were the totals of the trial balance of the individual share and loan ledgers in agreement with the balances of the respective general ledger control accounts as of the month-end preceding the date of this application? _____

b. What are the differences as of the month and preceding the date of this application?

	<u>Shares</u>	<u>Loans</u>
Balances in General Ledger	\$ _____	\$ _____
Totals of the trial balance of the individual ledgers	\$ _____	\$ _____
Differences	\$ _____	\$ _____

16. Supervisory Committee:

a. What is the effective date of the last complete comprehensive annual audit performed by the supervisory committee?

Effective Date _____

(1) If the effective date of the annual audit is not within the last 18 months what is the supervisory committee's target date for completion of a comprehensive audit?

Date _____

b. Show the effective date of the supervisory committee's last controlled verification of all members' accounts:

Effective Date _____

(1) If all members' accounts have not been verified under controlled conditions during the last two years, what is the supervisory committee's target date for completion of the verification program?

Date _____

c. If it is necessary to complete either 16a(1) or 16 b(1); please describe the directors' plans for seeing that the target dates are met. (Discuss below or on an attached schedule.) Schedule No. _____

17. List below the credit union's surety bond coverage.**a. Name of carrier** _____**b. Standard form number of the bond (i.e., 23, 576, 577, 578, 581, 562 CU-1, other)**
_____**c. Basic amount of coverage \$**_____**d. Bond premium paid to (date)** _____**e. What is the amount of coverage required by State law or your bylaws?** _____**f. Riders to the bond (list below) (i.e., faithful performance, forgery, misplacement, etc.)** _____
_____**18. Does the credit union render any services to or perform any functions on behalf of the members, non-members, organizations, or the public other than the usual savings and loan services for members?** _____**Attach a schedule describing each activity in full. Schedule No.** _____**19. Does the board of directors or management know of any adverse economic condition that is affecting or will affect the credit union's present or future operation or that of the sponsor organization?** _____**Attach a schedule describing the condition and its possible effect on the credit union's future. Schedule No.** _____**20. To the best of the credit union's knowledge and belief, has any director, officer, committee member, or employee been convicted of any criminal offense involving dishonesty or breach of trust?** _____**a. Attach a statement describing the circumstances. Schedule No.** _____**21. Lending policies and practices:****a. Complete the following schedule showing the present policies and practices on loans to members.****b. Complete the following schedule of largest loans with the attached instructions pertaining to Item No. 21.**

LENDING POLICIES AND PRACTICES

	Maximum Loan Amount	Maximum Period of Repayment	Required Amount of Down Payment (Equity)
1. Credit Union Policies and Practices			
a. Unsecured Loan Limits			
b. Secured Loan Limits			
(1) New Auto Collateral			
(2) Used Auto Collateral			
(3) Real Estate			
(a) First Mortgage			
(b) Second Mortgage			
(4) Comakers			
(5) Others (describe)			
c. Loans to Organizations			
d. Loans to Directors, Officers, or Committee Members			
2. State Credit Union Law; Bylaws			
a. Unsecured Loan Limits			
b. Secured Loan Limits			
c. Loans to Directors, Officers, or Committee Members			

SCHEDULE OF LARGEST LOANS

[illegible]

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**CREDIT UNION SERVICE ORGANIZATION
(CUSO)**

1. Name of CUSO _____
2. Date of CUSO'S Organization _____
(Date of obtaining charter from State)
3. Type of organization (check one):
- a. General Partnership ☐ c. Joint Ownership ☐
- b. Limited Partnership ☐ d. Corporation ☐
4. Owners of CUSO (list name, charter number if FCU, and percentage of ownership, if possible).
- a. _____
- | Name | Charter Number (If FCU) | % |
|------|-------------------------|---|
|------|-------------------------|---|
- b. _____
- | Name | Charter Number (If FCU) | % |
|------|-------------------------|---|
|------|-------------------------|---|
- (Continue on reverse side if additional space is required)
5. Capitalization (list investors and amount of investment in CUSO).
- a. _____
- | Name | Charter Number (If FCU) | Amount |
|------|-------------------------|--------|
|------|-------------------------|--------|
- b. _____
- | Name | Charter Number (If FCU) | Amount |
|------|-------------------------|--------|
|------|-------------------------|--------|
- (Continue on reverse side if additional space is required)
6. List all known services which are being offered by CUSO (be as specific as possible). _____
- _____
- _____

7. Comments (include all other pertinent information, if applicable, not previously discussed). _____

8. Attach the latest Financial and Statistical Report of CUSO, if available.

FORM 9600 INSTRUCTIONS**APPLICATION OF A STATE CHARTERED CREDIT UNION
FOR INSURANCE OF ACCOUNTS**

The application and all supporting documents should be prepared, photocopied, and submitted in accordance with these instructions. Additional schedules may be included if deemed appropriate.

Existing credit unions must complete the entire application. All other applicants do not have to complete questions 8, 11, 12, 13, 15, and 16.

Existing credit unions must submit current policies and financial statements as noted in the application. All other applicants must submit proposed policies and pro forma financial statements for the first and second year of operation.

When an item specifies that a schedule should be prepared and attached, please assign a schedule number in consecutive order, starting with number one. Please show the schedule number at the top right-hand corner of the schedule.

Some of the items are self-explanatory and require no special instructions.

Other items, however, need special explanations, definitions, and instructions for completion. These are listed below, identified by the same item numbers as appear in Exhibit A.

Item No. 10: Reserves: The term "reserves" means that account, or accounts, which

represents segregated portions of earnings as provided by the law, bylaws, and/or the credit union's management for the absorption of losses relating to loans to members.

Item No. 11a: The delinquent loan list requested should include, for each delinquent loan, the account number of the borrower, date of loan, original amount of loan, unpaid balance, date of last payment of principle, excluding transfers from pledged shares, collateral, and comments regarding the collectibility of each loan in the categories 6 months to less than 12 months and 12 months and over. Payments of interest only should be so identified.

Item No. 11b: The schedule provided for the delinquent loan information is set up in delinquency categories of 2 months to less than 6 months, 6 to less than 12 months, and 12 months and over. Credit unions that compute delinquency using categories other than shown in column (b) may use these other categories and show them in column (a). Credit unions using column (a) need not show the delinquencies in the column (b) categories. It is not necessary to report on loans which are delinquent less than 2 months.

Adverse Trends: If items 8, 9, or 11 indicate adverse trends such as significant decreases in shares, loans or reserves, increases in loan delinquency or loan charge-offs, or unresolved serious exceptions shown in the State examination report, the credit union may attach an explanation and identify it as "Explanation of Adverse Trends or Unresolved Examination Exceptions" and assign it a schedule number.

Item No. 14: This item need be completed only if the credit union owns any of the following:

A. Investments in U.S. Government securities guaranteed as to principle and interest or Federal Agency securities, the market value of which is now less than the book value.

B. Real estate other than that used entirely for the credit union's own office(s).

C. Other investments of any type except:

- 1. Loans to other credit unions.**
- 2. Certificates of, or accounts in, federally insured financial institutions.**
- 3. Deposits or accounts in corporate credit unions.**

If corporate bonds are listed, please show maturity date, rate of interest on bonds and current yield rate.

If stocks are listed, please show number of shares and bid price.

Please identify the source of the market valuation information and the date of such information.

Item No. 21b: In selecting the largest loans for this Exhibit, list the largest outstanding unpaid loan balance and proceed in descending order by dollar amount until the number specified below has been shown. The number of such loans to be listed will be determined as follows:

If your credit union has the following no. of outstanding loans

**Under 100
100 to 199
200 to 299
300 to 399
400 or more**

You should list the following no. of the largest unpaid balances

**5
10
15
20
25**

If any of the above loans are delinquent, please show the number of months delinquent in the appropriate "Status of Re-payment" column.

Complete the Credit Union Service Organization (CUSO) schedule for each investment/loan to a CUSO.

TERMINATION OF INSURANCE

Should the credit union, after obtaining insurance of member accounts, desire to terminate its insured status, this could be accomplished by complying with the provisions of Section 206(a), (c) and (d) of Title II of the Federal Credit Union Act. This action would require approval by a vote of the majority of the members, and ninety days written notice of the proposed termination date to NCUA. Member accounts would continue to be insured for one year following termination of insurance and the insurance premium would be paid during that period. After termination of insurance, the credit union shall give prompt and reasonable notice to all members whose accounts are insured

that it has ceased to be an insured credit union.

Sections 206(a)(2) and 206(d)(2) and (3) of the Act provide that an insured credit union may also terminate its insurance by converting from its status as an insured credit union under the Act to insurance from a corporation authorized and duly licensed to insure

member accounts. In this event, approval is required by a majority of all the directors and by affirmative vote of a majority of the members voting, provided that at least 20 percent of the members have voted on the proposition. Under this provision for termination, insurance of member accounts would cease as of the date of termination.

**APPLICATION AND AGREEMENTS FOR INSURANCE OF ACCOUNTS
STATE CHARTERED CREDIT UNION**

TO: The National Credit Union Administration Board**Date** _____**The** _____ **Credit Union,****Insurance Certificate Number** _____ **(if applicable)**_____
(mailing address)**(city)****(state)****(zip code)**

applies for insurance of its accounts as provided in Title II of the Federal Credit Union Act, and in consideration of the granting of insurance, hereby agrees:

1. To permit and pay the cost of such examinations as the NCUA Board deems necessary for the protection of the interests of the National Credit Union Share Insurance Fund. 2. To permit the Board to have access to all records and information concerning the affairs of the credit union, including any information or report related to an examination made by or for any other regulating authority, and to furnish such records, information, and reports upon request of the NCUA Board. 3. To possess such fidelity coverage and such coverage against burglary, robbery, and other losses as is required by Parts 713 and 741 of NCUA's regulations. 4. To meet, at a minimum, the statutory reserve and full and fair disclosure requirements imposed on Federal Credit Unions by Part 702 of NCUA's	regulations, and to maintain such special reserves as the NCUA Board may be regulation or on a case-by-case basis determine are necessary to protect the interests of members. Any waivers of the statutory reserve or full and fair disclosure requirements or any direct charges to the statutory reserve other than loss loans must have the prior written approval of the NCUA Board. In addition, corporate credit unions shall be subject to the reserve requirements specified in Part 704 of NCUA's regulations. 5. Not to issue or have outstanding any account or security the form of which has not been approved by the NCUA Board, except accounts authorized by state law for state credit unions.

6. To maintain the deposit and pay the insurance premium charges imposed as a condition of insurance pursuant to Title II (Share Insurance) of the Federal Credit Union Act.
7. To comply with the requirement of Title II (Share Insurance) of the Federal Credit Union Act and of regulations prescribed by the NCUA Board pursuant thereto.
8. For any investments other than loans to members and obligations or securities expressly authorized in Title I of the Federal Credit Union Act, as amended to establish now and maintain at the end of each accounting period and prior to payment of any dividend, an Investment Valuation Reserve Account in an amount at least equal to the net excess of book value over current market value of the investments. If the market value cannot be determined, an amount equal to the full book value will be established. When, as of the end of any dividend period, the amount in the Investment Valuation Reserve exceeds the difference between book value and market value, the board of directors may authorize the transfer of the excess to Undivided Earnings.
9. When a state-chartered credit union is permitted by state law to accept nonmember shares or deposits from sources other than other credit unions and public units, such nonmember accounts shall be identified as nonmember shares or deposits on any statement or report required by the NCUA Board for insurance purposes. Immediately after a state-chartered credit union receives notice from NCUA that its member accounts are federally insured, the credit union will advise any present nonmember share and deposit holders by letter that their accounts are not insured by the National Credit Union Share Insurance Fund. Also, future nonmember share and deposit fund holders will be so advised by letter as they open accounts.
10. In the event a state-chartered credit union chooses to terminate its status as a federally-insured credit union, then it shall meet the requirements imposed by Sections 206(a)(1) and 206(c) of the Federal Credit Union Act and Part 741.208 of NCUA's regulations.
11. In the event a state-chartered credit union chooses to convert from federal insurance to some other insurance from a corporation authorized and duly licensed to insure member accounts, then it shall meet the requirements imposed by Sections 206(a)(2), 206(c), 206(d)(2), and 206(d)(3) of the Federal Credit Union Act and any other applicable federal law.

In support of this application we submit the following schedules:

Schedule No.	Title

CERTIFICATIONS AND RESOLUTIONS

We, the undersigned, certify that we are the duly elected and qualified presiding officer and recording officer of the credit union and that at a properly called and regular or special meeting of its board of directors, at which a quorum was present, the following resolutions were passed and recorded in its minutes:

We, the undersigned, certify to the correctness of the information submitted.

Be it resolved that this credit union apply to the National Credit Union Administration Board for insurance of its accounts as provided in Title II of the Federal Credit Union Act.

Be it resolved that the presiding officer and recording officer be authorized and directed to execute the Application and Agreement for Insurance of Accounts as prescribed by the NCUA Board and any other papers and documents required in connection therewith and to pay all expenses and do all such other things necessary or proper to secure and continue in force such insurance.

We further certify that to the best of our knowledge and belief no existing or proposed officer, committee member, or employee of this credit union has been convicted of any criminal offense involving dishonesty or breach of trust, except as noted in attachments to this application. We further agree to notify the Board if any existing, proposed or future officer, committee member or employee is indicted for such an offense.

(Signature) Chairperson, Board of Directors

(Print or type Chairperson's Name)

(Signature) Secretary, Board of Directors

(Print or type Secretary's Name)

APPENDIX 5 TRADE ASSOCIATIONS

Credit Union National Association
(CUNA)
P.O. Box 431
Madison, WI 53701
608-231-4000

National Association of Federal Credit Unions
(NAFCU)
3138 N. 10th Street, Suite 300
Arlington, VA 22201
703-522-4770

National Association of State Credit Union
Supervisors (NASCUS)
1655 North Fort Myer Drive
Suite 300
Arlington, VA 22209
703-528-8351

National Federation of Community
Development Credit Unions
(NFCDCU)
120 Wall Street, 10th Floor
New York, NY 10005-3902
212-809-1850



Federal Register

**Tuesday,
June 17, 2008**

Part III

Department of Justice

28 CFR Parts 35 and 36

**Nondiscrimination on the Basis of
Disability in State and Local Government
Services; Nondiscrimination on the Basis
of Disability by Public Accommodations
and in Commercial Facilities; Proposed
Rules**

DEPARTMENT OF JUSTICE**28 CFR Part 35****[CRT Docket No. 105; AG Order No. 2967–2008]****RIN 1190–AA46****Nondiscrimination on the Basis of Disability in State and Local Government Services****AGENCY:** Department of Justice, Civil Rights Division.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to: Adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are “consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board” (Access Board); and perform periodic reviews of any rule judged to have a significant economic impact on a substantial number of small entities, and a regulatory assessment of the costs and benefits of any significant regulatory action as required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

In this NPRM, the Department proposes to adopt Parts I and III of the *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines* (2004 ADAAG), which were published by the Access Board on July 23, 2004. Prior to its adoption by the Department, the 2004 ADAAG is effective only as guidance to the Department; it has no legal effect on the public until the Department issues a final rule adopting the revised ADA Standards (proposed standards).

Concurrently with the publication of this NPRM, the Department is publishing an NPRM to amend its title III regulation, which covers public accommodations and commercial facilities, in order to adopt the 2004 ADAAG as its proposed standards for title III entities, to make amendments to the title III regulation for consistency with title II, and to make amendments that reflect the collective experience of sixteen years of enforcement of the ADA.

DATES: All comments must be received by August 18, 2008.

ADDRESSES: Submit electronic comments and other data to <http://www.regulations.gov>. Address written comments concerning this NPRM to: ADA NPRM, P.O. Box 2846, Fairfax, VA

22031–0846. Overnight deliveries should be sent to the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005. All comments will be made available for public viewing online at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Janet L. Blizzard, Deputy Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307–0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department’s toll-free ADA Information Line at (800) 514–0301 (voice) or (800) 514–0383 (TTY).

This rule is also available in an accessible format on the ADA Home Page at <http://www.ada.gov>. You may obtain copies of this rule in large print or on computer disk by calling the ADA Information Line at the number listed above.

SUPPLEMENTARY INFORMATION:**Electronic Submission and Posting of Public Comments**

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include CRT Docket No. 105 in the subject box, and you must include your full name and address.

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase “PERSONAL IDENTIFYING INFORMATION” in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it posted online, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively

redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency’s public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency’s public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

Overview

Throughout this NPRM, the current, legally enforceable ADA Standards will be referred to as the “1991 Standards.” 28 CFR part 36, App. A, 56 FR 35544 (July 26, 1991), modified in part 59 FR 2674 (Jan. 18, 1994). The Access Board’s 2004 revised guidelines will be referred to as the “2004 ADAAG.” 69 FR 44084 (July 23, 2004), as amended (editorial changes only) at 70 FR 45283 (Aug. 5, 2005). The revisions now proposed in the NPRM, based on the 2004 ADAAG, are referred to in the preamble as the “proposed standards.”

In performing the required periodic review of its existing regulations, the Department has reviewed its title II regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. In addition, the Department’s initial, formal benefit-cost analysis dealing with the Department’s NPRMs for both titles II and III is included in this NPRM. See E.O. 12866, 58 FR 51735 (Sept. 30, 1993), amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2763 (Jan. 18, 2007); 5 U.S.C. 601, 603, 610(a); and OMB Circular A–4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. The NPRM was submitted to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, for review and approval prior to publication in the **Federal Register**.

Purpose

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, a comprehensive civil rights law prohibiting discrimination on the basis of disability. At the beginning of his administration, President George W. Bush underscored the nation’s commitment to ensuring the rights of over 50 million individuals with disabilities nationwide by announcing the New Freedom Initiative (available at <http://www.whitehouse.gov/infocus/newfreedom>). The Access Board’s

publication of the 2004 ADAAG is the culmination of a long-term effort to facilitate ADA compliance and enforcement by eliminating, to the extent possible, inconsistencies among federal accessibility requirements and between federal accessibility requirements and state and local building codes. In support of this effort, the Department is announcing its intention to adopt standards consistent with Parts I and III of the 2004 ADAAG as the ADA Standards for Accessible Design. To facilitate this process, the Department is seeking public comment on the issues discussed in this notice.

The ADA and Department of Justice Regulations

The ADA broadly protects the rights of individuals with disabilities in employment, access to state and local government services, places of public accommodation, transportation, and other important areas of American life and, in addition, requires newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Under the ADA, the Department is responsible for issuing regulations to implement title II and title III of the Act, except to the extent that transportation providers subject to title II or title III are regulated by the Department of Transportation. *Id.* at 12134.

The Department is also proposing amendments to its title III regulation, which prohibits discrimination on the basis of disability in public accommodations and commercial facilities, published concurrently with the publication of this NPRM, in this issue of the **Federal Register**.

Title II applies to state and local government entities, and, in Subtitle A, protects qualified individuals with disabilities from discrimination on the basis of disability in services, programs, and activities provided by state and local government entities. Title II extends the prohibition of discrimination established by section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 (section 504), to all activities of state and local governments regardless of whether these entities receive federal financial assistance. 42 U.S.C. 12131–65.

On July 26, 1991, the Department issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the title III regulation, at 28 CFR part 36, contains the current 1991 Standards, which were

based upon the version of ADAAG published by the Access Board on the same date. Under the current regulation, title II entities are required to comply either with the 1991 Standards or with the Uniform Federal Accessibility Standards (UFAS), 41 CFR part 101–19.6, App. A—which many public entities were accustomed to following under section 504—with respect to newly constructed or altered facilities.

Relationship to Other Laws

The Department of Justice regulation implementing title II, 28 CFR 35.103, provides:

(a) *Rule of interpretation.* Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, or the regulations issued by federal agencies pursuant to that title.

(b) *Other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any other federal, state or local laws (including state common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

Nothing in this proposed rule will alter this relationship. The Department recognizes that public entities subject to title II of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment, section 504, which prohibits discrimination on the basis of disability in the programs and activities of recipients of federal financial assistance, and other federal statutes such as the Air Carrier Access Act, 49 U.S.C. 41705, and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* Compliance with the Department's regulations under the ADA does not necessarily ensure compliance with other federal statutes. Public entities that are subject both to the Department's regulations and to regulations published by other federal agencies must ensure that they comply with the requirements of both regulations. If there is a direct conflict between the regulations, the regulation that provides greater accessibility will prevail. When different statutes apply to entities that routinely interact, each entity must follow the regulation that specifically applies to it. For example, a public airport is a title II facility that houses air carriers subject to the Air Carrier Access Act (ACAA). The public airport operator would comply with the title II requirements, not with the ACAA requirements. Conversely, the air carrier is required to comply with the ACAA, not with the ADA.

In addition, public entities (including AMTRAK) that provide public

transportation services that are subject to subtitle B of title II should be reminded that the Department's regulation, at 28 CFR 35.102, provides that—

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, 42 U.S.C. 12141, they are not subject to the requirements of this part.

Nothing in this proposed rule alters that provision. To the extent that the public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are subject to the regulation of the Department of Transportation (DOT) at 49 CFR part 37 and are not covered by this proposed rule. Matters not covered by subtitle B are covered by this rule. In addition, activities not specifically addressed by DOT's ADA regulation may be covered by DOT's regulation implementing section 504 for its federally assisted programs and activities at 49 CFR part 27. Like other programs of public entities that are also recipients of federal financial assistance, those programs would be covered by both the section 504 regulation and this part. Airports operated by public entities are not subject to DOT's ADA regulation, but they are subject to subpart A of title II and to this rule.

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973, 29 U.S.C. 792. The Board consists of thirteen public members appointed by the President, of whom the majority must be individuals with disabilities, and the heads of twelve federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation. Originally, the Access Board was established to develop and maintain accessibility guidelines for federally funded facilities under the Architectural Barriers Act of 1968 (ABA), 42 U.S.C. 4151 *et seq.* The passage of the ADA expanded the Access Board's responsibilities. The ADA requires the Access Board to “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of

architecture and design, transportation, and communication, to individuals with disabilities.” 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the minimum guidelines issued by the Access Board. *Id.* at 12134, 12186.

The Department was extensively involved in the development of the 2004 ADAAG. As a federal member of the Access Board, the Attorney General’s representative voted to approve the revised guidelines. Although the enforceable standards issued by the Department under title II and title III must be consistent with the minimum guidelines published by the Access Board, it is the responsibility solely of the Attorney General to promulgate standards and to interpret and enforce those standards.

The ADA also requires the Department to develop regulations with respect to existing facilities subject to title II (Subtitle A) and title III. How and to what extent the Access Board’s guidelines are used with respect to the readily achievable barrier removal requirement applicable to existing facilities under title III of the ADA and to the provision of program accessibility under title II of the ADA are solely within the discretion of the Department of Justice.

The Revised Guidelines (2004 ADAAG)

Part I of the 2004 ADAAG provides so-called “scoping” requirements for facilities subject to the ADA; “scoping” is a term used in the 2004 ADAAG to describe requirements (set out in Parts I and II) that prescribe what elements and spaces—and, in some cases, how many of them—must comply with the technical specifications. Part II provides scoping requirements for facilities subject to the ABA (*i.e.*, facilities designed, built, altered, or leased with federal funds). Part III provides uniform technical specifications for facilities subject to either statute. This revised format is designed to eliminate unintended conflicts between the two federal accessibility standards and to minimize conflicts between the federal regulations and the model codes that form the basis of many state and local building codes.

The revised 2004 ADAAG is the culmination of a ten-year effort to improve ADA compliance and enforcement. In 1994, the Access Board began the process of updating the original ADAAG by establishing an advisory committee composed of members of the design and construction

industry, the building code community, state and local government entities, and individuals with disabilities. In 1999, based largely on the report and recommendations of the advisory committee,¹ the Access Board issued a proposed rule to jointly update and revise its ADA and ABA accessibility guidelines. 64 FR 62248 (Nov. 16, 1999). In response to its rule, the Access Board received more than 2,500 comments from individuals with disabilities, affected industries, state and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings throughout the nation. The Access Board worked vigorously from the beginning to harmonize the ADA and ABA Accessibility Guidelines with industry standards and model codes that form the basis for many state and local building codes. The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. By the date of its final publication on July 23, 2004, 69 FR 44084, the 2004 ADAAG had been the subject of extraordinary public participation and review.

In addition, the Access Board amended the ADAAG four times since 1998. In 1998, it added specific guidelines on state and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). Subsequently, the Access Board added specific guidelines on play areas, 65 FR 62498 (Oct. 18, 2000), and on recreation facilities, 67 FR 56352 (Sept. 3, 2002).

These amendments to the ADAAG have not previously been adopted by the Department as ADA Standards. Through this NPRM, the Department is announcing its intention to publish a proposed rule that will adopt revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the ADAAG since 1998.

The Advance Notice of Proposed Rulemaking

The Department published an advance notice of proposed rulemaking (ANPRM) regarding its ADA regulation on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the Access Board’s 2004

ADAAG by soliciting public input on issues relating to the potential application of the Access Board’s revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in OMB Circular A–4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>, Sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs). While underscoring that the Department, as a member of the Access Board, had already reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the program access requirement in title II (like the readily achievable barrier removal requirement applicable to existing facilities under title III) is solely within the discretion of the Department. The ANPRM dealt with the Department’s responsibilities under both title II and title III.

Public response to the ANPRM was extraordinary. The Department extended the comment deadline by four months at the public’s request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Most of the comments responded to questions specifically posed by the Department, including issues involving the application of the 2004 ADAAG once the Department adopts it, and cost information to assist the Department in its regulatory assessment. The public provided information on how to assess the cost of compliance by small entities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreational facilities, and play areas. Comments addressed the effective date of the proposed standards, the triggering event by which the effective date is measured in new construction, and variations on a safe harbor, which would excuse elements in compliance with the 1991 Standards from compliance with the proposed standards. Comments responded to questions regarding elements scoped for the “first time” in the 2004 ADAAG, including detention and correctional facilities, recreational facilities and play areas, as well as proposed additions to the Department’s regulation for items such as free-standing equipment.

¹ After a two-year process of collaboration with the Access Board, the Advisory Committee issued its *Recommendations for a New ADAAG* in September 1996, available at <http://www.access-board.gov/pubs.htm>.

Comments also dealt with the specific requirements of the 2004 ADAAG.

Many commenters requested clarification of or changes to the Department's title II regulation. Commenters observed that now, more than seventeen years after the enactment of the ADA, as facilities are becoming physically accessible to individuals with disabilities, the Department needs to focus on second-generation issues that ensure individuals with disabilities actually gain access to the accessible elements. So, for example, commenters asked the Department to focus on such issues as ticketing in assembly areas and reservations of boat slips. The public asked about captioning and the division of responsibility between the Department and the Access Board for fixed and non-fixed (or free-standing) equipment. Finally, commenters asked for clarification on some issues in the existing regulations, such as title III's requirements regarding service animals.

All of the issues raised in the public comments are addressed, in turn, in this NPRM or in the NPRM for title III. Issues involving title III of the ADA, such as readily achievable barrier removal, are addressed in the NPRM for title III, published concurrently with this NPRM in this issue of the **Federal Register**.

Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews

The Department must provide two types of assessments as part of its NPRM: an analysis of the benefits and costs of adopting the 2004 ADAAG as its proposed standards, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002) and E.O. 13422, 72 FR 2763 (Jan. 18, 2007); Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A-4; and E.O. 13272, 67 FR 53461 (Aug. 13, 2002).

The Department leaves open the possibility that, as a result of the receipt of comments on an issue raised by the 2004 ADAAG, or if the Department's Regulatory Impact Analysis reveals that the costs of making a particular feature or facility accessible are disproportionate to the benefits to persons with disabilities, the Attorney General, as a member of the Access Board, may return the issue to the

Access Board for further consideration of the particular feature or facility. In such a case, the Department would delay adoption of the accessibility requirement for the particular feature or facility in question in its final rule and await Access Board action before moving to consider any final action.

Regulatory Impact Analysis. An initial regulatory impact analysis of the benefits and costs of a proposed rule is required by Executive Order 12866 (as amended by Executive Order 13258 and Executive Order 13422). A full benefit-cost analysis is required of any regulatory action that is deemed to be significant—that is, a regulation that will have an annual effect of \$100 million or more on the economy. See OMB Circular A-4; Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by the SBREFA, 5 U.S.C. 610(a).

Early in the rulemaking process, the Department concluded that the economic impact of its adoption of the 2004 ADAAG as proposed standards for title II and title III was likely to exceed the threshold for significant regulatory actions of \$100 million. The Department has completed its initial regulatory impact analysis measuring the incremental benefits and costs of the proposed standards; the initial regulatory impact analysis is addressed at length with responses to public comments from the ANPRM in Appendix B.

The public may notice differences between the Department's regulatory impact analysis and the Access Board's regulatory assessment of the 2004 ADAAG. The differences in framework and approach result from the differing postures and responsibilities of the Department and the Access Board. First, the breadth of the proposed changes assessed in Appendix A of this NPRM is greater than in the Access Board's assessments related to the 2004 ADAAG. Unlike the Access Board, the Department must examine the effect of the proposed standards not only on newly constructed or altered facilities, but also on existing facilities. Second, whereas the Access Board issued separate rules for many of the differences between the 1991 Standards and the 2004 ADAAG (e.g., play areas and recreation facilities), the Department is proposing to adopt several years of revisions in a single rulemaking.

According to the Department's initial Regulatory Impact Analysis ("RIA"), it is estimated that the incremental costs of the proposed requirements for each of the following eight existing elements will exceed monetized benefits by more

than \$100 million when using the 1991 Standards as the comparative baseline: Side reach; water closet clearances in single-user toilet rooms with in-swinging doors; stairs; elevators; location of accessible routes to stages; accessible attorney areas and witness stands; assistive listening systems; and accessible teeing grounds, putting greens, and weather shelters at golf courses. However, this baseline figure does not take into account the fact that, since 1991, various model codes and consensus standards—such as the model International Building Codes ("IBC") published by the International Codes Council and the consensus accessibility standards developed by the American National Standards Institute ("ANSI")—have been adopted by a majority of states (in whole or in part) and that these codes have provisions mirroring the substance of the Department's proposed regulations. Indeed, such regulatory overlap is intentional since harmonization among federal accessibility standards, state and local building codes, and model codes is one of the goals of the Department's rulemaking efforts.

Even though the 1991 Standards are an appropriate baseline to compare the new requirements against, since they represent the current set of uniform federal regulations governing accessibility, in practice it is likely that many public and private facilities across the country are already being built or altered in compliance with the Department's proposed alterations standards with respect to these elements. Because the model codes are voluntary, public entities often modify or carve out particular standards when adopting them into their laws, and even when the standards are the same, local officials often interpret them differently. The mere fact that a state or local government has adopted a version of the IBC does not necessarily mean that facilities within that jurisdiction are legally subject to its accessibility provisions. Because of these complications, and the inherent difficulty of determining which baseline is the most appropriate for each provision, the RIA accompanying this rulemaking compares the costs and benefits of the proposed requirements to several alternative baselines, which reflect various versions of existing building codes. In addition, since the Department is soliciting comment on these eight particular provisions with high net costs, the Department believes it is useful to further discuss the potential impact of alternative baselines on these particular provisions.

For example, the Department's proposed standards for existing stairs and elevators have identical counterparts in one or more IBC versions put in place before the 2004 ADAAG (2000 or 2003). Please note, however, that the IBC 2006 version bases a number of its provisions on guidelines in the 2004 ADAAG. These IBC versions, in turn, have been adopted collectively by forty-six (46) states and the District of Columbia on a statewide basis. In the four (4) remaining states (Colorado, Delaware, Illinois, and Mississippi), while IBC adoption is left to the discretion of local jurisdictions, the vast majority of these local jurisdictions have elected to adopt IBC as their local code. Thus, given that nearly all jurisdictions in the country currently enforce a version of the IBC as their building code, and to the extent that the IBC building codes may be settled in this area and would not be further modified to be consistent if they differ from the final version of these regulations, the incremental costs and benefits attributable to the Department's proposed regulations governing alterations to existing stairs and elevators may be less significant than the RIA suggests over the life of the regulation.

In a similar vein, consideration of an alternate IBC/ANSI baseline would also likely lower the incremental costs and benefits for five other proposed standards (side reach; water closet clearances in single-user toilet rooms with in-swinging doors; location of accessible routes to stages; accessible attorney areas and witness stands; and assistive listening systems), albeit to a lesser extent. Each of these proposed standards has a counterpart in either Chapter 11 of one or more versions of the IBC, ANSI A117.1, or a functionally equivalent state accessibility code. While IBC Chapter 11 and ANSI A117.1 have yet not been as widely adopted as some other IBC chapters, the RIA nonetheless still estimates that between 15% and 35% of facilities nationwide are already covered by IBC/A117.1 provisions that mirror these five proposed standards. It is thus expected that the incremental costs and benefits for these proposed standards may also be lower than the costs and benefits relative to the 1991 Standards baseline.

Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance

with the proposed regulations (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these requirements, which are often difficult to adequately monetize.

The Department does not have statutory authority to modify the 2004 ADAAG; instead, the ADA requires the Attorney General to issue regulations implementing the ADA that are "consistent with" the ADA Accessibility Guidelines issued by the Access Board. See 42 U.S.C. 12134(c), 12186(c). As noted above in other parts of this preamble, the Department leaves open the possibility of seeking further consideration by the Access Board of particular issues raised by the 2004 ADAAG based on disproportionate costs and compared to benefits and public comments. The Access Board did not have the benefit of our RIA or public comment on our RIA as it pertains to the 2004 ADAAG.

Question 2: The Department would welcome comment on whether any of the proposed standards for these eight areas (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses) should be raised with the Access Board for further consideration, in particular as applied to alterations.

Stages. The proposed requirement to provide direct access to stages represents an effort to ensure that individuals with disabilities are able to participate in programs in an integrated setting. Under the current 1991 Standards, a compliant accessible route connecting seating locations to performing areas is permitted to go outside the assembly area and make use of an indirect interior accessible route to access the stage area. As a result, even when other audience members are able to access a stage directly via stairs in order to participate in ceremonies, skits, or other interactive on-stage events, persons with mobility disabilities may be required to use an inconvenient indirect entrance to the stage. As graduates or award recipients, they may be required to part company with their peers, to make their way to the stage alone, and to make a conspicuous entrance. To address this situation, the

proposed requirement mandates that, when a direct circulation path (for audience members) connects the seating area to a stage, the accessible route to the stage must also be direct.

The Department has generally determined that the overall costs for this requirement are relatively high in the alterations context, due to the expense of having to provide a lift or ramp to access the stage area directly, regardless of which baseline is used for the analysis. The Department, however, has had difficulty in estimating the real costs of this requirement because of a lack of information about whether colleges, elementary and secondary schools, and entertainment venues now routinely provide such access when they are altering existing auditoriums or how frequently such alterations occur. Also, the Department currently lacks sufficient data or other sources with which to quantify the benefits that accrue to students and other persons with disabilities who, as a result of direct access to stages, would be able to participate fully and equally in graduation exercises and other events.

Question 3: The Department would welcome information from operators of auditoriums on the likelihood that their auditoriums will be altered in the next fifteen years, and, if so, whether such alterations are likely to include accessible and direct access to stages. In addition, the Department would like specific information on whether, because of local law or policy, auditorium operators are already providing a direct accessible route to their stages. (The Department is also interested in whether having to provide a direct access to the stage would encourage operators of auditoriums to postpone or cancel the alterations of their facilities.) The Department also seeks information on possible means of quantifying the benefits that accrue to persons with disabilities from this proposed requirement or on its importance to them. To the extent that such information cannot be quantified, the Department welcomes examples of personal or anecdotal experience that illustrate the value of this requirement.

The Department's RIA also estimates significant costs, regardless of the baseline used, for the proposed requirement that court facilities must provide an accessible route to a witness stand or attorney area and clear floor space to accommodate a wheelchair. These costs arise both in the new construction and alteration contexts. If the witness stand is raised, then either a ramp or lift must be provided to ensure access to the witness stand. While the RIA quantifies the benefits for

this proposed requirement (as it does for all of the proposed requirements) primarily in terms of time savings, the Department fully appreciates that such a methodology does not capture the intangible benefits that accrue when persons with mobility disabilities are able to participate in the court process as conveniently as any other witness or party. Without access to the witness stand, for example, a wheelchair user, or a witness who uses other mobility devices such as a walker or crutches, may have to sit at floor level. If the witness with a mobility disability testifies from a floor level position, the witness could be placed at a disadvantage in communicating with the judge and jury, who may no longer be able to see the witness as easily, or, potentially, at all. This may create a reciprocal difficulty for the judge and jurors who lose the sightline normally provided by the raised witness stand that enables them to see and hear the witness in order to evaluate his or her demeanor and credibility—difficulty that redounds to the detriment of litigants themselves and ultimately our system of justice.

Question 4: The Department welcomes comment on how to measure or quantify the intangible benefits that would accrue from accessible witness stands. We particularly invite anecdotal accounts of the courtroom experiences of individuals with disabilities who have encountered inaccessible witness stands, as well as the experiences of state and local governments in making witness stands accessible, either in the new construction or alteration context.

Under the 1991 Standards, Assistive Listening Systems (“ALS”) are required in courtrooms and in other settings where audible communication is integral to the use of the space and audio amplification systems are provided for the general audience. However, these Standards do not set forth technical specifications for such systems. Since 1991, advancements in ALS and the advent of digital technologies have made these systems more amenable to uniform technical specifications. In keeping with these technological advancements, the revised requirements create a technical standard that, among other things, ensures that a certain percentage of required ALS have hearing-aid compatible receivers. Requiring hearing-aid compatible ALS enables persons who are hard of hearing to hear a speech, a play, a movie, or to follow the content of a trial. Without an effective ALS, people with hearing loss are effectively excluded from participation because they are unable to

hear or understand the audible portion of the presentation.

From an economic perspective, the cost of a single hearing-aid compliant ALS is not high—about \$500 more than a non-compliant system—and compliant equipment is readily available on the retail market. As estimated in the RIA, the high overall costs for the revised technical requirements for ALS are instead driven by the assumption that entities with large assembly areas (such as universities, stadiums, and auditoriums) will be required to purchase a relatively large number of compliant systems. On the other hand, the overall scoping for ALS has been reduced in the Department’s proposed requirement, thus mitigating the cost to covered entities. The proposed revision to the technical requirement merely specifies that 25% (or at least two) of the required ALS receivers must be hearing-aid compatible. The RIA estimates that a significant part of the cost of this requirement will come from the replacement of individual ALS receivers and system maintenance.

Question 5: The Department seeks information from arena and assembly area administrators on their experiences in managing ALS. In order to evaluate the accuracy of the assumptions in the RIA relating to ALS costs, the Department welcomes particular information on the life expectancy of ALS equipment and the cost of ongoing maintenance.

The Department’s proposed requirements mandate an accessible (pedestrian) route that connects all accessible elements within the boundary of the golf course and facility, including teeing grounds, putting greens, and weather shelters. Requiring access to necessary features of a golf course ensures that persons with mobility disabilities may fully and equally participate in a recreational activity.

From an economic perspective, the Department’s RIA assumes that virtually every tee and putting green on an existing course will need to be regraded in order to provide compliant accessible (pedestrian) routes to these features. However, the Department’s proposal also excuses compliance with the requirement for an accessible (pedestrian) route so long as a “golf car passage” (i.e., the path typically used by golf cars) is otherwise provided to the teeing ground, putting green, or other accessible element on a course. Because it is likely that most public and private golf courses in the United States already provide golf passages to most or all holes, the actual costs of this requirement for owners and operators of

existing golf courses should be reduced with little or no practical loss in accessibility.

Question 6: The Department seeks information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages to teeing grounds, putting greens, and weather shelters, and, if so, whether they intend to avail themselves of the proposed exception.

Analysis of impact on small entities. The second type of analysis that the Department has undertaken is a review of its existing regulations for title II and title III in order to consider the impact of those regulations on small entities. The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(b). Based on these factors, the agency should determine whether to continue the rule without change or to amend or rescind the rule to minimize any significant economic impact of the rule on a substantial number of small entities. *Id.* at 610(a).

In performing this review, the Department has gone through its regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. Amendments to its title III regulation are proposed in the NPRM for title III published jointly with this rule. The proposals reflect the Department’s analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

Organization of This NPRM

The subsequent sections of this NPRM deal with the Department's response to comments and its proposals for changes to its current regulation that derive from the required, periodic review that it performed. The proposed standards and the Department's response to comments regarding the 2004 ADAAG are contained in Appendix A to the NPRM. Appendix B to the NPRM contains the Department's initial, formal benefit-cost analysis.

The section of the NPRM entitled, "General Issues," briefly introduces topics that are noteworthy because they are new to the title II regulation or have been the subject of attention or comment. The topics introduced in the general issues section include: Safe harbor, service animals, wheelchairs and other power-driven mobility devices, effective communication and auxiliary aids, alterations to prison cells, and equipment.

Following the general issues section is the "Section-By-Section Analysis and Response to Comments." This section includes a detailed discussion of the proposed changes to the text of the title II regulation. The section-by-section analysis follows the order of the current regulation, except that regulatory sections that remain unchanged are not indicated. The discussion within each section explains the proposals and the reasoning behind them as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections where appropriate.

The section-by-section analysis includes specific questions to which the Department requests public response. These questions are numbered and italicized so that they are easier for readers to locate and reference. The Department emphasizes, however, that the public may comment on any aspect of this NPRM and is not required to respond solely to questions specifically posed by the Department.

The Department's proposed changes to the actual regulatory text of title II that follow the section-by-section analysis are entitled, "Part 35: Nondiscrimination on the Basis of Disability in State and Local Government Services."

General Issues

This section briefly introduces topics that are noteworthy because they are new to the title II regulation or have been the subject of considerable attention or comment. Each topic is discussed in greater detail subsequently in the section-by-section analysis.

Safe harbor. One of the most important issues the Department must address in proposing to adopt the 2004 ADAAG as its new ADA Standards for Accessible Design is the effect that the proposed standards will have on existing facilities under title II. This issue was not addressed in the 2004 ADAAG because it is outside of the scope of the Access Board's authority under the ADA.

Under title II, program accessibility requires that state and local government agencies provide individuals with disabilities with access to their programs when "viewed in their entirety." Title II does not require structural modifications in all circumstances in order to provide program access. As a result of this flexibility, the Department believes that the program accessibility requirement as it is codified in the current regulation may appropriately mitigate any burdens on public entities without additional regulatory safeguards. Nevertheless, in order to provide certainty and clarity, the Department is proposing a safe harbor for elements in existing facilities that are in compliance with either the 1991 Standards or the Uniform Federal Accessibility Standards (UFAS), 41 CFR part 101-19.6, App. A. This proposal is discussed below in § 35.150(b)(2) of the section-by-section analysis.

The Department invites comment on whether public entities that operate existing facilities with play or recreation areas should be exempted from compliance with certain requirements in the 2004 ADAAG. Existing facilities would continue to be subject to accessibility requirements in existing law, but not specifically to the requirements in: (1) The Access Board's supplemental guidelines on play areas, 65 FR 62498 (Oct. 18, 2000); and (2) the Access Board's supplemental guidelines on recreation facilities, 67 FR 56352 (Sept. 3, 2002). Under this scenario, the 2004 ADAAG would apply only to new play areas and recreation facilities, and would not govern the accessibility of existing facilities as legal requirements. Public entities that operate existing facilities with play or recreation areas, pursuant to the ADA's requirements to provide equal opportunity for individuals with disabilities, may still have the obligation to provide an accessible route to the playground, some accessible equipment, and an accessible surface for the play area or recreation facility.

Question 7: Should the Department exempt public entities from specific compliance with the supplemental requirements for play areas and recreation facilities, and instead

continue to determine accessibility in these facilities on a case-by-case basis under existing law? Please provide information on the effect of such a proposal on people with disabilities and public entities.

Service animals. The Department wishes to clarify the obligations of public entities to accommodate individuals with disabilities who use service animals. The Department continues to receive a large number of complaints from individuals with service animals. It appears, therefore, that many covered entities are confused about their obligations under the ADA in this area. At the same time, some individuals with impairments—who would not be covered as qualified individuals with disabilities—are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to the facilities of public entities. Another trend is the use of wild or exotic animals, many of which are untrained, as service animals. In order to clarify its position and avoid further misapplication of the ADA, the Department is proposing amendments to its regulation with regard to service animals.

Minimal protection. In the Department's *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language in its definition of service animals within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Although the Department received comments urging it to eliminate the phrase "providing minimal protection" from its regulation, the Department continues to believe that the language serves the important function of excluding from coverage so-called "attack dogs" that pose a direct threat to others.

Guidance on permissible service animals. The existing regulation implementing title III defines a "service animal" as "any guide dog, signal dog, or other animal." At the time the regulation was promulgated, the Department believed that leaving the species selection up to the discretion of the individual with a disability was the best course of action. Due to the proliferation of animal types that have been used as "service animals," including wild animals, the Department believes that this area needs established parameters. Therefore, the Department is proposing to eliminate certain species from coverage under the ADA even if the other elements of the definition are satisfied.

Comfort animals vs. psychiatric service animals. Under the Department's present regulatory language, some individuals and entities have assumed that the requirement that service animals must be individually trained to do work or carry out tasks excluded all persons with mental disabilities from having service animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to him or her was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task (e.g., reminding its owner to take medicine) for persons whose disability is covered by the ADA are protected by the Department's present regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

The Department is proposing new regulatory text in § 35.104 to formalize its position on emotional support or comfort animals, which is that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals." The Department wishes to underscore that the exclusion of emotional support animals from ADA coverage does not mean that persons with psychiatric, cognitive, or mental disabilities cannot use service animals. The Department proposes specific regulatory text in § 35.104 to make this clear: "[t]he term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities." This language simply clarifies the Department's longstanding position.

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment

where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.

Proposed training standards. The Department has always required that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process. While some advocacy groups have urged the Department to modify its position, the Department does not believe that such a modification would serve the array of individuals with disabilities who use service animals.

Detailed regulatory text changes and the Department's response to public comments on these issues and others are discussed below in the definitions § 35.104 and in a newly-proposed § 35.136.

Wheelchairs and other power-driven mobility devices. Since the passage of the ADA, choices of mobility aids available to individuals with disabilities have vastly increased. In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway®.) The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas. These new or adapted mobility aids benefit individuals with disabilities, but also present new challenges for state and local governments.

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized, battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed

for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 2004), available at <http://www.fhrc.gov/safety/pubs/04103>. Thus, EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

EPAMDs have been the subject of debate among users, pedestrians, disability advocates, state and local governments, businesses, and bicyclists. The fact that a device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed. Those who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users. Although the question of EPAMD safety has not been resolved, many states have passed legislation addressing EPAMD operation on sidewalks, bicycle paths, and roads. In addition, some states, such as Iowa and Oregon, have minimum age requirements, or mandatory helmet laws. New Jersey requires helmets for all EPAMD users, while Hawaii and Pennsylvania require helmets for users under a certain age.

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other nontraditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than wheelchairs, and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some

individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms “wheelchair”—which includes manually and power-driven wheelchairs and mobility scooters—and “other power-driven mobility device” and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 35.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 35.137.

Much of the debate surrounding mobility aids has centered on appropriate definitions for the terms “wheelchair” and “other power-driven mobility devices.” The Department has not defined the term “manually powered mobility aids.” Instead, the proposed rule provides a list including wheelchairs, walkers, crutches, canes, braces, or similar devices. The inclusion of the term “similar devices” indicates that the list is not intended to be exhaustive. The Department would like input as to whether addressing “manually powered mobility aids” in this manner (*i.e.*, via examples of such devices) is appropriate. The Department also would like information as to whether there are any other non-powered or manually powered mobility aids that should be added to the list and an explanation of the reasons they should be included. If an actual definition is preferred, the Department would welcome input with regard to the language that might be used to define “manually powered mobility aids,” and an explanation of the reasons this language would better serve the public.

Effective communication and auxiliary aids. Revised § 35.160(a) of the title II regulation requires a public entity to take appropriate steps to ensure that communications with individuals with disabilities, including applicants, participants, members of the public, and their companions, are as effective as communications with others. The Department has investigated hundreds of complaints alleging that public entities have failed to provide effective communication, many of which resulted in settlement agreements and consent decrees. During the course of its

investigations, the Department has determined that public entities sometimes misunderstand the scope of their obligations under the statute and the regulation. Moreover, the number of individuals with hearing loss continues to grow in this country as a large segment of the population ages and as individuals live longer.

The Department is proposing several changes and additions to §§ 35.104, 35.160, and 35.161 of the title II regulation to address these issues. Among other amendments, these changes update the regulatory language in response to numerous technological advances and breakthroughs in the area of auxiliary aids and services since the regulation was promulgated sixteen years ago. The most significant changes relate to video interpreting services (VIS) and the provision of effective communication for companions.

A technology that has emerged since promulgation of the original regulation is video interpreting services (VIS), and the Department proposes to include it in the regulation. VIS permits an individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location) who can see and sign to the individual through a camera located on or near the monitor. VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day in a variety of situations by allowing individuals in separate locations to have live, face-to-face communications.

The specific amendments to the section on auxiliary aids and services, in addition to the provision of VIS, are described in §§ 35.104, 35.160, and 35.161 of the section-by-section analysis below.

Alterations to prison cells. The 2004 ADAAG establishes requirements for the design and construction of cells in correctional facilities. When the Access Board adopted these new requirements, it deferred one decision to the Attorney General, specifically: “Alterations to cells shall not be required to comply except to the extent determined by the Attorney General.” The unique environment and security concerns of a correctional facility present challenges that are not an issue in other government buildings, so the Department must strike a balance between the accessibility needs of inmates with disabilities and the concerns of the prison officials and staff that run the facilities. Therefore, in the ANPRM, the Department sought public comment about the most effective means to ensure that existing correctional facilities are made

accessible to prisoners with disabilities and presented three options: (1) Require all altered elements to be accessible, which would maintain the current policy that applies to other ADA alterations requirements; (2) permit substitute cells to be made accessible within the same facility, which would permit correctional authorities to meet their obligation by providing the required accessible features in cells within the same facility, other than those specific cells in which alterations are planned; or (3) permit substitute cells to be made accessible within a prison system, which would focus on ensuring that prisoners with disabilities are housed in facilities that best meet their needs, since alterations within a prison environment often result in piecemeal accessibility. Discussion of the proposed options and submitted comments are described below in the section-by-section analysis of § 35.152, a newly proposed section on matters related to detention and correctional facilities.

Equipment and furniture. Question seven of the ANPRM asked for comment on whether regulatory guidance is needed with respect to the acquisition and use of mobile, portable, and other free-standing equipment or furnishings used by covered entities to provide services, and asked for specific examples of situations that should be addressed. The ANPRM explained that free-standing equipment was already addressed in the regulations in several different contexts, but that since covered entities continue to raise questions about the extent of their obligation to provide accessible free-standing equipment, the Department was considering adding specific language on equipment.

The Department received comments both in favor and against this proposal with a majority of comments in favor of requiring accessible equipment and furniture. However, the Department has decided to add no new regulatory text with respect to equipment at this time. A few title II entities submitted very brief comments, with about half in favor of specific requirements for free-standing equipment and half opposed. Most individuals and organizations representing individuals with disabilities were in favor of adding or clarifying requirements for accessible equipment. Disability organizations pointed out that from the user's perspective, it is irrelevant whether the equipment (*e.g.*, ATMs or vending machines) is free-standing or fixed, since the equipment must be accessible in order for them to use it.

The Department believes that accessible equipment and furnishings are required when appropriate under the existing regulations governing modifications of policies, practices, and procedures, and in the requirement for program accessibility. 28 CFR 35.130(7); 35.150. In addition, some equipment may also be subject to the effective communication requirements. 28 CFR 35.160. The existing regulation at § 35.150(a) requires that entities operate each service, program, or activity so that, when viewed in its entirety, each is readily accessible to and usable by individuals with disabilities, subject to a defense of fundamental alteration or undue burden. Section 35.150(b) specifies that such entities may meet their obligation to make each program accessible to individuals with disabilities through the “redesign of equipment.” Section 35.160(a) requires covered entities to provide effective communication to program participants. Consequently, providing accessible equipment is required when appropriate under the existing regulations. The Department has decided to continue with this approach and not to add any specific regulatory guidance addressing equipment at this time.

The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities should consult those requirements in determining what steps are appropriate for making free-standing equipment accessible. The Department also agrees that when federal guidance for accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D). The Department intends to continue to monitor the use of accessible equipment by covered entities and to analyze the economic impact of possibly providing more detailed requirements in future regulations governing specific types of free-standing equipment.

Accessible golf cars. Question six of the ANPRM asked whether golf courses should be required to make at least one,

and possibly two, specialized golf cars available for the use of individuals with disabilities, with no greater advance notice required to obtain them than for use of other golf cars. The Department also asked about the golf car’s safety and use on golf course greens. Accessible single-user golf cars are cars for use by individuals with mobility impairments that are driven with hand controls, and from which a person with a disability can hit the golf ball while remaining in the seat of the car. Some golf cars have a swivel, elevated seat that allows the golfer to play from a semi-standing position. These cars can be used by individuals without disabilities as well.

The Department received many comments regarding accessible golf cars, with the majority of commenters in favor of requiring accessible golf cars. The comments in opposition to requiring accessible golf cars came from some individuals and from entities covered by title III. The Department has decided to propose no new regulations specific to accessible golf cars at this time.

Many commenters in favor of requiring accessible golf cars noted the social aspect of golf, generally, and its specific—albeit informal—importance, in many business transactions, thus affecting both the social lives and the careers of some individuals with disabilities.

Comments opposed to requiring accessible golf cars generally came from individuals and golf course owners and associations covered by title III. Some commenters believed that there is little demand for accessible golf cars, or that the problem is solved by putting “medical” flags on traditional cars to identify individuals with disabilities who are then permitted to drive onto the greens, which otherwise would not be permitted. Others stated that accessible golf cars were too expensive or were specialized equipment that individuals with disabilities should purchase for themselves. One city representative commented that courses that do not provide golf cars should not be required to provide accessible golf cars.

Safety and the impact on golf course grounds were other areas addressed by the comments. Again, opinions were divided. Some commenters said that the single-user golf cars are safe, do not damage the greens, and speed up the pace of play. Others argued that the cars should pass the American National Standards Institute (ANSI) standards² for traditional golf cars, and that the single-user cars should not be required

until there are safety standards for these cars.

Other concerns raised by public comments were the effect of allowing accessible golf car use on the greens and their impact on maintenance of the course. Some commenters suggested that the cars would damage the greens and that the repair costs would be more significant than for traditional golf cars. In addition, one commenter suggested that courses exceeding certain slope and degree standards be exempted from having single-user cars because of safety concerns. Comments from golf courses that have provided accessible golf cars were generally positive in terms of safety and maintenance of the course. Further, courses that provide accessible cars do not report any safety issues or more than minimal damage to the greens.

With respect to making golf cars available, most supporters of providing accessible golf cars believe that no advance notice should be required to reserve the golf cars. One association supported requiring golf courses to have accessible cars with advance notice, which could be achieved through pooling arrangements with other courses. Some commenters explained that at least two cars per course should be required so that golfers with disabilities can play together.

Commenters also addressed whether courses that provide no cars at all should provide accessible cars. Some commenters supported requiring every golf course, whether or not it provides traditional golf cars, to provide accessible cars because individuals with disabilities will not be able to play without an accessible car.

The Department has decided not to add a regulation specifically addressing accessible golf cars at this time. The existing regulation, which requires that entities operate each service, program, or activity so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities, subject to a defense of fundamental alteration or undue burden, will continue to govern this issue. 28 CFR 35.150(a).

The Department is aware that the Department of Defense has recently undertaken an extensive study of the accessibility of golf courses operated for military personnel. As a result of its study, the Department of Defense plans to provide two accessible golf cars at each of the 174 golf courses that the Department of Defense operates, except those at which it would be unsafe to operate such golf cars because of the terrain of the course. See U.S. Department of Defense, *Report to*

² ANSI Z130.1–1999.

Congress: Access of Disabled Persons to Morale, Recreation, and Welfare (MRW) Facilities and Activities (Sept. 25, 2007). The Department of Justice plans to study the Defense Department's implementation of its plan to determine if it provides an effective framework for ensuring golf course accessibility.

Section-by-Section Analysis and Response to Comments

This section provides a detailed description of the Department's proposed changes to the title II regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the current title II regulation, except that if the Department is not proposing a change to a regulation section, the unchanged section is not discussed. In addition, this section includes specific questions for which the Department requests public response. These questions are numbered and italicized in order to make them easier for readers to locate and reference.

Subpart A—General

Section 35.104 Definitions

“1991 Standards” and “2004 ADAAG”

The Department is proposing to add to the proposed regulation definitions of both the “1991 Standards” and the “2004 ADAAG.” The term “1991 Standards” refers to the currently enforceable ADA Standards for Accessible Design, codified at 28 CFR part 36, App. A. The term “2004 ADAAG” refers to Parts I and III of the *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines*, which were issued by the Architectural and Transportation Barriers Compliance Board on July 23, 2004, at 69 FR 44084 (to be codified at 36 CFR 1191), and which the Department is proposing to adopt in this NPRM. These terms are included in the definitions section for ease of reference.

“Auxiliary Aids and Services”

Several types of auxiliary aids that have become more readily available have been added to § 35.104 under the definition of auxiliary aids and services.

For purposes of clarification, the Department has added the exchange of written notes as an example of an auxiliary aid or service. This common-sense example is a codification of the Department's longstanding policy with regard to title III entities. See *The Americans with Disabilities Act, Title III Technical Assistance Manual, Covering Public Accommodations and*

Commercial Facilities (Title III TA Manual), III–4.300, available at <http://www.ada.gov/taman3.html>. The title III definition of auxiliary aids and services provided the framework for the same definition in title II. See 56 FR 35544, 35565 (July 26, 1991) and 56 FR 35694, 35697 (July 26, 1991). This additional example of an appropriate auxiliary aid and service was inserted because many public entities do not realize that this easy and efficient technique is available to them. While the exchange of written notes is inappropriate for lengthy or complicated communications, it can be appropriate for situations such as routine requests for written information, for a police officer issuing a speeding ticket, or as a means of communication while awaiting the arrival of an interpreter.

Also in paragraph (1) of the definition, the Department has replaced the term “telecommunications devices for deaf persons (TDD)” with “text telephones (TTYs).” Although “TDD” is the term used in the ADA, the use of “TTY” has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. The Department has also included in paragraph (1) “accessible electronic and information technology” as another example of auxiliary aids and services. Lastly, “computer-aided” has been added to describe “transcription services” to make it consistent with title III.

The Department has added to paragraph (1) a new technology, video interpreting services (VIS), which consists of a video phone, video monitors, cameras, a high speed Internet connection, and an interpreter. VIS is specifically discussed below in the proposed definition of VIS.

In paragraph (2) of the definition, the Department proposes to insert additional examples of auxiliary aids and services for individuals who are blind or have low vision. The preamble to the original regulation makes clear that the original list in the regulation was “not an all-inclusive or exhaustive catalogue of possible or available auxiliary aids or services. It is not possible to provide an exhaustive list, and an attempt to do so would omit the new devices that will become available with emerging technology.” See 56 FR 35694, 35697 (July 26, 1991). Because technological advances in the seventeen years since the ADA was enacted have increased the range of auxiliary aids and services for those who are blind or have low vision, the Department has added additional examples, including brailled displays, screen reader software, magnification software, optical readers,

secondary auditory programs (SAP), and accessible electronic and information technology.

“Direct Threat”

In the Department's proposed § 35.136(b)(3), a service animal may be removed from the premises of a public entity if the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications. Direct threat is not defined in title II, but it is defined in § 36.208(b) of the current title III regulation as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.” The Department proposes taking the definition from its current location in title III and placing it in the definitions section in both title II (§ 35.104) and title III (§ 36.104).

“Existing Facility”

Under the ADA, a facility may be one or more of three types at different points in time: (1) An existing facility, (2) an altered facility, or (3) a newly designed and constructed facility. In the current regulation, title II defines new construction at § 35.151(a) and alterations at § 35.151(b). In contrast, the term “existing facility” is not defined although it is used in the statute and in the regulations for titles II and III. 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150.

The Department's enforcement of the ADA is premised on a broad understanding of “existing facilities.” The classifications of facilities under the ADA regulation are not static. Rather, a building that was newly designed and constructed at one time—and, therefore, subject to the accessibility standards in effect at the time—becomes an “existing facility” after it is completed. At some point in its life, it may also be considered “altered” and then again become “existing.”

The added definition of “existing facility” in the proposed regulation clarifies that the term means exactly what it says: A facility in existence on any given date is an existing facility under the ADA. If a facility exists, it is an existing facility whether it was built in 1989, 1999, or 2009. Of course, if the construction of a facility at issue begins after the triggering dates for the new construction standards, then the facility is subject to the new construction standards, and if it is altered, it is subject to the alterations standards.

“Other Power-Driven Mobility Device”

The proposed regulation defines the term “other power-driven mobility device” as “any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs) (e.g., Segway®), or any mobility aid designed to operate in areas without defined pedestrian routes.” The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary. Power-driven mobility devices are included in this category. Mobility aids that are designed for areas or conditions without defined pedestrian areas, such as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians, are also included in this category.

Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?

The Department’s proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 35.137 of the section-by-section analysis.

“Proposed Standards”

The Department has added the term “proposed standards” to mean the 2004 ADAAG as revised or amended by the Department in this rulemaking. The full text of the 2004 ADAAG is available for review at <http://www.access-board.gov> along with a detailed comparison of the 1991 Standards and the 2004 ADAAG that identifies the differences between the two documents.

“Qualified Interpreter”

The Department proposes to add to the definition of “qualified interpreter” to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued speech interpreters.

Not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily

qualified to interpret orally. Also, someone with just a rudimentary familiarity with sign language or finger spelling is not a qualified sign language interpreter. Likewise, a qualified sign language interpreter would not include someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

The revised definition includes examples of different types of interpreters. An oral interpreter has special skill and training to mouth a speaker’s words silently for individuals who are deaf or hard of hearing, many of whom were raised orally and were taught to read lips or were diagnosed with hearing loss later in life and do not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker’s voice is unclear, there is a quick-paced exchange of communication (e.g., in a meeting), or when the speaker does not directly face the individual who is deaf or hard of hearing. A cued speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

“Qualified Reader”

The current regulation identifies a qualified reader as an auxiliary aid, but it does not define the term. See 28 CFR 35.104(2). Based upon the Department’s investigation of complaints alleging that some entities have provided ineffective readers, the Department proposes to define “qualified reader” similarly to “qualified interpreter” to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. Failing to provide a qualified reader to a person with a disability could amount to discrimination based upon disability.

“Service Animal”

Although there is no specific language in the current title II regulation concerning service animals, title II entities have the same legal obligations as title III entities to make reasonable modifications in policies, practices, or procedures to allow service animals when necessary to avoid discrimination on the basis of disability, unless the modifications would fundamentally alter the nature of the service, program, or activity. 28 CFR 35.130(b)(7). In order to qualify for coverage under title II, a person must be a “qualified individual with a disability,” which is defined as “an individual with a disability who, with or without reasonable

modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 28 CFR 35.104. The Department is proposing to add to the title II regulation the same definition of “service animal” that it will propose for the title III regulation. The title III regulation currently contains a definition of “service animal” in § 36.104.

The current definition of “service animal” in § 36.104 is, “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” The Department would modify that current definition, and add the same definition, as modified, to the title II regulation at § 35.104. The changes that would be made to the title III definition, and that would be incorporated in the title II definition are as follows:

1. Remove “guide” or “signal” as descriptions of types of service dogs, add “other common domestic” animal, and add “qualified” to “individual” in the Department’s current definition;
2. Remove “individuals with impaired vision” and replace it with “individuals who are blind or have low vision;”
3. Change “individuals with impaired hearing” to “individuals who are deaf or hard of hearing;”
4. Replace the term “intruders” with the phrase “the presence of people” in the section on alerting individuals who are deaf or hard of hearing;
5. Add the following to the list of work and task examples: Assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation;
6. Add that “service animal” includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities;
7. Add that “service animal” does not include wild animals (including nonhuman primates born in captivity),

reptiles, rabbits, farm animals (including any breed of horse, pony, miniature horse, pig, and goat), ferrets, amphibians, and rodents; and

8. Add that animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.

The Department is proposing these changes in response to concerns expressed by commenters regarding the Department's ANPRM. Issues raised by the commenters include:

"Minimal protection." There were many comments by service dog users urging the Department to remove from the definition the phrase "providing minimal protection." The commenters set forth the following reasons for why the phrase should be deleted: (1) The current phrase can be interpreted to apply coverage under the ADA to "protection dogs" that are trained to be aggressive and protective, so long as they are paired with a person with a disability; and (2) since some view the minimal protection language to mean that a dog's very presence can act as a crime deterrent, the language may be interpreted to allow any untrained pet dog to provide minimal protection by its mere presence. These interpretations were not contemplated by the ADA.

Question 9: Should the Department clarify the phrase "providing minimal protection" in the definition or remove it? Are there any circumstances where a service animal providing "minimal protection" would be appropriate or expected?

"Alerting to intruders." Some commenters expressed a similar concern regarding the phrase "alerting * * * to intruders" in the current text as the concern expressed by commenters regarding the phrase "providing minimal protection." Commenters indicated that "alerting to intruders" has been misinterpreted by some individuals to apply to a special line of protection dogs that are trained to be aggressive. People have asserted, incorrectly, that use of such animals is protected under the ADA. The Department reiterates that public entities are not required to admit any animal that poses a direct threat to the health or safety of others. The Department has proposed removing "intruders" and replacing it with "the presence of people."

"Task" emphasis. Many commenters followed the lead of an umbrella service dog organization and suggested that the phrase "performing tasks" should form the basis of the service animal definition, that "do work" should be

eliminated from the definition, and that "physical" should be added to describe tasks. Tasks by their nature are physical, so the Department does not believe that such a change is warranted. In contrast, the existing phrase "do work" is slightly broader than "perform tasks," and adds meaning to the definition. For example, a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place. As one service dog user stated, in some cases, "critical forms of assistance can't be construed as physical tasks," noting that the manifestations of "brain-based disabilities," such as psychiatric disorders and autism, are as varied as their physical counterparts. One commenter stated that the current definition works for everyone (*i.e.*, those with physical and mental disabilities) and urged the Department to keep it. The Department has evaluated this issue and believes that the crux of the current definition (individual training to do work or perform tasks) is inclusive of the varied services provided by working animals on behalf of individuals with all types of disabilities and proposes that this portion of the definition remain the same.

Define "task." One commenter suggested defining the term "task," presumably so that there would be a better understanding of what type of service performed by an animal would qualify for coverage. The Department feels that the common definition of task is sufficiently clear and that it is not necessary to add the term to the definitions section; however, the Department has proposed additional examples of work or tasks to help illustrate this requirement in the definition of service animal.

Define "animal" or what qualifies certain species as "service animals." When the regulation was promulgated in 1991, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas. One commenter suggested defining "animal" (in the context of service animals) or the parameters of acceptable species to reduce the confusion over whether a particular service animal is covered. One service dog organization commented that other species would be acceptable if those animals could meet the behavioral standards of trained service dogs. Other commenters asserted that there are certain animals (*e.g.*, reptiles) that cannot be trained to do work or perform tasks, so these animals would not be covered. The Department has followed closely this particular

issue (*i.e.*, how many unusual animals are now claimed as service animals) and believes that this aspect of the regulation needs clarification.

To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to "dog or other common domestic animal" by excluding the following animals: Wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Many commenters asserted that limiting the number of allowable species would help stop erosion of the public's trust, which results in reduced access for many individuals with disabilities, despite the fact that they use trained service animals that adhere to high behavioral standards. The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as libraries or courtrooms.

In addition, the Department believes that it is necessary to eliminate from coverage all wild animals, whether born or bred in captivity or the wild. Some animals, such as nonhuman primates, pose a direct threat to safety based on behavior that can be aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement against the use of monkeys as service animals, stating, "[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury, and zoonotic [animal-to-human disease transmission] risks." See the AVMA 2005 position statement, *Nonhuman Primates as Assistance Animals*, available at http://www.avma.org/issues/policy/nonhuman_primates.asp. The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

Although unusual species make up a very small percentage of service animals as a collective group, their use has engendered broad public debate and, therefore, the Department seeks comment on this issue.

Question 10: Should the Department eliminate certain species from the definition of "service animal"? If so, please provide comment on the Department's use of the phrase "common domestic animal" and on its choice of which types of animals to exclude.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the "common domestic animal" prong of the proposed definition?

Comfort animals. It is important to address the concept of comfort animals or emotional support animals, which have become increasingly popular. The increased use of comfort animals is primarily by individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such an animal in order to bring their pets into facilities of public entities.

The difference between an emotional support animal and a psychiatric service animal is the service that is provided, *i.e.*, the actual work or task performed by the service animal. Another critical factor rests on the severity of the individual's impairment. For example, only individuals with conditions that substantially limit them in a major life activity qualify for coverage under the ADA, and only those individuals' use of a service animal will be covered under the ADA. See definition of disability, 42 U.S.C. 12102(2) and 28 CFR 35.104. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (*e.g.*, arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated, service animals have been trained to assist individuals with different types of disabilities. As a result, individuals with minor impairments may mistakenly conclude that any type of impairment qualifies them for ADA coverage.

Change "service animal" to "assistance animal." Some commenters asserted that "assistance animal" is a term of art and should replace "service animal." While some agencies, like the Department of Housing and Urban Development (HUD), use the term "assistance animal," that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) (*cf.*, HUD

Handbook No. 4350.3 Rev-1, Chg-2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at <http://www.hudclips.org>.) Moreover, the Department's proposal to change the definition of "service animal" under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA.

In addition, the term "psychiatric service animal" describes a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with "emotional support" animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 *et seq.*, and its implementing regulations, 14 CFR 382.7, *see also* 68 FR 24874, 24877 (May 9, 2003) (guidance on accommodation of service animals and emotional support animals on air transportation) and qualify as "assistance animals" under the FHA, but do not qualify as "service animals" under the ADA.

"Video Interpreting Services (VIS)"

The Department has added a definition of video interpreting services (VIS), a technology composed of a video phone, video monitors, cameras, a high speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.

VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, virtual face-to-face communications. Moreover, VIS is particularly helpful where qualified interpreters are not readily available (*e.g.*, for quick response during emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter's travel time present obstacles).

In addition to adding the specific definition of VIS, the Department proposes to add VIS to the definition of "auxiliary aids and services" (discussed above in § 35.104) and to set out

performance standards for VIS at § 35.160.

"Wheelchair"

The Department proposes the following definition of "wheelchair" in § 35.104: "Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven."

The proposed definition of "wheelchair" is informed by several existing definitions of "wheelchair." Section 507 of the ADA defines wheelchair in the context of whether to allow wheelchairs in federal wilderness areas: "The term 'wheelchair' means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area." 42 U.S.C. 12207(c)(2). The Department believes that while this definition is appropriate in the limited context of federal wilderness areas, it is not specific enough to provide clear guidance in the array of settings covered by title II.

The other existing federal definition of "wheelchair" that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation's definition of "wheelchair" is "a mobility aid belonging to any class of three or four-wheeled devices, usable indoors, designed for and used by individuals with mobility impairments, whether operated manually or powered." 49 CFR 37.3. The Department has adopted much of the language from this definition. Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not

include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

The Department does not propose to define specific dimensions that qualify a device as a wheelchair. The Department of Transportation's definition includes a subpart defining "common wheelchair" to provide guidance for public transit authorities on which devices must be transported. A "common wheelchair" is a wheelchair that "does not exceed 30 inches in width and 48 inches in length measured two inches above the ground, and does not weigh more than 600 pounds when occupied." 49 CFR 37.3. The narrower definition of "common wheelchair" was developed with reference to the requirements for lifts to establish parameters for the size and weight a lift can safely accommodate. See 49 CFR part 37, App. D (2002). The Department does not believe it is necessary to adopt stringent size and weight requirements for wheelchairs.

The Department requests public input on the proposed definition for "wheelchair."

Question 12: As explained above, the definition of "wheelchair" is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.

Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?

Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?

Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term "manually powered mobility aids"? If so, please indicate whether there are any other non-powered or manually powered mobility devices that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.

Question 16: Should the Department adopt a definition of the term "manually powered mobility aids"? If so, please provide suggested language and an explanation of the reasons such

a definition would better serve the public.

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 35.137.

Subpart B—General Requirements

Section 35.130 General Prohibitions Against Discrimination

Section 35.133 Maintenance of Accessible Features

The general rule regarding the maintenance of accessible features, which provides that a public entity must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities, is unchanged. However, the Department wishes to clarify its application and proposes one change to the section.

The Department has noticed that some covered entities do not understand what is required by § 35.133, and it would like to take the opportunity presented by this NPRM to clarify the requirement. Section 35.133(a) broadly covers all features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be changed or blocked later so that it becomes inaccessible. A common problem observed by the Department is that covered facilities do not maintain accessible routes. For example, the accessible routes in offices or hallways are commonly obstructed by boxes, furniture, or other items so that the routes are inaccessible to individuals who use wheelchairs. Under the ADA, the accessible route must be maintained and therefore these items are required to be removed. If the items are placed there temporarily—for example, if an office receives multiple boxes of supplies and is moving them from the hall to the storage room—then § 35.133(b) excuses such "isolated or temporary interruptions." Other common examples of features that must be maintained, and often are not, are platform lifts and elevators. Public entities must ensure that these features are operable, and to meet this requirement, regular servicing and making repairs quickly will be necessary.

The Department proposes to amend the rule by adding § 35.133(c) to address the discrete situation in which the scoping requirements provided in the proposed standards may reduce the number of required elements below that are required by the 1991 Standards. In

that discrete event, a public entity may reduce such accessible features in accordance with the requirements in the proposed standards.

Section 35.136 Service Animals

The Department's title II regulation now states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR 35.130(b)(7). In the proposed title II language, the Department intends to provide the broadest feasible access to individuals with disabilities who use service animals, unless a public entity can demonstrate that making the modifications would fundamentally alter the nature of the public entity's service, program, or activity.

The proposed section regarding service animals would incorporate the Department's policy interpretations as outlined in its published technical assistance *Commonly Asked Questions about Service Animals* (1996) (available at <http://www.ada.gov/qasrvc.htm>), and *ADA Business Brief: Service Animals* (2002) (available at <http://www.ada.gov/svcanimb.htm>), as well as make changes based on public comment. Proposed § 35.136 would:

1. Expressly incorporate the Department's policy interpretations as outlined in its published technical assistance and add that a public entity may ask an individual with a disability to remove a service animal from the premises if: (i) The animal is out of control and the animal's handler does not take effective action to control it; (ii) the animal is not housebroken; (iii) the animal's presence or behavior fundamentally alters the nature of the service the public entity provides (e.g., repeated barking); or (iv) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications in § 35.136(b);

2. Add in § 35.136(c) that if a public entity properly excludes a service animal, the public entity must give the individual with a disability the opportunity to participate in or benefit from the services, programs, or activities without having the service animal on the premises;

3. Add in § 35.136(d) requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a public entity's

facility must be individually trained to do work or perform a task, be housebroken, and be under the control of its owner; and that a service animal must have a harness, leash, or other tether;

4. Add in § 35.136(e) specific language clarifying that “[a] public entity is not responsible for caring for or supervising a service animal.” This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability. This provision is a variation on the existing title III language in § 36.302(c)(2), which states, “[n]othing in this part requires a public accommodation to supervise or care for a service animal.” The Department is proposing similar modifications to the title III requirements on service animals in the NPRM for title III, published concurrently with this NPRM.

5. Expressly incorporate the Department’s policy interpretations as outlined in its published technical assistance that a public entity must not ask what the person’s disability is or about the nature of the person’s disability, nor require proof of service animal certification or licensing, but that a public entity may ask (i) if the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform in § 35.136(f);

6. Expressly incorporate the Department’s policy interpretations as outlined in its published technical assistance and add that a public entity must not require an individual with a disability to pay a fee or surcharge or post a deposit as a condition of permitting a service animal to accompany its handler in a public entity’s facility, even if such deposits are required for pets, and that if a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal in § 35.136(h).

These changes will respond to the following concerns raised by individuals and organizations that commented in response to the ANPRM.

Proposed behavior or training standards. Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service

animals. Because of the variety of individual training that a service animal can receive—from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures—the Department is not inclined to establish a standard that all service animals must meet. Some of the behavioral standards that the Department is proposing actually relate to suitability for public access, such as being housebroken and under the control of its handler.

Hospital and healthcare settings. Public entities, including public hospitals, must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 35.130(b)(7). The exception to this requirement is if making the modification would fundamentally alter the nature of the service, program, or activity. The Department generally follows the guidance of the Centers for Disease Control and Prevention (CDC) on the use of service animals in a hospital setting.

As required by the ADA, a healthcare facility must permit a person with a disability to be accompanied by his or her service animal in all areas of the facility in which that person would otherwise be allowed, with some exceptions. Zoonotic diseases can be transmitted to humans through trauma (e.g., bites or scratches). Although there is no evidence that most service animals pose a significant risk of transmitting infectious agents to humans, animals can serve as a reservoir for a significant number of diseases that could potentially be transmitted to humans in the healthcare setting. A service animal may accompany its owner to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria, vending areas, the pharmacy, rest rooms, and all other areas of the facility where visitors are permitted, except those listed below.

Under the ADA, the only circumstances under which a person with a disability may not be entitled to be accompanied by his or her service animal are those rare circumstances in which it has been determined that the animal poses a direct threat to the health or safety of others. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated or mitigated by a modification of policies, practices, or procedures. Based on CDC guidance, it is generally appropriate to exclude a service animal from areas that require a protected environment, including

operating rooms, holding and recovery areas, labor and delivery suites, newborn intensive care nurseries, and sterile processing departments. See Centers for Disease Control, *Guidelines for Environmental Infection Control in Health Care Facilities* (June 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm>.

Section 35.137 Mobility Devices

Proposed § 35.137 has been added to provide additional guidance to public entities about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. See, e.g., Sarah Antonacci, *White Oaks Faces Lawsuit over Segway*, State Journal-Register, Oct. 9, 2007, available at <http://www.sj-r.com/news/stories/17784.asp>; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674>. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 35.137(a) reiterates the general rule that public entities shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title II applies.

Section 35.137(b) adopts the general requirement in the ADA that public entities must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with

a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public entity restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 35.137(c), public entities must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public entities may establish policies and procedures that address and distinguish among types of mobility devices.

For example, a city may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the city may address its concerns about factors such as space limitations by disallowing EPAMDs by members of the general public.

Section 35.137(c) lists permissible factors that a public entity may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public entities should group power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 35.137(c)(1)–(3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible factor is the risk of potential harm to others. The use of gas-powered golf cars by

people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public entity to stow the mobility device when not in use, if requested by the user.

While a public entity may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 35.137(d).

The Department anticipates that, in many circumstances, allowing the use of unique mobility devices by individuals with disabilities will be reasonable to provide access to a public entity's services, programs, and activities, and that in many cases it will not fundamentally alter the public entity's operations and services. On the other hand, the use of mobility devices that are unsafe to others, or unusually unwieldy or disruptive, is unlikely to be reasonable and may constitute a fundamental alteration.

Consider the following examples:

Example 1: Although people who do not have mobility impairments are prohibited from operating EPAMDs at the fairgrounds, the county has developed a policy allowing people with disabilities to use EPAMDs as their mobility device on the fairgrounds. The county's policy states that EPAMDs are allowed in all areas of the fairgrounds that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The county determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the fair's activities and services. The county's policies do, however, require that EPAMDs be operated at a safe speed limit. A county employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the county policy requires that it be operated at or below the designated speed limit.

Example 2: The city has developed a policy specific to city hall regarding the use of EPAMDs (i.e., users who do not need the devices due to disability are required to leave the devices outside the building). While most of city hall is spacious, the city has determined that it is not reasonable to allow people with disabilities to bring their EPAMDs into the recorder of deeds office, which is quite small, and the device's dimensions make it unsafe and unwieldy in this situation. If it is not possible for the

individual with a disability to park the mobility device and walk into the recorder of deeds office, the city government would still be required to provide services to the person through program access by meeting the individual in an adjacent, more spacious office, allowing him or her to obtain services over the phone, sending an employee to the individual's home, or through other means.

The Department is seeking public comment on the proposed definitions and policy concerning wheelchairs and other mobility devices.

Question 17: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

Question 18: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

Question 19: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

Section 35.138 Ticketing

The ticketing policies and practices of public entities are subject to title II's nondiscrimination provisions. See 42 U.S.C. 12132. Through the investigation of complaints, its enforcement actions, and public comments related to ticketing, the Department is aware of the need to provide regulatory guidance to entities involved in the sale or distribution of tickets. With this NPRM, the Department proposes to include a section on ticketing within the general requirements of subpart B.

In response to the ANPRM, individuals with disabilities and related advocacy groups commented that the reduced requirements for accessible seating in assembly areas underscored the need for clarification from the Department on ticketing related issues. One disability advocacy group asserted that in order to guarantee equal access to assembly areas for people with disabilities, it is necessary to provide complementary design standards, sales policies, and operational procedures.

The Department agrees that more explicit regulation is needed to ensure that individuals with disabilities are not

improperly denied access to events because of discriminatory procedures for the sale of wheelchair spaces. The Department's enforcement actions have demonstrated that some venue operators, ticket sellers, and distributors are not properly implementing title II's general nondiscrimination provisions.

The Department has entered into agreements addressing problems with ticketing sales and distribution by requiring specific modifications to ticketing policies. While these negotiated settlement agreements and consent decrees rest on fundamental nondiscrimination principles, they represent solutions tailored to specific facilities. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic.

The proposed rule clarifies the application of title II with respect to ticketing issues in certain contexts, and is intended to strike a balance between a covered entity's desire to maximize ticket sales and the rights of individuals with disabilities to attend events in assembly areas in a manner that is equal to that afforded to individuals without disabilities. The proposed rule does not, however, purport to cover or clarify all aspects or applications of title II to ticketing issues. Moreover, the rule applies only to the sale or distribution of tickets that are sold or distributed on a preassigned basis.

Because this rule addresses ticketing policies and practices for stadiums, arenas, theaters, and other facilities in which entertainment and sporting events are held, its provisions are related to and informed by those in proposed § 35.151(g), which establishes design requirements for seating in assembly areas. (Section 35.151(g) is discussed below in the section-by-section analysis.) After the proposed standards are finalized, the scoping reduction will apply to all public entities. See proposed 28 CFR 35.133(c) (discussed earlier in the section-by-section analysis).

Ticket distribution methods. Section 35.138(a) states the general rule that a public entity shall modify its policies, practices, and procedures to ensure that individuals with disabilities can purchase single or multi-event tickets for accessible seating in the same way as others (*i.e.*, during the same hours and through the same distribution methods as other seating is sold) unless doing so would fundamentally alter the nature of its ticketing service, program, or activity. The proposed rule makes clear that it is meant to reach all public

entities that provide a service or system by which individuals can purchase event tickets, and is not limited to a venue's operation of its own ticketing systems.

The Department has received numerous complaints from individuals who were denied the opportunity to acquire tickets for accessible seats through avenues such as ticketing pre-sales, promotions, lotteries, or wait lists. The proposed rule, at § 35.138(b), makes clear that public entities must include accessible seating in all stages of the ticketing process, including pre-sales, promotions, lotteries, or wait lists.

Identification of available accessible seating. Section 35.138(c) of the proposed rule requires a facility to identify available accessible seating if seating maps, brochures, or other information is provided to the general public. In the Department's investigations of theaters and stadiums, it has discovered that many facilities lack an accurate inventory of the accessible seating in their venues, and that this information gap results in lost opportunities for patrons who need accessible seating. For some public entities, multiple inventories may be required to account for different uses of the facilities because the locations of accessible seating may change in an arena depending on whether it is used for a hockey game, a basketball game, or a concert. The proposed rule further provides that the facility identify the accessible seating on publicly available seating charts. This transparency will facilitate the accurate sale of accessible seating.

Section 35.138(d) requires public entities to provide individuals with disabilities with accurate information about the location of accessible seating. The proposed rule specifically prohibits the practice of "steering" individuals with disabilities to certain wheelchair spaces so that the facility can maximize potential ticket sales for other unsold wheelchair spaces.

Season tickets and multiple event tickets. Section 35.138(e) addresses the sale of season tickets and other tickets for multiple events. The proposed rule provides that public entities must sell season tickets or tickets for multiple events for accessible seating in the same manner that such tickets are sold to those purchasing general seating. The rule also states that spectators purchasing tickets for accessible seating on a multi-event basis shall be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent other spectators holding tickets for the same type of ticketing plan are

permitted to do. A facility must provide a portable seat for the transferee to use if necessary.

Secondary market ticket sales. The Department is aware that the proposed rule may represent a significant change in practice for many public entities with respect to "secondary market" ticket sales. Because the secondary market is a recognized—and often integral—part of the ticketing distribution system for many venues and activities, individuals with disabilities will be denied an equal opportunity to benefit from the goods offered—attendance at an event—if public entities have no obligations with respect to accessible seating bought or sold in this way. In conjunction with the proposed rule, the Department seeks comment about public entities' current practices with respect to the secondary market for tickets, and the anticipated impact of the proposed rule on different types of facilities or events. Specifically, the Department would like to know:

Question 20: If an individual resells a ticket for accessible seating to someone who does not need accessible seating, should the secondary purchaser be required to move if the space is needed for someone with a disability?

Question 21: Are there particular concerns about the obligation imposed by the proposed rule in which a public entity must provide accessible seating, including a wheelchair space where needed, to an individual with a disability who purchases an "inaccessible" seat through the secondary market?

Release of unsold accessible seats. Section 35.138(f) provides regulatory guidance regarding the release of unsold accessible seats. Through its investigations, the Department has become familiar with the problem of designated accessible seating being sold to the general public before people who need accessible seating can buy tickets. As a result, individuals who need to use the accessible seating cannot attend an event.

The Department has entered into agreements addressing this problem by requiring specific modifications to ticketing policies. While these negotiated settlement agreements and consent decrees rest on fundamental nondiscrimination principles, they represent solutions tailored to specific facilities. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic. These options provide flexibility so that ticketing policies can be adjusted

according to the venue size and event type.

Facility sell-out. The approach in § 35.138(f)(1) allows for the release of unsold accessible seating once standard seats in the facility have been sold. (Luxury boxes, club boxes, or suites are not required to be sold out before the remaining accessible seats are released.) To implement this option, the release of unsold accessible seating should be done according to an established, written schedule. Blocks of seats should be released in stages, and should include tickets in a range of price categories and locations that is representative of the range of seating that remains available to other patrons.

Sell-outs in specific seating areas. Under the second option, § 35.138(f)(2), a facility could release unsold accessible seating in a specific seating area once all of the standard seats in that location were sold out. For example, if all standard seats in the orchestra level are sold, the unsold accessible seats in the orchestra level could be released for sale to the general public.

Sell-outs of specific price ranges. The third approach described at § 35.138(f)(3) would permit a public entity to release unsold accessible seats in a specific price range if all other standard seats in that price range were sold out. For example, if all \$50 seats were sold, regardless of their location, the unsold \$50 accessible seats would be released for sale to the general public.

Question 22: Although not included in the proposed regulation as currently drafted, the Department is soliciting comment on whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches discussed above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices, and procedures related to the sale, holding, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?

Ticket pricing. Section 35.138(g) of the proposed rule addresses ticket pricing. The proposed rule codifies the Department's longstanding policy that public entities cannot impose a surcharge for wheelchair spaces. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price

level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. For example, many theaters built prior to the passage of the ADA have balconies that are inaccessible to individuals who use wheelchairs, and the only wheelchair spaces are located in the orchestra level where tickets are more expensive. If a comparably sized balcony in a theater built under the ADA's new construction standards would have two wheelchair spaces, the older theater must sell two orchestra wheelchair spaces at the balcony price on a first come, first served basis.

Fraudulent purchase of designated accessible seating. The Department has received numerous comments regarding fraudulent attempts to purchase wheelchair spaces for patrons other than those who use wheelchairs. Moreover, the Department recognizes that implementation of some of its proposals, such as public identification of accessible seating, increases the potential for the fraudulent purchase of accessible seats by those who do not need them. The Department continues to believe that requiring an individual to provide proof that he or she is a person with a disability is an unnecessary and burdensome invasion of privacy and may unfairly deter individuals with disabilities from purchasing tickets to an event.

Notwithstanding this position, the proposed rule at § 35.138(h) would permit public entities to take certain steps to address potential ticket fraud. Under proposed § 35.138(h)(1), a covered entity may inquire at the time of the ticket purchase for single-event tickets whether the wheelchair space is for someone who uses a wheelchair. Section 35.138(h)(2) addresses potential ticket fraud for season or subscription tickets. Under this provision, a facility may require the purchaser to attest in writing that a wheelchair space is for someone who uses a wheelchair. However, the regulation preserves the right of an individual with a disability to transfer his or her ticket for individual events and clarifies that the intermittent use of the wheelchair space by a person who does not use a wheelchair does not constitute fraud.

Purchase of multiple tickets. The Department has received numerous complaints stating that assembly operators are unfairly restricting the number of tickets that can be purchased by individuals with disabilities. Many venues limit an individual requiring

wheelchair seating to purchase no more than two tickets (for him or herself and a companion), while other patrons have significantly higher purchase limits (if any). This is particularly difficult for families, friends, or other groups larger than two that include a person who requires accessible seating. If the ticket number is limited, the result for wheelchair users is that parents and children, friends, classmates, and others are separated. Section 35.138(i) clarifies application of title II to ameliorate such a situation.

There are various ways that covered entities can accommodate groups that require at least one wheelchair space. The proposed regulation at § 35.138(i)(1) would require a public entity to permit up to three companions to sit in a designated wheelchair area, platform, or cross-over aisle that is designated as a wheelchair area, even if the number of companions outnumber the individuals requiring a wheelchair space. For example, a parent who uses a wheelchair could attend a concert with his or her spouse and their two children, and all four could sit together in the wheelchair area. The Department recognizes that some advocates may object to this use of designated wheelchair areas because it will reduce the amount of accessible seating available for those who need it. On balance, however, the Department believes that the opportunity to sit with family and friends, as other patrons do, is an integral element of the experience of attending a ticketed event, and it is an element that is often denied to individuals with disabilities.

By limiting the number of tickets that can be purchased under this provision to four, the Department seeks a balance by which groups and families can be accommodated while still leaving ample space for other individuals who use wheelchairs. The Department seeks comments from individuals, business entities, and advocacy organizations on whether the proposed rule will appropriately effectuate the integration and nondiscrimination principles underlying the rule.

Question 23: Is the proposed rule regarding the number of tickets that a public entity must permit individuals who use wheelchairs to purchase sufficient to effectuate the integration of wheelchair users with others? If not, please provide suggestions for achieving the same result with regard to individual and group ticket sales.

Group ticket sales. Group ticket sales present another area in which the Department believes additional regulatory guidance is appropriate. The purpose of the proposed rule at

§ 35.138(i)(2) is to prevent the current practice of separating groups in a way that isolates or segregates those in the group who require wheelchair seating. If a group includes one or more individuals who use a wheelchair, the proposed rule requires the facility to place that group in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use a wheelchair are not isolated from the group. In existing facilities that lack accessible seating in certain areas, *e.g.*, a theater with an inaccessible balcony, the proposed regulation would require covered entities to seat at least three companions with the individuals using a wheelchair in the accessible seating area of the orchestra.

Subpart D—Program Accessibility

Section 35.150(b)(2) Safe Harbor

Under the “program accessibility” requirement in title II, each service, program, or activity, *when viewed in its entirety*, must be readily accessible to and usable by individuals with disabilities. 28 CFR 35.150 (emphasis added). The title II regulation makes clear that, unlike public accommodations under title III, a public entity is not required to make each of its existing facilities accessible to and usable by individuals with disabilities. 28 CFR 35.150(a)(1). Moreover, public entities are not required to make structural changes to existing facilities where other methods are effective in ensuring program accessibility. 28 CFR 35.150(b)(1).

Given that program accessibility is not an element-by-element inquiry, but rather looks to the program when “viewed in its entirety,” and that structural changes are not always required in order to provide access to the programs, services, or activities of a public entity, the Department believes that the program accessibility requirement, itself, may appropriately mitigate any burdens on public entities with respect to their existing facilities.

Nevertheless, in order to provide certainty to public entities and individuals with disabilities alike, the Department proposes to add a provision to the program accessibility requirement in § 35.150 that would clarify that public entities that have brought elements into compliance in existing facilities are not, simply because of the Department’s adoption of the 2004 ADAAG as its new standards, required to modify those elements in order to reflect incremental changes in the

proposed standards. In these circumstances, the public entity is entitled to a safe harbor, and is only required to modify elements to comply with the proposed standards if the public entity is, independently, planning an alteration that is not undertaken in fulfillment of its program accessibility obligations. *See* 28 CFR 35.151(b). The proposed safe harbor for title II operates only with respect to elements that are in compliance with the scoping and technical specifications in either the 1991 Standards or the UFAS; it does not apply to elements that are addressed by supplemental requirements in the 2004 ADAAG. The Department proposes a new § 35.150(b)(2), denominated *Safe Harbor*, to § 35.150 (*Program Accessibility*). Section 35.150(a) includes general provisions, and paragraph (b) of that section describes the methods by which a public entity complies with the program accessibility requirements. Historic preservation programs, which are addressed in § 35.150(b)(2) in the current regulation, have been moved to § 35.150(b)(3) in the proposed rule.

The Department proposes in § 35.150(b)(2) that if elements in an existing facility are in compliance with either the 1991 Standards or UFAS, the public entity is not required to alter—or retrofit again—such elements to reflect incremental changes in the 2004 ADAAG simply because the Department is adopting new ADA Standards. As explained above, this safe harbor operates on an element-by-element basis, and does not apply to elements subject to requirements that are not included in the current ADA Standards for Accessible Design, but rather are supplemental requirements in the 2004 ADAAG.

Section 35.150(b)(4) and (5) Existing Play Areas and Recreation Facilities

Play areas. Sections 206.2.17, 206.7.8, and 240.1 of the 2004 ADAAG provide a detailed set of requirements for newly constructed and altered play areas. Section 240.2.1.1 of the 2004 ADAAG requires that at least one ground level play component of each type provided (*e.g.*, for different experiences such as rocking, swinging, climbing, spinning, and sliding) must be accessible and connected to an accessible route. In addition, if elevated play components are provided, entities must make at least fifty percent (50%) of the elevated play components accessible and connect them to an accessible route, and may have to make an additional number of ground level play components (representing different types) accessible

as well. There are a number of exceptions to the technical specifications for accessible routes, and there are special rules (incorporated by reference from nationally recognized standards for accessibility and safety in play areas) for accessible ground surfaces. Accessible ground surfaces must be inspected and maintained regularly and frequently to ensure continued compliance.

The Department is concerned about the potential impact of these supplemental requirements on existing play areas that are not otherwise being altered. The program accessibility requirement does not require public entities to make structural modifications to existing facilities except where such modifications may be necessary to make the program or service, when considered as a whole, accessible to individuals with disabilities. Although play areas may be more likely than other types of facilities to require structural modifications, this does not mean that every existing playground operated by a city or county must be made accessible. Compliance with the program accessibility requirement turns on the accessibility of the program—*i.e.*, the program of providing and maintaining public playgrounds—rather than the accessibility of each particular facility used to provide that program. Where a public entity provides and maintains multiple play areas as part of its program of providing public playgrounds, for purposes of the program accessibility requirement, only a reasonable number but at least one of such play areas would be required to undertake structural modifications to provide access for individuals with disabilities. The same reasoning would apply where an existing site (*e.g.*, a state park) provides multiple play areas designed for the same age group.

The Department notes that the requirement to provide a reasonable number of accessible play areas is consistent with the longstanding program accessibility rules, which provide that it is not necessary for every facility to be accessible, provided that the program, when viewed in its entirety, is readily accessible to individuals with disabilities. In situations where a public entity provides the services of one program at multiple sites (*e.g.*, a town with ten parks), the public entity would focus on whether the number and location of the accessible parks offer comparable convenience to persons with disabilities and whether the range of programs and services offered at the accessible parks are equivalent to the range offered at the inaccessible parks. At a minimum, a

public entity must provide at least one accessible facility unless the public entity can demonstrate that providing the accessible facility would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. However, determining how many more than one would be "reasonable" requires a careful analysis of factors in order to determine how many accessible facilities are necessary to ensure that the covered program is accessible. Factors to be considered include, but are not limited to, the size of the public entity, geographical distance between sites, travel times to the sites, the number of sites, and availability of public transportation to the sites.

The Department is proposing several specific provisions and posing additional questions in an effort to both mitigate and gather information about the potential burden of the supplemental requirements on existing public facilities.

Question 24: Is a "reasonable number, but at least one" a workable standard for determining the appropriate number of existing play areas that a public entity must make accessible for its program to be accessible? Should the Department provide a more specific scoping standard? Please suggest a more specific standard if appropriate. In the alternative, should the Department provide a list of factors that a public entity could use to determine how many of its existing play areas to make accessible, e.g., number of play areas, travel times, or geographic distances between play areas, and the size of the public entity?

State and local governments may have already adopted accessibility standards or codes similar to the 2004 ADAAG requirements for play and recreation areas, but which might have some differences from the Access Board's guidelines.

Question 25: The Department would welcome comment on whether there are state and local standards specifically regarding play and recreation area accessibility. To the extent that there are such standards, we would welcome comment on whether facilities currently governed by, and in compliance with, such state and local standards or codes should be subject to a safe harbor from compliance with applicable requirements in the 2004 ADAAG. We would also welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations.

Question 26: The Department requests public comment with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the new requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?

The Department is proposing two specific provisions to reduce the impact on existing facilities that undertake structural modifications pursuant to the program accessibility requirement. First, the Department proposes to add § 35.150(b)(5)(i) to provide that existing play areas that are less than 1,000 square feet in size and are not otherwise being altered need not comply with the scoping and technical requirements for play areas in section 240 of the 2004 ADAAG. The Department selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, permitting play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed that such "small" play areas represented only about twenty percent (20%) of the play areas located in public schools, and none of the play areas located in city and state parks (which the Board assumed were typically larger than 1,000 square feet). If these assumptions are correct, the proposed exemption would have relatively little impact on most existing play areas operated by public entities, while still mitigating the burden on those smaller public entities to which it did apply.

Question 27: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should existing play areas less than 1,000 square feet be exempt from the requirements applicable to play areas?

Secondly, the Department proposes to add § 35.150(b)(4)(i) to provide that existing play areas that are not being altered will be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components, which are found on most playgrounds, are the individual components that are linked together to form large-scale composite playground equipment (e.g., the monkey bars attached to the suspension bridge attached to the tube slide, etc.). The proposed standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground level play components and at least fifty

percent (50%) of the elevated play components are accessible.

Many commenters advised the Department that making elevated play components accessible in existing play areas that are not otherwise being altered would impose an undue burden on most facilities. Given the nature of the element at issue, retrofitting existing elevated play components in play areas to meet the scoping and technical specifications in the alteration standard would be difficult and costly, and in some instances, infeasible. In response to expressed concerns, the Department proposes to reduce the scoping for existing play areas that are not being altered by permitting entities to substitute ground level play components for elevated play components. Entities that provide elevated play components that do not comply with section 240.2.2 of the 2004 ADAAG would be deemed in compliance for purposes of the program accessibility requirement as long as the number of accessible ground level play components is equal to the sum of (a) the number of ground level play components required to comply with section 240.2.1 of the 2004 ADAAG (as provided by Table 240.2.1.2, but at least one of each type) and (b) the number of elevated play components required to comply with 2004 ADAAG section 240.2.2 (namely, fifty percent (50%) of all elevated play components). In existing play areas that provide a limited number of ground level play components, qualifying for this exception may require providing additional ground level play components.

While this provision may result in less accessibility than the application of the alteration standard, public entities will likely be more willing to voluntarily undertake structural modifications in play areas if they anticipate that compliance will be straightforward and relatively inexpensive. In addition, for existing play areas with limited resources, it will often be more efficient to devote resources to making the ground surface of the play area accessible, which is necessary to provide an accessible route to any play components. Reduced scoping for elevated play components could also minimize the risk that covered entities will delay compliance, remove elevated play components, or simply close the play area. It also provides a bright-line rule for which compliance can be easily evaluated.

Question 28: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should

existing play areas be permitted to substitute additional ground level play components for the elevated play components it would otherwise have been required to make accessible? Are there other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping?

Question 29: The Department would welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines for play and recreational facilities undertaking alterations that would permit reduced scoping of requirements or substitution of ground level play components in lieu of elevated play components, as the Department is proposing with respect to barrier removal obligations for certain play or recreational facilities.

Swimming pools. As noted earlier, the program accessibility requirement does not require public entities to make structural modifications to existing facilities except where such modifications may be necessary to make the program or service, when considered as a whole, accessible to individuals with disabilities. Although swimming pools, like play areas, may be more likely than other types of facilities to require structural modifications, this does not mean that every existing swimming pool operated by a city or county must be made accessible. Compliance with the program accessibility requirement turns on the accessibility of the program—*i.e.*, the program of providing and maintaining public swimming pools—rather than the accessibility of each particular facility used to provide that program. Where a public entity provides and maintains multiple swimming pools as part of its program of providing public swimming pools, for purposes of the program accessibility requirement, only a reasonable number but at least one of such swimming pools would be required to undertake structural modifications to provide access for individuals with disabilities. The same reasoning would apply where an existing site (e.g., a city recreation center) provides multiple swimming pools serving the same purpose.

Question 30: Is a “reasonable number, but at least one” a workable standard for determining the appropriate number of existing swimming pools that a public entity must make accessible for its program to be accessible? Should the Department provide a more specific scoping standard? Please suggest a more specific standard if appropriate. In the alternative, should the Department

provide a list of factors that a public entity could use to determine how many of its existing swimming pools to make accessible, e.g., number of swimming pools, travel times or geographic distances between swimming pools, and the size of the public entity?

The Department is proposing two specific provisions to minimize the potential impact of the new requirements on existing swimming pools that undertake structural modifications pursuant to the program accessibility requirement. First, the Department is proposing to add § 35.150(b)(5)(ii) to provide that swimming pools that have over 300 linear feet of swimming pool wall and are not being altered will be required to provide only one (rather than two) accessible means of entry, at least one of which must be a sloped entry or a pool lift. This provision represents a less stringent requirement than the requirement in 2004 ADAAG section 242.2, which requires such pools, when newly constructed or altered, to provide two accessible means of entry. Under this proposal, for purposes of the program accessibility requirement, swimming pools operated by public entities would be required to have *at least one* accessible entry.

Commenters responding to the ANPRM noted that the two-means-of-entry-standard, if applied to existing swimming pools, will disproportionately affect small public entities, both in terms of the cost of implementing the standard and anticipated litigation costs. Larger public entities benefit from economies of scale, which are not available to small entities. Although complying with the alteration standard would impose an undue burden on many small public entities, the litigation-related costs of proving that such compliance is not necessary to provide program access may be significant. Moreover, these commenters argue, the immediacy of perceived noncompliance with the standard—it will usually be readily apparent whether a public entity has the required accessible entry or entries—makes this element particularly vulnerable to serial ADA litigation. The reduced scoping would apply to all public entities, regardless of size.

The Department recognizes that this approach could reduce the accessibility of larger swimming pools compared to the requirements in the 2004 ADAAG. Individuals with disabilities and advocates were particularly concerned about the accessibility of pools, and noted that for many people with disabilities, swimming is one of the few types of exercise that is generally

accessible and, for some people, can be an important part of maintaining health. Other commenters noted that having two accessible means of egress from a pool can be a significant safety feature in the event of an emergency. It may be, however, that as a practical matter the reduction in scoping may not be significant, as the measures required to meet the alteration standards for accessible entries would often impose an undue burden even if considered on a case-by-case basis.

Question 31: The Department would like to hear from public entities and individuals with disabilities about this exemption. Should the Department allow existing public entities to provide only one accessible means of access to swimming pools more than 300 linear feet long?

Secondly, the Department proposes to add § 35.150(b)(5)(ii) to provide that existing swimming pools that have less than 300 linear feet of swimming pool wall and are not being altered need not undertake structural modifications to comply with the scoping and technical requirements for swimming pools in section 242.2 of the 2004 ADAAG. In its 2002 regulatory assessment for the recreation guidelines, the Access Board assumed that pools with less than 300 feet of linear pool wall would represent ninety percent (90%) of the pools in public high schools; forty percent (40%) of the pools in public parks and community centers; and thirty percent (30%) of the pools in public colleges and universities. If these assumptions are correct, the proposed exemption would have the greatest impact on the accessibility of swimming pools in public high schools.

Question 32: The Department would like to hear from public entities and individuals with disabilities about the potential effect of this approach. Should existing swimming pools with less than 300 linear feet of pool wall be exempt from the requirements applicable to swimming pools?

Wading pools. Section 242.3 of the 2004 ADAAG provides that newly constructed or altered wading pools must provide at least one sloped means of entry to the deepest part of the pool. The Department is concerned that installing a sloped entry in existing wading pools may not be feasible for a significant proportion of public entities and is considering creating an exemption for existing wading pools that are not being altered.

Question 33: What site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that

are not being altered be exempt from the requirement to provide a sloped entry?

Saunas and steam rooms. The Department is proposing one specific provision to minimize the potential impact of the new requirements on existing saunas and steam rooms. Section 241 of the 2004 ADAAG requires newly constructed or altered saunas and steam rooms to meet accessibility requirements, including accessible turning space and an accessible bench. Where saunas or steam rooms are provided in clusters, five percent (5%), but at least one sauna or steam room in each cluster, will have to be accessible. The Department understands that many saunas are manufactured (pre-fabricated) and come in standard sizes (e.g., two-person or four-person), and that the two-person size may not be large enough to meet the turning space requirement. Therefore, the Department proposes in § 35.150(b)(5)(iii) to specify that existing saunas or steam rooms that have a capacity of only two persons and are not being altered need not undertake structural modifications to comply with the scoping and technical requirements for saunas and steam rooms in section 241 of the 2004 ADAAG. While this exception may limit the accessibility of small existing saunas or steam rooms in public facilities, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of their facilities.

Exercise machines. Sections 236 and 206.2.13 of the 2004 ADAAG require one of each type of fixed exercise machine to meet clear floor space specifications and to be on an accessible route. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

Question 34: Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?

Team or player seating areas. Section 221.2.1.4 of the 2004 ADAAG requires one or more wheelchair spaces to be provided in each team or player seating area with fixed seats, depending upon the number of seats provided for spectators. For bowling lanes, the requirement would be limited to lanes required to be accessible.

Question 35: Are team or player seating areas in certain types of existing facilities (e.g., ice hockey rinks) more difficult to make accessible due to existing designs? What types of existing facilities typically have design

constraints that would make compliance with this requirement infeasible?

Areas of sport activity. Sections 206.2.2 and 206.2.12 of the 2004 ADAAG require each area of sport activity (e.g., courts and playing fields, whether indoor or outdoor) to be served by an accessible route. In court sports, the accessible route would also have to directly connect both sides of the court. For purposes of the program accessibility requirement, as with play areas and swimming pools, where an existing facility provides multiple areas of sport activity that serve the same purpose (e.g., multiple soccer fields), only a reasonable number but at least one (rather than all) would need to meet accessibility requirements.

Question 36: Should the Department create an exception to this requirement for existing courts (e.g., tennis courts) that have been constructed back-to-back without any space in between them?

Boating facilities. Sections 206.2.10, 235.2 and 235.3 of the 2004 ADAAG require a specified number of boat slips and boarding piers at boat launch ramps to be accessible and connected to an accessible route. In existing boarding piers, the required clear pier space may be perpendicular to and extend the width of the boat slip if the facility has at least one accessible boat slip, providing that more accessible slips would reduce the total number (or widths) of existing boat slips. Accessible boarding piers at boat launch ramps must comply with the requirements for accessible boat slips for the entire length of the pier. If gangways (only one end of route is attached to land) and floating piers (neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except in an alteration, as may be required by the path of travel requirement).

Question 37: The Department is interested in collecting data regarding the impact of these requirements in existing boating facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing boat slips and boarding piers at boat launch ramps? To what extent do the exceptions for existing facilities (i.e., with respect to boat slips and gangways) mitigate the burden on existing facilities?

Fishing piers and platforms. Sections 206.2.14 and 237 of the 2004 ADAAG

require at least twenty-five percent (25%) of railings at fishing piers and platforms to be no higher than 34 inches high, so that a person seated in a wheelchair can fish over the railing, to be dispersed along the pier or platform, and to be on an accessible route. (An exception permits railings to comply, instead, with the model codes, which permit railings to be 42 inches high.) If gangways (where only one end of route is attached to land) and floating piers (where neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

Question 38: The Department is interested in collecting data regarding the impact of this requirement on existing facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing fishing piers and platforms?

Miniature golf courses. Sections 206.2.16, 239.2, and 239.3 of the 2004 ADAAG require at least fifty percent (50%) of the holes on miniature golf courses to be accessible and connected to an accessible route (which must connect the last accessible hole directly to the course entrance or exit); generally, the accessible holes would have to be consecutive ones. Specified exceptions apply to accessible routes located on the playing surfaces of holes.

Question 39: The Department is considering creating an exception for existing miniature golf facilities that are of a limited total square footage, have a limited amount of available space within the course, or were designed with extreme elevation changes. If the Department were to create such an exception, what parameters should the Department use to determine whether a miniature golf course should be exempt?

Section 35.151 New Construction and Alterations

Section 35.151, which provides that those buildings that are constructed or altered by, on behalf of, or for the use of a public entity shall be designed, constructed, or altered to be readily accessible to and usable by individuals with disabilities, is unchanged in the proposed rule, but current § 35.151(a) will be redesignated as § 35.151(a)(1). The Department will add a new section, designated as § 35.151(a)(2), to provide that full compliance with the

requirements of this section is not required where an entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features. This exception is now contained in the title III regulation and in the 1991 Standards (applicable to both public accommodations and facilities used by public entities), so it has applied to any covered facility that was constructed under the 1991 Standards since the effective date of the ADA. The Department is adding it to the text of § 35.151 to maintain consistency between the design requirements that apply under title II and those that apply under title III.

Section 35.151(b) Alterations

The Department's proposed rule would amend § 35.151(b)(2) to make clear that the path of travel requirements of § 35.151(b)(4) do not apply to measures taken solely to comply with program accessibility requirements. This amendment is consistent with § 36.304(d)(1) of the title III regulation, which states that "[t]he path of travel requirements of § 36.403 shall not apply to measures taken solely to comply with the barrier removal requirements of this section."

The two requirements for alterations to historic facilities enumerated in current § 35.151(d)(1) and (2) have been combined under proposed § 35.151(b)(3), and one substantive change is proposed. Proposed § 35.151(b)(3) provides that alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c). Currently, the regulation provides that alterations to historic facilities shall comply with section 4.1.7 of UFAS or section 4.1.7 of the 1991 Standards. *See* 28 CFR 35.151(d)(1). However, the proposed regulation requires that alterations to historic properties on or after six months after the effective date of the proposed regulation comply with the proposed standards, not UFAS or the 1991 Standards. *See* § 35.151(c). The substantive requirement in current § 35.151(d)(2)—that alternative methods of access shall be provided pursuant to the requirements of § 35.150 if it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility—is unchanged.

The Department proposes to add § 35.151(b)(4) in order to make the path of travel requirement in title II consistent with that in title III. Both the Uniform Federal Accessibility Standards (UFAS) and the title III regulation contain requirements for provision of an accessible "path of travel" to the altered area when an existing facility is altered, although the circumstances that trigger the requirements are somewhat different under each statute. Under section 4.1.6(3) of UFAS, an accessible route to the altered area, an accessible entrance, and (where applicable) accessible toilet facilities must be provided when a substantial alteration is made to an existing building. An alteration is considered "substantial" if the total cost of all alterations within any twelve month period amounts to fifty percent (50%) or more of the full and fair cash value of the building. The proposed rule eliminates the UFAS "substantial alteration" basis for path of travel requirements because it eliminates UFAS as an option.

The path of travel requirements of the Department's proposed title II rule are based on section 303(a)(2) of the ADA, which provides that when an entity undertakes an alteration to a place of public accommodation or commercial facility that affects or could affect the usability of or access to an area that contains a primary function, the entity shall ensure that, to the maximum extent feasible, the path of travel to the altered area—and the restrooms, telephones, and drinking fountains serving it—is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The Department proposes to add a provision to the path of travel requirement in § 35.151(b)(4)(ii)(C) that would clarify that public entities that have brought required elements of the path of travel into compliance are not required to modify those elements in order to reflect incremental changes in the proposed standards when the public entity alters a primary function area that is served by the element. In these circumstances, the public entity is entitled to a safe harbor, and is only required to modify elements to comply with the proposed standards if the public entity is planning an alteration to the element.

The proposed rule provides that areas such as mechanical rooms, boiler rooms, supply storage rooms, employee lounges and locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Nor are restroom areas containing a primary

function unless the provision of restrooms is the major reason that the facility is maintained by a public entity, such as at a highway rest stop. In that situation, a restroom would be considered to be an "area containing a primary function" of the facility.

The requirement for an accessible path of travel does not apply, however, to the extent that the cost and scope of alterations to the path of travel is disproportionate to the cost of the overall alteration, as determined under criteria established by the Attorney General. Sections 227, 42 U.S.C. 12147, and 242, 42 U.S.C. 12162, of the ADA adopt the same requirement for public transportation facilities under title II.

Section 202.4 of the proposed standards adopts the statutory path of travel requirement, and § 36.403 of the Department's title III regulation establishes the criteria for determining when the cost of alterations to the path of travel is "disproportionate" to the cost of the overall alteration. The Department's proposed § 35.151(b)(4) will adopt the language now contained in the title III regulation in its entirety, including the disproportionality limitation (*i.e.*, alterations made to provide an accessible path of travel to the altered area would be deemed disproportionate to the overall alteration when the cost exceeds twenty percent (20%) of the cost of the alteration to the primary function area).

Section 35.151(c) Accessibility Standards for New Construction and Alterations

Section 35.151(c) proposes to adopt Parts I and III of the Americans with Disabilities Act and Architectural Barriers Act Guidelines, 69 FR 44084 (July 23, 2004) (2004 ADAAG) as the ADA Standards for Accessible Design (proposed standards). As the Department noted above, the development of these proposed standards represents the culmination of a lengthy effort by the Access Board to update its guidelines, to make the federal guidelines consistent to the extent permitted by law, and to harmonize the federal requirements with the private sector model codes that form the basis of many state and local building code requirements. The full text of the 2004 ADAAG is available for public review on the ADA Home Page (<http://www.ada.gov>) and on the Access Board's Web site (<http://www.access-board.gov>). The Access Board site also includes an extensive discussion of the development of the 2004 ADAAG, and a detailed comparison of the 1991 Standards, the 2004 ADAAG, and the 2003 International Building Code.

Appendix A to this proposed rule is an analysis of the major changes in the proposed standards and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. Comments discussing the costs and benefits of the proposed standards have been considered and taken into account by the Department's regulatory impact analysis. Comments on the effect of the proposed standards on existing facilities are discussed in conjunction with the analysis of § 35.150 of this proposed rule.

The remaining comments addressed global issues, such as the Department's proposal to adopt the 2004 ADAAG as the ADA Standards for Accessible Design without significant changes.

Section 204 of the ADA, 42 U.S.C. 12134, directs the Attorney General to issue regulations to implement title II that are consistent with the guidelines published by the Access Board. Commenters suggested that the Department should not adopt the 2004 ADAAG, but should develop an independent regulation. The Department is a statutory member of the Access Board and was actively involved in the development of the 2004 ADAAG. Because of its long involvement with the process, the Department does not believe that it is necessary or appropriate to begin that lengthy development process again. Nevertheless, during the process of drafting this NPRM, the Department has reviewed the 2004 ADAAG to determine if additional regulatory provisions are necessary. As a result of this review, the Department decided to propose new sections, which are contained in § 35.151(d)–(h), to clarify how the Department will apply the proposed standards to social service establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

Another general comment suggested that the Department should adopt a system for providing formal interpretations of the standards, analogous to the code interpretation systems used by states and the major model codes. Because the ADA is a civil rights statute, not a building code, the statute does not contemplate or authorize a formal code interpretation system. The ADA anticipated that there would be a need for close coordination of the ADA building requirements with the state and local requirements. Therefore, the statute authorized the Attorney General to establish an ADA code certification process under title III of the ADA. That process is addressed

in 28 CFR part 36, subpart F. Revisions to that process are being proposed in an NPRM to amend the title III regulation that is being published elsewhere in the **Federal Register** today. In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, it will issue revised technical assistance material to provide guidance about the implementation of this rule.

Current § 35.151(c) establishes two standards for accessible new construction and alteration. Under paragraph (c), design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) or with the 1991 Standards (which, at the time of the publication of the rule were also referred to as the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG)) is deemed to comply with the requirements of this section with respect to those facilities (except that if the 1991 Standards are chosen, the elevator exemption does not apply). The 1991 Standards were based on the ADAAG that were initially developed by the Access Board as guidelines for the accessibility of buildings and facilities that are subject to title III. The Department adopted the ADAAG as the standards for places of public accommodation and commercial facilities under title III of the ADA and it was published as Appendix A to the Department's regulation implementing title III, 28 CFR part 36, and amended on Jan. 18, 1994, 59 FR 2674.

The Department's proposed rule would revise the existing § 35.151(c) to adopt the 2004 ADAAG as the ADA Standards for Accessible Design. The proposed rule amends current § 35.151(c)(1) by revising the current language to limit its application to facilities on which construction commences within six months of the publication of the final rule adopting revised standards. The proposed rule adds paragraph (c)(2) to § 35.151, which states that facilities on which construction commences on or after the date six months following the publication of the final rule shall comply with the proposed standards adopted by that rule.

As a result, for the first six months after the effective date of the proposed regulation, public entity recipients can continue to use either UFAS or the 1991 Standards and be in compliance with title II. Six months after the effective date of the rule, the new standards will take effect. Construction in accordance with UFAS will no longer satisfy ADA

requirements. To avoid placing the burden of complying with both standards on public entities, the Department will coordinate a government-wide effort to revise federal agencies' section 504 regulations to adopt the 2004 ADAAG as the standard for new construction and alterations.

The purpose of the six-month delay in requiring compliance with the 2004 Standards is to allow covered entities a reasonable grace period to transition between the existing and the proposed standards. For that reason, if a title II entity prefers to use the 2004 ADAAG as the standard for new construction or alterations commenced within the six-month period after the effective date of the proposed regulation, such entity will be considered in compliance with title II of the ADA.

Section 35.151(d) Scope of Coverage

The Department is proposing § 35.151(d) to clarify that the requirements established by this section, including those contained in the proposed standards, prescribe what is necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to individuals with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established in this regulation. Although the Department often chooses to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those determinations fall within the discretionary authority of the Department and do not flow automatically from the Standards.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 Standards do not establish separately enforceable requirements. This clarification has been made to address concerns expressed by commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (e.g., Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosing to make them more visible to individuals with low vision).

Section 35.151(e) Social Service Establishments

The Department is proposing a new § 35.151(e) that provides that group homes, halfway houses, shelters, or similar social service establishments

that provide temporary sleeping accommodations or residential dwelling units shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in §§ 233 and 809 of the 2004 ADAAG.

The reasons for this proposal are based on two important changes in the 2004 ADAAG. For the first time, residential dwelling units are explicitly covered in the 2004 ADAAG in section 233. Second, the language addressing scoping and technical requirements for homeless shelters, group homes, and similar social service establishments is eliminated. Currently, such establishments are covered in section 9.5 of the transient lodging section of the 1991 Standards. The deletion of section 9.5 creates an ambiguity of coverage that must be addressed.

The Department proposed in the ANPRM that the establishments currently covered by section 9.5 be covered as residential dwelling units in the 2004 ADAAG (section 233), rather than as transient lodging guest rooms in section 224. The Department believes this is a prudent action based on its effect on social service providers. Transferring coverage of social service establishments from transient lodging to residential dwelling units will alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of federal financial assistance from the HUD. The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA and section 504. The two design standards for accessibility—i.e., the 1991 Standards and UFAS—have confronted many social service providers with separate, and sometimes conflicting, requirements for design and construction of facilities. To resolve these conflicts, the residential dwelling unit standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the 2004 ADAAG presented two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential dwelling unit section, which harmonizes the regulatory requirements under the ADA and section 504. The Department chose

the option that harmonizes the regulatory requirements: Coverage under the residential dwelling units requirements.

In response to its request for public comments on this issue, the Department received a total of eleven responses from industry and disability rights groups and advocates. Some commenters representing disability rights groups expressed concern that the residential dwelling unit requirements in the 2004 ADAAG are less stringent than the revised transient lodging requirements, and would result in diminished access for individuals with disabilities.

The commenters are correct that in some circumstances, the residential requirements are less stringent, particularly with respect to accessibility for individuals with communication-related disabilities. Other differences between the residential standards and the transient lodging standards include: The residential guidelines do not require elevator access to upper floors if the required accessible features can be provided on a single, accessible level; and the residential guidelines do not expressly require roll-in showers. Despite this, the Department still believes that applying the residential dwelling unit requirements to homeless shelters and similar social service establishments is appropriate to the nature of the services being offered at those facilities, and that it will harmonize the ADA and section 504 requirements applicable to those facilities. In addition, the Department believes that the proposal is consistent with its obligations under the Regulatory Flexibility Act to provide some regulatory relief to small entities that operate on limited budgets.

Nevertheless, the Department is requesting information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service establishments, and from the clients of these facilities who would be affected by this proposed change.

Question 40: To what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?

Another commenter expressed concern about how the Department would address dormitory-style settings in homeless shelters, transient group homes, halfway houses, and other social service establishments if they are scoped as residential dwelling units. The commenter noted that the transient lodging requirements include a specific

provision that in guest rooms with more than twenty-five beds, at least five percent (5%) of the beds must have parallel clear floor space enabling a person using a wheelchair to access and transfer to the bed. See sections 224.3, 806.2.3, 305 of the 2004 ADAAG. The residential dwelling unit section does not explicitly include a similar provision.

In response to this concern, the Department has added § 35.151(e)(1), which states that in settings where the sleeping areas include more than twenty-five beds, and in which the residential dwelling unit requirements apply, five percent (5%) of the beds must comply with section 806.2.3 of the 2004 ADAAG (i.e., at least five percent (5%) must have parallel clear floor space on both sides of the bed enabling a person using a wheelchair to access and transfer to the bed).

Definitions of residential facilities and transient lodging. The 2004 ADAAG adds a definition of “residential dwelling unit” and modifies the current definition of “transient lodging.”

Under section 106.5 of the 2004 ADAAG, a “residential dwelling unit” is defined as “a unit intended to be used as a residence, that is primarily long-term in nature” and does not include transient lodging, inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the 2004 ADAAG changes the definition of “transient lodging” to a building or facility “containing one or more guest room[s] for sleeping that provides accommodations that are primarily short-term in nature” and does not include residential dwelling units intended to be used as a residence. The references to “dwelling units” and “dormitories” that are in the definition of the 1991 Standards are omitted from the 2004 ADAAG definition of transient lodging.

The Department said in the ANPRM that by applying the 2004 ADAAG residential facility standards to transient group homes, homeless shelters, halfway houses, and other social service establishments, these facilities would be more appropriately classified according to the nature of the services they provide, rather than the duration of those services. Participants in these programs may be housed on either a short-term or long-term basis in such facilities, and variations occur even within the same programs and the same facility. Therefore, duration is an inconsistent way of classifying these facilities.

Several commenters stated that the definitions of residential dwellings and

transient lodging in the 2004 ADAAG are not clear and will confuse social service providers. They noted that including “primarily long-term” and “primarily short-term” in the respective definitions creates confusion when applied to the listed facilities because they serve individuals for widely varying lengths of time.

The Department is aware of the wide range and duration of services provided by social service establishments. Therefore, rather than focus on the length of a person’s stay at a facility, the Department believes that it makes more sense to look at a facility according to the type of services provided. For that reason, rather than saying that social service establishments “are” residential facilities, the Department has drafted the proposed § 35.151(e) to provide that group homes, and other listed facilities, shall comply with the provisions in the 2004 ADAAG that would apply to residential facilities.

Finally, the Department received comments from code developers and architects commending the decision to coordinate the 2004 ADAAG with the requirements of section 504, and asking the Department to coordinate the 2004 ADAAG with the Fair Housing Act’s accessibility requirements. The Department believes that the coordination of the Fair Housing Act with the other applicable disability rights statutes is within the jurisdiction of HUD. HUD is the agency charged with the responsibility to develop regulations to implement the Fair Housing Act, the Architectural Barriers Act, and the provisions of section 504 applicable to federally funded housing programs.

Scoping of residential dwelling units for sale to individual owners. In the 2004 ADAAG, the Access Board deferred to the Department and to HUD, the standard-setting agency under the ABA, to decide the appropriate scoping for residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners. These programs include, for example, HUD’s HOME program. In addition, some states have their own state-funded programs to construct units for sale to individuals. The Department expects that, after consultation and coordination with HUD, the Department will make a determination in the final rule.

Question 41: The Department would welcome recommendations from individuals with disabilities, public housing authorities, and other interested parties that have experience with these programs. Please comment on the appropriate scoping for

residential dwelling units built by or on behalf of public entities with the intent that the finished units will be sold to individual owners.

Section 35.151(f) Housing at a Place of Education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to the ADA and section 504, other federal laws, including the Fair Housing Act of 1968, may apply. Covered entities subject to the ADA must always be aware of, and comply with, any other federal statutes or regulations that govern the operation of residential properties.

Since the enactment of the ADA, the Department has received many questions about how the ADA applies to educational settings, including school dormitories. Neither the 1991 Standards nor the 2004 ADAAG specifically addresses how it applies to housing in educational settings. Therefore, the Department is proposing a new § 35.151(f) that provides that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG. Housing provided via individual apartments or townhouses will be subject to the requirements for residential dwelling units.

Public and private school dormitories have varied characteristics. Like social service establishments, schools are generally recipients of federal financial assistance and are subject to both the ADA and section 504. College and university dormitories typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. They are also diverse in their layout. Some have double-occupancy rooms and a toilet and bathing room shared with a hallway of others, while some may have cluster, suite, or group arrangements where several rooms are located inside a secure area with bathing, kitchen, and common facilities.

Public schools are subject to title II and program access requirements. Throughout the school year and the

summer, school dormitories become program areas where small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms, both accessible rooms and standard rooms, in order to socialize, to study, and to use all public and common use areas is an essential part of having access to these educational programs and activities.

If the requirements for residential facilities were applied to dormitories operated by schools, this could hinder access to educational programs for students with disabilities. The prior discussion about social service establishments with sleeping accommodations explained that the requirements for dispersing accessible units would not necessarily require an elevator or access to different levels of a facility. Conversely, applying the transient lodging requirements to school dormitories would necessitate greater access throughout the facility to students with disabilities. Therefore, the Department requests public comment on how to scope school dormitories.

Question 42: Would the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing? Please provide examples, if possible.

Section 35.151(g) Assembly Areas

The Department is proposing a new § 35.151(g) to supplement the assembly area requirements in the proposed standards. This provision would add five additional requirements.

Section 35.151(g)(1) would require wheelchair and companion seating locations to be dispersed so that some seating is available on each level served by an accessible route. This requirement should have the effect of ensuring the full range of ticket prices, services, and amenities offered in the facility. Factors distinguishing specialty seating areas are generally dictated by the type of facility or event, but may include, for example, such distinct services and amenities as reserved seating (when other seats are sold on a first-come-first-served basis only); reserved seating in sections or rows located in premium locations (e.g., behind home plate or near the home team’s end zone) that are not otherwise available for purchase by other spectators; access to wait staff for in-seat food or beverage service; availability of catered food or beverages for pre-game, intermission, or post-game meals; restricted access to lounges with special amenities, such as couches or

flat screen televisions; or access to team personnel or facilities for team-sponsored events (e.g., autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

Section 35.151(g)(2) adds the prohibition that the seating may not be placed on temporary platforms or other movable structures. The Department has become aware that a growing trend in the design of large sports facilities is to provide wheelchair seating on removable platforms that seat four or more wheelchair users and their companions. These platforms cover one or more rows of non-wheelchair seating. The platforms are designed to be removed so that the part of the seating bowl that they cover can be used to seat additional ambulatory spectators. The sale of any seats in the covered area requires removal of the platform, thereby eliminating some of the required wheelchair seating locations. In another design that produces a similar result, removable platforms configured to provide multiple, non-wheelchair seats, are installed over some or all of the required wheelchair seating locations. In this configuration, selling a ticket for one wheelchair location requires the removal of multiple non-wheelchair seats.

The Department believes that both of these designs violate both the letter and the intent of this regulation. Both designs have the potential to reduce the number of available wheelchair seating spaces below the level required. Reducing the number of available spaces is likely to result in reducing the opportunity for people who use wheelchairs to have the same choice of ticket prices and access to amenities that are available to other patrons in the facility. In addition, placing wheelchair seating on removable platforms may have a disproportionate effect on the availability of seating for individuals who use wheelchairs and their companions attempting to buy tickets on the day of the event. Use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of wheelchair seating will be lost when a platform is removed. The use of movable seats, on the other hand, could meet such a demand without eliminating blocks of wheelchair seating at a time, converting only those seats that are needed for ambulatory spectators and are not wanted by individuals who use wheelchairs and their companions.

For these reasons, the Department believes that it is necessary and

appropriate to prohibit the use of temporary platforms in fixed seating areas. Nothing in § 35.151(g) is intended to prohibit the use of temporary platforms to increase the available seating, e.g., platforms that cover a basketball court or hockey rink when the arena is being used for a concert. These areas of temporary seating do not remove required wheelchair locations and, therefore, would not violate the requirements of this regulation. In addition, covered entities would still be permitted to use individual movable seats to infill any wheelchair locations that are not sold to wheelchair users.

Section 35.151(g)(3) would require facilities that have more than 5,000 seats to provide at least five wheelchair locations with at least three companion seats for each wheelchair space. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Section 35.151(g)(4) would provide more precise guidance for designers of stadium-style movie theaters by requiring such facilities to locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

- (i) It is located within the rear sixty percent (60%) of the seats provided in an auditorium; or
- (ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

Section 35.151(h) Medical Care Facilities

The Department is proposing a new § 35.151(h) on medical care facilities, which now must comply with the applicable sections of the proposed standards. The Department also proposes that medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 of the proposed standards in a manner that enables patients with disabilities to have access to appropriate specialty services.

The Department is aware that the Access Board sought comment on how dispersion of accessible sleeping rooms can effectively be achieved and

maintained in medical care facilities such as hospitals. In response, commenters representing individuals with disabilities supported a requirement for dispersion of accessible sleeping rooms among all types of medical specialty areas, such as obstetrics, orthopedics, pediatrics, and cardiac care. Conversely, commenters representing the health care industry pointed out that treatment areas in health care facilities can be very fluid due to fluctuation in the population and other demographic and medical funding trends. The Access Board decided not to add a dispersion requirement because compliance over the lifetime of the facility could prove difficult given the need for flexibility of spaces within such facilities. The Department recognizes that it may be difficult to ensure a perfect distribution of rooms throughout all specialty areas in a hospital, but the Department is concerned that the absence of any dispersion requirement may result in inappropriate concentrations of accessible rooms.

Question 43: The Department is seeking information from hospital designers and hospital administrators that will help it determine how to ensure that accessible hospital rooms are dispersed throughout the facility in a way that will not unduly restrain the ability of hospital administrators to allocate space as needed. The proposed standards require that ten percent (10%) of the patient bedrooms in hospitals that do not specialize in treating conditions that affect mobility be accessible. If it is not feasible to distribute these rooms among each of the specialty areas, would it be appropriate to require the accessible rooms to be dispersed so that there are accessible patient rooms on each floor? Are there other methods of dispersal that would be more effective?

Section 35.151(i) Curb Ramps

The current § 35.151(e) on curb ramps has been redesignated as § 35.151(i). The Department has made a minor editorial change, deleting the phrase "other sloped areas" from the two places in which it appears in the current rule. The phrase "other sloped areas" lacks technical precision. Both the 1991 Standards and the proposed standards provide technical guidance for the installation of curb ramps.

Miniature Golf Courses

The Department proposes to adopt the requirements for miniature golf courses in the 2004 ADAAG. However, it requests public comment on a suggested change to the requirement for holes to

be consecutive. A commenter association argued that the "miniature golf experience" includes not only putting but also enjoyment of "beautiful landscaping, water elements that include ponds, fountain displays, and lazy rivers that matriculate throughout the course and themed structures that allow players to be taken into a 'fantasy-like' area." Thus, requiring a series of consecutive accessible holes would limit the experience of guests with disabilities to one area of the course. To remedy this situation, the association suggests allowing multiple breaks in the sequence of accessible holes while maintaining the requirement that the accessible holes are connected by an accessible route.

The suggested change would need to be made by the Access Board and then adopted by the Department, and if adopted, it would apply to all miniature golf courses, not only existing miniature golf facilities.

Question 44: The Department would like to hear from the public about the suggestion of allowing multiple breaks in the sequence of accessible holes, provided that the accessible holes are connected by an accessible route. Should the Department ask the Access Board to change the current requirement in the 2004 ADAAG?

Accessible Cells in Detention and Correctional Facilities

Through complaints received, investigations, and compliance reviews of jails, prisons, and other detention and correctional facilities, the Department has found that many detention and correctional facilities have too few or no accessible cells and shower facilities to meet the needs of their inmates with mobility disabilities. The insufficient numbers of accessible cells are, in part, due to the fact that most jails and prisons were built long before the ADA became law and, since then, have undergone few alterations. However, the Department believes that the unmet demand for accessible cells is also due to the changing demographics of the inmate population. With thousands of prisoners serving life sentences without eligibility for parole, prisoners are aging, and the prison population of individuals with disabilities and elderly individuals is growing. A recent article illustrates this change. Since 1990, the number of Oklahoma inmates age 45 or older has quadrupled, and, in 2006, ten percent (10%) of the Oklahoma state prison population was elderly. Angel Riggs, *Now in Business: Handicapped Accessible Prison: State Opens First Prison for Disabled*, in *Tulsa World* (Feb. 20, 2007). Reflecting this trend of

aging inmate populations, corrections conferences now routinely include workshops on strategies to address the needs of elderly prisoners, including the increased health care needs. In addition, the Federal Bureau of Prisons requires that three percent (3%) of inmate housing at BOP facilities is accessible. Bureau of Prisons, Design Construction Branch, *Design Guidelines, Attachment A: Accessibility Guidelines for Design, Construction, and Alteration of Federal Bureau of Prisons* (Oct. 31, 2006).

The lack of sufficient accessible cells is further demonstrated by complaints received by the Department. The Department receives dozens of complaints per year alleging that detention and correctional facilities have too few accessible cells, toilets, and showers for inmates with mobility disabilities. Other complaints allege that inmates with mobility disabilities are housed in medical units or infirmaries separate from the general population simply because there are no accessible cells. Another common complaint to the Department is from inmates alleging that they are housed at a more restrictive classification level simply because no accessible housing exists at the appropriate classification level.

Further, the Department's onsite reviews and investigations of detention and correctional facilities confirm the complaints that there are too few accessible cells. The need for accessible cells can vary widely from facility to facility, depending on the population housed. While the requirement that two percent (2%) of the cells have mobility features would be adequate to meet current needs in some facilities the Department has reviewed, it would not begin to meet current needs at other facilities. For example, at one facility with a population of almost 300 inmates, ten percent (10%) of the inmates use wheelchairs. The requirement that two percent (2%) of cells at this facility must be accessible would not meet the needs of inmates with mobility disabilities, since it would not be adequate to meet the needs of wheelchair users alone. Another facility has a geriatric unit for 60 inmates. A two percent (2%) standard would fall far short of meeting the needs of this largely bedridden population. Another building at this same facility has 600 cells and houses more than 18 inmates who need accessible cells. Under the two percent (2%) standard, only twelve accessible cells would be required.

According to the Bureau of Justice Statistics (BJS) 2002 survey of jail inmates, "two percent of jail inmates said they had a mobility impairment,

requiring the use of a cane, walker, wheelchair, or other aids to do daily activities." Laura M. Maruschak, Bureau of Justice Statistics (BJS), *Medical Problems of Jail Inmates* (2006), available at <http://www.ojp.usdoj.gov/bjs/abstract/mpji.htm>. In a 1997 survey, BJS reported that among state prison inmates age 45 or older, twenty-five percent (25%) said they had a "physical condition." Laura M. Maruschak and Allen J. Beck, Ph.D., Bureau of Justice Statistics, *Medical Problems of Inmates, 1997* (2001), available at <http://www.ojp.usdoj.gov/bjs/abstract/mpi97.htm>.

Number of accessible cells. Section 232.2.1 of the 2004 ADAAG requires at least two percent (2%), but no fewer than one, of the cells in newly constructed detention and correctional facilities to have accessibility features for individuals with mobility disabilities. Section 232.3 provides that, where special holding cells or special housing cells are provided, at least one cell serving each purpose shall have mobility features. While the 2004 ADAAG establishes these requirements for cells in newly constructed detention and correctional facilities, it does not establish requirements for accessible cells in alterations to existing facilities, deferring that decision to the Attorney General.

The Department seeks input on how best to meet the needs of inmates with mobility disabilities in the design, construction, and alteration of detention and correctional facilities. The Department seeks comments on the following issues:

Question 45: Are the requirements for accessible cells in sections 232.2 and 232.3 of the 2004 ADAAG adequate to meet the needs of the aging inmate population in prisons? If not, should the percentage of cells required to have accessible features for individuals with mobility disabilities be greater and, if so, what is the appropriate percentage? Should the requirement be different for prisons than for other detention and correctional facilities?

Question 46: Should the Department establish a program accessibility requirement that public entities modify additional cells at a detention or correctional facility to incorporate the accessibility features needed by specific inmates with mobility disabilities when the number of cells required by sections 232.2 and 232.3 of the 2004 ADAAG are inadequate to meet the needs of their inmate population? Under this option, additional cells provided for inmates with mobility disabilities would not necessarily be required to comply with all requirements of section 807.2 of the

2004 ADAAG, so long as a cell had the mobility features needed by the inmate it housed.

Dispersion of cells. In the 2004 ADAAG, Advisory 232.2 recommends that “[a]ccessible cells or rooms should be dispersed among different levels of security, housing categories, and holding classifications (e.g., male/female and adult/juvenile) to facilitate access.” In explaining the basis for recommending, but not requiring, this type of dispersal, the Access Board stated that “[m]any detention and correctional facilities are designed so that certain areas (e.g., ‘shift’ areas) can be adapted to serve as different types of housing according to need” and that “[p]lacement of accessible cells or rooms in shift areas may allow additional flexibility in meeting requirements for dispersion of accessible cells or rooms.” During its onsite reviews of detention and correctional facilities, the Department has observed that male and female inmates, adult and juvenile inmates, and inmates at different security classifications are typically housed in separate areas of detention and correctional facilities. In many instances, detention and correctional facilities have housed inmates in inaccessible cells, even though accessible cells were available elsewhere in the facility, because there were no cells in the areas where they needed to be housed, such as the women’s section of the facility, the juvenile section of the facility, or in a particular security classification area.

Question 47: Please comment on whether the dispersal of accessible cells recommended in Advisory 232.2 of the 2004 ADAAG should be required.

Alterations to cells. In section 232.2 of the 2004 ADAAG, the Access Board deferred one decision to the Attorney General, specifically: “Alterations to cells shall not be required to comply except to the extent determined by the Attorney General.” The security concerns of detention and correctional facilities present challenges that do not exist in other government buildings, so the Department must strike a balance that accommodates the accessibility needs of inmates with disabilities while addressing security concerns. Therefore, in the ANPRM, the Department sought public comment on three options for the most effective means of ensuring that existing detention and correctional facilities are made accessible to inmates with disabilities. The proposed options and submitted comments are discussed below in the section-by-section analysis for a new proposed section on detention and correctional facilities.

Introduction of new § 35.152 for detention and correctional facilities. In view of the statistics regarding the current percentage of inmates with mobility disabilities, the fact that prison populations include large numbers of aging inmates who are not eligible for parole, the allegations in complaints received by the Department from inmates, and the Department’s own experience with detention and correctional facilities, the Department is proposing regulatory language in a new section (§ 35.152) on correctional facilities, and seeking public comment on these issues.

The proposed rule at § 35.152 is intended to address these frequent problems for inmates with disabilities by: (1) Proposing specific requirements to ensure accessibility when a correctional or detention facility alters cells; (2) specifying that public entities shall not place inmates or detainees with disabilities in locations that exceed their security classification in order to provide accessible cells; (3) requiring that public entities shall not place inmates in designated medical units and infirmaries solely due to disability; (4) specifying that public entities shall not relocate inmates and detainees solely based on disability to different, accessible facilities without equivalent programs than where they would ordinarily be housed; and (5) requiring that public entities shall not deprive inmates or detainees from visitation with family members by placing them in distant facilities based on their disabilities. The additions to the existing title II regulation, including each of these proposals and any public comments received on this topic, are discussed in turn below.

Contractual arrangements with private entities. Prisons that are built or run by private entities have caused some confusion with regard to requirements under the ADA. The Department believes that title II obligations extend to the public entity as soon as the building is used by or on behalf of a state or local government entity, irrespective of whether the public entity contracts with a private entity to run the correctional facility. The power to incarcerate citizens rests with the state, not a private entity. As the Department stated in the preamble to the current title II regulation, “[a]ll governmental activities of public entities are covered, even if they are carried out by contractors.” 56 FR 35694, 35696 (July 26, 1991). If a prison is occupied by state prisoners and is inaccessible, the state is responsible under title II of the ADA. In essence, the private builder or contractor that

operates the correctional facility does so at the direction of the state government, unless the private entity elects to use the facility for something other than incarceration, in which case title III may apply. For that reason, the proposed § 35.152(a) makes it clear that this section’s requirements will apply to prisons operated by public entities directly or through contractual or other relationships.

Alterations to cells and program access. When addressing the issue of alterations of prison cells, the Department must consider the realities of many inaccessible state prisons and strained budgets against the title II program access requirement for existing facilities under § 35.150(a), which states: “A public entity shall operate each service, program, or activity, so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” The Supreme Court, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), unanimously held that the ADA unmistakably covers state prisons and prisoners, so program access does apply to state correctional facilities; the question remains how best to achieve that within the unique confines of a prison system.

Correctional and detention facilities commonly provide a variety of different programs for education, training, counseling, or other purposes related to rehabilitation. Some examples of programs generally available to inmates include: Programs to obtain G.E.D.s; English as a second language; computer training; job skill training and on-the-job training; religious instruction and guidance; alcohol and substance abuse groups; anger management; and other programs. Historically, individuals with disabilities have been excluded from such programs because they are not located in accessible locations, or inmates with disabilities have been segregated to units without equivalent programs. In light of the Supreme Court’s decision in *Yeskey* and the requirements of title II, however, it is critical that public entities provide these opportunities. The Department’s proposed rule aims to specifically require equivalent opportunities to such programs.

The Department wishes to emphasize that detention and correctional facilities are unique facilities under title II. Inmates cannot leave the facilities and must have their needs met—including those relating to a disability—by the state corrections system. If the state fails to accommodate prisoners with disabilities, these individuals have little

recourse, particularly when the need is urgent (e.g., an accessible toilet or clean needles for insulin injections for prisoners with diabetes).

In light of a public entity's obligation to provide program access to prisoners with disabilities, coupled with the Department's proposal for a more flexible alterations standard, the Department believes that the state has a higher responsibility to provide accommodations based on disability. Therefore, it is essential that state corrections systems fulfill their program access requirements by adequately addressing the needs of prisoners with disabilities, which include, but are not limited to, proper medication and medical treatment, accessible toilet and shower facilities, devices such as a bed transfer or a shower chair, and assistance with hygiene methods for prisoners with physical disabilities. Therefore, the Department is proposing a new § 35.152 that will require public entities to ensure that inmates with disabilities do not experience discrimination because the prison facilities or programs are not accessible to them.

Integration of inmates and detainees with disabilities. The Department is also proposing a specific application of the ADA's general integration mandate. Section 35.152(b)(2) would require public entities to ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individual. Unless the public entity can demonstrate that it is appropriate for a specific individual, a public entity—

(1) Should not place inmates or detainees with disabilities in locations that exceed their security classification because there are no accessible cells or beds in the appropriate classification;

(2) Should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(3) Should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed;

(4) Should not place inmates or detainees with disabilities in facilities further away from their families in order to provide accessible cells or beds, thus diminishing their opportunity for visitation based on their disability.

The Department recognizes that there are a wide range of considerations that affect decisions to house inmates or detainees and that in specific cases there may be compelling reasons why a placement that does not follow the provisions of § 35.152(b) may, nevertheless, comply with the ADA. However, the Department believes that

it is essential that the planning process initially assume that inmates or detainees with disabilities will be assigned within the system under the same criteria that would be applied to inmates who do not have disabilities. Exceptions may be made on a case-by-case basis if the specific situation warrants different treatment. For example, if an inmate is deaf and communicates only using sign language, a prison may consider whether it is more appropriate to give priority to housing the prisoner in a facility close to his family that houses no other deaf inmates, or if it would be preferable to house the prisoner in a setting where there are other sign language users with whom he can communicate.

Question 48: The Department is particularly interested in hearing from prison administrators and from the public about the potential effect of the assignment scheme proposed here on inmates and detainees who are deaf or who have other disabilities. Are there other, more appropriate tests to apply?

Alterations to cells. In the ANPRM, the Department proposed three options for altering cells. The vast majority of commenters (numbering three to one) supported Option II, which would allow substitute cells to be made accessible within the same facility, over Option III. Only one commenter expressed support for Option I, and a handful of commenters supported Option III. The comments on each option are discussed below.

Option I: Require all altered elements to be accessible. Only one commenter supported this option, stating that providing alternative approaches could allow those running the prison to provide a lower level of accessibility, and that any deviation from the 1991 Standards on alterations should be addressed through a barrier removal plan, transition plan, or a claim of technical infeasibility. A few commenters argued that this option would result in piecemeal accessibility, which would be inadequate. As one commenter stated, "providing an accessible lavatory or water closet (often a single unit) in an inaccessible cell makes no sense."

Option II: Permit substitute cells to be made accessible within the same facility. Commenters supporting Option II favored the more flexible plan to achieve accessibility within a prison context. Many expressed support for this option because it would allow individuals with disabilities to remain close to their families. One commenter requested accessible cells by type (e.g., women's, men's, juvenile, different security levels, etc.). Another

commenter offered that the unique safety concerns of a correctional facility require a balance between staff and inmate safety and accessibility. One advocacy group reasoned that Option II was best because it would allow prison operators to determine the most appropriate location for the accessible cells. One group commented that this option would allow the prison officials more flexibility, which is necessary in a correctional environment. Equally important, keeping inmates in the same facility may allow them to remain closer to their homes; the third option could create segregated facilities. In the end, this group asserted that each facility—rather than each system—should be looked at "in its entirety."

One large advocacy group stated that Option II was acceptable, stressing that program access requires the same training and work opportunities that other prisoners have. An architectural association asserted that this option should only apply to existing correctional cells, but that any other part of a correctional facility should be made accessible when it is altered. The Department, however, is only addressing the alterations of prison cells in this rulemaking. While expressing support for Option II, a few commenters stressed that cells made accessible in a different location in the facility must provide equal access to dining, recreational, educational, medical, and visitor areas as the former location. Another commenter stated that the alternate cell location should not require longer travel distances.

The Department has evaluated all of the comments and proposes regulatory language reflecting Option II, which provides an appropriate balance between the needs of prisoners with disabilities and the unique requirements of detention and correctional facilities.

Option III: Permit substitute cells to be made accessible within a prison system. The biggest problem that commenters had with Option III was that it would be more likely to separate prisoners from their families and communities. One advocacy group asserted that this option could lead to the illegal segregation of inmates with disabilities; moreover, some of the accessible facilities may not have the same programs or services (e.g., Alcoholics Anonymous, etc.). One group argued that this option would give preference to the needs of the prison system over the needs of individuals with disabilities, while another group found this option unacceptable because it had seen its own state correctional system "funneling" its wheelchair-using inmates into a few facilities, which

sometimes exceeded the prisoners' security level requirements. Moreover, some prisoners with disabilities are sent to "special housing" units in a facility because they are the only areas with accessible cells.

In support of Option III, one state building code commissioner stressed that this plan would maximize the flexibility of corrections officials to place individuals with disabilities in facilities best suited to their needs; prison accessibility extends far beyond cells; and barrier removal in a very old prison could be cost prohibitive. Another commenter, a state department of labor representative, argued that Option III is the most reasonable for state-run facilities (but that Option I should extend to private correctional facilities) due to tremendous budget constraints. As the Department expressed initially, the same title II accessibility requirements apply to a facility, irrespective of whether it is run directly by the state or a private entity with which the state contracts.

While expressing some support for Option II, one public interest law firm representing individuals with disabilities stated that Option III is the best, because many older prisons are inaccessible. "Simply having one accessible cell in an otherwise inaccessible facility does little good." Therefore, requiring an entire prison system to have at least one fully accessible facility is the better approach.

The Department appreciates that Option III affords state corrections systems the maximum amount of flexibility with regard to placement of individuals with disabilities. Unfortunately, many commenters expressed legitimate concerns, most significantly that prisoners will, more likely, be separated from family, friends, and community, which is critical to their rehabilitation and successful release, and many programs at the new facility will not be the same. Lastly, the fact that certain facilities could become exclusively, or largely, designated for prisoners with disabilities would result in segregation, even if it is not intended.

Proposed requirement for cell alterations. The Department has concluded that Option II provides the best balance. Therefore, the Department is proposing § 35.152(c) that would provide that when cells are being altered, a covered entity may satisfy its obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (*i.e.*, cells other than those where alterations are originally planned), provided that: Each substitute cell is located within the

same facility; is integrated with other cells to the maximum extent feasible; and has, at a minimum, equal physical access as the original cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

Subpart E—Communications

Section 35.160 Communications

The Department proposes to expand § 35.160(a) to clarify that a public entity's obligation to ensure effective communication extends not just to applicants, participants, and members of the public with disabilities, but to their companions as well.

The Department also proposes to add a new § 35.160(a)(2) that will define "companion" for the purposes of this section as a person who is a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public entity should communicate.

The Department is proposing to add companions to the scope of coverage of § 35.160 to emphasize that the ADA applies in some instances in which a public entity needs to communicate with a family member, friend, or associate of the program participant in order to provide its services. Examples of such situations include when a school communicates with the parent of a child during a parent-teacher meeting; in a life-threatening situation, when a hospital needs to communicate with an injured person's companion to obtain necessary information; or when a person may need to communicate with a parole officer about a relative's release conditions. In such situations, if the companion is deaf or hard of hearing, blind, has low vision, or has a disability that affects his or her speech, it is the public entity's responsibility to provide an appropriate auxiliary aid or service to communicate effectively with the companion. Where communication with a companion is necessary to serve the interests of a person who is participating in a public entity's services, programs, or activities, effective communication must be assured.

This issue is particularly important in health care settings. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligations with respect to such companions. Effective communication with a companion with a disability is necessary in a variety of

circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient's next of kin or health care surrogate with whom hospital personnel communicate concerning the patient's medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. It has been the Department's longstanding position that public entities are required to provide effective communication to companions who are themselves deaf, hard of hearing, or who have other communication-related disabilities when they accompany patients to medical care providers for treatment.

Public entities must be aware, however, that considerations of privacy, confidentiality, emotional involvement, and other factors may adversely affect the ability of family members or friends to facilitate communication. In addition, the Department stresses that privacy and confidentiality must be maintained. We note that covered entities, such as hospitals, that are subject to the Privacy Rule, 45 CFR parts 160, 162, and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPPA), Public Law 104–191, are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. The agreement need not be in writing. Covered entities should consult the Privacy Rule regarding other ways disclosures might be able to be made to such persons.

The Department is proposing to amend § 35.160(b)(2) to recognize that the type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. This addition is a codification of the Department's longstanding position, which is included in the Department of Justice's *The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering State and Local Government Programs and Services* (Title II TA Manual), II–7.1000, available at <http://www.ada.gov/taman2.html>. For example, an individual who is deaf or hard of hearing may need a qualified

interpreter to discuss with municipal hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (e.g., dosage, side effects, drug interactions, etc.), or to explain follow-up treatments, therapies, test results, or recovery. In comparison, in a simpler, shorter interaction, the method to achieve effective communication can be more basic. For example, an individual who is seeking local tax forms may only need an exchange of written notes to achieve effective communication.

The Department proposes adding § 35.160(c) to codify its longstanding policy that it is the obligation of the public entity, not the individual with a disability, to provide auxiliary aids and services when needed for effective communication. In particular, the Department receives many complaints from individuals who are deaf or hard of hearing alleging that public entities expect them to provide their own sign language interpreters. This burden is misplaced. As such, § 35.160(c)(1) makes clear that a public entity may not require an individual with a disability to bring another individual to interpret for him or her.

Section 35.160(c)(2) codifies the Department's policy that there are very limited instances when a public entity may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances. In such instances, the public entity is still required to offer to provide an interpreter free of charge. In no circumstances should a child be used to facilitate communication with a parent about a sensitive matter. The Department has produced a video and several publications that explain this and other ADA obligations in law enforcement settings. They may be viewed at <http://www.ada.gov> or ordered from the ADA Information Line (800-514-0301 (voice) or 800-514-0383 (TTY)).

Video interpreting services. Section 35.160(d) has been added to establish performance standards for video interpreting services (VIS), a system the Department recognizes as a means to provide qualified interpreters quickly and easily. (The mechanics of VIS are discussed above in the definition of VIS in the section-by-section analysis of § 35.104.) VIS also has economic advantages, is readily available, and

because of advances in video technology, can provide a high quality interpreting experience. VIS can circumvent the difficulty of providing live interpreters quickly, which is why more public entities are providing qualified interpreters via VIS.

There are downsides to VIS, such as frozen images on the screen, or when an individual is in a medical care facility and is limited in moving his or her head, hands, or arms. Another downside is that the camera may mistakenly focus on an individual's head, which makes communication difficult or impossible. Also, the accompanying audio transmission might be choppy or garbled, making spoken communication unintelligible. The Department is aware of complaints that some public entities have difficulty setting up and operating VIS because staff have not been appropriately trained to do so.

To address the potential problems associated with the use of VIS, the Department is proposing the inclusion of four performance standards for VIS to ensure effective communication: (1) High quality, clear, real time, full-motion video and audio over a dedicated high speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participants' heads, arms, hands, and fingers, regardless of the body position of the person who is deaf; (3) clear transmission of voices; and (4) nontechnicians who are trained to set up and operate the VIS quickly.

Captioning at sporting venues. The Department is aware that individuals who are deaf or hard of hearing have expressed concerns that they are unaware of information that is provided over the public address systems. Therefore, the Department is proposing requiring that sports stadiums with a capacity of 25,000 or more provide captioning for patrons who are deaf or hard of hearing for safety and emergency information announcements made over the public address system. There are various options that could be used for providing captioning, such as on a scoreboard, on a line board, on a handheld device, or other methods.

Question 49: The Department believes that requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 has the potential of creating an undue burden for smaller entities. However, the Department requests public comment about the effect of requiring captioning of emergency announcements in all stadiums, regardless of size. Would such a request be feasible for small stadiums?

Question 50: The Department is considering requiring captioning of safety and emergency information in sports stadiums with a capacity of 25,000 or more within a year of the effective date of the regulation. Would a larger threshold, such as sports stadiums with a capacity of 50,000 or more, be more appropriate or would a lower threshold, such as stadiums with a capacity of 15,000 or more, be more appropriate?

Question 51: If the Department adopted a requirement for captioning at sports stadiums, should there be a specific means required? That is, should it be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or are there problems with some means, such as handheld devices, that should eliminate them as options?

Question 52: The Department is aware that several major stadiums that host sporting events, including National Football League football games at FedEx Field in Prince Georges County, Maryland, currently provide open captioning of all public address announcements, and do not limit captioning to safety and emergency information. What would be the effect of a requirement to provide captioning for patrons who are deaf or hard of hearing for game-related information (e.g., penalties), safety and emergency information, and any other relevant announcements?

Section 35.161 Telecommunications

The Department proposes to retitle this section "Telecommunications" to reflect situations in which a public entity must provide an effective means to communicate by telephone for individuals with disabilities, and proposes several other changes.

The Department proposes to redesignate current § 35.161 as § 35.161(a), and to replace the term "Telecommunication devices for the deaf (TDD's)" with "text telephones (TTYs)." Although "TDD" is the term used in the ADA, "TTY" has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. In addition, the proposed regulation updates the terminology in light of modern usage from "individuals with impaired hearing or speech" to "individuals with hearing or speech disabilities."

In § 35.161(b), the Department addresses automated attendant systems that handle telephone calls electronically. These automated systems are a common method for answering and directing incoming calls to public

entities. The Department has become aware that individuals with disabilities who use TTYs or the telecommunications relay services—primarily those who are deaf or hard of hearing or who have speech-related disabilities—have been unable to use automated telephone trees systems, because they are not compatible with TTYs or a telecommunications relay service. Automated attendant systems often disconnect before the individual using one of these calling methods can complete the communication.

In addition, the Department proposes a new § 35.161(c) that would require that individuals using telecommunications relay services or TTYs be able to connect to and use effectively any automated attendant system used by a public entity. The Department declined to address this issue in the 1991 regulation because it believed that it was more appropriate for the Federal Communications Commission (FCC) to address this in its rulemaking under title IV, 56 FR 35694, 35712 (July 26, 1991). Because the FCC has since raised this concern with the Department and requested that the Department address it, it is now appropriate to raise this issue in the title III regulation.

The Department has proposed § 35.161(c), which requires that a public entity must respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls. The Department proposes adding this provision to address a series of complaints from those who use TTYs or the telecommunications relay systems that many public entities refuse to accept those calls.

Section 35.170 Complaints—Prison Litigation Reform Act

In the ANPRM, the Department proposed addressing the effect of the Prison Litigation Reform Act (PLRA) on complaints by prisoners alleging unlawful discrimination on the basis of disability under title II of the ADA. The PLRA provides, in relevant part, that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. 1997e(a). As a result of this language, the Department proposed requiring those prisoners alleging title II violations to file an administrative complaint with the

Department prior to filing a lawsuit, and that a complainant would satisfy this requirement if no action was taken by the Department within sixty days. The Department has considered the comments that it received by a variety of groups and has decided not to propose an exhaustion requirement exclusively for prisoners in the regulation.

Sections 35.171, 35.172, and 35.190 Streamlining Complaint Investigations and Designated Agency Authority

The Department is proposing modifications to its current procedures with respect to the investigation of complaints alleging discrimination on the basis of disability by public entities under title II of the ADA. Specifically, the Department is proposing several amendments to its enforcement procedures in order to streamline both its internal procedures for investigating complaints and its procedures with regard to the other designated agencies with enforcement responsibilities under title II. These proposals will reduce the administrative burdens associated with implementing the statute and ensure that the Department retains the flexibility to allocate its limited enforcement resources effectively and productively.

Subtitle A of title II of the ADA defines the remedies, procedures, and rights provided for qualified individuals with disabilities who are discriminated against on the basis of disability in the services, programs, or activities of state and local governments. 42 U.S.C. 12131–12134. Subpart F of the current regulation establishes administrative procedures for the enforcement of title II of the ADA. Subpart G identifies eight “designated agencies,” including the Department, that have responsibility for investigating complaints under title II.

The Department’s current title II regulation is based on the enforcement procedures established in regulations implementing section 504. Thus, the Department’s current regulation provides that the designated agency “shall investigate each complete complaint” alleging a violation of title II and shall “attempt informal resolution” of such complaint. 28 CFR 35.172(a).

In the years since the current regulation went into effect, the Department has received many more complaints alleging violations of title II than its resources permit it to resolve. The Department has reviewed each complaint that it has received and directed its resources to resolving the most critical matters. The Department proposes to clarify in its revised regulation that designated agencies may

exercise discretion in selecting title II complaints for resolution by deleting the term “each” as it appears before “complaint” in § 35.172(a). The proposed rule at § 35.172(a) would read that, “[t]he designated agency shall investigate complaints” rather than “investigate each complaint.”

The Department also proposes to change the language in § 35.171(a)(2)(i) regarding misdirected complaints to make it clear that, if an agency receives a complaint for which it lacks jurisdiction either under section 504 or as a designated agency under the ADA, the agency may refer the complaint to the appropriate agency. The current language requires the agency to refer the complaint to the Department, which, in turn, refers the complaint. The proposed revisions to § 35.171 make it clear that an agency can refer a misdirected complaint either directly to the appropriate agency or to the Department. This amendment is intended to protect against the unnecessary backlogging of complaints and to prevent undue delay in an agency taking action on a complaint.

The Department is also proposing to make clear that the same procedures that apply to complaint investigations also apply to compliance reviews that are not initiated by receipt of a complaint, but rather are based on other information indicating that discrimination exists in a service, program, or activity covered by this part. This provision is consistent with the Department’s procedures for enforcing title III of the ADA as well as title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, and section 504. Section 203 of the ADA provides that those same rights, remedies, and procedures shall apply to title II of the ADA, 42 U.S.C. 12133. The Department’s proposed rule renames § 35.172(a), “Investigations and Compliance Reviews,” and provides in new paragraph (b) that “[t]he designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part.”

Finally, the Department is proposing to streamline the requirements for letters of findings. Section 35.172 of the Department’s current regulation requires designated agencies to investigate all complete complaints for which they are responsible as determined under § 35.171. Specifically, a designated agency must issue a letter of findings at the conclusion of the investigation if the complaint was not resolved informally and attempt to negotiate a voluntary compliance agreement if a violation was

found. The Department's proposal will clarify that letters of finding are only required when a violation is found. The discussion of letters of finding is moved to a new paragraph (c) in the proposed rule, and provides the same language as in the current regulation with the exception that the phrase "and a violation is found" is added following the phrase "if resolution is not achieved."

Subpart G of the existing regulation deals with the various agency designations that the Department proposed in promulgating the regulation for title II of the ADA. Current § 35.190 lays out all of the agency designations. Paragraphs 35.190(c) and (d), respectively, leave to the discretion of the Attorney General decisions where delegations are not specifically assigned or where there are apparent conflicts of jurisdiction. The Department's proposed rule would add a new § 35.190(e) in order to deal with the situation in which a complainant has sought the assistance of the Department of Justice. The proposed rule at § 35.190(e) provides that when the Department receives a complaint alleging a violation of title II that is directed to the Attorney General that may fall within the jurisdiction of a designated agency or another federal agency that has jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part. The Department would, of course, consult with the designated agency regarding its intention to review when it plans to retain the complaint. In appropriate circumstances, the Department and the designated agency may conduct a joint investigation. Finally, the Department also proposes to amend § 35.171(a)(2)(ii) to be consistent with the changes in the proposed rule at § 35.190(e).

Additional Information

Withdrawal of Outstanding NPRMs

With the publication of this NPRM, the Department is withdrawing three outstanding NPRMs: The joint NPRM of the Department and the Access Board dealing with children's facilities, published on July 22, 1996, at 61 FR 37964; the Department's proposal to extend the time period for providing curb ramps at existing pedestrian walkways, published on November 27, 1995, at 60 FR 58462; and the Department's proposal to adopt the Access Board's accessibility guidelines and specifications for state and local government facilities, published as an interim final rule by the Access Board on June 20, 1994, at 59 FR 31676, and

by the Department as a proposed rule on June 20, 1994, at 59 FR 31808. To the extent that those proposals were incorporated in the 2004 ADAAG, they will all be included in the Department's proposed standards.

Regulatory Process Matters

This NPRM has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866, 58 FR 51735 (Sept. 30, 1993). The Department has evaluated its existing regulations for title II and title III section by section, and many of the proposals in its NPRMs for both titles reflect its efforts to mitigate any negative effects on small entities. The Department has also prepared its initial regulatory impact analysis (RIA), as directed by Executive Order 12866 (amended without substantial change by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2763 (Jan. 18, 2007)), and OMB Circular A-4.

The Department's initial regulatory impact analysis measures the incremental benefits and costs of the proposed standards relative to the benefits and costs of the 1991 Standards. The assessment has estimated the benefits and costs of all new and revised requirements as they would apply to newly constructed facilities, altered facilities, and facilities that are removing barriers to access.

A summary of the regulatory assessment, including the Department's responses to public comments addressing its proposed methodology and approach, is attached as Appendix B to this NPRM. The complete, formal report of the initial regulatory impact analysis is available online for public review on the Department's ADA Home Page (<http://www.ada.gov>) and at <http://www.regulations.gov>. The report is the work product of the Department's contractor, HDR/HLB Decision Economics, Inc. The Department has adopted the results of this analysis as its assessment of the benefits and costs that the proposed standards will confer on society. The Department invites the public to read the full report and to submit electronic comments at <http://www.regulations.gov>.

Regulatory Flexibility Act

This NPRM has also been reviewed by the Small Business Administration's Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002). Because the proposed rule, if adopted, may have a significant economic impact on a substantial number of small entities, the Department has conducted an Initial Regulatory Flexibility Analysis (IRFA)

as a component of this rulemaking. The Department's ANPRM, NPRM, and the RIA include all of the elements of the IRFA required by the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601 *et seq.*, as amended by SBREFA, 5 U.S.C. 603(b)(1)–(5), 603(c).

Section 603(b) lists specific requirements for an IRFA regulatory analysis. The Department has addressed these IRFA issues throughout the ANPRM, NPRM, and the RIA. In summary, the Department has satisfied its IRFA obligations under section 603(b) by providing the following:

1. *Description of the reasons that action by the agency is being considered.* See, e.g., "The Roles of the Access Board and the Department of Justice," "The Revised Guidelines," and "The Advance Notice of Proposed Rulemaking" sections of the titles II and III NPRMs; Section 2.1, "Access Board Regulatory Assessment" of the Initial Regulatory Impact Analysis; see also Department of Justice ADA Advanced Notice of Proposed Rulemaking, 69 FR 58768, 58768–70 (Sept. 30, 2004) (outlining the regulatory history and rationale underlying DOJ's proposal to revise its regulations implementing titles II and III of the ADA);

2. *Succinct statement of the objectives of, and legal basis for, the proposed rule.* See, e.g., titles II and III NPRM sections entitled, "Summary," "Overview," "Purpose," "The ADA and Department of Justice Regulations," "The Roles of the Access Board and the Department of Justice," "Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews," and "Regulatory Impact Analysis"; App. B: Regulatory Assessment sections entitled, "Background," "Regulatory Alternatives," "Regulatory Proposals with Cost Implications," and "Measurement of Incremental Benefits"; see also 69 FR at 58768–70, 58778–79 (outlining the goals and statutory directives for the regulations implementing titles II and III of the ADA);

3. *Description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.* See Section 6, "Small Business Impact Analysis" and App. 5, "Small Business Data of the RIA" (available for review at <http://www.ada.gov>); see also App. B: Regulatory Assessment sections entitled, "Regulatory Alternatives," "Regulatory Proposals with Cost Implications," and "Measurement of Incremental Benefits" (estimating the number of small entities the Department believes may be impacted by the proposed rules and calculating the likely incremental economic impact of

these rules on small facilities/entities versus “typical” (i.e., average-sized) facilities/entities);

4. *Description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* See titles II and III NPRM sections entitled, “Paperwork Reduction Act” (providing that no new record-keeping or reporting requirements will be imposed by the NPRMs). The Department acknowledges that there are other compliance requirements in the NPRMs that may impose costs on small entities. These costs are presented in the Department’s Initial Regulatory Impact Analysis, Chapter 6, “Small Business Impact Analysis” and accompanying App. 5, “Small Business Data” (available for review at <http://www.ada.gov>);

5. *Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.* See, e.g., title II NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ efforts to eliminate duplication or overlap in federal accessibility guidelines), “The ADA and Department of Justice Regulations,” “Social Service Establishments” (§ 35.151(e)), “Streamlining Complaint Investigations and Designated Agency Authority” (§§ 35.171, 35.172, and 35.190), “Executive Order 13132: Federalism” (discussing interplay of section 504 and ADA Standards), “Alterations” (§ 35.151(b)) (discussing interplay of UFAS and ADA Standards); title III NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ’s harmonization efforts with other federal accessibility guidelines), “Social Service Establishments” (§ 36.406(d)), “Definitions of Residential Facilities and Transient Lodging,” “Housing at a Place of Education” (§ 36.406(e)) (discussing section 504), “Change ‘Service Animal’ to ‘Assistance Animal,’” “Scope of Coverage” (discussing Fair Housing Act), “Effective Date: Time Period,” and “Social Service Establishments” (discussing UFAS); and

6. *Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take*

into account the resources available to small entities; (2) use of performance rather than design standards; and (3) any exemption from coverage of the rule, or any part thereof, for such small entities.

The Department’s rulemaking efforts satisfy the IRFA requirement for consideration of significant regulatory alternatives. In September 2004, the Department issued an ANPRM to commence the process of revising its regulations implementing titles II and III of the ADA. See 69 FR 58768 (Sept. 30, 2004). Among other things, the ANPRM sought public comment on 54 specific questions. Prominent among these questions was the issue of whether (and how) to craft a “safe harbor” provision for existing title III-covered facilities/entities that would reduce the financial burden of complying with the 2004 ADAAG. See *id.* at 58771–72. The ANPRM also specifically invited comment from small entities concerning the proposed rules’ potential economic impact and suggested regulatory alternatives to ameliorate such impact. *Id.* at 58779 (Question 10). By the end of the comment period, the Department had received over 900 comments, including comments from SBA’s Office of Advocacy and small entities. See, e.g., title II NPRM Preamble and title III NPRM Preamble sections entitled, “The Advance Notice of Proposed Rulemaking” (summarizing public response to the ANPRM). Many small business advocates expressed concern regarding the cost of making older existing title III-covered buildings compliant with new regulations (since many small businesses operate in such facilities) and urged DOJ to issue clearer guidance on barrier removal. See title III NPRM Preamble discussion of “Safe harbor and other proposed limitations on barrier removal.”

In drafting the NPRMs for titles II and III, the Department expressly addressed small businesses’ collective ANPRM comments and proposed regulatory alternatives to help mitigate the economic impact of the proposed regulations on small entities. For example, the Department’s regulatory proposals:

- Provide a “safe harbor” provision whereby elements in existing title II- or title III-covered buildings or facilities that are compliant with the current 1991 Standards or UFAS need not be modified to comply with the standards in the proposed regulations (see “Safe Harbor” and § 35.150(b)(2) of the title II NPRM; “Safe Harbor and Other Proposed Limitations on Barrier Removal” and § 36.304 of the title III NPRM);

- Adopt a regulatory alternative for barrier removal that, for the first time, provides a specific annual monetary “cost cap” for barrier removal obligations for qualified small businesses (see title III NPRM sections entitled, “Safe Harbor and Other Proposed Limitations on Barrier Removal” and “Safe Harbor for Qualified Small Businesses Regarding What Is Readily Achievable”);

- Exempt certain existing small recreational facilities (i.e., play areas, swimming pools, saunas, and steam rooms) which, in turn, are often owned or operated by small entities, from barrier removal obligations in order to comply with the standards in the proposed regulations (see title II NPRM at § 35.150(b)(4) and (5); title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”); and

- Reduce scoping for certain other existing recreational facilities (i.e., play areas over 1,000 square feet and swimming pools with over 300 linear feet of pool wall) operated by either title II or title III entities (see title II NPRM at § 35.150(b)(4) and (5); title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”).

Taken together, the foregoing regulatory proposals amply demonstrate that the Department was sensitive to the potential economic impact of the revised regulations on small businesses and attempted to mitigate this impact with a variety of provisions that, to the extent consistent with the ADA, impose reduced compliance standards on small entities.

Section 610 Review. The Department is also required to conduct a periodic regulatory review pursuant to section 610 of the RFA, 5 U.S.C. 601 *et seq.*, as amended by the SBREFA, 5 U.S.C. 610 *et seq.*

The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. See 5 U.S.C. 610(b). Based on these factors, the agency is required to determine whether to continue the rule without change or to

amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* at 610 (a).

In developing these proposed rules, the Department has gone through its regulations section by section, and, as a result, proposes several clarifications and amendments in both the title II and title III implementing regulations. The proposals reflect the Department's analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

The Department has consulted with the Small Business Administration's Office of Advocacy about this process. The Office of Advocacy has advised that although the process followed by the Department was ancillary to the proposed adoption of revised ADA Standards, the steps taken to solicit public input and to respond to public concerns is functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department's obligations under the RFA.

Executive Order 13132: Federalism

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 4, 1999), requires executive branch agencies to consider whether a proposed rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on state and local governments; a substantial direct effect on the relationship between the federal government and the states and localities; or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a proposed rule is likely to have federalism implications, it must consult with state and local elected officials about how to minimize or eliminate the effects.

Title II of the ADA covers state and local government programs, services,

and activities, and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulations are not novel for state and local governments. This proposed rule will preempt state laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. But the Department believes it is prudent to consult with public entities about the potential federalism implications of the proposed title II regulations.

In addition, the interaction of title II and title III has potentially significant federalism implications. Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including federal, state, and local governments. The ADA and the Department's implementing regulation set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of state and local laws, particularly building codes. For these reasons, the Department has determined that this NPRM may have federalism implications and requires intergovernmental consultation in compliance with Executive Order 13132.

The Department intends to amend the regulation in a manner that meets the objectives of the ADA while also minimizing conflicts between state law and federal interests. To that end, as a member of the Access Board, the Department has been privy to substantial feedback from state and local governments through the development of the 2004 ADAAG. In addition, the Department solicited and received input from public entities in the September 2004 ANPRM. Some elements of the proposed rule reflect the Department's work to mitigate federalism implications, particularly the provisions that streamline the administrative process for state and local governments seeking ADA code certification under title III.

The Department is now soliciting comments from elected state and local officials and their representative national organizations through this NPRM. The Department seeks comment from all interested parties, but especially state and local elected officials, about the potential federalism implications of the proposed rule. The Department will welcome comments on whether the proposed rule may have

direct effects on state and local governments, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that all federal agencies and departments use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104-113 (15 U.S.C. 272(b)). In addition, the statute directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.

The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the proposed standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the International Building Code (IBC), and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, an historic level of harmonization has been achieved, which has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward that also gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800-514-0301 (voice); 800-514-0383 (TTY)) that the public is welcome to call during normal business hours to obtain

assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief, Disability Rights Section, whose contact information is provided in the introductory section of this rule, entitled, **FOR FURTHER INFORMATION CONTACT.**

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, requires agencies to clear forms and record keeping requirements with OMB before they can be introduced. This rule does not contain any paperwork or record keeping requirements, and does not require clearance under the PRA.

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects in 28 CFR Part 35

Administrative practice and procedure, Buildings and facilities, Civil rights, Communications, Individuals with disabilities, Reporting and recordkeeping requirements, State and local governments.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 204 of the Americans with Disabilities Act, Public Law 101–336, 42 U.S.C. 12134, and for the reasons set forth in the preamble, chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES

1. The authority citation for 28 CFR part 35 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

Subpart A—General

2–3. Amend § 35.104 by adding the following definitions of *1991 Standards*, *2004 ADAAG*, *direct threat*, *existing facility*, *other power-driven mobility device*, *proposed standards*, *service animal*, *qualified reader*, *video interpreting services (VIS)*, and

wheelchair in alphabetical order and revising the definitions of *auxiliary aids and services* and *qualified interpreter* to read as follows:

§ 35.104 Definitions.

1991 Standards means the ADA Standards for Accessible Design, codified at 28 CFR part 36, Appendix A.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191.

* * * * *

Auxiliary aids and services includes—

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, text telephones (TTYs), videotext displays, video interpreting services (VIS), accessible electronic and information technology, or other effective methods of making orally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers, taped texts, audio recordings, brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), large print materials, accessible electronic and information technology, or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

* * * * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

* * * * *

Existing facility means a facility that has been constructed and remains in existence on any given date.

* * * * *

Other power-driven mobility device means any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.

Proposed standards means the requirements set forth in appendices B and D to 36 CFR part 1191 as adopted by the Department of Justice.

* * * * *

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral interpreters, and cued speech interpreters. Oral interpreter means an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. Cued speech interpreter means an interpreter who functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

* * * * *

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary vocabulary.

* * * * *

Service animal means any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term *service animal* includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities. The term *service animal* does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.

* * * * *

Video interpreting services (VIS) means an interpreting service that uses video conference technology over high

speed Internet lines. VIS generally consists of a videophone, monitors, cameras, a high speed Internet connection, and an interpreter.

Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.

Subpart B—General Requirements

4. Amend § 35.133 by adding paragraph (c) to read as follows:

§ 35.133 Maintenance of accessible features.

* * * * *

(c) If the proposed standards reduce the number of required accessible elements below the number required by the 1991 Standards, the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the proposed standards.

5. Amend 28 CFR part 35 by adding § 35.136 to read as follows:

§ 35.136 Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability, unless the public entity can demonstrate that the use of a service animal would fundamentally alter the public entity's service, program, or activity.

(b) *Exceptions.* A public entity may ask an individual with a disability to remove a service animal from the premises if:

(1) The animal is out of control and the animal's handler does not take effective action to control it;

(2) The animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public entity provides; or

(3) The animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.

(c) *If an animal is properly excluded.* If a public entity properly excludes a service animal, it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) *General requirements.* The work or tasks performed by a service animal shall be directly related to the handler's disability. A service animal that accompanies an individual with a disability into a facility of a public entity shall be individually trained to do

work or perform a task, housebroken, and under the control of its handler. A service animal shall have a harness, leash, or other tether.

(e) *Care or supervision of service animals.* A public entity is not responsible for caring for or supervising a service animal.

(f) *Inquiries.* A public entity shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public entity may ask: If the animal is required because of a disability; and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.

(g) *Access to areas open to the public, program participants, and invitees.* Individuals with disabilities who are accompanied by service animals may access all areas of a public entity's facility where members of the public, program participants and invitees are allowed to go, unless the public entity can demonstrate that individuals accompanied by service animals would fundamentally alter the public entity's service, program, or activity.

(h) *Fees or surcharges.* A public entity shall not ask or require an individual with a disability to post a deposit, pay a fee or surcharge, or comply with other requirements not generally applicable to other citizens as a condition of permitting a service animal to accompany its handler in a public entity's facility, even if people accompanied by pets are required to do so. If a public entity normally charges its citizens for damage that they cause, a citizen with a disability may be charged for damage caused by his or her service animal.

6. Amend 28 CFR part 35 by adding § 35.137 to read as follows:

§ 35.137 Mobility devices.

(a) *Use of wheelchairs, scooters, and manually powered mobility aids.* A public entity shall permit individuals with mobility impairments to use wheelchairs, scooters, walkers, crutches, canes, braces, or other similar devices designed for use by individuals with mobility impairments in any areas open to pedestrian use.

(b) *Other power-driven mobility devices.* A public entity shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public entity can demonstrate that the use of the device is not reasonable or that its use will result in

a fundamental alteration of the public entity's service, program, or activity.

(c) *Development of policies permitting the use of other power-driven mobility devices.* A public entity shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable to allow an individual with a disability to participate in a service, program, or activity. Whether a modification is reasonable to allow the use of a class of power-driven mobility device by an individual with a disability in specific venues (e.g., parks, courthouses, office buildings, etc.) shall be determined based on:

(1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair;

(2) The risk of potential harm to others by the operation of the mobility device;

(3) The risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and

(4) The ability of the public entity to stow the mobility device when not in use, if requested by the user.

(d) *Inquiry into use of power-driven mobility device.* A public entity may ask a person using a power-driven mobility device if the mobility device is needed due to the person's disability. A public entity shall not ask a person using a mobility device questions about the nature and extent of the person's disability.

7. Amend 28 CFR part 35 by adding § 35.138 to read as follows:

§ 35.138 Ticketing.

(a) *General.* A public entity that sells tickets on a preassigned basis shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating during the same hours, through the same methods of distribution, and in the same types and numbers of ticketing sales outlets as other patrons, unless the modification would fundamentally alter the nature of the ticketing service, program, or activity.

(b) *Availability.* Tickets for accessible seating shall be made available during all stages of ticket sales, including, but not limited to, presales, promotions, lotteries, wait-lists, and general sales.

(c) *Identification of accessible seating.* If seating maps, plans, brochures, or other information is provided to the general public, wheelchair seating and companion seats shall be identified.

(d) *Notification of accessible seating locations.* A public entity that sells or distributes tickets for seating at

assembly areas shall, upon inquiry, inform spectators with disabilities and their companions of the locations of all unsold or otherwise available accessible seating for any ticketed event at the facility.

(e) *Sale of season tickets or other tickets for multiple events.* Season tickets or other tickets sold on a multi-event basis to individuals with disabilities and their companions shall be sold under the same terms and conditions as other tickets sold for the same series of events. Spectators purchasing tickets for accessible seating on a multi-event basis shall also be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent as permitted other spectators holding tickets for the same type of ticketing plan.

(f) *Hold and release of accessible seating.* A public entity may release unsold accessible seating to any person with or without a disability following any of the circumstances described below:

(1) When all seating (excluding luxury boxes, club boxes, or suites) for an event has been sold;

(2) When all seating in a designated area in the facility has been sold and the accessible seating being released is in the same designated area; or

(3) When all seating in a designated price range has been sold and the accessible seating being sold is within the same designated price range. Nothing in this provision requires a facility to release wheelchair seats for general sale.

(g) *Ticket prices.* The price of tickets for accessible seating shall not be set higher than for tickets to seating located in the same seating section for the same event. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location.

(h) *Prevention of fraudulent purchase of accessible seating.* A public entity may not require proof of disability before selling a wheelchair space.

(1) For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the wheelchair space uses a wheelchair.

(2) For season tickets, subscriptions, or other multi-events, it is permissible to ask the individual to attest in writing that the wheelchair space is for an

individual who utilizes a wheelchair. A public entity may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

(i) *Purchasing multiple tickets.* (1) Individuals with disabilities and their companions shall be permitted to purchase the same maximum number of tickets for an event per sales transaction as other spectators seeking to purchase seats for the same event. If there is an insufficient number of seats for all members of a party to sit together, seats shall be provided that are as close as possible to the wheelchair spaces. For accessible seating in a designated wheelchair area, a public entity shall provide up to three companion seats for each person with a disability who requires a wheelchair space, provided that at the time of purchase there are sufficient available wheelchair spaces.

(2) For group sales, if a group includes one or more individuals who use a wheelchair, the group shall be placed in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.

Subpart D—Program Accessibility

8. Amend § 35.150 as follows:

a. Redesignate paragraph (b)(2) as paragraph (b)(3);

b. Add the words “or acquisition” after the word “redesign” in the first sentence of paragraph (b)(1) and add paragraphs (b)(2), (b)(4), and (b)(5) to read as follows:

§ 35.150 Existing facilities.

* * * * *

(b) * * *

(2) *Safe harbor.* If a public entity has constructed or altered elements in an existing facility in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standard, such public entity is not, solely because of the Department's adoption of the proposed standards, required to retrofit such elements to reflect incremental changes in the proposed standards.

* * * * *

(4) *Reduced scoping for existing facilities.* For measures taken to comply with the program accessibility requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 35.151 of this part, except as follows:

(i) In addition to the provisions of section 240.2.1 of the proposed standards, where an existing play area provides elevated play components, an additional number of ground level play components may be substituted for the number of elevated play components that would have been required to comply with the provisions of section 240.2.2 of the proposed standards; and

(ii) Where an existing swimming pool has at least 300 linear feet of swimming pool wall, it shall comply with the applicable requirements for swimming pools, except that it shall provide at least one accessible means of entry that complies with section 1009.2 or section 1009.3 of the proposed standards.

(5) *Exemption for small facilities.* For measures taken to comply with the program accessibility requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 35.151 of this part, except as follows:

(i) Where an existing play area has less than 1000 square feet, it shall be exempt from the provisions of section 240 of the proposed standards;

(ii) Where an existing swimming pool has less than 300 linear feet of swimming pool wall, it shall be exempt from the provisions of section 242.2 of the proposed standards; and

(iii) Where an existing sauna or steam room was designed and constructed to seat only two people, it shall be exempt from the provisions of § 241 of the proposed standards.

* * * * *

9. Revise § 35.151 to read as follows:

§ 35.151 New construction and alterations.

(a) *Design and construction.* (1) Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(2) *Exception for structural impracticability.* (i) Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements. Full compliance will be considered structurally impracticable only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features.

(ii) If full compliance with this section would be structurally impracticable, compliance with this section is required to the extent that it is not structurally impracticable. In that case, any portion of the facility that can

be made accessible shall be made accessible to the extent that it is not structurally impracticable.

(b) *Alteration.* (1) Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(2) The path of travel requirements of § 35.151(b)(4) shall not apply to measures taken solely to comply with the program accessibility requirements of this section.

(3) Alterations to historic properties shall comply, to the maximum extent feasible, with the provisions applicable to historic properties in the design standards specified in § 35.151(c). If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(4) *Path of travel.* An alteration that affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path of travel to the altered area and the restrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the cost and scope of such alterations is disproportionate to the cost and scope of the overall alterations.

(i) *Primary function.* A *primary function* is a major activity for which the facility is intended. Areas that contain a primary function include, but are not limited to, the meeting rooms in a conference center, as well as offices and other work areas in which the activities of the public entity using the facility are carried out.

(A) Mechanical rooms, boiler rooms, supply storage rooms, employee lounges or locker rooms, janitorial closets, entrances, and corridors are not areas containing a primary function. Restrooms are not areas containing a primary function unless the provision of restrooms is the principal purpose of the area, e.g., in highway rest stops.

(B) For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations

that affect the usability of or access to an area containing a primary function.

(ii) A *path of travel* includes a continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility.

(A) An accessible path of travel may consist of walks and sidewalks, curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and other improved areas; parking access aisles; elevators and lifts; or a combination of these elements.

(B) For the purposes of this section, the term *path of travel* also includes the restrooms, telephones, and drinking fountains serving the altered area.

(C) *Safe harbor.* If a public entity has constructed or altered required elements of a path of travel in accordance with the specifications in either the 1991 Standards or the Uniform Federal Accessibility Standards, the public entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel.

(iii) *Disproportionality.* (A) Alterations made to provide an accessible path of travel to the altered area will be deemed disproportionate to the overall alteration when the cost exceeds twenty percent (20%) of the cost of the alteration to the primary function area.

(B) Costs that may be counted as expenditures required to provide an accessible path of travel may include:

(1) Costs associated with providing an accessible entrance and an accessible route to the altered area, e.g., the cost of widening doorways or installing ramps;

(2) Costs associated with making restrooms accessible, such as installing grab bars, enlarging toilet stalls, insulating pipes, or installing accessible faucet controls;

(3) Costs associated with providing accessible telephones, such as relocating a telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); and

(4) Costs associated with relocating an inaccessible drinking fountain.

(iv) *Duty to provide accessible features in the event of disproportionality.* (A) When the cost of alterations necessary to make the path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, the path of travel

shall be made accessible to the extent that it can be made accessible without incurring disproportionate costs.

(B) In choosing which accessible elements to provide, priority should be given to those elements that will provide the greatest access, in the following order:

- (1) An accessible entrance;
- (2) An accessible route to the altered area;
- (3) At least one accessible restroom for each sex or a single unisex restroom;
- (4) Accessible telephones;
- (5) Accessible drinking fountains; and
- (6) When possible, additional accessible elements such as parking, storage, and alarms.

(v) *Series of smaller alterations.* (A) The obligation to provide an accessible path of travel may not be evaded by performing a series of small alterations to the area served by a single path of travel if those alterations could have been performed as a single undertaking.

(B)(1) If an area containing a primary function has been altered without providing an accessible path of travel to that area, and subsequent alterations of that area, or a different area on the same path of travel, are undertaken within three years of the original alteration, the total cost of alterations to the primary function areas on that path of travel during the preceding three-year period shall be considered in determining whether the cost of making that path of travel accessible is disproportionate.

(2) Only alterations undertaken after the effective date of this part shall be considered in determining if the cost of providing an accessible path of travel is disproportionate to the overall cost of the alterations.

(c) *Accessibility standards.* (1) For facilities on which construction commences before [date six months after the effective date of the final rule], design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR part 101–19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (Appendix A to the Department of Justice's final rule implementing title III of the ADA, 56 FR 35544) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(j) of the 1991 Standards shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to

the facility or part of the facility is thereby provided.

(2) Facilities on which construction commences on or after [date six months after the effective date of the final rule] shall comply with the proposed standards.

(d) *Scope of coverage.* The proposed standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise in the text, advisory notes, appendix notes, and figures contained in the ADA Standards explain or illustrate the requirements of the rule, they do not establish enforceable requirements.

(e) *Social service establishments.* Group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units subject to the proposed standards shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in sections 233 and 809.

(1) In sleeping rooms covered by this section with more than twenty-five beds, five percent (5%) minimum of the beds shall have clear floor space complying with section 806.2.3.

(f) *Housing at a place of education.* Dormitories or residence halls operated by or on behalf of places of education that are subject to the proposed standards shall comply with the provisions applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806.

(g) *Assembly areas.* Assembly areas subject to the proposed standards shall comply with the provisions applicable to assembly areas, including, but not limited to, sections 221 and 804. In addition, assembly areas shall ensure that—

(1) Wheelchair and companion seating locations are dispersed among all levels of the facility that are served by an accessible route;

(2) Wheelchair and companion seating locations are not located on (or obstructed by) temporary platforms or other movable structures. When wheelchair seating locations are not required to accommodate people who use wheelchairs, individual, readily removable seats may be placed in those spaces;

(3) Facilities that have more than 5,000 seats shall provide at least five wheelchair locations that are configured to provide at least three companion seats for each wheelchair space; and

(4) Stadium-style movie theaters locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

(i) It is located within the rear sixty percent (60%) of the seats provided in an auditorium; or

(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(h) *Medical care facilities.* Medical care facilities subject to the proposed standards shall comply with the provisions applicable to medical care facilities, including, but not limited to, sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient rooms required by section 223.2.1 in a manner that enables patients with disabilities to have access to appropriate specialty services.

(i) *Curb ramps.* (1) Newly constructed or altered streets, roads, and highways must contain curb ramps at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps at intersections to streets, roads, or highways.

10. Amend 28 CFR part 35 by adding § 35.152 to read as follows:

§ 35.152 Detention and correctional facilities.

(a) *General.* Public entities that are responsible for the operation or management of detention and correctional facilities, either directly or through contracts or other arrangements, shall comply with this section.

(b) *Discrimination prohibited.* (1) Public entities shall ensure that qualified inmates or detainees with disabilities shall not, because that facility is inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity unless the public entity can demonstrate that the required actions would result in a fundamental alteration or undue burden.

(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless the public entity

can demonstrate that it is appropriate to make an exception for a specific individual, a public entity—

(i) Should not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;

(ii) Should not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment;

(iii) Should not place inmates or detainees with disabilities in facilities that do not offer the same programs as the facilities where they would ordinarily be housed; and

(iv) Should not deprive inmates or detainees with disabilities of visitation with family members by placing them in distant facilities where they would not otherwise be housed.

(c) *Alterations to detention and correctional facilities.* Alterations to jails, prisons, and other detention and correctional facilities will comply with the requirements of § 35.151(b).

However, when alterations are made to specific cells, detention and correctional facility operators may satisfy their obligation to provide the required number of cells with mobility features by providing the required mobility features in substitute cells (*i.e.*, cells other than those where alterations are originally planned), provided that each substitute cell—

(1) Is located within the same facility;

(2) Is integrated with other cells to the maximum extent feasible; and

(3) Has, at a minimum, equal physical access as the altered cells to areas used by inmates or detainees for visitation, dining, recreation, educational programs, medical services, work programs, religious services, and participation in other programs that the facility offers to inmates or detainees.

Subpart E—Communications

11. Revise § 35.160 to read as follows:

§ 35.160 General.

(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public with disabilities, and companions thereof are as effective as communications with others.

(2) For purposes of this section, companion means a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public entity should communicate.

(b) A public entity shall furnish appropriate auxiliary aids and services

where necessary to afford individuals with disabilities and their companions who are individuals with disabilities, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A public entity shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

(d) *Video interpreting services (VIS)*. A public entity that chooses to provide qualified interpreters via VIS shall ensure that it provides—

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high speed Internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head and the participating individual's head, arms, hands, and fingers, regardless of his body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VIS.

(e) *Sports stadiums*. One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall provide captioning on the scoreboards and video monitors for safety and emergency information.

12. Revise § 35.161 to read as follows:

§ 35.161 Telecommunications.

(a) Where a public entity communicates by telephone with applicants and beneficiaries, text telephones (TTYs) or equally effective telecommunications systems shall be used to communicate with individuals who are deaf or hard of hearing or have speech impairments.

(b) When a public entity uses an automated attendant system for receiving and directing incoming telephone calls, that automated attendant system must provide effective communication with individuals using auxiliary aids and services, including TTYs or a telecommunications relay system.

(c) A public entity shall respond to telephone calls from a telecommunications relay service established under title IV of the

Americans with Disabilities Act in the same manner that it responds to other telephone calls.

Subpart F—Compliance Procedures

13. Amend § 35.171 by revising paragraph (a)(2) to read as follows:

§ 35.171 Acceptance of complaints.

(a) * * *

(2)(i) If an agency other than the Department of Justice determines that it does not have section 504 jurisdiction and is not the designated agency, it shall promptly refer the complaint to either the appropriate designated agency or agency that has section 504 jurisdiction or to the Department of Justice, and so notify the complainant.

(ii) When the Department of Justice receives a complaint for which it does not have jurisdiction under section 504 and is not the designated agency, it may exercise jurisdiction pursuant to § 35.190(e) or refer the complaint to an agency that does have jurisdiction under section 504 or to the appropriate agency designated in subpart G of this part or, in the case of an employment complaint that is also subject to title I of the Act, to the Equal Employment Opportunity Commission.

* * * * *

14. Revise § 35.172 to read as follows:

§ 35.172 Investigations and compliance reviews.

(a) The designated agency shall investigate complaints for which it is responsible under § 35.171.

(b) The designated agency may conduct compliance reviews of public entities based on information indicating a possible failure to comply with the nondiscrimination requirements of this part.

(c) Where appropriate, the designated agency shall attempt informal resolution of any matter being investigated under this section, and, if resolution is not achieved and a violation is found, issue to the public entity and the complainant, if any, a Letter of Findings that shall include—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) Notice of the rights and procedures available under paragraph (d) of this section and §§ 35.173 and 35.174.

(d) At any time, the complainant may file a private suit pursuant to § 203 of the Act, whether or not the designated agency finds a violation.

Subpart G—Designated Agencies

15. Amend § 35.190 by adding paragraph (e) to read as follows:

§ 35.190 Designated agencies.

* * * * *

(e) When the Department receives a complaint directed to the Attorney General alleging a violation of this part that may fall within the jurisdiction of a designated agency or another Federal agency that may have jurisdiction under section 504, the Department may exercise its discretion to retain the complaint for investigation under this part.

Dated: May 30, 2008.

Michael B. Mukasey,
Attorney General.

[FR Doc. E8–12622 Filed 6–16–08; 8:45 am]

BILLING CODE 4410–13–P

DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 106; AG Order No. 2968–2008]

RIN 1190–AA44

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to: Adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are “consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board” (Access Board); and perform periodic reviews of any rule judged to have a significant economic impact on a substantial number of small entities, and a regulatory assessment of the costs and benefits of any significant regulatory action as required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

In this NPRM, the Department proposes to adopt Parts I and III of the *Americans With Disabilities Act and Architectural Barriers Act Accessibility Guidelines* (2004 ADAAG), which were published by the Architectural and Transportation Barriers and Compliance Board (Access Board) on July 23, 2004. Prior to its adoption by the Department, the 2004 ADAAG is effective only as guidance to the Department; it has no legal effect on the public until the Department issues a final rule adopting

the revised ADA Standards (proposed standards).

Concurrently with the publication of this NPRM, the Department is publishing an NPRM to amend its title II regulation, which covers state and local government entities, in order to adopt the 2004 ADAAG as its proposed standards for title II entities, to make amendments to the title II regulation for consistency with title III, and to make amendments that reflect the collective experience of 16 years of enforcement of the ADA.

DATES: All comments must be received by August 18, 2008.

ADDRESSES: Submit electronic comments and other data to <http://www.regulations.gov>. Address written comments concerning this NPRM to: ADA NPRM, P.O. Box 2846, Fairfax, VA 22031-0846. Overnight deliveries should be sent to the Disability Rights Section, Civil Rights Division, U.S. Department of Justice, located at 1425 New York Avenue, NW., Suite 4039, Washington, DC 20005. All comments will be made available for public viewing online at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Janet L. Blizard, Deputy Chief, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll-free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

This rule is also available in an accessible format on the ADA Home Page at <http://www.ada.gov>. You may obtain copies of this rule in large print or on computer disk by calling the ADA Information Line listed above.

SUPPLEMENTARY INFORMATION:

Electronic Submission and Posting of Public Comments

You may submit electronic comments to <http://www.regulations.gov>. When submitting comments electronically, you must include CRT Docket No. 106 in the subject box, and you must include your full name and address.

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be

posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify information you want redacted.

If you want to submit confidential business information as part of your comment but do not want it posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the public docket file. If you wish to inspect the agency's public docket file in person by appointment, please see the "FOR FURTHER INFORMATION CONTACT" paragraph.

Overview

Throughout this NPRM, the current, legally enforceable ADA Standards will be referred to as the "1991 Standards," 28 CFR part 36, App. A, 56 FR 35544 (July 26, 1991), modified in part at 59 FR 2674 (Jan. 18, 1994). The Access Board's 2004 revised guidelines will be referred to as the "2004 ADAAG," 69 FR 44084 (July 23, 2004), as amended (editorial changes only) at 70 FR 45283 (Aug. 5, 2005). The revisions now proposed in the NPRM, based on the 2004 ADAAG, are referred to in the preamble as the "proposed standards."

In performing the required, periodic review of its existing regulation, the Department has reviewed the title III regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. The Department's initial, formal benefit-cost analysis can be found at Appendix B. See E.O. 12866, 58 FR 51735 (Sept. 30, 1993), amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2703 (Jan. 18, 2007); 5 U.S.C. 601, 603, and 610(a); and OMB Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>. The NPRM was submitted to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs, for

review and approval prior to publication in the **Federal Register**. It has also been reviewed by the Small Business Administration's Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002).

Purpose

On July 26, 1990, President George H.W. Bush signed into law the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*, a comprehensive civil rights law prohibiting discrimination on the basis of disability. At the beginning of his administration, President George W. Bush underscored the nation's commitment to ensuring the rights of over fifty million individuals with disabilities nationwide by announcing the New Freedom Initiative (available at <http://www.whitehouse.gov/infocus/newfreedom>). The Access Board's publication of the 2004 ADAAG is the culmination of a long-term effort to facilitate ADA compliance and enforcement by eliminating, to the extent possible, inconsistencies among federal accessibility requirements and between federal accessibility requirements and state and local building codes. In support of this effort, the Department is announcing its intention to adopt standards consistent with Parts I and III of the 2004 ADAAG as the ADA Standards for Accessible Design. To facilitate this process, the Department is seeking public comment on the issues discussed in this notice.

The ADA and Department of Justice Regulations

The ADA broadly protects the rights of individuals with disabilities in employment, access to state and local government services, places of public accommodation, transportation, and other important areas of American life and, in addition, requires newly designed and constructed or altered state and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Under the ADA, the Department is responsible for issuing regulations to implement title II and title III of the Act, except to the extent that transportation providers subject to title II or title III are regulated by the Department of Transportation. *Id.* at 12134.

The Department also is proposing amendments to its title II regulation, which prohibits discrimination on the basis of disability in state and local government services, concurrently with the publication of this NPRM, in this issue of the **Federal Register**.

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities like factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–89.

On July 26, 1991, the Department issued its final rules implementing title II and title III, which are codified at 28 CFR part 35 (title II) and part 36 (title III). Appendix A of the title III regulation, at 28 CFR part 36, contains the 1991 Standards, which were based upon the version of ADAAG published by the Access Board on the same date. Under the Department's regulation implementing title III, places of public accommodation and commercial facilities are currently required to comply with the 1991 Standards with respect to newly constructed or altered facilities.

Relationship to Other Laws

The Department of Justice regulation implementing title III, 28 CFR 36.103, provides:

(a) Rule of interpretation. Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, or the regulations issued by federal agencies pursuant to that title.

(b) Section 504. This part does not affect the obligations of a recipient of federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and regulations issued by federal agencies implementing section 504.

(c) Other laws. This part does not invalidate or limit the remedies, rights, and procedures of any other federal, state, or local laws (including state common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them.

Nothing in this proposed rule will alter this relationship. The Department recognizes that public accommodations subject to title III of the ADA may also be subject to title I of the ADA, which prohibits discrimination on the basis of disability in employment; section 504, which prohibits discrimination on the basis of disability in the programs and activities of recipients of federal financial assistance; and other federal statutes such as the Air Carrier Access

Act, 49 U.S.C. 41705, and the Fair Housing Act, 42 U.S.C. 3601 *et seq.* Compliance with the Department's ADA regulations does not necessarily ensure compliance with other federal statutes.

Public accommodations that are subject both to the Department's regulations and to regulations published by other federal agencies must ensure that they comply with the requirements of both regulations. If there is a direct conflict between the regulations, the regulation that provides greater accessibility will prevail. When different statutes apply to entities that routinely interact, each entity must follow the regulation that specifically applies to it. For example, a quick service restaurant in an airport is a public accommodation subject to title III. It regularly serves the passengers of air carriers subject to the Air Carrier Access Act (ACAA). The restaurant is subject to the title III requirements, not to the ACAA requirements. Conversely, the airline is required to comply with the ACAA, not with the ADA.

The Roles of the Access Board and the Department of Justice

The Access Board was established by section 502 of the Rehabilitation Act of 1973, 29 U.S.C. 792. The Board consists of thirteen public members appointed by the President, of whom the majority must be individuals with disabilities, and the heads of twelve federal departments and agencies specified by statute, including the heads of the Department of Justice and the Department of Transportation. Originally, the Access Board was established to develop and maintain accessibility guidelines for federally funded facilities under the Architectural Barriers Act of 1968 (ABA). 42 U.S.C. 4151 *et seq.* The passage of the ADA expanded the Access Board's responsibilities. The ADA requires the Access Board to “issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter * * * to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.” 42 U.S.C. 12204. The ADA requires the Department to issue regulations that include enforceable accessibility standards applicable to facilities subject to title II or title III that are consistent with the minimum guidelines issued by the Access Board. *Id.* at 12134, 12186.

The Department was extensively involved in the development of the 2004

ADAAG. As a federal member of the Access Board, the Attorney General's representative voted to approve the revised guidelines. Although the enforceable standards issued by the Department under title II and title III must be consistent with the minimum guidelines published by the Access Board, it is the sole responsibility of the Attorney General to promulgate standards and to interpret and enforce those standards.

The ADA also requires the Department to develop regulations with respect to existing facilities subject to title II (Subtitle A) and title III. How and to what extent the Access Board's guidelines are used with respect to the barrier removal requirement applicable to existing facilities under title III of the ADA and to the provision of program accessibility under title II of the ADA are solely within the discretion of the Department.

The Revised Guidelines (2004 ADAAG)

Part I of the 2004 ADAAG provides scoping requirements for facilities subject to the ADA; scoping is a term used in the 2004 ADAAG to describe requirements (set out in Parts I and II) that prescribe what elements and spaces—and, in some cases, how many—must comply with the technical specifications. Part II provides scoping (which is defined in the preamble of title 2) requirements for facilities subject to the ABA (*i.e.*, facilities designed, built, altered, or leased with federal funds). Part III provides uniform technical specifications for facilities subject to either statute. This revised format is designed to eliminate unintended conflicts between the two federal accessibility standards and to minimize conflicts between the federal regulations and the model codes that form the basis of many state and local building codes.

The 2004 ADAAG is the culmination of a ten-year effort to improve ADA compliance and enforcement. In 1994, the Access Board began the process of updating the original ADAAG by establishing an advisory committee composed of members of the design and construction industry, the building code community, state and local government entities, and people with disabilities. In 1999, based largely on the report and recommendations of the advisory committee,¹ the Access Board issued a proposed rule to update and revise its ADA and ABA Accessibility Guidelines.

¹ After a two-year process of collaboration with the Access Board, the Advisory Committee issued its *Recommendations for a New ADAAG* in September 1996, available at <http://www.access-board.gov/pubs.htm>.

See 64 FR 62248 (Nov. 16, 1999). In response to its proposed rule, the Access Board received more than 2,500 comments from individuals with disabilities, affected industries, state and local governments, and others. The Access Board provided further opportunity for participation by holding public hearings throughout the nation. The Access Board worked vigorously from the beginning to harmonize the ADA and ABA Accessibility Guidelines with industry standards and model codes. The Access Board released an interim draft of its guidelines to the public on April 2, 2002, 67 FR 15509, in order to provide an opportunity for entities with model codes to consider amendments that would promote further harmonization. By the date of its final publication on July 23, 2004, 69 FR 44084, the 2004 ADAAG had been the subject of extraordinary public participation and review.

In addition, the Access Board amended the ADAAG four times since 1998. In 1998, it added specific guidelines on state and local government facilities, 63 FR 2000 (Jan. 13, 1998), and building elements designed for use by children, 63 FR 2060 (Jan. 13, 1998). Subsequently, the Access Board added specific guidelines on play areas, 65 FR 62498 (Oct. 18, 2000), and on recreational facilities 67 FR 56352 (Sept. 3, 2002).

These amendments to the ADAAG have not previously been adopted by the Department as ADA Standards. Through this NPRM, the Department is announcing its intention to publish a proposed rule that will adopt revised ADA Standards consistent with the 2004 ADAAG, including all of the amendments to the ADAAG since 1998.

The Advance Notice of Proposed Rulemaking

The Department published an advance notice of proposed rulemaking (ANPRM) on September 30, 2004, 69 FR 58768, for two reasons: (1) To begin the process of adopting the Access Board's 2004 ADAAG by soliciting public input on issues relating to the potential application of the Access Board's revisions once the Department adopts them as revised standards; and (2) to request background information that would assist the Department in preparing a regulatory analysis under the guidance provided in OMB Circular A-4, available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>, Sections D (Analytical Approaches) and E (Identifying and Measuring Benefits and Costs). While underscoring that the Department, as a member of the Access Board, had

already reviewed comments provided to the Access Board during its development of the 2004 ADAAG, the Department specifically requested public comment on the potential application of the 2004 ADAAG to existing facilities. The extent to which the 2004 ADAAG is used with respect to the barrier removal requirement applicable to existing facilities under title III (like the program access requirement in title II) is solely within the discretion of the Department. The ANPRM dealt with the Department's responsibilities under both title II and title III.

Public response to the ANPRM was extraordinary. The Department extended the comment deadline by four months at the public's request. 70 FR 2992 (Jan. 19, 2005). By the end of the extended comment period, the Department had received more than 900 comments covering a broad range of issues. Most of the comments responded to questions specifically posed by the Department, including issues involving the application of the 2004 ADAAG once the Department adopts it and cost information to assist the Department in its regulatory assessment. The public provided information on how to assess the cost of elements in small facilities, office buildings, hotels and motels, assembly areas, hospitals and long-term care facilities, residential units, recreational facilities, and play areas. Comments addressed the effective date of the proposed standards, the triggering event by which the effective date is measured in new construction, and variations on a safe harbor that would excuse elements built in compliance with the 1991 Standards from compliance with the proposed standards. Comments responded to questions regarding elements scoped for the "first time" in the 2004 ADAAG, including detention and correctional facilities, recreational facilities, and play areas, as well as proposed additions to the Department's regulation for items such as free-standing equipment. Comments also dealt with specific requirements in the 2004 ADAAG.

Many commenters requested clarification of or changes to the Department's title III regulation. Commenters observed that now, more than seventeen years after enactment of the ADA, as facilities are becoming physically accessible to individuals with disabilities, the Department needs to focus on second generation issues that ensure that individuals with disabilities can actually gain access to and use the accessible elements. So, for example, commenters asked the

Department to focus on such issues as ticketing in assembly areas and reservations for hotel rooms, rental cars, and boat slips. The public asked about captioning and the division of responsibility between the Department and the Access Board for fixed and non-fixed (or free-standing) equipment. Finally, commenters asked for clarification on some issues in the existing regulations, such as title III's requirements regarding service animals.

All of the issues raised in the public comments are addressed, in turn, in this NPRM or in the NPRM for title II. Issues involving title II of the ADA, such as the exhaustion of administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e *et seq.*, are addressed in the Department's NPRM for title II, in this issue of the **Federal Register**, published concurrently with this NPRM.

Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews

The Department must provide two types of assessments as part of its NPRM: an analysis of the costs and benefits of adopting the 2004 ADAAG as its proposed standards, and a periodic review of its existing regulations to consider their impact on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13258, 67 FR 9385 (Feb. 26, 2002) and E.O. 13422, 72 FR 2763 (Jan. 18, 2007); Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 610(a); OMB Circular A-4, <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>; and E.O. 13272, 67 FR 53461 (Aug. 13, 2002).

The Department leaves open the possibility that, as a result of the receipt of comments on an issue raised by the 2004 ADAAG, or if the Department's Regulatory Impact Analysis reveals that the costs of making a particular feature or facility accessible are disproportionate to the benefits to persons with disabilities, the Attorney General, as a member of the Access Board, may return the issue to the Access Board for further consideration of the particular feature or facility. In such a case, the Department would delay adoption of the accessibility requirement for the particular feature or facility in question in its final rule and await Access Board action before moving to consider any final action.

Regulatory Impact Analysis. An initial regulatory impact analysis of the costs and benefits of a proposed rule is required by Executive Order 12866 (as amended by Executive Order 13258 and Executive Order 13422). A full benefit-cost analysis is required of any regulatory action that is deemed to be significant—that is, a regulation that will have an annual effect of \$100 million or more on the economy. See OMB Circular A–4; Regulatory Flexibility Act of 1980, 5 U.S.C. 601, 603, as amended by SBREFA, 5 U.S.C. 610(a).

Early in the rulemaking process, the Department concluded that the economic impact of its adoption of the 2004 ADAAG as proposed standards for title II and title III was likely to exceed the threshold for significant regulatory actions of \$100 million. The Department has completed its initial regulatory impact analysis measuring the incremental benefits and costs of the proposed standards; the initial regulatory impact analysis is addressed at length with responses to public comments from the ANPRM, in Appendix B.

The public may notice differences between the Department's regulatory impact analysis and the Access Board's regulatory assessment of the 2004 ADAAG. The differences in framework and approach result from the differing postures and responsibilities of the Department and the Access Board. First, the breadth of the proposed changes assessed in Appendix A of this NPRM is greater than in the Access Board's assessments related to the 2004 ADAAG. Unlike the Access Board, the Department must examine the effect of the proposed standards not only on newly constructed or altered facilities, but also on existing facilities. Second, whereas the Access Board issued separate rules for many of the differences between the 1991 Standards and the 2004 ADAAG (e.g., play areas and recreational facilities), the Department is proposing to adopt several years of revisions in a single rulemaking.

According to the Department's initial Regulatory Impact Analysis ("RIA"), it is estimated that the incremental cost of the proposed requirements for each of the following eight existing elements will exceed monetized benefits by more than \$100 million when using the 1991 Standards as the comparative baseline: Side reach; water closet clearances in single-user toilet rooms with in-swinging doors; stairs; elevators; location of accessible routes to stages; accessible attorney areas and witness stands; assistive listening systems; and

accessible teeing grounds, putting greens, and weather shelters at golf courses. However, this baseline figure does not take into account the fact that, since 1991, various model codes and consensus standards—such as the model International Building Codes ("IBC") published by the International Codes Council and the consensus accessibility standards developed by the American National Standards Institute ("ANSI")—have been adopted by a majority of states (in whole or in part) and that these codes have provisions mirroring the substance of the Department's proposed regulations. Indeed, such regulatory overlap is intentional since harmonization among federal accessibility standards, state and local building codes, and model codes, is one of the goals of the Department's rulemaking efforts.

Even though the 1991 Standards are an appropriate baseline to compare the new requirements against, since they represent the current set of uniform federal regulations governing accessibility, in practice it is likely that many public and private facilities across the country are already being built or altered in compliance with the Department's proposed standards with respect to these elements. Because the model codes are voluntary, public entities often modify or carve out particular standards when adopting them into their laws, and even when the standards are the same, local officials often interpret them differently. The mere fact that a state or local government has adopted a version of the IBC does not necessarily mean that the facilities within that jurisdiction are legally subject to its accessibility provisions. Because of these complications, and the inherent difficulty of determining which baseline is the most appropriate for each provision, the RIA accompanying this rulemaking compares the costs and benefits of the proposed requirements to several alternative baselines, which reflect various versions of existing building codes. In addition, since the Department is soliciting comment on these eight particular provisions with high net costs, the Department believes it is useful to further discuss the potential impact of alternative baselines on these particular provisions.

For example, the Department's proposed standards for existing stairs and elevators have identical counterparts in one or more IBC versions (2000, 2003, or 2006). Please note, however, that the IBC 2006 version bases a number of its provisions on guidelines in the 2004 ADAAG. These IBC versions, in turn, have been adopted

collectively by forty-six (46) states and the District of Columbia on a statewide basis. In the four (4) remaining states (Colorado, Delaware, Illinois, and Mississippi), while IBC adoption is left to the discretion of local jurisdictions, the vast majority of these local jurisdictions have elected to adopt IBC as their local code. Thus, given that nearly all jurisdictions in the country currently enforce a version of the IBC as their building code, and to the extent that the IBC building codes may be settled in this area and would not be further modified to be consistent if they differ from the final version of these regulations, the incremental costs and benefits attributable to the Department's proposed regulations governing alterations to existing stairs and elevators may be less significant than the RIA suggests over the life of the regulation.

In a similar vein, consideration of an alternate IBC/ANSI baseline would also likely lower the incremental costs and benefits for five other proposed standards (side reach; water closet clearances in single-user toilet rooms with in-swinging doors; location of accessible routes to stages; accessible attorney areas and witness stands; and assistive listening systems), albeit to a lesser extent. Each of these proposed standards has a counterpart in either Chapter 11 of one or more versions of the IBC, ANSI A117.1, or a functionally equivalent state accessibility code. While IBC Chapter 11 and ANSI A117.1 have yet not been as widely adopted as some other IBC chapters, the RIA nonetheless still estimates that between 15% and 35% of facilities nationwide are already covered by IBC/A117.1 provisions that mirror these five proposed standards. It is thus expected that the incremental costs and benefits for these proposed standards may also be lower than the costs and benefits relative to the 1991 Standards baseline.

Question 1: The Department believes it would be useful to solicit input from the public to inform us on the anticipated costs or benefits for certain requirements. The Department therefore invites comment as to what the actual costs and benefits would be for these eight existing elements, in particular as applied to alterations, in compliance with the proposed regulations (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses), as well as additional practical benefits from these

requirements, which are often difficult to adequately monetize.

The Department does not have statutory authority to modify the 2004 ADAAG; instead, the ADA requires the Attorney General to issue regulations implementing the ADA that are “consistent with” the ADA Accessibility Guidelines issued by the Access Board. See 42 U.S.C. 12134(c), 12186(c). As noted above in other parts of this preamble, the Department leaves open the possibility of seeking further consideration by the Access Board of particular issues based on disproportionate costs compared to benefits and public comments. The Access Board did not have the benefit of our RIA or public comment on our RIA as it pertains to the 2004 ADAAG.

Question 2: The Department would welcome comment on whether any of the proposed standards for these eight areas (side reach, water closet clearances in single-user toilet rooms with in-swinging doors, stairs, elevators, location of accessible routes to stages, accessible attorney areas and witness stands, assistive listening systems, and accessible teeing grounds, putting greens, and weather shelters at golf courses) should be raised with the Access Board for further consideration, in particular as applied to alterations.

Stages. The proposed requirement to provide direct access to stages represents an effort to ensure that individuals with disabilities are able to participate in programs in an integrated setting. Under the current 1991 Standards, a compliant accessible route connecting seating locations to performing areas is permitted to go outside the assembly area and make use of an indirect interior accessible route to access the stage area. As a result, even when other audience members are able to access a stage directly via stairs in order to participate in ceremonies, skits, or other interactive on-stage events, persons with mobility disabilities may be required to use an inconvenient indirect entrance to the stage. As graduates or award recipients, they may be required to part company with their peers, to make their way to the stage alone, and to make a conspicuous entrance. To address this situation, the proposed requirement mandates that, when a direct circulation path (for audience members) connects the seating area to a stage, the accessible route to the stage must also be direct.

The Department has generally determined that the overall costs for this requirement are relatively high in the alterations context, due to the expense of having to provide a lift or ramp to access the stage area directly, regardless

of which baseline is used for the analysis. The Department, however, has had difficulty in estimating the real costs of this requirement because of a lack of information about whether colleges, elementary and secondary schools, and entertainment venues now routinely provide such access when they are altering existing auditoriums or how frequently such alterations occur. Also, the Department currently lacks sufficient data or other sources with which to quantify the benefits that accrue to students and other persons with disabilities who, as a result of direct access to stages, would be able to participate fully and equally in graduation exercises and other events.

Question 3: The Department would welcome information from operators of auditoriums on the likelihood that their auditoriums will be altered in the next fifteen years, and, if so, whether such alterations are likely to include accessible and direct access to stages. In addition, the Department would like specific information on whether, because of local law or policy, auditorium operators are already providing a direct accessible route to their stages. (The Department is also interested in whether having to provide a direct access to the stage would encourage operators of auditoriums to postpone or cancel the alteration of their facilities.) The Department also seeks information on possible means of quantifying the benefits that accrue to persons with disabilities from this proposed requirement or on its importance to them. To the extent that such information cannot be quantified, the Department welcomes examples of personal or anecdotal experience that illustrate the value of this requirement.

The Department's RIA also estimates significant costs, regardless of the baseline used, for the proposed requirement that court facilities must provide an accessible route to a witness stand or attorney area and clear floor space to accommodate a wheelchair. These costs arise both in the new construction and alteration contexts. If the witness stand is raised, then either a ramp or lift must be provided to ensure access to the witness stand. While the RIA quantifies the benefits for this proposed requirement (as it does for all of the proposed requirements) primarily in terms of time savings, the Department fully appreciates that such a methodology does not capture the intangible benefits that accrue when persons with mobility disabilities are able to participate in the court process as conveniently as any other witness or party. Without access to the witness stand, for example, a wheelchair user, or

a witness who uses other mobility devices such as a walker or crutches, may have to sit at floor level. If the witness with a mobility disability testifies from a floor level position, the witness could be placed at a disadvantage in communicating with the judge and jury who may no longer be able to see the witness as easily, or, potentially at all. This may create a reciprocal difficulty for the judge and jurors who lose the sightline normally provided by the raised witness stand that enables them to see and hear the witness in order to evaluate his or her demeanor and credibility—difficulty that redounds to the detriment of litigants themselves and ultimately our system of justice.

Question 4: The Department welcomes comment on how to measure or quantify the intangible benefits that would accrue from accessible witness stands. We particularly invite anecdotal accounts of the courtroom experiences of individuals with disabilities who have encountered inaccessible witness stands, as well as the experiences of state and local governments in making witness stands accessible, either in the new construction or alteration context.

Under the 1991 Standards, Assistive Listening Systems (“ALS”) are required in courtrooms and in other settings where audible communication is integral to the use of the space and audio amplification systems are provided for the general audience. However, these Standards do not set forth technical specifications for such systems. Since 1991, advancements in ALS and the advent of digital technologies have made these systems more amenable to uniform technical specifications. In keeping with these technological advancements, the revised requirements create a technical standard that, among other things, ensures that a certain percentage of required ALS have hearing-aid compatible receivers. Requiring hearing-aid compatible ALS enables persons who are hard of hearing to hear a speech, a play, a movie, or to follow the content of a trial. Without an effective ALS, people with hearing loss are effectively excluded from participation because they are unable to hear or understand the audible portion of the presentation.

From an economic perspective, the cost of a single hearing-aid compliant ALS is not high—about \$500 more than a non-compliant system—and compliant equipment is readily available on the retail market. As estimated in the RIA, the high overall costs for the revised technical requirements for ALS are instead driven by the assumption that entities with large assembly areas (such

as universities, stadiums, and auditoriums) will be required to purchase a relatively large number of compliant systems. On the other hand, the overall scoping for ALS has been reduced in the Department's proposed requirement, thus mitigating the cost to covered entities. The proposed revision to the technical requirement merely specifies that (25% or at least 2) of the required ALS receivers must be hearing-aid compatible. The RIA estimates that a significant part of the cost of this requirement will come from the replacement of individual ALS receivers and system maintenance.

Question 5: The Department seeks information from arena and assembly area administrators on their experiences in managing ALS. In order to evaluate the accuracy of the assumptions in the RIA relating to ALS costs, the Department welcomes particular information on the life expectancy of ALS equipment and the cost of ongoing maintenance.

The Department's proposed requirements mandate an accessible (pedestrian) route that connects all accessible elements within the boundary of the golf course and facility, including teeing grounds, putting greens, and weather shelters. Requiring access to necessary features of a golf course ensures that persons with mobility disabilities may fully and equally participate in a recreational activity.

From an economic perspective, the Department's RIA assumes that virtually every tee and putting green on an existing course will need to be regraded in order to provide compliant accessible (pedestrian) routes to these features. However, the Department's proposal also excuses compliance with the requirement for an accessible (pedestrian) route so long as a "golf car passage" (*i.e.*, the path typically used by golf cars) is otherwise provided to the teeing ground, putting green, or other accessible element on a course. Because it is likely that most public and private golf courses in the United States already provide golf passages to most or all holes, the actual costs of this requirement for owners and operators of existing golf courses should be reduced with little to no practical loss in accessibility.

Question 6: The Department seeks information from the owners and operators of golf courses, both public and private, on the extent to which their courses already have golf car passages to teeing grounds, putting greens, and weather shelters, and, if so, whether they intend to avail themselves of the proposed exception.

Analysis of impact on small entities. The second type of analysis that the Department has undertaken is a review of its existing regulations for title II and title III in order to consider the impact of those regulations on small entities. The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. 5 U.S.C. 610(b). Based on these factors, the agency should determine whether to continue the rule without change, or to amend or rescind the rule to minimize any significant economic impact of the rule on a substantial number of small entities. *Id.* at 610(a).

In performing this review, the Department has gone through its regulation section by section, and, as a result, proposes several clarifications and amendments in this NPRM. Amendments to its title II regulation are proposed in the NPRM for title II published concurrently with this rule. The proposals reflect the Department's analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, a significant goal in the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

Organization of This NPRM

The subsequent sections of this NPRM deal with the Department's response to comments and its proposals for changes to its current regulation that derive from the required, periodic review that it performed. The proposed standards and the Department's response to comments regarding the 2004 ADAAG are contained in Appendix A to the NPRM. Appendix B to the NPRM contains the

Department's initial, formal benefit-cost analysis.

The section of the NPRM entitled, "General Issues," briefly introduces topics that are noteworthy because they are new to the title III regulation or have been the subject of attention or comment. The topics introduced in the general issues section include: safe harbor and other proposed limitations on barrier removal, service animals, equipment, wheelchairs and other power-driven mobility devices, auxiliary aids and services (including captioning and video interpreting services), and certification of state and local building codes.

Following the "General Issues" section, there is a section entitled, "Section-By-Section Analysis and Response to Comments." This section provides a detailed discussion of the proposed changes to the title III regulation. The section-by-section analysis follows the order of the current regulation, except that regulatory sections that remain unchanged are not indicated. The discussion within each section explains the proposals and the reasoning behind them, as well as the Department's response to related public comments. Subject areas that deal with more than one section of the regulation include references to the related sections, where appropriate.

Both the "General Issues" section and the "Section-By-Section Analysis" include specific questions to which the Department requests public response. These questions are numbered and italicized so that they are easier for readers to locate and reference. The Department emphasizes, however, that the public may comment on any aspect of this NPRM and is not required to respond solely to questions specifically posed by the Department.

The Department's proposed changes to the actual regulatory text of title III, that follow the section-by-section analysis are entitled, "Part 36: Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities."

General Issues

This section briefly introduces topics that are noteworthy because they are new to the title III regulation or have been the subject of considerable attention or comment. Each topic is discussed subsequently in the section-by-section analysis.

Safe harbor and other proposed limitations on barrier removal. One of the most important issues that the Department must address is the effect that supplemental or changed ADA Standards will have on the continuing

obligation of public accommodations to remove architectural, transportation, and communication barriers in existing facilities to the extent that it is readily achievable to do so. This issue was not addressed in the 2004 ADAAG because it was outside the scope of the Access Board's authority under the ADA. Responsibility for implementing title III's requirement that public accommodations eliminate existing architectural barriers where it is readily achievable to do so rests solely with the Department.

The Department's current regulation implementing title III of the ADA establishes the requirements for barrier removal by public accommodations. 28 CFR 36.304. Under this requirement, the Department uses the 1991 Standards as a guide to identify what constitutes an architectural barrier, as well as the specifications that covered entities must follow in making architectural changes to the extent that it is readily achievable. 28 CFR part 36, App. B. Once adopted, therefore, the 2004 ADAAG will present a new reference point for title III's requirement to remove architectural barriers in existing places of public accommodation. The Department is concerned that the incremental changes in the 2004 ADAAG may place unnecessary cost burdens on businesses that have already removed barriers by complying with the 1991 Standards in their existing facilities.

The Department seeks to strike an appropriate balance between ensuring that people with disabilities are provided access to buildings and facilities and potential financial burdens on existing places of public accommodation under their continuing obligation for barrier removal. Such a balance would not impose unnecessary financial burdens on existing places of public accommodation.

The Department's ANPRM raised several options that might reduce such financial burdens. One approach, described in the ANPRM as Option I, is to establish a safe harbor with regard to elements in existing facilities that comply with the scoping and technical provisions in the 1991 Standards. Specifically, the Department would deem that public accommodations have met their obligation for barrier removal with respect to any element in an existing facility if that element complies with the scoping and technical requirements in the 1991 Standards. Another possible approach—Option II in the ANPRM—is to reduce the scoping requirements for some of the supplemental or changed requirements as they apply to existing facilities (e.g.,

play areas and recreational facilities). Option III in the ANPRM proposed the exemption of certain elements in the proposed standards; under this option, the Department would determine that certain supplemental requirements are inappropriate for barrier removal. After reviewing the public comments on the ANPRM, the Department has decided to propose a combination of Options I and II. The specific proposals are addressed in the discussion of barrier removal in the section-by-section analysis of § 36.304 below.

The Department is not proposing to adopt Option III. Instead, in keeping with its obligations under the SBREFA to consider regulatory alternatives, the Department is seeking public comment on an alternative suggested by advocates for small business. Under this alternative, the Department would revamp its approach to barrier removal that is readily achievable as applied to "qualified small business" entities, which are defined in § 36.104.

Small business advocates argued for clearer guidance on when barrier removal is, and is not, readily achievable. According to the small business advocacy groups, the Department's current approach to readily achievable barrier removal disproportionately affects small businesses for the following reasons: (1) Small businesses are more likely to operate in older buildings and facilities; (2) the 1991 Standards are too numerous and technical for most small business owners to understand and then to square with the ADA requirements with state and local building or accessibility codes; and (3) small businesses are particularly vulnerable to title III litigation and are often compelled to settle because they cannot afford the litigation costs involved in proving whether an action is readily achievable. Advocates for small business endorsed many of the proposals in the ANPRM, such as the safe harbor and reduced scoping for some elements.

The proposed standards will go a long way toward meeting the concern of small businesses with regard to harmonizing federal and state requirements; the Access Board harmonized the 2004 ADAAG with the model codes that form the basis of most state and local accessibility codes. Still, the Department is proposing that a qualified small business is presumed to have done what is readily achievable in a given year if, in the prior tax year, it spent a fixed percentage of its revenues on readily achievable barrier removal. The Department believes that the efficacy of any such proposal will turn on two determinations: (1) The

definition of a qualified small business, and (2) the formula for calculating what percentage of revenues should be sufficient to satisfy the readily achievable presumption. The Department discusses its proposal for safe harbor and reduced scoping requirements in the section-by-section analysis of § 36.304.

The Department invites comment on whether public accommodations that operate existing facilities with play or recreation areas should be exempted from compliance with certain requirements in the 2004 ADAAG. Existing facilities would continue to be subject to accessibility requirements in existing law, but not specifically to the requirements in: (1) The Access Board's supplemental guidelines on play areas, 65 FR 62498 (Oct. 18, 2000); and (2) the Access Board's supplemental guidelines on recreation facilities, 67 FR 56352 (Sept. 3, 2002). Under that scenario, the 2004 ADAAG would apply only to new play areas and recreation facilities, and would not govern the accessibility of existing facilities as legal requirements. Public accommodations that operate existing facilities with play or recreation areas, pursuant to the ADA's requirements to provide equal opportunity for individuals with disabilities, may still have the obligation to provide an accessible route to the playground, some accessible equipment, and an accessible surface for the play area or recreation facility.

Question 7: Should the Department exempt owners and operators of public accommodations from specific compliance with the supplemental requirements for play areas and recreation facilities, and instead continue to determine accessibility in these facilities on a case-by-case basis under existing law? Please provide information on the effect of such a proposal on people with disabilities and places of public accommodation.

Service animals. The Department wishes to clarify the obligations of public accommodations to accommodate individuals with disabilities who use service animals. The Department continues to receive a large number of complaints from individuals with service animals. It appears that many covered entities are confused regarding their obligations under the ADA with regard to individuals with disabilities who use service animals. At the same time, some individuals with impairments—who would not be covered as individuals with disabilities—are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to hotels,

restaurants, and other places of public accommodation. Another trend is the use of wild, exotic, or unusual species, many of which are untrained, as service animals. The Department is proposing amendments to its regulation on service animals in the hope of mitigating the apparent confusion.

Minimal protection. In the Department's *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Although the Department received comments urging it to eliminate the minimal protection language, the Department continues to believe that it should retain the "providing minimal protection" language and interpret the language to exclude so-called "attack dogs" that pose a direct threat to others.

Guidance on permissible service animals. In the original regulation implementing title III, "service animal" was defined as "any guide dog, signal dog, or other animal," and the Department believed, at the time, that leaving the species selection up to the discretion of the person with a disability was the best course of action. Due to the proliferation of animals used by individuals, including wild animals, the Department believes that this area needs some parameters. Therefore, the Department is proposing to eliminate certain species from coverage even if the other elements of the definition are satisfied.

Comfort animals vs. psychiatric service animals. Under the Department's present regulatory language, some individuals and entities have assumed that the requirement that service animals must be individually trained to do work or perform tasks excluded all individuals with mental disabilities from having service animals. Others have assumed that any person with a psychiatric condition whose pet provided comfort to them was covered by the ADA. The Department believes that psychiatric service animals that are trained to do work or perform a task (*e.g.*, reminding its owner to take medicine) for individuals whose disability is covered by the ADA are protected by the Department's present regulatory approach.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing

safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.

The Department is proposing new regulatory text in § 36.104 to formalize its position on emotional support/comfort animals, which is that "[a]nimals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals." The Department wishes to state, however, that the exclusion of emotional support animals from ADA coverage does not mean that individuals with psychiatric, cognitive, or mental disabilities cannot use service animals. The Department proposes specific regulatory text in § 36.104 to make this clear: "The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities." This language simply clarifies the Department's longstanding position and is not a new position.

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.

Modification in policies, practices, or procedures. The preamble to § 36.302 of the current title III regulation states that the regulatory language was intended to provide the "broadest feasible access" to individuals with service animals while acknowledging that, in rare circumstances, accommodating service animals may not be required if it would result in a fundamental alteration of the nature of the goods or services the public accommodation provides or the safe operation of the public accommodation. 56 FR 35544, 35565 (July 26, 1991). In order to clarify this provision, the Department is incorporating into the proposed

regulation guidance that it has provided previously through technical assistance.

Proposed training standards. The Department has always required that service animals be individually trained to do work or perform tasks for the benefit of an individual with a disability, but has never imposed any type of formal training requirements or certification process. While some groups have urged the Department to modify this position, the Department does not believe such a modification would serve the array of individuals with disabilities who use service animals.

Detailed regulatory text changes and the Department's response to public comments on these issues and others are discussed below in the definition section, § 36.104, and the section on modifications in policies, practices, and procedures, § 36.302(c).

Equipment and furniture. In question seven of the ANPRM, the Department asked for comment on whether regulatory guidance is needed with respect to the acquisition and use of free-standing equipment or furnishings used by covered entities to provide services, and asked for specific examples of the circumstances in which such equipment should be addressed. The ANPRM explained that free-standing equipment was already addressed in the regulation in several different contexts, but because covered entities continue to raise questions about their obligations to provide accessible free-standing equipment, the Department was considering adding specific language on equipment. The Department received comments both in favor and against new guidance on accessible equipment and furniture, but has decided not to add any specific regulation governing equipment at this time.

Many businesses were opposed to additional requirements for free-standing equipment, although they favored a move toward clarity and specificity. Some businesses were concerned that they lack control of the design or manufacturing of such equipment.

Most organizations and individuals representing individuals with disabilities were in favor of adding or clarifying requirements for accessible equipment. Disability organizations pointed out that from the user's perspective, it is not relevant whether the equipment (*e.g.*, ATMs, vending machines) is free-standing or fixed, because the equipment must be accessible in order for individuals with disabilities to use it.

A specific point of concern to several commenters was inaccessible aisles

between movable display racks in stores. The Department's current regulation addresses this issue under barrier removal, requiring that stores rearrange display racks when readily achievable but adding the following exception to § 36.304(f): "The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space." If the rearrangement of display racks is not readily achievable, stores still have an obligation to provide alternatives to barrier removal, such as retrieving merchandise from inaccessible shelves or racks. 28 CFR 36.305(b)(2).

When the title III regulation was initially proposed in 1991, it contained a provision concerning accessible equipment, which required that newly purchased furniture or equipment that was made available for use at a place of public accommodation be accessible, unless complying with this requirement would fundamentally alter the goods, services, facilities, privileges, advantages, or accommodations offered, or would not be readily achievable. *See* 56 FR 7452, 7470–71 (Feb. 22, 1991). In the final title III regulation promulgated in 1991, the Department decided not to include this provision, explaining in the preamble to the regulation that "its requirements are more properly addressed under other sections, and . . . there are currently no appropriate accessibility standards addressing many types of furniture and equipment." 56 FR 35544, 35572 (July 26, 1991).

Equipment has been covered under the Department's ADA regulation, including under the provision requiring modifications in policies, practices, and procedures and the provision requiring barrier removal, even though there is no provision specifically addressing equipment. *See* 28 CFR 36.302, 36.304. If a person with a disability does not have full and equal access to a covered entity's services because of the lack of accessible equipment, the entity must provide that equipment, unless doing so would be a fundamental alteration or would not be readily achievable.

The Department has decided to continue with this approach, and not to add any specific regulatory guidance addressing equipment at this time. It intends to analyze the economic impact of future regulations governing specific types of free-standing equipment. The 2004 ADAAG includes revised requirements for some types of fixed equipment that are specifically addressed in the 1991 Standards, such as ATMs and vending machines, as well

as detailed requirements for fixed equipment that is not addressed by name in the current Standards, such as depositories, change machines, and fuel dispensers. Because the 2004 ADAAG provides detailed requirements for many types of fixed equipment, covered entities may apply those requirements to analogous free-standing equipment to ensure that they are accessible, and to avoid potential liability for discrimination. The Department also believes that when federal guidance for accessibility exists for equipment required to be accessible to individuals who are blind or have low vision, entities should consult such guidance (e.g., federal standards implementing section 508 of the Rehabilitation Act, 36 CFR part 1194, or the guidelines that specify communication accessibility for ATMs and fare card machines in the 2004 ADAAG, 36 CFR part 1191, App. D). With regard to the specific issue of display racks in stores, the Department does not propose to change the approach in the current regulation. The tension between access for individuals with disabilities and loss of selling space caused by the arrangement of the racks within the store is the same whether the store is newly constructed or an existing facility. The existing approach appropriately balances the needs of businesses and individuals with disabilities.

Accessible golf cars. Question six of the ANPRM asked whether golf courses should be required to make at least one, and possibly two, specialized golf cars available for the use of individuals with disabilities with no greater advance notice than that required of other golfers. The ANPRM also asked about the safety of such cars and their potential for damaging golf course greens. Accessible golf cars are designed for use by individuals with mobility disabilities and are operated using hand controls. An individual with a disability can hit a golf ball while remaining in the seat of an accessible golf car. Some accessible golf cars have a swivel, elevated seat that allows the golfer to play from a semi-standing position. Accessible golf cars can be used by individuals without disabilities as well. The Department received many comments on the subject of accessible golf cars (approximately one quarter of all comments received), the majority of which favored a requirement for accessible golf cars. However, the Department has decided not to add a regulation specifically addressing accessible golf cars at this time.

Comments in support of requiring courses to provide accessible golf cars came from individuals both with and

without disabilities. These commenters generally supported having one, two, or multiple cars per course. A number of comments stressed the social aspect of golf, generally, and its specific importance in many business transactions. Most commenters believed that no advance notice should be required to reserve an accessible golf car. Some golf course owners argued that a requirement for advance reservation of an accessible golf car might allow them to develop pooling arrangements with other courses.

In response to the Department's questions regarding the safety of accessible golf cars, most commenters stated that the accessible cars are safe, do not damage the greens, and speed up the pace of play. Some commenters expressed concern about the safety of accessible golf cars, arguing either that the cars should pass the American National Standards Institute (ANSI) standards for traditional golf cars,² or that accessible cars should not be required until there are applicable safety standards. Comments from golf courses with experience in providing accessible golf cars were generally positive in terms of the cars' safety and the impact on maintenance of the greens and the course.

As the Department requested, the public also addressed the issue of whether a golf course that does not provide standard golf cars should offer accessible cars. One commenter explained that the courses that do not provide golf cars are often shorter length courses, such as "executive" or nine-hole courses, and that individuals with disabilities who are learning to play golf, or who might not have the stamina to play eighteen holes, would be more likely to use these courses. Thus, accessible golf cars should be available at these courses. This commenter pointed out that one executive course that had no traditional—but two accessible—cars made money on the single-user cars because individuals with and without disabilities wanted to use them.

The Department also received comments opposing a requirement to provide accessible golf cars from some golf course owners, associations, and individuals. Those opposing such a requirement argued that there was little demand for accessible golf cars, or that the problem could be solved by putting "medical flags" on traditional golf cars. Such flags might identify cars that were permitted to have wider use of the course. Other commenters stated that accessible golf cars were too expensive

² ANSI Z130.1–1999.

or were specialized equipment that individuals with disabilities should purchase for themselves.

Like some individuals with disabilities, some commenters who opposed a requirement for accessible golf cars also expressed concern about the lack of safety standards. There were also concerns that repair costs for greens or for accessible golf cars would be more significant than with traditional golf cars. One commenter suggested that courses exceeding certain slope and degree standards be exempted from having single-user cars. Others argued that, in practice, the safety issue and the issue of damage to courses are negligible.

The Department has decided not to add a regulation specifically addressing accessible golf cars at this time. As with free-standing equipment, the Department believes that the existing regulation is adequate to address this issue. The Department may gain additional guidance in the future from the experience of the Department of Defense, which is planning to provide two accessible golf cars at each of the 174 golf courses that the Department of Defense operates, except those at which it would be unsafe to operate such golf cars because of the terrain of the course. See U.S. Department of Defense, *Report to Congress: Access of Disabled Persons to Morale, Recreation, and Welfare (MRW) Facilities and Activities* (Sept. 25, 2007).

Wheelchairs and other power-driven mobility devices. Since the passage of the ADA, choices of mobility aids available to individuals with disabilities have vastly increased. In addition to devices such as wheelchairs and mobility scooters, individuals with disabilities may use devices that are not designed primarily for use by individuals with disabilities, such as electronic personal assistive mobility devices (EPAMDs). (The only available model known to the Department is the Segway®.) The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices for locomotion in pedestrian areas. These new or adapted mobility aids benefit individuals with disabilities, but also present new challenges for public accommodations and commercial facilities.

EPAMDs illustrate some of the challenges posed by new mobility devices. The basic Segway® model is a two-wheeled, gyroscopically stabilized,

battery-powered personal transportation device. The user stands on a platform suspended three inches off the ground by wheels on each side, grasps a T-shaped handle, and steers the device similarly to a bicycle. The EPAMD can travel up to 12½ miles per hour, compared to the average pedestrian walking speed of 3 to 4 miles per hour and the approximate maximum speed for power-operated wheelchairs of 6 miles per hour. In a study of trail and other nonmotorized transportation users including EPAMDs, the Federal Highway Administration (FHWA) found that the eye height of people using EPAMDs ranged from 68¼ inches to 79½ inches. See Federal Highway Administration, *Characteristics of Emerging Road and Trail Users and Their Safety* (Oct. 2004), available at <http://www.tfhrc.gov/safety/pubs/04103>. Thus, EPAMDs can operate at much greater speeds than wheelchairs, and the average user is much taller than most wheelchair users.

EPAMDs have been the subject of debate among users, pedestrians, disability advocates, state and local governments, businesses, and bicyclists. The fact that the device is not designed primarily for use by or marketed primarily to individuals with disabilities, nor used primarily by persons with disabilities, complicates the question of whether individuals with disabilities should be allowed to operate them in areas and facilities where other powered devices are not allowed. Those who question the use of EPAMDs in pedestrian areas argue that the speed, size, and operating features of the devices make them too dangerous to operate alongside pedestrians and wheelchair users. Although the question of their safety has not been resolved, many states have passed legislation addressing EPAMD operation on sidewalks, bicycle paths, and roads. In addition, some states, such as Iowa and Oregon, have minimum age requirements, or mandatory helmet laws. New Jersey requires helmets for all EPAMD users, while Hawaii and Pennsylvania require helmets for users under a certain age.

While there may be legitimate safety issues for EPAMD users and bystanders, EPAMDs and other non-traditional mobility devices can deliver real benefits to individuals with disabilities. For example, individuals with severe respiratory conditions who can walk limited distances and individuals with multiple sclerosis have reported benefitting significantly from EPAMDs. Such individuals often find that EPAMDs are more comfortable and easier to use than more traditional

mobility devices and assist with balance, circulation, and digestion in ways that wheelchairs do not. See Rachel Metz, *Disabled Embrace Segway*, New York Times, Oct. 14, 2004.

The Department has received questions and complaints from individuals with disabilities and covered entities about which mobility aids must be accommodated and under what circumstances. While some individuals with disabilities support the use of unique mobility devices, other individuals with disabilities are concerned about their personal safety when others are using such devices. There is also concern about the impact of such mobility devices on facilities, such as the weight of the device on fragile floor surfaces.

The Department intends to address these issues and proposes to adopt a policy that sets the parameters for when these devices must be accommodated. Toward that end, the Department proposes new definitions of the terms “wheelchair”—which includes manually and power-driven wheelchairs and mobility scooters—and “other power-driven mobility device” and accompanying regulatory text. The proposed definitions are discussed in the section-by-section analysis of § 36.104, and the proposed regulatory text is discussed in the section-by-section analysis of § 36.311.

Much of the debate surrounding mobility aids has centered on appropriate definitions for the terms “wheelchair” and “other power-driven mobility devices.” The Department has not defined the term “manually powered mobility aids.” Instead, the proposed rule provides a list including wheelchairs, walkers, crutches, canes, braces, or similar devices. The inclusion of the term “similar devices” indicates that the list is not intended to be exhaustive. The Department would like input as to whether addressing “manually powered mobility aids” in this manner (*i.e.*, via examples of such devices) is appropriate. The Department also would like information as to whether there are any other non-powered or manually powered mobility aids that should be added to the list and an explanation of the reasons they should be included. If an actual definition is preferred, the Department would welcome input with regard to the language that might be used to define “manually powered mobility aids,” and an explanation of the reasons this language would better serve the public.

Auxiliary aids and services: captioning and video interpreting services. Section 36.303 of the title III regulation requires a public

accommodation to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden. Implicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech, and their companions.

The Department has investigated hundreds of complaints alleging that public accommodations have failed to provide effective communication, many of which have resulted in settlement agreements and consent decrees. During the course of its investigations, the Department has determined that public accommodations sometimes misunderstand the scope of their obligations under the statute and the regulation. Moreover, the number of individuals with hearing loss continues to grow in this country as a large segment of the population ages and as people live longer.

The Department is proposing several changes to § 36.303 to update the regulatory language in response to numerous technological advances and breakthroughs in the area of auxiliary aids and services since the regulation was promulgated sixteen years ago. The most significant changes are in the language regarding video interpreting services and the provision of effective communication for companions. In addition, the Department is discussing in its preamble to § 36.303 options for adding captioning and narrative description that may eventually result in proposed textual changes. The specific amendments are described below in § 36.303 of the section-by-section analysis.

Certification. The current title III regulation provides that state or local governments may apply to the Department for certification that state laws or local building codes comply with or exceed the minimum accessibility requirements of the ADA. The current submission requirements and certification process, however, have proved onerous for state and local governments and for the Department. Many have urged the Department to streamline the certification process and

make it less cumbersome for state and local jurisdictions.

In keeping with the Department's efforts to clarify legal obligations under the ADA and harmonize requirements with other federal laws and model codes, the proposed rule includes amendments to subpart F (§§ 36.601–36.608) to streamline the certification process. The proposed changes are intended to provide more flexibility in the certification process and shorten the overall time involved. The Department believes that the adoption of the 2004 ADAAG will help achieve these goals because it has been further harmonized with model codes. The specific changes to subpart F are described below in the section-by-section analysis.

Section-By-Section Analysis and Response to Comments

This section provides a detailed description of the Department's proposed changes to the title III regulation, the reasoning behind the proposals, and responses to public comments received on the topic. The section-by-section analysis follows the order of the title III regulation itself, except that if the Department is not proposing a change to a regulation section, the unchanged section is not mentioned.

Subpart A—General

Section 36.104 Definitions

“1991 Standards” and “2004 ADAAG”

The Department is proposing to add to the proposed regulation definitions of both the “1991 Standards” and the “2004 ADAAG.” The term “1991 Standards” refers to the currently enforceable ADA Standards for Accessible Design, codified at 28 CFR part 36, App. A. The term “2004 ADAAG” refers to Parts I and III of the *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines*, which were issued by the Architectural and Transportation Barriers Compliance Board on July 23, 2004, at 69 FR 44084 (to be codified at 36 CFR 1191), and which the Department is proposing to adopt in this NPRM. These terms are included in the definitions section for ease of reference.

“Existing Facility”

Under the ADA, a facility is initially classified as one of three types: (1) An existing facility; (2) an altered facility; or (3) a newly designed and constructed facility. In the current regulation, title III defines new construction at § 36.401(a) and alterations at § 36.402. In contrast, the term “existing facility” is not defined, although it is used in the

statute and the regulations for titles II and III. 42 U.S.C. 12182(b)(2)(A)(iv); 28 CFR 35.150.

The Department's enforcement of the ADA is premised on a broad understanding of “existing facility.” The classifications of facilities under the ADA regulation are not static. Rather, a building that was newly designed and constructed at one time—and therefore subject to the accessibility standards in effect at the time—becomes an “existing facility” after it is completed. At some point in its life, it may also be considered “altered” and then again become “existing.”

The added definition of “existing facility” in the proposed regulation clarifies that the term means exactly what it says: A facility in existence on any given date is an existing facility under the ADA. If a facility exists, it is an existing facility whether it was built in 1989, 1999, or 2009.

“Other Power-Driven Mobility Device”

The proposed regulation defines the term “other power-driven mobility device” as “any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf carts, bicycles, electronic personal assistance mobility devices (EPAMDs) (e.g., Segway®), or any mobility aid designed to operate in areas without defined pedestrian routes.” The definition is designed to be broad and inclusive because the Department recognizes the diverse needs and preferences of individuals with disabilities and does not wish to impede individual choice except when necessary. Power-driven mobility devices are included in this category. Mobility aids that are designed for areas or conditions without defined pedestrian areas, such as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians, are also included in this category.

Question 8: Please comment on the proposed definition of other power-driven mobility devices. Is the definition overly inclusive of power-driven mobility devices that may be used by individuals with disabilities?

The Department's proposed regulatory text on accommodating wheelchairs and other power-driven mobility devices is discussed below in § 36.311 of the section-by-section analysis.

“Place of Lodging”

The Department proposes to add a definition of “place of lodging” that will be used in proposed § 36.406(c) to address the coverage of rental accommodations in time-shares, condominium hotels, and mixed-use and corporate hotels. The proposed definition specifies that a place of lodging is a facility that provides guestrooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), where the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, such as an on-site proprietor and reservations desk. The factors to be followed in determining the conditions and amenities of a hotel include rooms available on a walk-up basis, linen service, and accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. It is the Department’s intention that facilities that do not meet this definition would not be covered by the proposed § 36.406(c).

“Qualified Interpreter”

The Department proposes to add to the definition of qualified interpreter to clarify that the term includes, but is not limited to, sign language interpreters, oral interpreters, and cued speech interpreters.

Not all interpreters are qualified for all situations. For example, a qualified interpreter who uses American Sign Language (ASL) is not necessarily qualified to interpret orally. Also, someone with just a rudimentary familiarity with sign language or finger spelling is not a qualified sign language interpreter. Likewise, a qualified sign language interpreter would not include someone who is fluent in sign language but unable to translate spoken communication into ASL or to translate signed communication into spoken words.

The revised definition includes examples of different types of interpreters. An oral interpreter has special skill and training to mouth a speaker’s words silently for individuals who are deaf or hard of hearing, many of whom were raised orally and taught to read lips or were diagnosed with hearing loss later in life and do not know sign language. An individual who is deaf or hard of hearing may need an oral interpreter if the speaker’s voice is unclear, there is a quick-paced exchange of communication (e.g., in a meeting), or

when the speaker does not directly face the individual who is deaf or hard of hearing. A cued speech interpreter functions in the same manner as an oral interpreter except that he or she also uses a hand code or cue to represent each speech sound.

“Qualified Reader”

The current title III regulation identifies a qualified reader as an auxiliary aid, but it does not define the term. *See* 28 CFR 36.303(b)(2). Based upon the Department’s investigation of complaints alleging that some entities have provided ineffective readers, the Department proposes to define “qualified reader” similarly to “qualified interpreter” to ensure that entities select qualified individuals to read an examination or other written information in an effective, accurate, and impartial manner. Failing to provide a qualified reader to a person with a disability may constitute a violation of the requirement to provide appropriate auxiliary aids and services.

“Qualified Small Business”

A qualified small business is a business entity defined as a small business concern under the regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act. *See* 15 U.S.C. 632; 13 CFR part 121. Under section 3(a)(2)(C) of the Small Business Act, federal departments and agencies are prohibited from prescribing a size standard for categorizing a business concern as a small business unless they have been specifically authorized to do so or have proposed a size standard in compliance with the criteria set forth in the SBA regulations, have provided an opportunity for public notice and comment on the proposed standard, and have received approval from the Administrator of the SBA to use the standard. *See id.* Federal agencies or departments promulgating regulations relating to small businesses usually use SBA size criteria. If they decide otherwise, they must be prepared to justify how they arrived at a different standard and why the SBA’s regulations do not satisfy the agency’s program requirements. *See* 13 CFR 121.903.

The ADA does not define “small business” or specifically authorize the Department to prescribe size standards. The Department believes that the size standards SBA has developed are appropriate for determining which businesses subject to the ADA should be subject to the proposed safe harbor provisions. Therefore, the Department proposes to adopt the SBA’s size

standards to define small businesses under the ADA.

The SBA’s small business size standards define the maximum size that a concern, together with all of its affiliates, may be if it is to be eligible for federal small business programs or to be considered a small business for the purpose of other federal agency programs. Concerns primarily engaged in the same kind of economic activity are classified in the same industry regardless of their types of ownership (such as sole proprietorship, partnership or corporation). Approximately 1200 industries are described in detail in the North American Industry Classification System—United States, 2007. For most places of public accommodation, the SBA has established a size standard based on average annual receipts. The majority of places of public accommodation will be classified as small businesses if their average annual receipts are less than \$6.5 million. However, some will qualify with higher annual receipts. The SBA’s small business size standards should be familiar to most small businesses. Current standards, which can only be changed after notice and comment rulemaking, are available at <http://www.census.gov/epcd/naics07/naics07fr3.htm>.

“Service Animal”

The Department is proposing to amend the definition of “service animal” in § 36.104 of the current regulation, which is defined as, “any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.” Proposed § 36.104 would:

1. Remove “guide” or “signal” as descriptions of types of service dogs and add “other common domestic” animal to the Department’s current definition;

2. Remove “individuals with impaired vision” and replace it with “individuals who are blind or have low vision”;

3. Change “individuals with hearing impairments” to “individuals who are deaf or hard of hearing”;

4. Replace the term “intruders” with the phrase “the presence of people” in the section on alerting individuals who are deaf or hard of hearing;

5. Add the following to the list of work and task examples: Assisting an individual during a seizure, retrieving

medicine or the telephone, providing physical support to assist with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation;

6. Add that “service animal” includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, or mental disabilities;

7. Add that “service animal” does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, and goats), ferrets, amphibians, and rodents; and

8. Add that animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not “service animals.”

The Department is proposing these changes in response to concerns expressed by commenters who responded to the Department’s ANPRM. Issues raised by the commenters include:

“Minimal protection.” There were many comments by service dog users urging the Department to remove from the definition “providing minimal protection.” The commenters set forth the following reasons: (1) The current phrase can be interpreted to allow “protection dogs” that are trained to be aggressive and to provide protection to be covered under the ADA, so long as they are paired with a person with a disability; and (2) since some view the minimal protection language to mean that a dog’s very presence can act as a crime deterrent, the language allows any untrained pet dog to provide this minimal protection by its mere presence. These interpretations were not contemplated by the ADA or the title III regulation.

In the Department’s *ADA Business Brief on Service Animals*, which was published in 2002, the Department interpreted the minimal protection language within the context of a seizure (*i.e.*, alerting and protecting a person who is having a seizure). Despite the Department’s best efforts, the minimal protection language appears to have been misinterpreted. Nonetheless, the Department continues to believe that it should retain the “providing minimal protection” language and interpret the language to exclude so-called “attack dogs” that pose a direct threat to others.

Question 9: Should the Department clarify the phrase “providing minimal

protection” in the definition or remove it?

“Alerting to intruders.” Some commenters argued that the phrase “alerting to intruders” in the current text has been misinterpreted by some people to apply to a special line of protection dogs that are trained to be aggressive. People have asserted, incorrectly, that use of such animals is protected under the ADA. The Department reiterates that public accommodations are not required to admit any animal that poses a direct threat to the health or safety of others. The Department has proposed removing “intruders” and replacing it with “the presence of people.”

“Task” emphasis. Many commenters followed the lead of an umbrella service dog organization in suggesting that “performing tasks” should form the basis of the service animal definition, that “do work” should be eliminated from the definition, and that “physical” should be added to describe tasks. Tasks by their nature are physical, so the Department does not believe that such a change is warranted. In contrast, the phrase “do work” is slightly broader than “perform tasks,” and adds meaning to the definition. For example, a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place. As one service dog user stated, in some cases “critical forms of assistance can’t be construed as physical tasks,” noting that the manifestations of “brain-based disabilities,” such as psychiatric disorders and autism, are as varied as their physical counterparts. One commenter stated that the current definition works for everyone (*i.e.*, those with physical and mental disabilities) and urged the Department to keep it. The Department has evaluated this issue and believes that the crux of the current definition (individual training to do work or perform tasks) is inclusive of the varied services provided by working animals on behalf of individuals with all types of disabilities and proposes that this portion of the definition remain the same.

Define “task.” One commenter suggested defining the term “task,” presumably so that there would be a better understanding of what type of service performed by an animal would qualify for coverage. The Department feels that the common definition of task is sufficiently clear and that it is not necessary to add to the definitions section. However, the Department has proposed additional examples of work or tasks to help illustrate this requirement in the definition.

Define “animal” or what qualifies certain species as “service animals.” When the regulations were promulgated in the early 1990s, the Department did not define the parameters of acceptable animal species, and few anticipated the variety of animals that would be used in the future, ranging from pigs and miniature horses to snakes and iguanas. One commenter suggested defining “animal” (in the context of service animals) or the parameters of species to reduce the confusion over whether a particular service animal is covered. One service dog organization commented that other species would be acceptable if those animals could meet the behavioral standards of trained service dogs. Other commenters asserted that there are certain animals (*e.g.*, reptiles) that cannot be trained to do work or perform tasks, so these animals would not be covered. The Department has followed closely this particular issue (*i.e.*, how many unusual animals are now claimed as service animals) and believes that this aspect of the regulation needs clarification.

To establish a practical and reasonable species parameter, the Department proposes to narrow the definition of acceptable animal species to “dog or other common domestic animal” by excluding the following animals: Reptiles, rabbits, farm animals (including horses, miniature horses, ponies, pigs, or goats), ferrets, amphibians, and rodents. Many commenters asserted that limiting the number of allowable species would help stop erosion of the public’s trust, which results in reduced access for many individuals with disabilities, despite the fact that they use trained service animals that adhere to high behavioral standards. The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public contexts, such as restaurants, grocery stores, and performing arts venues.

In addition, the Department believes that it is necessary to eliminate from coverage all wild animals, whether born or bred in captivity or the wild. Some animals, such as nonhuman primates, pose a direct threat to safety based on behavior that can be aggressive and violent without notice or provocation. The American Veterinary Medical Association (AVMA) issued a position statement against the use of monkeys as service animals, stating, “[t]he AVMA does not support the use of nonhuman primates as assistance animals because of animal welfare concerns, the potential for serious injury and zoonotic (animal to human disease transmission)

risks.” See AVMA position statement, *Nonhuman Primates as Assistance Animals* (2005), available at http://www.avma.org/issues/policy/nonhuman_primates.asp. The potential for nonhuman primates to transmit dangerous diseases to humans has been documented in scientific journals.

Although unusual species make up a very small percentage of service animals as a collective group, their use has engendered broad public debate and, therefore, the Department seeks comment on this issue.

Question 10: Should the Department eliminate certain species from the definition of “service animal”? If so, please provide comment on the Department’s use of the phrase “common domestic animal” and on its choice of which types of animals to exclude.

Question 11: Should the Department impose a size or weight limitation for common domestic animals, even if the animal satisfies the “common domestic animal” prong of the proposed definition?

Comfort animals. It is important to address the concept of comfort animals or emotional support animals, which have become increasingly popular, primarily with individuals with mental or psychiatric impairments, many of which do not rise to the level of disability. Comfort animals are also used by individuals without any type of impairment who claim the need for such animals in order to bring their pets into places of public accommodation.

The difference between an emotional support animal and a legitimate psychiatric service animal is the service that is provided (*i.e.*, the actual work or task performed by the service animal). Another critical factor rests on the severity of the individual’s impairment. For example, only individuals with conditions that substantially limit them in a major life activity currently qualify for coverage under the ADA, and only those individuals will qualify to use a service animal. See 42 U.S.C. 12102(2) (defining disability); 28 CFR 36.104 (same). Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Many Americans have some type of physical or mental impairment (*e.g.*, arthritis, anxiety, back pain, imperfect vision, etc.), but establishing a physical or mental disability also requires there to be a substantial limitation of a major life activity. Traditionally, service dogs worked as guides for individuals who were blind or had low vision. Since the original regulations were promulgated,

service animals have been trained to assist individuals with many different types of disabilities. In some cases, individuals with minor impairments who are not individuals with disabilities under the Act have mistakenly concluded that any type of impairment qualified them for the ADA’s protection of the right of individuals with disabilities to use service animals.

Change “service animal” to “assistance animal.” Some commenters asserted that “assistance animal” is a term of art and should replace “service animal.” While some agencies, like the Department of Housing and Urban Development (HUD), use the term “assistance animal,” that term is used to denote a broader category of animals than is covered by the ADA. The Department believes that changing the term used under the ADA would create confusion, particularly in view of the broader parameters for coverage under the Fair Housing Act (FHA) *cf.*, HUD Handbook No. 4350.3 Rev-1, Chg-2, *Occupancy Requirements of Subsidized Multifamily Housing Programs* (June 2007), available at <http://www.hudclips.org>. Moreover, the Department’s proposal to change the definition of “service animal” under the ADA is not intended to affect the rights of people with disabilities who use assistance animals in their homes under the FHA. In addition, the Department wishes to use the term “psychiatric service animal” to describe a service animal that does work or performs a task for the benefit of an individual with a psychiatric disability. This contrasts with “emotional support” animals that are covered under the Air Carrier Access Act, 49 U.S.C. 41705 *et seq.*, and its implementing regulations. 14 CFR 382.7 *et seq.*; see also 68 FR 24874, 24877 (May 9, 2003) (discussing accommodation of service animals and emotional support animals on air transportation), and that qualify as “assistance animals” under the FHA, but do not qualify as “service animals” under the ADA.

“Video Interpreting Services” (VIS)

The Department has added a definition of “video interpreting services (VIS),” a technology composed of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (*i.e.*, a live interpreter in another location), who can see and sign to the individual through a camera

located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, with the interpreter in one image and the individual who is deaf or hard of hearing in the other image.

VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, face-to-face communications. Moreover, VIS is particularly helpful where qualified interpreters are not readily available (*e.g.*, for quick response to emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter’s travel time present obstacles).

Along with the addition of the definition of VIS, other amendments to the communications section are discussed below in § 36.303.

“Wheelchair”

The Department proposes the following definition of “wheelchair” in § 36.104: “Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.”

The proposed definition of “wheelchair” is informed by several existing definitions of “wheelchair.” Section 507 of the ADA defines wheelchair in the context of whether to allow wheelchairs in federal wilderness areas: “the term ‘wheelchair’ means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.” 42 U.S.C. 12207(c)(2). The Department believes that while this definition is appropriate in the limited context of federal wilderness areas, it is not specific enough to provide clear guidance in the array of settings covered by title III.

The other existing federal definition of wheelchair that the Department reviewed is in the Department of Transportation regulation implementing the transportation provisions under title II and title III of the ADA. The Department of Transportation’s definition of wheelchair is “a mobility aid belonging to any class of three- or four-wheeled devices, usable indoors, designed for and used by individuals with mobility disabilities, whether operated manually or powered.” 49 CFR 37.3. The Department has adopted much of the language from this definition.

Under the proposed definition, wheelchairs include manually operated and power-driven wheelchairs and mobility scooters. Mobility devices such as golf cars, bicycles, and electronic personal assistance mobility devices (EPAMDs) are inherently excluded from the proposed definition. Typically, the devices covered under the proposed definition are single-user, have three to four wheels, and are appropriate for both indoor and outdoor pedestrian areas. However, it could include a variety of types of wheelchairs and mobility scooters with individualized or unique features or models with different numbers of wheels. "Typical indoor and outdoor pedestrian areas" refer to locations and surfaces used by and intended for pedestrians, including sidewalks, paved paths, floors of buildings, elevators, and other circulation routes, but would not include such areas as off-road bike paths, roads (except where allowed by law or where a sidewalk is not provided), freeways, or natural surfaces such as beaches where there is not a defined circulation route for pedestrians.

The Department does not propose to define specific dimensions that qualify a device as a wheelchair. The Department of Transportation's definition includes a subpart defining "common wheelchair" to provide guidance for public transit authorities on which devices must be transported. A "common wheelchair" is a wheelchair that "does not exceed 30 inches in width and 48 inches in length measured two inches above the ground, and does not weigh more than 600 pounds when occupied." 49 CFR 37.3. The narrower definition of "common wheelchair" was developed with reference to the requirements for lifts to establish parameters for the size and weight a lift can safely accommodate. See 49 CFR part 37, App. D (2002). The Department does not believe it is necessary to adopt stringent size and weight requirements for wheelchairs.

The Department requests public input on the proposed definition for "wheelchair."

Question 12: As explained above, the definition of "wheelchair" is intended to be tailored so that it includes many styles of traditional wheeled mobility devices (e.g., wheelchairs and mobility scooters). Does the definition appear to exclude some types of wheelchairs, mobility scooters, or other traditional wheeled mobility devices? Please cite specific examples if possible.

Question 13: Should the Department expand its definition of "wheelchair" to include Segways®?

Question 14: Are there better ways to define different classes of mobility devices, such as the weight and size of the device that is used by the Department of Transportation in the definition of "common wheelchair"?

Question 15: Should the Department maintain the non-exhaustive list of examples as the definitional approach to the term "manually powered mobility aids"? If so, please indicate whether there are any other non-powered or manually powered mobility devices that should be considered for specific inclusion in the definition, a description of those devices, and an explanation of the reasons they should be included.

Question 16: Should the Department adopt a definition of the term "manually powered mobility aids"? If so, please provide suggested language and an explanation of the reasons such a definition would better serve the public.

The proposed regulation regarding mobility devices, including wheelchairs, is discussed below in the section-by-section analysis for § 36.311.

Subpart B—General Requirements

Section 36.208 Direct Threat

The proposed regulation moves the definition of direct threat from § 36.208(b) to the definitions section at § 36.104. This is an editorial change. Consequently, § 36.208(c) would become § 36.208(b) in the proposed regulation.

Section 36.211 Maintenance of accessible features

The general rule regarding the maintenance of accessible features, which provides that a public accommodation must maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by qualified individuals with disabilities, is unchanged. However, the Department wishes to clarify its application and proposes one change to the section.

The Department has noticed that some covered entities do not understand what is required by § 36.211, and it would like to take the opportunity presented by this NPRM to clarify. Section 36.211(a) broadly covers all features that are required to be accessible under the ADA, from accessible routes and elevators to roll-in showers and signage. It is not sufficient for a building or other feature to be built in compliance with the ADA, only to be blocked or changed later so that it is inaccessible. A common problem observed by the Department is that

covered facilities do not maintain accessible routes. For example, the accessible routes in offices or stores are commonly obstructed by boxes, potted plants, display racks, or other items so that the routes are inaccessible to people who use wheelchairs. Under the ADA, the accessible route must be maintained and, therefore, these items are required to be removed. If the items are placed there temporarily—for example, if an office receives multiple boxes of supplies and is moving them from the hall to the storage room—then § 36.211(b) excuses such "isolated or temporary interruptions." Other common examples of features that must be maintained, and often are not, are platform lifts and elevators. Public accommodations must ensure that these features are operable and, to meet this requirement, regular servicing and making repairs quickly will be necessary.

The Department proposes to amend the rule by adding § 36.211(c) to address the discrete situation in which the scoping requirements provided in the proposed standards may reduce the number of required elements below that are required by the 1991 Standards. In that discrete event, a public accommodation may reduce such accessible features in accordance with the requirements in the proposed standards.

Section 36.302 Modifications in Policies, Practices, or Procedures

Section 36.302(c) Service Animals

The Department's regulation now states that "[g]enerally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability." 28 CFR 36.302(c)(1). In general, the Department is proposing to retain the scope of the current regulation while clarifying its longstanding policies and interpretations.

The Department is proposing to revise § 36.302(c) by adding the following sections as exceptions to the general rule on access. Proposed § 36.302 would:

1. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrv.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) and add that a public accommodation may ask an individual with a disability to remove a service animal from the premises if: (1) The animal is out of

control and the animal's owner does not take effective action to control it; (2) the animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (e.g., repeated barking during a live performance); or (3) the animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications;

2. Add that if a place of public accommodation properly excludes a service animal, the public accommodation must give the individual with a disability the opportunity to obtain goods, services, or accommodations without having the service animal on the premises;

3. Add requirements that the work or tasks performed by a service animal must be directly related to the handler's disability; that a service animal that accompanies an individual with a disability into a place of public accommodation must be individually trained to do work or perform a task, be housebroken, and be under the control of its owner; and that a service animal must have a harness, leash, or other tether;

4. Modify the language in § 36.302(c)(2), which currently states, "[n]othing in this part requires a public accommodation to supervise or care for a service animal," to read, "[a] public accommodation is not responsible for caring for or supervising a service animal," and relocate this provision to proposed § 36.302(c)(5). (This proposed language does not require that the person with a disability care for his or her service animal if care can be provided by a family member, friend, attendant, volunteer, or anyone acting on behalf of the person with a disability.);

5. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrvcl.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) that a public accommodation must not ask about the nature or extent of a person's disability, nor require proof of service animal certification or licensing, but that a public accommodation may ask: (i) If the animal is required because of a disability; and (ii) what work or tasks the animal has been trained to perform;

6. Add that individuals with disabilities who are accompanied by service animals may access all areas of a public accommodation where

members of the public are allowed to go; and

7. Expressly incorporate the Department's policy interpretations as outlined in published technical assistance *Commonly Asked Questions about Service Animals* (1996) (<http://www.ada.gov/qasrvcl.htm>) and *ADA Business Brief: Service Animals* (2002) (<http://www.ada.gov/svcanimb.htm>) and add that a public accommodation must not require an individual with a disability to pay a fee or surcharge, post a deposit, or comply with requirements not generally applicable to other patrons as a condition of permitting a service animal to accompany its handler in a place of public accommodation, even if such deposits are required for pets, and that if a public accommodation normally charges its clients or customers for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

These changes will respond to the following concerns raised by individuals and organizations that commented in response to the ANPRM.

Proposed behavior or training standards. Some commenters proposed behavior or training standards for the Department to adopt in its revised regulation, not only to remain in keeping with the requirement for individual training, but also on the basis that without training standards the public has no way to differentiate between untrained pets and service animals. Because of the variety of individual training that a service animal can receive—from formal licensing at an academy to individual training on how to respond to the onset of medical conditions, such as seizures—the Department is not inclined to establish a standard that all service animals must meet. While the Department does not plan to change the current policy of no formal training or certification requirements, some of the behavioral standards that it has proposed actually relate to suitability for public access, such as being housebroken and under the control of its handler.

Hospital and healthcare settings. Public accommodations, including hospitals, must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability. 28 CFR 36.302(c)(1). The exception to this requirement is if making the modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations. *Id.* at 36.302(a). The Department generally follows the guidance of the Centers for Disease Control and Prevention (CDC)

on the use of service animals in a hospital setting.

As required by the ADA, a healthcare facility must permit a person with a disability to be accompanied by his or her service animal in all areas of the facility in which that person would otherwise be allowed, with some exceptions. Zoonotic diseases can be transmitted to humans through trauma (bites, scratches, direct contact, arthropod vectors, or aerosols). Although there is no evidence that most service animals pose a significant risk of transmitting infectious agents to humans, animals can serve as a reservoir for a significant number of diseases that could potentially be transmitted to humans in the healthcare setting. A service animal may accompany its owner to such areas as admissions and discharge offices, the emergency room, inpatient and outpatient rooms, examining and diagnostic rooms, clinics, rehabilitation therapy areas, the cafeteria and vending areas, the pharmacy, rest rooms, and all other areas of the facility where visitors are permitted, except those listed below.

Under the ADA, the only circumstances under which a person with a disability may not be entitled to be accompanied by his or her service animal are those rare circumstances in which it has been determined that the animal poses a direct threat to the health or safety of others. A direct threat is defined as a significant risk to the health or safety of others that cannot be eliminated or mitigated by a modification of policies, practices, or procedures. Based on CDC guidance, it is generally appropriate to exclude a service animal from areas that require a protected environment, including operating rooms, holding and recovery areas, labor and delivery suites, newborn intensive care nurseries, and sterile processing departments. See Centers for Disease Control, *Guidelines for Environmental Infection Control in Health-Care Facilities*:

Recommendations of CDC and the Healthcare Infection Control Practices Advisory Committee (June 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm>.

Section 36.302(e) Hotel Reservations

Each year, the Department receives many complaints about failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible. Although reservations services were not addressed in the ANPRM, commenters noted the ongoing

problem with hotel reservations and urged the Department to provide regulatory guidance on the issue.

The reservations policies, practices, and procedures of public accommodations are subject to title III's general and specific nondiscrimination provisions. See 42 U.S.C. 12182; 28 CFR 36.302. With this NPRM, the Department proposes to address hotel reservations within its regulation on modifications to policies, practices, and procedures. See 28 CFR 36.302.

The proposed rule is based on straightforward nondiscrimination principles: individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. Currently, this simple premise appears more often to be the exception than the rule.

General rule on reservations. The Department's proposed § 36.302(e)(1) states the general rule that a public accommodation that owns, leases (or leases to), or operates a place of lodging shall modify its policies, practices, and procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms in the same way as others (*i.e.*, during the same hours and in the same manner as individuals who do not need accessible rooms).

Reservations can be made in many different ways—in person, on the phone, directly with the hotel, with a parent company, or through a travel agency. The proposed rule is meant to reach any public accommodation that owns, leases (or leases to), or operates a place of lodging, and is not limited to a hotel's operation of its own reservations service. Thus, the rule would apply equally to corporations that own one or more hotel chains and provide a system by which prospective customers can reserve guest rooms, as well as to franchisors that provide reservation services. All covered entities must modify their policies and practices to ensure parity in reservations policies between those who need accessible rooms and those who do not.

Identification of accessible guest rooms. Proposed § 36.302(e)(2) states that hotel reservations services must identify and describe the accessible features in the hotels and guest rooms. This requirement is integral to ensuring that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging. As a practical matter, a public accommodation's designation of a guest room as "accessible" will not necessarily ensure that the room complies with all of the 1991 Standards.

In older facilities subject to barrier removal, strict compliance with the 1991 Standards is not required. Public accommodations must remove barriers to the extent that it is readily achievable to do so. Individuals with disabilities must be able to ascertain which features—in new and existing buildings—are included in the hotel's accessible guest rooms. The presence or absence of particular accessible features may be the difference between a room that is usable by a person with a disability and one that is not. Information about the availability and nature of accessible features will minimize the risk that individuals with disabilities will reserve a room that is not what was expected or needed.

Guarantees of accessible guest room reservations. Section 36.302(e)(3) provides that a public accommodation that owns, operates, leases (or leases to) a place of lodging shall guarantee accessible guest rooms that are reserved through a reservations service to the same extent that it guarantees rooms that are not accessible. The Department recognizes that not all reservations are guaranteed and the proposed rule does not impose an affirmative duty to do so. When a public accommodation typically guarantees hotel reservations (absent unforeseen circumstances), it must provide the same guarantee for accessible guest rooms. Because the Department is aware that reservation guarantees take many different forms (*e.g.*, an upgrade within the same hotel or a comparable room in another hotel), the Department seeks comment on the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations and the impact of requiring a public accommodation to guarantee accessible rooms to the extent it guarantees other rooms.

Question 17: What are the current practices of hotels and third party reservations services with respect to "guaranteed" hotel reservations? What are the practical effects of requiring a public accommodation to guarantee accessible guest rooms to the same extent that it guarantees other rooms?

Finally, although not included in the proposed regulation as currently drafted, the Department is seeking comment on whether additional regulatory guidance is needed on the policies, practices, and procedures by which public accommodations hold and release accessible hotel guest rooms, and whether third party travel agents should be subject to the requirements set out in § 36.302(e)(2) and § 36.302(e)(3).

Hold and release of accessible guest rooms and third-party reservations. With respect to the hold and release of accessible guest rooms, the Department has addressed this issue in settlement agreements and recognizes that current practices vary widely. As in the ticketing context, regulating in the area of hotel reservations involves complicated issues, such as guest room dispersion and variable pricing. The Department is concerned about current practices by which accessible guest rooms are released to the general public even though the hotel is not sold out. In such instances, individuals with disabilities may be denied an equal opportunity to benefit from the services offered by the public accommodation, *i.e.*, a hotel guest room.

The Department also recognizes that the proposed rule does not reach all public accommodations that are engaged in the business of providing hotel reservations. As discussed above, the rule reaches public accommodations that own, lease (or lease to), or operate a place of lodging. It does not reach an entity that, for example, owns or operates a travel agency, while the agency or service is independent of any place of lodging. Public accommodations that own, lease (or lease to), or operate places of lodging are required to provide the information prescribed by the proposed rule to third parties like travel agencies, but the third parties are not, independently, liable. At this juncture, the Department seeks comment from individuals, businesses, and advocacy groups as to whether such entities should be required to identify and describe accessible features in hotel rooms available through their services, and whether such entities should be subject to the guarantee obligations set out in proposed § 36.302(e)(2) and § 36.302(e)(3).

Question 18: What are the current practices of hotels and third-party reservations services with respect to (1) holding accessible rooms for individuals with disabilities and (2) releasing accessible rooms to individuals without disabilities? What factors are considered in making these determinations? Should public accommodations be required to hold one or more accessible rooms until all other rooms are rented, so that the accessible rooms would be the last rooms rented?

Question 19: Should a public accommodation that does not itself own, lease (or lease to), or operate a place of lodging but nevertheless provides reservations services, including reservations for places of lodging, be subject to the requirements of proposed § 36.302(e)(2) and (e)(3)?

Section 36.302(f) Ticketing

The ticketing policies and practices of public accommodations are subject to title III's general and specific discrimination provisions. *See* 42 U.S.C. 12182; 28 CFR 36.302. Through the investigation of complaints, its enforcement actions, and public comments related to ticketing, the Department is aware of the need to provide regulatory guidance to entities involved in the sale or distribution of tickets. With this NPRM, the Department proposes to include a section on ticketing within the regulation on modifications to policies, practices, and procedures. *See* 28 CFR 36.302.

In response to the ANPRM, individuals with disabilities and related advocacy groups commented that the reduced requirements for accessible seating in assembly areas underscored the need for clarification from the Department on ticketing related issues. One disability advocacy group asserted, that in order to guarantee equal access to assembly areas for people with disabilities, it is necessary to provide complementary design standards, sales policies, and operational procedures.

The Department agrees that more explicit regulation is needed to ensure that individuals with disabilities are not improperly denied access to events because of discriminatory procedures for the sale of wheelchair spaces. The Department's enforcement actions have demonstrated that some venue operators, ticket sellers and distributors are not properly implementing title III's nondiscrimination provisions.

The Department has entered into agreements addressing problems with ticketing sales and distribution by requiring specific modifications to ticketing policies. While these negotiated settlement agreements and consent decrees rest on fundamental nondiscrimination principles, they represent solutions tailored to specific facilities. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic.

The proposed rule clarifies the application of title III with respect to ticketing issues in certain contexts, and is intended to strike a balance between a covered entity's desire to maximize ticket sales and the rights of individuals with disabilities to attend events in assembly areas in a manner that is equal to that afforded to individuals without disabilities. The proposed rule does not, however, purport to cover or clarify all

aspects or applications of title III to ticketing issues. Moreover, the rule applies only to the sale or distribution of tickets that are sold or distributed on a preassigned basis. Tickets sold for most motion pictures, for example, would not be affected by the proposed rule.

Because this rule addresses ticketing policies and practices for stadiums, arenas, theaters, and other facilities in which entertainment and sporting events are held, its provisions are related to and informed by those in proposed § 36.308 (discussed below in the section-by-section analysis of § 36.308), which covers seating in assembly areas. Section 221 of the proposed standards reduces the scoping requirements for accessible seating in assembly areas. After the proposed standards are finalized, the scoping reduction will apply to all public accommodations. *See* proposed 28 CFR 36.211(c).

Ticket distribution methods. Section 36.302(f)(1) states the general rule that a public accommodation shall modify its policies, practices, and procedures to ensure that individuals with disabilities can purchase single or multi-event tickets for accessible seating in the same way as others, *i.e.*, during the same hours and through the same distribution methods as other seating is sold. Tickets can be purchased in many different ways: in person or on the phone, directly through the venue, or through a third-party company. The proposed rule makes clear that it is meant to reach all public accommodations that provide a service by which individuals can purchase event tickets, and is not limited to a venue's operation of its own ticketing systems.

The Department has received numerous complaints from individuals who were denied the opportunity to acquire tickets for accessible seats through avenues such as ticketing presales, promotions, lotteries, or waitlists. The proposed rule, at § 36.302(f)(2), makes clear that public accommodations must include accessible seating in all stages of the ticketing process, including presales, promotions, lotteries, or waitlists.

Identification of available accessible seating. Section 36.302(f)(3) of the proposed rule requires a facility to identify available accessible seating. In the Department's investigations of theaters and stadiums, the Department has discovered that many facilities lack an accurate inventory of the accessible seating in their venues, and that this information gap results in lost opportunities for patrons who need accessible seating. For some public

accommodations, multiple inventories may be required to account for different uses of the facility because the locations of accessible seating may change in an arena depending on whether it is used for a hockey game, a basketball game, or a concert. The proposed rule further requires that the facility identify the accessible seating on publicly available seating charts. This transparency will facilitate the accurate sale of accessible seating.

Proposed § 36.302(f)(4) requires public accommodations to provide individuals with disabilities with accurate information about the location of accessible seating. The proposed rule specifically prohibits the practice of "steering" individuals with disabilities to certain wheelchair spaces so that the facility can maximize potential ticket sales for other unsold wheelchair spaces.

Season tickets and multiple event sales. Proposed § 36.302(f)(5) addresses the sale of season tickets and other tickets for multiple events. The proposed rule provides that public accommodations must sell season tickets or tickets for multiple events for accessible seating in the same manner that such tickets are sold to those purchasing general seating. The rule also states that spectators purchasing tickets for accessible seating on a multi-event basis shall be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent as other spectators holding tickets for the same type of ticketing plan. A facility must provide a portable seat for the transferee to use, if necessary.

Secondary market ticket sales. The Department is aware that the proposed rule may represent a significant change in practice for many public accommodations with respect to "secondary market" ticket sales. Because the secondary market is a recognized—and often integral—part of the ticketing distribution system for many venues and activities, individuals with disabilities will be denied an equal opportunity to benefit from the goods offered—attendance at an event—if public accommodations have no obligations with respect to accessible seating bought or sold in this way. In conjunction with the proposed rule, the Department seeks comment about public accommodations' current practices with respect to the secondary market for tickets, and the anticipated impact of the proposed rule on different types of facilities or events.

Question 20: If an individual resells a ticket for accessible seating to someone who does not need accessible seating,

should the secondary purchaser be required to move if the space is needed for someone with a disability?

Question 21: Are there particular concerns about the obligation imposed by the proposed rule, in which a public accommodation must provide accessible seating, including a wheelchair space where needed, to an individual with a disability who purchases an "inaccessible" seat through the secondary market?

Release of unsold accessible seats. Proposed § 36.302(f)(6) provides regulatory guidance regarding the release of unsold accessible seats. Through its investigations, the Department has become familiar with the problem of designated accessible seating being sold to the general public before people who need accessible seating buy tickets. As a result, individuals who need to use the accessible seating cannot attend the event.

The Department has entered into agreements addressing this problem by requiring specific modifications to ticketing policies. The Department believes that guidance in this area is needed, but also recognizes that ticketing practices and policies vary with venue size and event type, and that a "one-size-fits-all" approach may be unrealistic. These options provide flexibility so that ticketing policies can be adjusted according to the venue size and event type.

Facility sell-out. Proposed § 36.302(f)(6)(i) allows for the release of unsold accessible seating once standard seats in the facility have been sold, but luxury boxes, club boxes, or suites are not required to be sold out before the remaining accessible seats are released. To implement this option, the release of unsold accessible seating should be done according to an established, written schedule. Blocks of seats should be released in stages, and should include tickets in a range of price categories and locations that is representative of the range of seating that remains available to other patrons.

Sell-outs in specific seating areas. Under the second contingency, proposed § 36.302(f)(6)(ii), a facility could release unsold accessible seating in a specific seating area if all of the standard seats in that location were sold out. For example, if all seats in the orchestra level are sold, the unsold accessible seats in the orchestra level could be released for sale to the general public.

Sell-outs in specific price ranges. The third approach described at proposed § 36.302(f)(6)(iii) permits a public accommodation to release unsold

accessible seats in a specific price range if all other seats in that price range were sold out. For example, if all \$50 seats were sold, regardless of their location, the unsold \$50 accessible seats may be released for sale to the general public.

Question 22: Although not included in the proposed regulation, the Department is soliciting comment on whether additional regulatory guidance is required or appropriate in terms of a more detailed or set schedule for the release of tickets in conjunction with the three approaches described above. For example, does the proposed regulation address the variable needs of assembly areas covered by the ADA? Is additional regulatory guidance required to eliminate discriminatory policies, practices, and procedures related to the sale, hold, and release of accessible seating? What considerations should appropriately inform the determination of when unsold accessible seating can be released to the general public?

Ticket pricing. Section 36.302(f)(7) of the proposed rule addresses ticket pricing. The proposed rule codifies the Department's longstanding policy that public accommodations cannot impose a surcharge for wheelchair spaces. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. In no case shall the price of any particular accessible seat exceed the price that would ordinarily be charged for an inaccessible seat in that location. For example, many theaters built prior to the passage of the ADA have balconies that are inaccessible to people who use wheelchairs, and the only wheelchair spaces are located in the orchestra level in which tickets are more expensive. If a comparably sized balcony in a theater built under the ADA's new construction standards would have two wheelchair spaces, the existing theater must sell two orchestra wheelchair spaces at the balcony price on a first come, first served basis.

Fraudulent purchase of designated accessible seating. The Department has received numerous comments regarding fraudulent attempts to purchase wheelchair spaces for patrons other than those who use wheelchairs. Moreover, the Department recognizes that the implementation of some of its proposals, such as those relating to the public identification of accessible

seating, increase the potential for the fraudulent purchase of accessible seats by those who do not need them. The Department continues to believe that requiring an individual to provide proof that he or she is a person with a disability is an unnecessary and burdensome invasion of privacy and may unfairly deter individuals with disabilities who seek to purchase tickets to an event.

Notwithstanding this position, the proposed rule at § 36.302(f)(8) permits public accommodations to take certain steps to address potential ticket fraud. A covered entity may inquire at the time of the ticket purchase whether the wheelchair space is for someone who uses a wheelchair. For season or subscription tickets, a facility may require the purchaser to attest in writing that the wheelchair space is for someone who uses a wheelchair. However, the proposed rule preserves the right of an individual with a disability to transfer his or her ticket for individual events and clarifies that the intermittent use of the wheelchair space by a person who does not use a wheelchair does not constitute fraud.

Purchase of multiple tickets. The Department has received numerous complaints that public accommodations are unfairly restricting the number of tickets that can be purchased by individuals with disabilities. Many public accommodations limit the number of tickets an individual with a disability may purchase, requiring the individual to purchase no more than two tickets (for himself or herself and a companion), while other patrons have significantly higher purchase limits (if any). This is particularly unfair for families, friends, or other groups larger than two that include a person who requires accessible seating. If the ticket number is limited, the result for wheelchair users is that parents and children, friends, classmates, and others are separated. Section 36.302(f)(9) clarifies the application of title III to ameliorate such a situation.

There are various ways that covered entities can accommodate groups that require at least one wheelchair space. The proposed regulation permits up to three companions to sit in a designated wheelchair area, platform, or cross-over aisle that is designated as a wheelchair area, even if the number of companions outnumbers the individuals requiring a wheelchair space. For example, a parent who uses a wheelchair could attend a concert with his or her spouse and their two children who do not use wheelchairs, and all four could sit together in the wheelchair area. The Department recognizes that some

advocates may object to this use of designated wheelchair areas because it will reduce the amount of accessible seating available for those who need it. On balance, however, the Department believes that the opportunity to sit with family and friends, as other patrons do, is an integral element of the experience of attending a ticketed event, and it is an element that is often denied to individuals with disabilities.

By limiting the number of tickets that can be purchased under this provision to four, the Department seeks a balance by which groups and families can be accommodated while still leaving ample space for other individuals who use wheelchairs. The Department seeks comments from individuals, business entities, and advocacy organizations on whether the proposed rule will appropriately effectuate the integration and nondiscrimination principles underlying the rule.

Question 23: Is the proposed rule regarding the number of tickets that a public accommodation must permit individuals who use wheelchairs to purchase sufficient to effectuate the integration of wheelchair users with others? If not, please provide suggestions for achieving the same result with regard to individual and group ticket sales.

Group ticket sales. Group ticket sales present another area in which the Department believes additional regulatory guidance is appropriate. The purpose of the proposed rule is to prevent the current practice of separating groups in a way that isolates or segregates those in the group who require wheelchair seating. For group sales, if a group includes one or more individuals who use a wheelchair, the proposed rule requires the facility to place that group in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from the group. In existing facilities that lack accessible seating in certain areas (e.g., a theater with an inaccessible balcony) the proposed regulation requires covered entities to seat at least three companions with the individual using a wheelchair in the accessible seating area of the orchestra.

Section 36.303 Auxiliary Aids and Services

Captioning, narrative description, and video interpreting services. The Department is proposing changes to § 36.303 in order to codify its longstanding policies in this area, and to

propose amendments based on technological advances and breakthroughs in the area of auxiliary aids and services since the original regulation was published more than sixteen years ago. The Department is proposing to add video interpreting services (VIS) to the regulatory text and is discussing in this preamble options for addressing captioning and narrative description.

Several types of auxiliary aids that have become more readily available have been added to § 36.303. The Department has added a new technology in § 36.303(b)(1), video interpreting services (VIS), which consists of a video phone, video monitors, cameras, a high-speed Internet connection, and an interpreter. The video phone provides video transmission to a video monitor that permits the individual who is deaf or hard of hearing to view and sign to a video interpreter (i.e., a live interpreter in another location), who can see and sign to the individual through a camera located on or near the monitor, while others can communicate by speaking. The video monitor can display a split screen of two live images, the interpreter in one image and the individual who is deaf or hard of hearing in the other image. VIS can provide immediate, effective access to interpreting services seven days a week, twenty-four hours a day by allowing people in different locations to engage in live, face-to-face communications. Moreover, VIS is particularly helpful when qualified interpreters are not readily available (e.g., for quick responses to emergency hospital visits, in areas with an insufficient number of qualified interpreters to meet demand, and in rural areas where distances and an interpreter's travel time present obstacles).

For purposes of clarification, the Department proposes to add to § 36.303(b)(1) the exchange of written notes as an example of an auxiliary aid or service. This common-sense example is a codification of the Department's longstanding policy with regard to title III entities, and was included in the preamble to the original regulation. See 56 FR 35544, 35566 (July 26, 1991). This additional example of an appropriate auxiliary aid or service was inserted because many entities do not realize that this easy and efficient means is available to them. While the exchange of written notes is inappropriate for lengthy or complicated communications, it can be appropriate for situations such as routine purchases in a department store or at a sports arena, or as a means of communication

while awaiting the arrival of an interpreter.

In § 36.303(b)(2), the Department proposes to insert additional examples of auxiliary aids and services for individuals who are blind or have low vision. The preamble to the 1991 title III regulation makes clear that the original list was illustrative and that "additional examples such as signage or mapping, audio description services, secondary auditory programs (SAP), telebrailers, and reading machines * * * may be considered appropriate auxiliary aids and services." 56 FR 35544, 35566. Because technological advances in the seventeen years since the ADA was enacted have increased the range of auxiliary aids and services for those who are blind or have low vision, the Department has added additional examples, including brailled displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), and accessible electronic and information technology.

The Department proposes replacing the term "telecommunications devices for deaf persons (TDD's)" with "text telephones (TTYs)" in § 36.303(b)(1). Although "TDD" is the term used in the ADA, "TTY" has become the commonly accepted term and is consistent with the terminology used by the Access Board in the 2004 ADAAG. Second, the Department has inserted in § 36.303(d)(2) additional types of auxiliary aids and services that can effectively provide telephone communication for individuals who are deaf or hard of hearing. Two of the auxiliary aids now included—public telephones equipped with volume control mechanisms and hearing aid-compatible telephones—are designed for individuals who are hard of hearing. The third added auxiliary aid or service is VIS, which is an alternative designed for individuals who are deaf. A public accommodation need not provide all of these auxiliary aids and services, but should offer those needed to provide effective communication.

Companions. The Department's proposed language for § 36.303(c) imposes no new obligations on places of public accommodation. The first sentence of § 36.303(c)(1) adds the phrase "and their companions," so that the sentence now reads: "A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and their companions who are individuals with disabilities." A new § 36.303(c)(1)(i) defines "companion" as "a family member, friend, or associate of a program

participant who, along with the participant, is an appropriate person with whom the public accommodation should communicate.” Section 36.303(c)(1)(ii) advises that public accommodations should be aware that the method of communication used by the individual and the nature, length, and complexity of the communication involved are factors to be considered by the public accommodation in determining what type of auxiliary aid or service is necessary. *See, e.g.,* Department of Justice, *The Americans with Disabilities Act, Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities* (Title III TA Manual), III–4.300, available at <http://www.ada.gov/taman3.html>. For example, an individual with a disability who is deaf or hard of hearing may need a qualified interpreter to discuss with hospital personnel a diagnosis, procedures, tests, treatment options, surgery, or prescribed medication (*e.g.*, dosage, side effects, drug interactions, etc.). In comparison, an individual who is deaf or hard of hearing who purchases an item in the hospital gift shop may only need an exchange of written notes to achieve effective communication.

The Department is proposing to add companions to the scope of coverage of § 36.303 to emphasize that the ADA applies in some instances in which a public accommodation needs to communicate with a family member, friend, or associate of the program participant in order to provide its services. Examples of such situations include when a school communicates with the parent of a child during a parent-teacher meeting or in a life-threatening situation, when a hospital needs to communicate with an injured person's companion to obtain necessary information. In such situations, if the companion is deaf or hard of hearing, blind, has low vision, or has a disability that affects his or her speech, it is the public accommodation's responsibility to provide appropriate auxiliary aid or service to communicate effectively with the companion. Where communication with a companion is necessary to serve the interests of a person who is participating in a public accommodation's services, programs, or activities, effective communication must be assured.

Companions in health care settings. Effective communication is particularly critical in health care settings where miscommunication may lead to misdiagnosis and improper or delayed medical treatment. Under the ADA, hospitals must provide effective means of communication for patients and their

companions with disabilities. The Department has encountered confusion and reluctance by medical care providers regarding the scope of their obligation with respect to such companions. Effective communication with a companion with a disability is necessary in a variety of circumstances. For example, a companion may be legally authorized to make health care decisions on behalf of the patient or may need to help the patient with information or instructions given by hospital personnel. In addition, a companion may be the patient's next of kin or health care surrogate with whom hospital personnel communicate concerning the patient's medical condition. Moreover, a companion could be designated by the patient to communicate with hospital personnel about the patient's symptoms, needs, condition, or medical history. It has been the Department's longstanding position that public accommodations are required to provide effective communication to companions when they accompany patients to medical care providers for treatment.

Consultation on auxiliary aid or service. A public accommodation should consult with the individual with a disability, wherever possible, to determine what auxiliary aid or service would provide effective communication. In many cases, more than one auxiliary aid or service will provide effective communication, and the individual with a disability can provide invaluable information as to what auxiliary aids are effective. For example, it could be difficult to provide effective communication using written notes involving someone with a developmental disability or in severe pain, or if a public accommodation were to provide a qualified ASL interpreter, when an individual needs an oral interpreter instead. Both examples illustrate the importance of consulting with the individual with a disability.

Proposed § 36.303(c)(2) states that a public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her. The Department is adding this language to emphasize that when a public accommodation is interacting with a person with a disability, it is the public accommodation's responsibility to provide an interpreter to ensure that the communication is as effective as its communications with others. It is not appropriate to require the person with a disability to bring another individual to provide such services or, when an accompanying individual is present, to expect that individual to provide such services.

Limited instances in which an accompanying individual may interpret. Section 36.303(c)(3) codifies the Department's policy that there are very limited instances when a public accommodation may rely on an accompanying individual to interpret or facilitate communication: (1) In an emergency involving a threat to public safety or welfare; or (2) if the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances. In such instances, the public accommodation is still required to offer to provide an interpreter free of charge. In no circumstances should a child be used to facilitate communication with a parent about a sensitive matter. The Department has produced a video and several publications that explain this and other ADA obligations in law enforcement settings. They may be viewed at <http://www.ada.gov> or ordered from the ADA Information Line (800–514–0301 (voice) or 800–514–0383 (TTY)).

Public accommodations must be aware that considerations of privacy, confidentiality, emotional involvement, and other factors may adversely affect the ability of family members or friends to facilitate communication. In addition, the Department stresses that privacy and confidentiality must be maintained. We note that covered entities, such as hospitals, that are subject to the Privacy Rules, 45 CFR parts 160, 162, and 164, of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, are permitted to disclose to a patient's relative, close friend, or any other person identified by the patient (such as an interpreter) relevant patient information if the patient agrees to such disclosures. The agreement need not be in writing. Covered entities should consult the HIPAA Privacy Rules regarding other ways disclosures might be able to be made to such persons.

Telecommunications. The Department is proposing to reorganize § 36.303(d) and make several substantive changes that reflect changing terminology and technology.

The heading “Telecommunications devices for the deaf (TDDs)” currently at § 36.303(d) is replaced by the broader heading “Telecommunications.” Paragraph (d)(1) is retitled, “Telephones” and altered to address situations in which a public accommodation must provide an effective means to communicate by telephone for individuals with disabilities, including the use of

automated attendant systems, which are electronic, automated systems and that are a common method for answering and directing incoming calls to places of public accommodation. The Department has become aware that individuals with disabilities who use TTYs or telecommunications relay services—primarily those who are deaf or hard of hearing or who have speech-related impairments—have been unable to use automated attendant systems because they are not compatible with TTYs or telecommunications relay services. Automated attendant systems often disconnect before the individual using one of these calling methods can complete the communication. The Department, therefore, proposes a new § 36.303(d)(1)(i) that requires that individuals using telecommunications relay services or TTYs must be able to connect to and use effectively any automated attendant system used by a public accommodation.

The Department declined to address this issue in the 1991 regulations because it believed that it was more appropriate for the Federal Communications Commission (FCC) to address this in its rulemaking under title IV of the ADA. See 56 FR 35544, 35567 (July 26, 1991). Because the FCC has since raised this concern with the Department and requested that the Department address it, it is now appropriate to raise this issue in the title III regulation.

As mentioned above in the discussion of § 36.303(b), the Department is replacing the term “telecommunications devices for the deaf (TDDs)” wherever it occurs throughout the proposed regulation with the term “text telephones (TTYs).” Thus, § 36.303(d)(2) is entitled, “Text telephones (TTY),” and where “TDD” is used in this portion, it is replaced by “TTY.” Aside from these updates to terminology and adjustments to the section numbering, proposed § 36.303(d)(2) is unchanged substantively from current § 36.303(d).

Video interpreting services. Section 36.303(f) has been added to establish performance standards for video interpreting services (VIS), a system the Department recognizes as a means to provide qualified interpreters quickly and easily. VIS also has economic advantages, is readily available, and because of advances in video technology, can provide a high quality interpreting experience. Circumventing the difficulty of providing live interpreters quickly, more public accommodations are providing qualified interpreters via VIS.

There are downsides to VIS, such as frozen images on the screen, or when an individual is in a medical care facility and is limited in moving his or her head, hands, or arms. Another downside is that the camera may mistakenly focus on an individual’s head, which makes communication difficult or impossible. In addition, the accompanying audio transmission might be choppy or garbled, making spoken communication unintelligible. Lastly, the Department is aware of complaints that some public accommodations have difficulty setting up and operating VIS, because staff have not been appropriately trained.

To address these potential problems, the Department is proposing the inclusion of four performance standards for VIS to ensure effective communication: (1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed Internet connection; (2) a clear, sufficiently large, and sharply delineated picture of the participant’s heads, arms, hands, and fingers, regardless of his or her body position; (3) clear transmission of voices; and (4) nontechnicians who are trained to set up and operate VIS quickly.

Finally, the changes enumerated above result in the current § 36.303(f), “Alternatives,” being moved to § 36.303(h).

Captioning at movie theaters. The Department is considering options under which it might require that movie theater owners and operators exhibit movies that are captioned for patrons who are deaf or hard of hearing. Both open and closed captioning are examples of auxiliary aids and services under the Department’s regulation. 28 CFR 36.303(b)(1). Open captions are similar to subtitles in that the text is visible to everyone in the theater, while closed captioning displays the written text of the audio only to those individuals who request it. The ADA itself contains no explicit language regarding captioning in movie theaters, but the legislative history of title III states that, “[o]pen-captioning * * * of feature films playing in movie theaters, is not required by this legislation. Film makers, are, however, encouraged to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.” H.R. Rep. No. 101–485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 389–91; S. Rep. No. 101–116 at 64 (1989). Congress was silent, however, on the question of closed captioning in movie theaters, a technology not yet developed at that time for first run movies, while

acknowledging that closed captions may be an effective auxiliary aid and service for making aurally delivered information available to individuals who are deaf or hard of hearing. See H.R. Rep. No. 101–485 (II), at 108 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 303, 391. In addition, Congress stated that “technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.” *Id.*

Similarly, in 1991, the Department stated that “[m]ovie theaters are not required * * * to present open-captioned films,” but was silent as to closed captioning. 56 FR 35544, 35567 (July 26, 1991). The Department also noted, however, that “other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons with hearing impairments. Captioning is one means to make the information accessible to individuals with disabilities.” *Id.* The Department cited in its regulation “open and closed captioning,” as examples of auxiliary aids and services. 28 CFR 36.303(b)(1).

Captioning makes films accessible to individuals whose hearing is too limited to benefit from assistive listening devices. Technological advances since the early 1990s have made open and closed captioning for movies more readily available and effective. Movie theater owners generally do not pay for open movie captions; rather, the cost generally is absorbed by the movie studios. Originally, the captions had to be burned onto select film prints, which would be distributed to theaters around the country. These prints usually were not captioned and distributed at the same time the movie was released to the general public, but only after a film had experienced some commercial success. This technology has evolved, however, and burning captions onto individual film prints is no longer necessary. Due to advances in digital technology, captions can be turned on or off in digital format without having to use a separate film print with the hard captions burned on. As a result, captions can be superimposed onto the film at theaters. In addition, digital projection systems send all captions and audio to the theaters on a hard disk or via satellite, and a digital projector is

used to display the movie. While movie theater owners need to purchase expensive projectors in order to display digital movies, the Department understands that movie theater operators are moving to digital film and are entering into creative agreements to help finance the projectors. Open captioning can now be done before a movie is released to the public.

Closed captioning displays the written text of the audio only to those individuals who request captioning. With some closed captioning systems, the captions are displayed on the back wall of the theater as the movie is shown on the movie screen and reflected onto portable devices at the seats of patrons who are deaf or hard of hearing. Another system involves captioning that the patron receives through electronic devices, such as personal digital assistants (PDAs), using mobile wireless technology. The individual wears a pair of glasses or a head band that plugs into the PDA (*i.e.*, a wireless transmitter sends the captions to each moviegoer using the device), and that produces "floating" captions that appear as if they are several meters in front of the viewer's eyes. Significantly, more than half of the feature films produced by the major movie studios now provide some form of captioning.

While the Department has not required that the movie theater industry caption its presentations, during the mid-1990s, as closed captioning became available, the Department began requiring in certain settlement agreements that presentations be closed captioned. *See Agreement Between Walt Disney World Co. and the United States* (Jan. 17, 1997), available at <http://www.ada.gov/disagree.htm> (requiring captioning for film, video, and video monitors that are part of an attraction or that provide information).

The Department is aware that the courts have split on the question of whether captioning should be provided at movie theaters. *See Ball v. AMC Entm't*, 246 F. Supp. 2d 17 (D.D.C. 2003) (denying defendant movie operators' motion for summary judgment and noting that a closed captioned system is an auxiliary aid or service that could be required under the ADA); *Cornilles v. Regal Cinema*, No. Civ. 00-173-AS, 2001 WL 34041789 (D. Or. Dec. 11, 2001) (unpub. op.) (rejecting plaintiff's request that all films at a movie theater be captioned, noting that defendants already provide some captioning); *Todd v. American Multi-Cinema, Inc.*, No. Civ. A. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004) (unpub. op.) (granting summary judgment for

defendant because of plaintiffs' inability to rebut defendants' claims that providing a specific type of closed captioning constituted an undue burden). The judge in the *Ball* case cited legislative history for the proposition that captioning may be required, noting that technological advances may "require public accommodations to provide auxiliary aids and services in the future which today would not be required" and that the type of accommodation and services provided * * * [under the ADA] should "keep pace with the rapidly changing technology of the times." 246 F. Supp. 2d at 22 (citing H.R. Rep. No. 101-485(II) at 108).

Several state Attorney General Offices around the country have begun negotiating agreements and, in some instances, initiating lawsuits to ensure that movie theater owners and operators provide captioning at certain movie screenings.

Although captioning was not mentioned in the ANPRM, two commenters requested that captioning be provided and a movie theater owner urged the Department not to require movie theaters to provide captioning or narrative description services.

The Department is considering options under which it might require captioning for movies exhibited by public accommodations, while recognizing that the movie industry is in transition as more movies are made in digital format and movie theater owners and operators begin to purchase digital projectors. Movie theater owners and operators with digital projectors have available to them different options for providing captioning than those without digital projectors. The Department is aware of the flux in the technology used to exhibit movies and seeks comments regarding how to require captioning while the film industry transitions to a digital format. Also, the Department is concerned about the potential cost to exhibit captioned movies, although that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used. The Department is cognizant that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a).

The Department is considering the possibility of requiring that, after the effective date of the revised regulation, a public accommodation will exhibit all new movies in captioned format at every showing. The Department would not specify which types of captioning to provide, but would instead leave that to the discretion of the movie theater owners and operators.

Question 24: Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of a digital format? Please include specifics regarding how frequently captioning should be provided.

Narrative description. The Department is also considering options under which it might require that movie theater owners and operators exhibit movies with narrative descriptions, which enable individuals who are blind or have low vision to enjoy movies by providing a spoken interpretation of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are narrated and recorded onto an audiotape or disk that can be synchronized with the film as it is projected. For example, a special reader head attached to the film projector can read a timecode track printed on the film, which then sends a signal using an infrared or FM transmitter to the theater where the narration can be heard on headsets equipped with receivers and worn by the movie patron.

As with captioning, the same two issues arise with this technology: the cost and the change to digital movies and projectors. The Department understands that the cost of narrative description equipment is less than that for closed captioning. Generally, movie studios contract with entities to provide the narrative description, and it can be done at the same time captioning is created. The Department understands that when theaters move to digital technology, both the caption data and the narrative descriptions can be embedded into the digital signal that is projected.

Question 25: Should the Department require that, one year after the effective date of this revised regulation, a public accommodation will exhibit all new movies with narrative description? Would it be more appropriate to require narrative description less frequently? Should the requirement for narrative description of movies be tied to the use of a digital format? If so, why? Please include specifics regarding how frequently narrative description should be provided.

Captioning at sporting venues. The Department is aware that individuals who are deaf or hard of hearing have expressed concerns that they are unaware of information that is provided over the public address systems.

Therefore, in § 36.303(g), the Department is proposing that sports stadiums with a capacity of 25,000 or more provide captioning for patrons who are deaf or hard of hearing for safety and emergency information announcements made over the public address system. There are various options that could be used for providing captioning, such as on a scoreboard, on a line board, on a handheld device, or other methods.

Question 26: The Department believes that requiring captioning of safety and emergency information made over the public address system in stadiums seating fewer than 25,000 has the potential of creating an undue burden for smaller entities. However, the Department requests public comment about the effect of requiring captioning of emergency announcements in all stadiums, regardless of size. Would such a requirement be feasible for small stadiums?

Question 27: The Department is considering requiring captioning of safety and emergency information in sports stadiums with a capacity of 25,000 or more within a year of the effective date of the regulation. Would a larger threshold, such as sports stadiums with a capacity of 50,000 or more, be more appropriate or would a lower threshold, such as stadiums with a capacity of 15,000 or more, be more appropriate?

Question 28: If the Department adopted a requirement for captioning at sports stadiums, should there be a specific means required? That is, should it be provided through any effective means (scoreboards, line boards, handheld devices, or other means), or are there problems with some means, such as handheld devices, that should eliminate them as options?

Question 29: The Department is aware that several major stadiums that host sporting events, including National Football League football games at Fed Ex Field in Prince Georges County, Maryland, currently provide open captioning of all public address announcements, and do not limit captioning to safety and emergency information. What would be the effect of a requirement to provide captioning for patrons who are deaf or hard of hearing for game-related information (e.g., play-by-play information), safety and emergency information, and any other relevant announcements?

Section 36.304 Removal of Barriers

The Department is offering for public comment several proposed additions to § 36.304, which requires the removal of architectural or communications

barriers that are structural in nature when it is readily achievable to do so. These proposed additions are designed to mitigate financial burdens on covered entities, while at the same time ensuring that individuals with disabilities have access to existing facilities. Discussed below, in turn, is a proposal for a safe harbor provision and a reduced scoping option that would apply to all public accommodations, as well as a proposal for a safe harbor provision and an exemption that would apply only to qualified small businesses as defined in § 36.104.

The proposed additions stem from the Department's proposal to adopt the 2004 ADAAG and from comments the Department received in response to its ANPRM from small business advocates expressing concern with the Department's interpretation of the barrier removal requirement. The reason that the Department's proposal to adopt the 2004 ADAAG is relevant to barrier removal is that the Department approaches barrier removal by reference to the alterations standard. 28 CFR 36.304(d)(1); 56 FR 35544, 35570 (July 26, 1991). To the extent that it is readily achievable to do so, public accommodations must comply with the requirement for alterations by following the accessibility standards in Appendix A of the existing regulation. *Id.* By specifying that covered entities follow the 1991 Standards, the regulation provides clear guidance on both what constitutes a barrier and how to make an existing facility accessible to and usable by individuals with disabilities. *Id.*

Because the Department uses the 1991 Standards as a guide to identify what constitutes a barrier, the proposed standards will provide a new reference point in assessing an entity's obligations for readily achievable barrier removal. As discussed above, the 2004 ADAAG contains several changes from the 1991 Standards. Some of those changes are additions; the 2004 ADAAG introduces requirements for elements in facility types, like recreational facilities and play areas, that are not in the 1991 Standards. In other situations the changes are incremental, and were added either because of additional study by the Access Board or in order to harmonize requirements with the model codes. It is the incremental changes that are relevant to the Department's first proposed addition to § 36.304, the proposal of an element-by-element safe harbor for all public accommodations. The Department has prepared a detailed matrix that identifies both the incremental changes and the new requirements in Appendix 8 of its Regulatory Impact Analysis, which is

available for public review at <http://www.ada.gov>. The elements listed as numbers 1 through 66 on the matrix are incremental changes that the Department deems to be subject to the safe harbor.

The safe harbors discussed in the following paragraphs are available for specific building elements that comply with the 1991 Standards. If a public accommodation identified barriers but did not remove them because it was not readily achievable because of cost considerations, that public accommodation has a continuing obligation to remove those barriers if the economic considerations for the public accommodation change. For example, a business upturn may provide the ability to pay for physical changes to the facility, or technological advances may have reduced the costs of a previously expensive modification. Regardless of the reason that barrier removal has not yet been accomplished, any barrier removal undertaken after the effective date of this rule must comply with the proposed standards to the extent that it is readily achievable to do so.

Element-by-element safe harbor for public accommodations. The Department is proposing to amend § 36.304(d) in order to adopt a safe harbor for elements in existing facilities that comply with the 1991 Standards, or option I in the ANPRM. This provision is proposed § 36.304(d)(2). What is currently § 36.304(d)(2) in the regulation would be redesignated as § 36.304(d)(6). Specifically, the new § 36.304(d)(2) codifies a safe harbor for all elements that are in compliance with the specific requirements—both the scoping and technical specifications—of the 1991 Standards. Elements in existing facilities that are not altered after the effective date of this rule, and that comply with the 1991 Standards, are not required to be modified in order to comply with the proposed standards.

This safe harbor provision is not a blanket exemption for facilities. Compliance with the 1991 Standards is determined on an element-by-element basis in each covered facility. As noted, elements that the Access Board addressed for the first time in the supplemental guidelines (e.g., play area requirements introduced in the supplemental guidelines, etc.) would not be subject to the safe harbor. Of course, this safe harbor would have no effect on noncompliant elements. Barrier removal is an ongoing obligation. To the extent that elements in existing facilities that impose barriers are not already in compliance with the 1991 Standards, public accommodations would be required to modify such

elements to comply with the proposed standards.

The proposed safe harbor reflects the Department's determination that it would be an inefficient use of resources to require covered entities that have complied with the 1991 Standards to retrofit elements simply to comply with the proposed standards if the change provides only a minimal improvement in accessibility. To a substantial degree, the barrier has already been removed. In addition, covered entities would have a strong disincentive for voluntary compliance if, every time the applicable standards are revised, covered entities are required once again to modify elements simply to keep pace with new proposals.

The Department recognizes, however, that there are also considerations opposing this approach. While the incremental benefit of the revisions may be minimal with respect to some elements, with respect to others the proposed standards may confer a significant benefit on some individuals with disabilities that would be unavailable—except of course when public accommodations and commercial facilities undergo alterations or new construction—if this option is adopted. Because there are valid arguments on both sides of this issue, the Department sought public comment on this issue in its ANPRM.

General comments regarding safe harbor. The Department received numerous comments on this option in the ANPRM. Generally, covered entities favored a safe harbor, while entities representing individuals with disabilities did not. Some disability rights groups, however, favored the safe harbor, arguing that the marginal improvements in accessibility were insufficient to ask entities to retrofit elements that work for most individuals with disabilities. One disability rights group commented that proposing new standards without a safe harbor would penalize compliant businesses, who would have to pay for retrofits twice, and reward scofflaws, who would have avoided the expense of complying with the current law. Some businesses opposed the application of a safe harbor and, instead, encouraged the government to consider other avenues for reducing costs, like providing tax relief for businesses. A tax credit is already available to small businesses (as defined in the tax code), and larger businesses can receive a tax deduction. 26 U.S.C. 44.

Several disability groups and state advocacy centers felt that there was no need for a safe harbor because the statute already controls costs by limiting

required actions to what is “readily achievable.” 28 CFR 36.304. The statutory defense maximizes accessibility by requiring case-specific, individualized determinations that excuse strict compliance when it is too difficult or costly. The safe harbor, by contrast, would exempt even some actions that are readily achievable. Similarly, disability rights groups objected to a blanket rule when the facilities at issue vary so greatly, arguing that large companies should be able to do more to provide accessibility than smaller businesses.

A broad cross section of industries and advocates for industry favored the safe harbor approach organizations representing retail establishments, hotels and lodging, and recreational facilities. These entities raised issues related to cost, reliance on federal law, and fair play. Industry advocates were concerned not only with the cost of making the actual changes, but also with the cost of assessing their facilities for compliance with the incremental changes, arguing that the money would be better spent on other, higher priority accessibility measures.

As noted earlier in the general discussion of the safe harbor proposals, some commenters proposed that the Department treat the proposed standards like most building codes when they are updated and apply them prospectively only. Under the International Building Code, for example, an existing structure is generally grandfathered provided that the building meets a minimum level of safety. *See International Code Council, International Bldg. Code, Commentary, section I.206 (2003); International Existing Bldg. Code, Commentary, section 101.4 (2003).*

While the Department agrees generally with the goal of aiming for consistency between the ADA Standards and building codes—indeed, great effort in the development of the 2004 ADAAG was undertaken to create consistency with building codes where possible—there are critical differences between the 2004 ADAAG and building codes. The ADA is a civil rights statute, not a building and safety code. Its primary goal is to ensure access and equality for individuals with disabilities. It is also a relatively new law, and much of the built environment remains inaccessible. Nevertheless, the Department is asking for public input on a more limited version of this approach that would exempt owners and operators of places of public accommodation from compliance with the supplemental requirements for play areas and recreation facilities.

Specific areas of dispute. Commenters expressed specific concern with the application of a safe harbor to four discrete areas: reach ranges, ATMs, seating in assembly areas, and access to swimming pools. Part of the reason the Department received so many comments about reach ranges and swimming pools may owe to the fact that the Department used these requirements in its ANPRM in order to illustrate the application of a safe harbor. With the exception of swimming pools, which are discussed below in § 36.304(d)(4)(ii), these concerns are addressed, in turn, in the following paragraphs.

Maximum side reach ranges. Reach ranges apply to a variety of building elements, including light switches, key pads, electrical outlets, fire alarm pulls, card readers, thermostats, elevator controls, pay phones, and other elements. The 2004 ADAAG includes a change in the maximum height of a side reach range from 54 inches in the current ADA Standards, to 48 inches in the 2004 ADAAG. The change related to the needs of little people, and, not surprisingly, the most vocal opposition for a safe harbor came from groups representing little people. Commenters argued that the lowered height of operable controls can mean the difference between independence and dependence. One individual argued that little people can become trapped in elevators, posing serious safety risks, when the controls are over 48 inches high. Two groups strongly opposed a safe harbor for side reach ranges, one of which estimated that the revised reach range will provide access to an additional half million individuals with disabilities.

Industry commenters asserted that requiring existing facilities to apply the new requirement would mean, among other things, that entities would be required to lower every light switch in every building to the extent it is readily achievable. One business group noted that thousands of businesses have already internalized the cost of lowering operating controls from 60 inches to 54 inches to comply with the 1991 Standards, and that an additional retrofit would require an additional commitment of funds. A small business association stated that lowering pay phones would be a significant expense to the pay phone industry, which is already incurring losses due to the introduction of cell phones on the market. Other associations expressed concerns about vending machines, most of which now comply with the 54-inch reach range.

Potential solutions that do not require structural modifications were offered by

disability advocacy groups. One national advocacy group stated that public accommodations could provide relatively low-cost solutions to the problem, such as light switch extension handles or other inexpensive alternatives to relocating operating controls. Some commenters noted that, while it is not an ideal solution, individuals of short stature may choose to carry equipment that would enable them to reach controls.

Independence and ready accessibility are significant goals in the ADA. The Department would like to hear further from individuals of short stature whether there are discrete areas—like operating controls in elevators—that are either significant to daily living or pose safety risks that cannot be ameliorated by extension handles or similar, less expensive devices. The 48-inch maximum reach range would apply fully to alterations and new construction. Similarly, elements that do not comply with the existing requirement of a 48-inch reach range would also be required to meet the new 48-inch reach range.

ATMs. Several commenters expressed concern about the application of a safe harbor to ATMs. Specifically, “talking ATMs”—or ATMs with speech output that are independently usable by individuals who are blind or have low vision—are an important issue for one advocacy group, as well as for the banking and ATM industries. The 1991 Standards use a performance test, requiring that “[i]nstructions and all information for use shall be made accessible to and independently usable by persons with vision impairments.” 28 CFR part 36, App. A, section 4.34.4. The 2004 ADAAG has a similar requirement that more specifically spells out what is necessary for ATMs to be speech-enabled. Under the 2004 ADAAG, there are specific design requirements for speech output, and speech must be delivered through a mechanism that is readily available to all users. See 2004 ADAAG section 707.5.

Some individuals who are blind or have low vision fear that a safe harbor would derail the efforts they have made to ensure that ATMs have speech output. The banking and ATM industries object to retrofitting all existing ATMs, arguing it requires both hardware and software changes that can be expensive in certain cases. They also argue that retrofitting is inefficient, since most machines, especially those in banks, are replaced every seven to nine years, a relatively short life span compared to other elements in facilities,

and will be updated when they are replaced.

Because new ATMs are generally equipped with speech output, this is a time-limited issue that really affects a discrete group of stand-alone ATMs in rural areas or small retail locations, like gas stations or convenience stores. Industry commenters describe a practice by which used machines in urban areas or larger banks are generally sold to smaller entities or placed in rural areas as new machines are purchased. ATMs vary in their technological sophistication, and it is more expensive to adapt the smaller, stand-alone machines.

Even though the ATM requirement appears in the 1991 Standards, the Department has traditionally treated the speech or communication element as subject to the requirements for auxiliary aids and services in § 36.303. The Department’s preamble to its regulation explained that, “[g]iven that § 36.304’s proper focus is on the removal of physical barriers, the Department believes that the obligation to provide communications equipment and devices * * * is more appropriately determined by the requirements for auxiliary aids and services under § 36.303.” 56 FR 35544, 35568. When the Department later discussed ATMs as they relate to barrier removal in the 1991 regulation, the Department referred only to those aspects of the ATM that make it physically accessible to individuals with mobility disabilities. *Id.*

The safe harbor provision applies only to readily achievable barrier removal; the Department is not planning to apply a safe harbor to the requirement for auxiliary aids and services. ATMs that lack speech output are not eligible for a safe harbor. Although the Department is not applying a safe harbor to the communication-related requirements on ATMs, the Department is proposing a new section dealing with equipment that the Department hopes will resolve some of the concerns raised by both sides. The issue of whether it is permissible for an entity to purchase used ATMs that do not have speech output remains an open question, and the Department is proposing questions designed to elicit more specific feedback from the industry in the section dealing with equipment. The Department offers for comment a narrowly drawn exemption for small, stand-alone ATMs, in which entities would be allowed to purchase used ATMs without speech output in certain circumstances.

Stadium-style theaters. Finally, commenters expressed concern regarding the application of a safe harbor to stadium-style theaters. Lines

of sight and dispersal of wheelchair seating in assembly areas, especially in stadium-style theaters, have been the subject of litigation. The 1991 Standards require that wheelchair seating “provide people with physical disabilities a choice of admissions prices and lines of sight comparable to those for members of the general public.” The 2004 ADAAG adopts specific design guidelines for lines of sight and the dispersal of wheelchair seating. *Cf.* 28 CFR part 36, App. A, section 4.33.3; 2004 ADAAG sections 221, 802. As the Department explained in the ANPRM, however, this guideline is merely the codification of longstanding Department policy. Because the requirements in the 2004 ADAAG are not a change from that policy, entities that comply with the Department’s policy will also be in compliance with the relevant provisions in the proposed standards.

Reduced scoping for public accommodations, small facilities, and qualified small businesses. As noted above, the Department is still considering the possibility of developing an alternative set of reduced scoping requirements for certain elements that were not subject to specific scoping and technical requirements in the 1991 Standards. Business entities were generally in favor of exemptions and reduced scoping, although most of the comments addressed elements in compliance with technical and scoping requirements in the 1991 Standards (e.g., the maximum side reach range). Disability advocacy groups and individuals strongly objected to exemptions and to significantly reduced scoping, arguing that the 2004 ADAAG represents minimum standards, and that the readily achievable standard already provides enough flexibility to covered entities.

The Department believes that reduced scoping for a select few specifications in the context of barrier removal is a moderate and reasonable response to business entities’ concerns about the potential for increased costs of compliance and litigation risk when the Department adopts the 2004 ADAAG. Reduced scoping reflects the determination that, while some requirements make sense for alterations and new construction, in the barrier removal context they might not because of the expense or nature of the measure required. Given the disparity in size and resources among the entities that fall within the ambit of public accommodations, reduced scoping would be justified only for supplemental elements that are particularly complicated and expensive

to retrofit. Based on comments in the ANPRM and the Department's initial regulatory assessment, the Department has identified ten elements for which the Department believes reduced scoping might be appropriate for barrier removal: play areas, swimming pools, wading pools, saunas and steam rooms, exercise machines, team or player seating areas, areas of sport activity, boating facilities, fishing piers and platforms, and miniature golf courses.

Play areas. Sections 206.2.17, 206.7.8, and 240.1 of the 2004 ADAAG provide a detailed set of requirements for newly constructed and altered play areas. At least one ground level play component of each type provided (e.g., for different experiences such as rocking, swinging, climbing, spinning, and sliding) must be accessible and connected to an accessible route. In addition, if elevated play components are provided, entities must make at least fifty percent (50%) of the elevated play components accessible and connect them to an accessible route, and may have to make an additional number of ground level play components (representing different types) accessible as well. There are a number of exceptions to the technical specifications for accessible routes, and there are special rules (incorporated by reference from nationally recognized standards for accessibility and safety in play areas) for accessible ground surfaces. Accessible ground surfaces must be inspected and maintained regularly and frequently to ensure continued compliance.

The Department is concerned about the potential impact of these supplemental requirements on existing play areas that are not otherwise being altered. Consequently, the Department is proposing several specific provisions and posing additional questions in an effort to both mitigate and gather information about the potential burden of the supplemental requirements on existing facilities.

State and local governments may have already adopted accessibility standards or codes similar to the 2004 ADAAG requirements for play and recreation areas, but which might have some differences from the Access Board's guidelines.

Question 30: The Department would welcome comment on whether there are state and local standards specifically regarding play and recreation area accessibility. To the extent that there are such standards, we would welcome comment on whether facilities currently governed by, and in compliance with, such state and local standards or codes should be subject to a safe harbor from compliance with applicable

requirements in the 2004 ADAAG. We would also welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines that would permit such a safe harbor with respect to play and recreation areas undertaking alterations.

Question 31: The Department requests public comment with respect to the application of these requirements to existing play areas. What is the "tipping point" at which the costs of compliance with the supplemental requirements for existing play areas would be so burdensome that the entity would simply shut down the playground?

The Department notes that section 240.1 of the 2004 ADAAG specifies that play areas located in family child care facilities where the proprietor actually resides are exempt from the scoping and technical requirements for play areas. Thus, such family child care facility owners have no obligation to make similar changes for their existing facilities for purposes of barrier removal. According to the Access Board, these family child care facilities are typically located in private homes, serve a relatively small number of children (usually no more than twelve) at any given time, and install simple and inexpensive playground equipment for which accessible products are less likely to be readily available. For such facilities, moreover, the cost of providing an accessible ground surface could far exceed the cost of the equipment itself, increasing the likelihood that the home owner will simply decide not to provide any playground equipment. While this exception may limit the accessibility of play areas in home-based child care facilities, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services of their facilities.

The Department proposes to add § 36.304(d)(4)(i) to provide that, for purposes of the readily achievable barrier removal requirement, existing play areas that are less than 1,000 square feet in size are exempt from the scoping and technical requirements for play areas in the 2004 ADAAG found in section 240 of the proposed standards. The Department selected this size based on the provision in section 1008.2.4.1 of the 2004 ADAAG, Exception 1, permitting play areas less than 1,000 square feet in size to provide accessible routes with a reduced clear width (44 inches instead of 60 inches). In its 2000 regulatory assessment for the play area guidelines, the Access Board assumed

that such "small" play areas represent one hundred percent (100%) of the play areas located in restaurants, the largest proportion (between sixty to eighty percent (60–80%)) of the play areas located in hotels and day care facilities, and about twenty percent (20%) of the play areas located in schools. (The Access Board assumed that play areas in city and state parks are typically larger than 1,000 square feet.) If these assumptions are correct, the proposed exemption would have the greatest impact upon existing play areas located in restaurants, hotels, and day care facilities and would have relatively little impact on existing play areas located in schools or parks.

Question 32: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing play areas less than 1,000 square feet be exempt from the requirements applicable to play areas?

The Department also proposes to add § 36.304(d)(3)(i) to provide that, for purposes of the readily achievable barrier removal requirement, existing play areas will be permitted to meet a reduced scoping requirement with respect to their elevated play components. Elevated play components are play components that are approached above or below grade and that are part of a composite play structure consisting of two or more components that are attached or functionally linked to create an integrated unit providing more than one play activity. The proposed standards provide that a play area that includes both ground level and elevated play components must ensure that a specified number of the ground level play components and at least fifty percent (50%) of the elevated play components are accessible.

Many commenters advised the Department that making elevated play components accessible in the barrier removal context would exceed what is readily achievable for most facilities. Given the nature of the element at issue, retrofitting existing elevated play components in play areas to meet the scoping and technical specifications in the alteration standard would be difficult and costly, and in some instances, infeasible. In response to expressed concerns, the Department proposes to reduce the scoping for existing play areas undertaking barrier removal by permitting entities to substitute ground level play components for elevated play components. Entities that provide elevated play components that do not

comply with the 2004 ADAAG section 240.2.2 would be deemed in compliance with their barrier removal obligations as long as the number of accessible ground level play components is equal to the sum of (a) the number of ground level play components required to comply with the 2004 ADAAG section 240.2.1 (as provided by Table 240.2.1.2, but at least one of each type) and (b) the number of elevated play components required to comply with the 2004 ADAAG section 240.2.2 (namely, fifty percent (50%) of all elevated play components). In existing play areas that provide a limited number of ground level play components, qualifying for this exception may require providing additional ground level play components.

While this provision may result in less accessibility than the application of the alteration standard where readily achievable, public accommodations will likely be more willing to voluntarily undertake barrier removal measures in play areas if they anticipate that compliance will be straightforward and readily achievable in most instances. In addition, for existing play areas with limited resources, it will often be more efficient to devote resources to making the ground surface of the play area accessible, which is necessary to provide an accessible route to any play components. Reduced scoping for elevated play components could also minimize the risk that covered entities will delay compliance, remove elevated play components, or simply close the play area. It also provides a bright-line rule for which compliance can be easily evaluated.

Question 33: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing play areas be permitted to substitute additional ground level play components for the elevated play components it would otherwise have been required to make accessible?

Question 34: The Department would welcome comment on whether it would be appropriate for the Access Board to consider implementation of guidelines for play and recreational facilities undertaking alterations that would permit reduced scoping of requirements or substitution of ground level play components in lieu of elevated play components, as the Department is proposing with respect to barrier removal obligations for certain play or recreational facilities.

The Department is also considering reducing the scoping for sites with multiple existing play areas designed for

the same age group. Where separate play areas are provided within a single site, even if each play area serves the same age group and provides the same types of play components, the 2004 ADAAG would require each play area to comply. In existing facilities that are not being altered, where multiple play areas designed for a particular age group are provided, the Department is considering requiring only one play area to be made accessible.

Question 35: Should the Department require only one play area of each type to comply in existing sites with multiple play areas? Are there other select requirements applicable to play areas in the 2004 ADAAG for which the Department should consider exemptions or reduced scoping?

Swimming pools. The Department is proposing two specific provisions to minimize the potential impact of the supplemental requirements on existing swimming pools. First, the Department is proposing to add § 36.304(d)(3)(ii) to provide that, for purposes of the readily achievable barrier removal requirement, swimming pools that have at least 300 linear feet of swimming pool wall will be required to provide only one (rather than two) accessible means of entry, which must be a sloped entry or a pool lift. This provision represents a less stringent requirement than section 242.2 of the 2004 ADAAG, which requires such pools, when newly constructed or altered, to provide two accessible means of entry. Under this proposal, for barrier removal purposes, public accommodations would be required to have at least one accessible entry where readily achievable to do so.

Commenters responding to the ANPRM noted that the two-means-of-entry-standard, if applied in the barrier removal context, will disproportionately affect small businesses, both in terms of the cost of implementing the standard and anticipated litigation costs. Larger covered entities benefit from economies of scale, which are not available to small businesses. Although complying with the alteration standard will not be readily achievable for many small businesses (at least not complete compliance), the litigation-related costs of proving that compliance is not readily achievable may be significant. Moreover, these commenters argue, the immediacy of perceived noncompliance with the standard—it will usually be readily apparent whether a public accommodation has the required accessible entry or entries—makes this element particularly vulnerable to serial ADA litigation. The reduced scoping would apply to all existing public accommodations, regardless of size.

The Department recognizes that this approach could reduce the accessibility of larger swimming pools compared to the requirements in the 2004 ADAAG. Individuals with disabilities and advocates were particularly concerned about the accessibility of pools, and noted that for many people with disabilities, swimming is one of the few types of exercise that is generally accessible and, for some people, can be an important part of maintaining health. Other commenters noted that having two accessible means of egress from a pool can be a significant safety feature in the event of an emergency. It may be, however, that as a practical matter the reduction in scoping may not be significant, as the measures required to meet the alteration standards for accessible entries would often not be readily achievable even if considered on a case-by-case basis.

Question 36: The Department would like to hear from public accommodations and individuals with disabilities about this exemption. Should the Department allow existing public accommodations to provide only one accessible means of access to swimming pools more than 300 linear feet long?

The Department also proposes to add § 36.304(d)(4)(ii) to provide that, for purposes of the readily achievable barrier removal requirement, existing swimming pools that have less than 300 linear feet of swimming pool wall will be exempt from the provisions of section 242.2 of the 2004 ADAAG. In its 2002 regulatory assessment for the recreation guidelines, the Access Board assumed that pools with less than 300 feet of linear pool wall would represent ninety percent (90%) of the pools in high schools; eighty percent (80%) of the pools in hotels and motels; seventy percent (70%) of the pools in exercise and sports facilities; forty percent (40%) of the pools in public parks and community centers (e.g., YMCAs); and thirty percent (30%) of the pools in colleges and universities.

Question 37: The Department would like to hear from public accommodations and individuals with disabilities about the potential effect of this approach. Should existing swimming pools with less than 300 linear feet of pool wall be exempt from the requirements applicable to swimming pools?

Finally, the Department is interested in collecting information regarding the number of existing facilities that provide more than one swimming pool on a site. The Department is considering creating an exception that would permit existing facilities with multiple

swimming pools on a site to make only one of each type of swimming pool accessible.

Question 38: What types of facilities provide more than one swimming pool on a site? In such facilities, do the pools tend to be identical or do they differ in type (e.g., in size, configuration, function, or use)?

Wading pools. Section 242.3 of the 2004 ADAAG provides that newly constructed or altered wading pools must provide at least one sloped means of entry to the deepest part of the pool. The Department is concerned that installing a sloped entry in existing wading pools may not be feasible for a significant proportion of covered entities and is considering creating an exemption for existing wading pools that are not being altered. The Department is also interested in collecting information regarding the number of existing facilities that provide more than one wading pool on a site. As an alternative to an exemption for all existing wading pools, the Department is considering creating an exception that would permit existing facilities with multiple wading pools on a site to make only one of each type of pool accessible.

Question 39: What site constraints exist in existing facilities that could make it difficult or infeasible to install a sloped entry in an existing wading pool? Should existing wading pools that are not being altered be exempt from the requirement to provide a sloped entry? What types of facilities provide more than one wading pool on a site? In such facilities, do the pools tend to be identical or do they differ in type (e.g., in size, configuration, function or use)?

Saunas and steam rooms. The Department is proposing one specific provision to minimize the potential impact of the supplemental requirements on existing saunas and steam rooms. Section 241 of the 2004 ADAAG requires newly constructed or altered saunas and steam rooms to meet accessibility requirements, including accessible turning space and an accessible bench. Where saunas or steam rooms are provided in clusters, five percent (5%), but at least one sauna or steam room in each cluster, will have to be accessible. The Department understands that many saunas are manufactured (pre-fabricated) and come in standard sizes (e.g., two-person or four-person), and that the two-person size may not be large enough to meet the turning space requirement. Therefore, the Department proposes in § 36.304(d)(4)(iii) to specify that, for purposes of the readily achievable barrier removal requirement, existing

saunas or steam rooms that have a capacity of only two persons are exempt from the scoping and technical requirements for saunas and steam rooms in section 241 of the 2004 ADAAG. While this exception may limit the accessibility of small existing saunas or steam rooms, such facilities would remain subject to the ADA's general requirement to ensure that individuals with disabilities have an equal opportunity to enjoy the services and amenities of their facilities.

Exercise machines. Sections 206.2.13 and 236 of the 2004 ADAAG require one of each type of fixed exercise machine to meet clear floor space specifications and to be on an accessible route. Types of machines are generally defined according to the muscular groups exercised or the kind of cardiovascular exercise provided.

Question 40: Will existing facilities have to reduce the number of available exercise equipment and machines in order to comply? What types of space limitations would affect compliance?

Team or player seating areas. Section 221.2.1.4 of the 2004 ADAAG requires one or more wheelchair spaces to be provided in each team or player seating area with fixed seats, depending upon the number of seats provided for spectators. For bowling lanes, the requirement would be limited to lanes required to be accessible.

Question 41: Are team or player seating areas in certain types of existing facilities (e.g., ice hockey rinks) more difficult to make accessible due to existing designs? What types of existing facilities typically have design constraints that would make compliance with this requirement infeasible?

Areas of sport activity. Sections 206.2.2 and 206.2.12 of the 2004 ADAAG require each area of sport activity (e.g., courts and playing fields, whether indoor or outdoor) to be served by an accessible route. In court sports, the accessible route would also have to directly connect both sides of the court. The Department is considering limiting the application of this requirement in existing facilities that have multiple areas of sport activity that serve the same purpose. For example, in existing facilities with multiple soccer fields of a similar size, the Department may interpret the readily achievable barrier removal requirement to require that a reasonable number but at least one soccer field (rather than all of them) be served by an accessible route.

Question 42: Should the Department interpret the barrier removal requirement to require only a reasonable number but at least one of each type of

playing field to be served by an accessible route? Should the Department create an exception to this requirement for existing courts (e.g., tennis courts) that have been constructed back-to-back without any space in between them?

Boating facilities. Sections 206.2.10, 235.2, and 235.3 of the 2004 ADAAG require a specified number of boat slips and boarding piers at boat launch ramps to be accessible and connected to an accessible route. In existing boarding piers, the required clear pier space may be perpendicular to and extend the width of the boat slip if the facility has at least one accessible boat slip, providing that more accessible slips would reduce the total number (or widths) of existing boat slips. Accessible boarding piers at boat launch ramps must comply with the requirements for accessible boat slips for the entire length of the pier. If gangways (only one end of route is attached to land) and floating piers (neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

Question 43: The Department is interested in collecting data regarding the impact of these requirements in existing boating facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing boat slips and boarding piers at boat launch ramps? To what extent do the exceptions for existing facilities (i.e., with respect to boat slips and gangways) mitigate the burden on existing facilities?

Fishing piers and platforms. Sections 206.2.14 and 237 of the 2004 ADAAG require at least twenty-five percent (25%) of railings at fishing piers and platforms to be no higher than 34 inches high, so that a person seated in a wheelchair can fish over the railing, to be dispersed along the pier or platform, and to be on an accessible route. (An exception permits railings to comply instead with the model codes, which permit railings to be 42 inches high.) If gangways (where only one end of route is attached to land) and floating piers (where neither end is attached to land) are involved, a number of exceptions are provided from the general standards for accessible routes in order to take into account the difficulty of meeting

accessibility slope requirements due to fluctuations in water level. In existing facilities, moreover, gangways need not be lengthened to meet the requirement (except, in an alteration, as may be required by the path of travel requirement).

Question 44: The Department is interested in collecting data regarding the impact of this requirement on existing facilities. Are there issues (e.g., space limitations) that would make it difficult to provide an accessible route to existing fishing piers and platforms?

Miniature golf courses. Sections 206.2.16, 239.2, and 239.3 of the 2004 ADAAG require at least fifty percent (50%) of the holes on miniature golf courses to be accessible and connected to an accessible route (which must connect the last accessible hole directly to the course entrance or exit); generally, the accessible holes would have to be consecutive ones. Specified exceptions apply to accessible routes located on the playing surfaces of holes.

Question 45: The Department is considering creating an exception for existing miniature golf facilities that are of a limited total square footage, have a limited amount of available space within the course, or were designed with extreme elevation changes. If the Department were to create such an exception, what parameters should the Department use to determine whether a miniature golf course should be exempt?

Scope of coverage. As illustrated by the above discussion, the 2004 ADAAG introduces supplemental scoping and technical requirements for play areas and recreation facilities that apply to elements and spaces—e.g., playgrounds and swimming pools—that are found in a variety of different types of facilities. In light of these supplemental requirements and their potentially wide-ranging application, the Department wishes to emphasize that the types of private entities covered under title III are unchanged by the proposed rule, and to reiterate the criteria that determine whether an entity is exempt from coverage under the ADA. In addition, the Department notes that certain types of facilities, while they may be exempt from the coverage of the ADA, may nonetheless be subject to the accessibility requirements of other federal laws.

Private clubs (e.g., country clubs and civic organizations) are generally exempt from title III. Under the ADA, the definition of a private club is based on title II of the Civil Rights Act of 1964 and related case law. Generally, entities are considered private clubs where members exercise a high degree of control over club operations; the

membership selection is highly selective; substantial membership fees are charged; the entity is operated on a nonprofit basis; and the club was not founded specifically to avoid compliance with federal civil rights laws. For example, a country club may qualify as a private club and have a golf course on its grounds. If the golf course is for the exclusive use of club members and their guests, the golf course is not a public accommodation covered by title III. However, if the country club allows nonmembers to pay a fee to play golf, the golf course is a public accommodation and is subject to title III. The country club's other operations and facilities, however, would remain exempt if they were exclusive to members.

Religious organizations and entities controlled by religious organizations, including places of worship, are also exempt from the coverage of title III. This exemption is intended to have a broad application and covers all of the activities of a religious entity, whether they are religious or secular. For example, a religious organization that operates a child care facility that includes a playground, even if the child care facility is open to nonmembers, is exempt from the requirements of the ADA despite the fact that the facility would otherwise qualify as a public accommodation under title III. However, it should be noted that religious organizations that receive federal financial assistance are not exempt from the responsibility to comply with the requirements of section 504 or any other applicable federal statute that prohibits discrimination on the basis of disability in federally assisted programs.

Finally, facilities governed by homeowners associations or similar organizations may be covered by the Fair Housing Act (FHA) and subject to HUD's jurisdiction, rather than title III of the ADA, or they may be covered by both the FHA and title III. The distinguishing feature is whether use of the facilities in question is limited exclusively to owners, residents, and their guests, or if the facilities are made available to the public. For example, a development governed by a homeowners association that includes a swimming pool may be covered by the FHA only, or both the FHA and the ADA. The residences and other areas provided for the exclusive use of residents and their guests are covered by the FHA. If the swimming pool is available only to residents and their guests, it would be covered by the FHA only. However, if the pool is also available to members of the public who buy pool memberships, the pool would

qualify as a public accommodation and would be subject to the requirements of title III.

Safe harbor for qualified small businesses regarding what is readily achievable. The Department is offering for public comment a modification to the barrier removal requirement at § 36.304(d)(5) that provides a safe harbor for qualified small businesses as defined in § 36.104. Pursuant to this safe harbor, a qualified small business would have met its readily achievable barrier removal obligations for a given year if, in the preceding tax year, it spent at least one percent (1%) of its gross revenues on barrier removal. In so doing, the Department wishes to promulgate a rule that will benefit a broad class of small businesses by providing a level of certainty in short-term and long-term planning with respect to barrier removal. An effective rule would also provide some protection, through diminished litigation risks, to small businesses that undertake significant barrier removal projects. The Department received many comments from the small business community urging it to consider changing its approach to barrier removal.

The Department seeks public input on this safe harbor for readily achievable barrier removal, and, specifically, solicits advice on whether one percent (1%) is the appropriate level of expenditure. Another business group, which proposed a similar scheme, suggested that the Department propose that small businesses spend five percent (5%) of their net revenues. The Department believes from its experience in enforcing the ADA that the relevant expenditure should be a percentage of gross, rather than net, revenues in order to avoid the effect of differences in bookkeeping practices and to maximize accessibility consistent with congressional intent. The Department recognizes, however, that entities with similar gross revenues may have very different net revenues, and that this difference may significantly affect what is readily achievable for a particular entity. Such an approach places significant importance on getting the right percentage of revenues that should be considered.

Any formulaic approach, even for a subset of the public accommodations covered by the ADA, is a departure from the Department's current position on barrier removal. During the Department's rulemaking for the regulation published in 1991, the issue of barrier removal received significant attention. Advocacy groups both for individuals with disabilities and private

businesses requested specific guidance on what measures were required for barrier removal. Commenters were concerned that, absent a standard, unsafe or ineffective design practices might be undertaken. The Department's current rule reflects the view of many commenters that requiring public accommodations to comply with the alteration standards, where readily achievable to do so, promotes certainty and good design.

SBREFA requires the Department to consider alternative means of compliance for small businesses. 5 U.S.C. 603(c). To comply with this obligation, the Department is soliciting public comment on the possibility of providing a safe harbor to qualified small businesses that have spent at least one percent (1%) of their gross revenues to remove architectural, communication, or transportation barriers.

Question 46: Should the Department adopt a presumption whereby qualifying small businesses are presumed to have done what is readily achievable for a given year if, during the previous tax year, the entity spent at least one percent (1%) of its gross revenues on barrier removal? Why or why not? Is one percent (1%) an appropriate amount? Are gross revenues the appropriate measure? Why or why not?

Section 36.308 Seating in Assembly Areas

The Department is proposing to revise this section to be consistent with revisions in the proposed requirements applicable to new construction and alterations. The purpose of the section is unchanged: To establish the barrier removal requirements for assembly areas. Sections 36.308(a)(1) and (b) have been revised to include an express requirement to provide companion seats and designated aisle seats.

Section 36.308(a)(1)(ii)(A) and (B) have been revised to provide that wheelchair and companion seats must be an integral part of the seating area, dispersed to all accessible seating levels, and that the locations must provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators.

Proposed § 36.308(a)(1)(iii) provides that companion seats may be fixed or movable and that they shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly area.

A new § 36.308(c)(1) has been added to provide that when an assembly area has designated seating sections that

provide spectators with distinct services or amenities that are not generally available to other spectators, the facility must ensure that wheelchair seating spaces and companion seating are provided in each specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than being additive to, wheelchair space requirements set forth in table 221.2.1.1 in the proposed standards.

Proposed § 36.308(c)(2) requires that, to the extent possible, wheelchair users shall be permitted to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, each of five designated wheelchair spaces shall have at least three companion seats (*i.e.*, five groups of four seats, each group including a wheelchair space) in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this section may be located adjacent to either the wheelchair location or other companion seats. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Section 36.309 Examinations and Courses

Section 309 of the ADA is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 or title II of the ADA, and to ensure that individuals with disabilities are not excluded from educational, professional, or trade opportunities because examinations or courses are offered in a place or manner that is not accessible. *See* 42 U.S.C. 12189. Through its enforcement efforts, the Department has discovered that the requests made by testing entities for documentation regarding the existence of an individual's disability and her or his need for a modification or an auxiliary aid or service are often inappropriate or burdensome. The proposed rule attempts to address this problem.

Section 36.309(b) as revised states that while it is appropriate for a testing entity to require that an applicant document the existence of a disability in order to establish that he or she is entitled to testing modifications or aids, the request for documentation must be

appropriate and reasonable. Requested documentation should be narrowly tailored so that the testing entity can ascertain the nature of the disability and the individual's need for the requested modification or auxiliary aid. Generally, a testing entity should accept without further inquiry documentation provided by a qualified professional who has made an individualized assessment of the applicant. Appropriate documentation may include a letter from a qualified professional or evidence of a prior diagnosis, accommodation, or classification, such as eligibility for a special education program. When an applicant's documentation is recent and demonstrates a consistent history of a diagnosis, there is no need for further inquiry into the nature of the disability. A testing entity should consider an applicant's past use of a particular auxiliary aid or service.

Finally, a private entity should respond in a timely manner to requests and should provide applicants with a reasonable opportunity to supplement their requests with additional information, if necessary. Failure by the testing entity to act in a timely manner and making requests of unnecessary magnitude could result in the sort of delay that amounts to a denial of equal opportunity or equal treatment.

Section 36.311 Mobility Devices

Proposed § 36.311 has been added to provide additional guidance to public accommodations about the circumstances in which power-driven mobility devices must be accommodated.

As discussed earlier in this NPRM, this proposal is in response to growing confusion about what types of mobility devices must be accommodated. The Department has received complaints and become aware of situations where individuals with mobility disabilities have utilized for locomotion purposes riding lawn mowers, golf cars, large wheelchairs with rubber tracks, gasoline-powered, two-wheeled scooters, and other devices that are not designed for indoor use or exclusively used by people with disabilities. Indeed, there has been litigation about whether the ADA requires covered entities to allow people with disabilities to use their EPAMDs like users of traditional wheelchairs. Individuals with disabilities have sued several shopping malls in which businesses refused to allow a person with a disability to use an EPAMD. *See, e.g., Sarah Antonacci, White Oaks Faces Lawsuit over Segway, State Journal-Register, Oct. 9, 2007, available at <http://www.sj-r.com/news/>*

stories/17784.asp; Shasta Clark, *Local Man Fighting Mall Over Right to Use Segway*, WATE 6 News, July 26, 2005, available at <http://www.wate.com/Global/story.asp?s=3643674>. The Department believes clarification on what the ADA requires is necessary at this juncture.

Section 36.311(a) reiterates the general rule that public accommodations shall permit individuals using wheelchairs, scooters, and manually powered mobility aids, including walkers, crutches, canes, braces, and similar devices, in any areas open to pedestrians. The regulation underscores this general proposition because the great majority of mobility scooters and wheelchairs must be accommodated under nearly all circumstances in which title III applies.

Section 36.311(b) adopts the general requirement in the ADA that public accommodations must make reasonable modifications to their policies, practices, and procedures when necessary to enable an individual with a disability to use a power-driven mobility device to participate in its services, programs, or activities unless doing so would result in a fundamental alteration of their services, programs, or activities.

If a public accommodation restricts the use of power-driven mobility devices by people without disabilities, then it must develop policies addressing which devices and under what circumstances individuals with disabilities may use power-driven mobility devices for the purpose of mobility. Under the Department's proposed regulation in § 36.311(c), public accommodations must adopt policies and procedures regarding the accommodation of power-driven mobility devices other than wheelchairs and scooters that are designed to assess whether allowing an individual with a disability to use a power-driven mobility device is reasonable and does not result in a fundamental alteration to its programs, services, or activities. Public accommodations may establish policies and procedures that address and distinguish among types of mobility devices.

For example, an amusement park may determine that it is reasonable to allow individuals with disabilities to use EPAMDs in a variety of outdoor programs and activities, but that it would not be reasonable to allow the use of golf cars as mobility devices in similar circumstances. At the same time, the entity may address its concerns about factors such as space limitations by disallowing EPAMDs by members of the general public.

Section 36.311(c) lists permissible factors that a public accommodation may consider in determining whether the use of different types of power-driven mobility devices by individuals with disabilities may be permitted. In developing policies, public accommodations should group power-driven mobility devices by type (e.g., EPAMDs, golf cars, gasoline-powered vehicles, wheelchairs designed for outdoor use, and other devices). A blanket exclusion of all devices that fall under the definition of other power-driven mobility devices in all locations would likely violate the proposed regulation.

The factors listed in § 36.311(c)(1) through (3) may be used in order to develop policies regarding the use of other power-driven mobility devices by people with disabilities. The dimensions, weight, and other characteristics of the mobility device in relation to a wheelchair or scooter, as well as the device's maneuverability and speed, may be considered. Another permissible consideration is the potential risk of harm to others by the operation of other power-driven mobility devices. The use of gasoline-powered golf cars by people with disabilities inside a building may be prohibited, for example, because the exhaust may be harmful to others. A mobility device that is unsafe to others would not be reasonable under the proposed regulation. Additionally, the risk of harm to the environment or natural or cultural resources or conflicts with federal land management laws and regulations are also to be considered. The final consideration is the ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

While a public accommodation may inquire into whether the individual is using the device due to a disability, the entity may not inquire about the nature and extent of the disability, as provided in § 36.311(d).

The Department anticipates that, in many circumstances, allowing the use of unique mobility devices by individuals with disabilities will be reasonable to provide access to a public accommodation's services, programs, and activities, and that in many cases it will not fundamentally alter the public accommodation's operations and services. On the other hand, the use of mobility devices that are unsafe to others, or unusually unwieldy or disruptive, is unlikely to be reasonable and may constitute a fundamental alteration.

Consider the following examples:

Example 1: Although people who do not have mobility disabilities are prohibited from operating EPAMDs at a theme park, the public accommodation has developed a policy allowing people with disabilities to use EPAMDs as their mobility device at the theme park. The policy states that EPAMDs are allowed in all areas of the theme park that are open to pedestrians as a reasonable modification to its general policy on EPAMDs. The public accommodation determined that the venue provides adequate space for a larger device such as an EPAMD and that it does not fundamentally alter the nature of the theme park's goods and services. The theme park's policies do, however, require that EPAMDs be operated at a safe speed limit. A theme park employee may inquire at the ticket gate whether the device is needed due to the user's disability and also inform an individual with a disability using an EPAMD that the theme park's policy requires that it be operated at or below the designated speed limit.

Example 2: A luxury cruise ship has developed a policy regarding the use of EPAMDs by individuals with disabilities on the ship. In developing the policy, the public accommodation has considered the dimensions of the EPAMD, including its height, in relation to the common areas of the ship and the safety of other passengers. Since the cruise ship in this example is large, there are many areas where a person using an EPAMD can be easily accommodated, including decks and spaces where passengers routinely walk and exercise, under certain weather conditions. However, the dimensions of the ship, as on most such vessels, are more compact than analogous features of facilities on land and may contain thresholds and other features that present obstacles to some EPAMDs. Therefore, with respect to some areas, such as the passageways in cabin areas where the spaces are narrow and ceilings are low, the cruise ship may determine that allowing an individual with a disability to use an EPAMD for mobility would result in a fundamental alteration to some of the cruise ship areas. In these constricted areas, the cruise ship staff may offer a wheelchair or other means of locomotion where the EPAMD would be inappropriate. If the cruise ship in this example is smaller, it may be necessary for the staff to restrict the use of EPAMDs in most or all areas.

The Department is seeking public comment on the proposed definitions and policy concerning wheelchairs and other mobility devices.

Question 47: Are there types of personal mobility devices that must be accommodated under nearly all circumstances? Conversely, are there types of mobility devices that almost always will require an assessment to determine whether they should be accommodated? Please provide examples of devices and circumstances in your responses.

Question 48: Should motorized devices that use fuel or internal-combustion engines (e.g., all-terrain

vehicles) be considered personal mobility devices that are covered by the ADA? Are there specific circumstances in which accommodating these devices would result in a fundamental alteration?

Question 49: Should personal mobility devices used by individuals with disabilities be categorized by intended purpose or function, by indoor or outdoor use, or by some other factor? Why or why not?

Subpart D—New Construction and Alterations

Subpart D establishes the title III requirements applicable to new construction and alterations. The Department is proposing to amend this subpart to adopt the proposed standards and to make related changes to give effect to these changes, as described below.

Section 36.403 Alterations and Path of Travel

The Department is proposing one change to § 36.403 on alterations and path of travel by adding a path of travel safe harbor. Proposed § 36.403(a)(1) states that if a private entity has constructed or altered required elements of a path of travel in accordance with the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel. The Department is not proposing any additional changes to §§ 36.402 through 36.405, which establish requirements for alterations. Some commenters suggested that the definition of alteration be modified to provide more guidance on what actions trigger application of the proposed standards generally, and the extent to which an alteration triggers an additional path of travel obligation.

Consequently, the Department is proposing a safe harbor to clarify alteration requirements as they pertain to path of travel. One commenter noted that changing a door lock on a hotel guest room would trigger requirements to make the path of travel accessible. This suggestion is expressly rejected by the language of the existing regulation in § 36.403(c)(2), which makes clear that “alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function.” Commenter suggestions that painting and wallpapering be expressly excluded from the definition of alterations are similarly unnecessary as both the 1991

Standards and the proposed standards provide in the definition of “alteration” that “[n]ormal maintenance, reroofing, painting or wallpapering * * * are not alterations unless they affect the usability of the building or facility.”

Section 36.406 Standards for New Construction and Alterations

Section 36.406(a)(2) Applicable Standards

Section 306 of the ADA, 42 U.S.C. 12186, directs the Attorney General to issue regulations to implement title III that are consistent with the guidelines published by the Access Board. Commenters suggested that the Department should not adopt the 2004 ADAAG, but should develop an independent regulation. The Department is a statutory member of the Access Board and was actively involved in the development of the 2004 ADAAG. Because of the Department’s long involvement in the process to develop the 2004 ADAAG, the Department does not believe that it is necessary or appropriate to begin that lengthy process anew. Nevertheless, during the process of drafting this NPRM, the Department has reviewed the 2004 ADAAG to determine if additional regulatory provisions are necessary. As a result of this review, the Department has decided to propose new sections, which are contained in §§ 36.406(b)–(g), to clarify how the Department will apply the proposed standards to social service establishments, housing at places of education, assembly areas, and medical care facilities. Each of these provisions is discussed below.

The Department is proposing to adopt the proposed standards and to establish the effective date and triggering event for the new coverage. Specifically, the Department is proposing to amend § 36.406(a) by dividing it into two sections. Proposed § 36.406(a)(1) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences less than six months after the effective date of the proposed rule. Proposed § 36.406(a)(2) specifies that new construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences six months or more after the effective date. The Department is also proposing to delete the advisory information now published in a table at § 36.406(b).

The ANPRM gave notice that the Department must determine when the proposed standards will apply to newly constructed facilities following the

publication of a final rule by establishing: (1) The effective date after publication of the final rule; and (2) the triggering event for compliance with the proposed standards (*i.e.*, the event or action that compels compliance with the proposed standards).

Attachment A to this proposed rule is an analysis of the major changes in the proposed standards and a discussion of the public comments that the Department received on specific sections of the 2004 ADAAG. In addition to those comments, the Department also received some comments that raised issues concerning the scope of the coverage of the proposed standards, the Department’s decision to adopt them, and the established methods of interpretation. Comments discussing the costs and benefits of the proposed standards will be addressed in the discussion of the Department’s regulatory impact analysis. Comments on the effect of the proposed standards on existing facilities will be discussed in conjunction with the analysis of § 36.304 of this proposed rule. The remaining comments addressed global issues, such as the Department’s proposal to adopt the 2004 ADAAG as the ADA Standards for Accessible Design without significant changes and the application of the proposed standards to employee areas.

Several commenters, including individual business owners and organizations representing business interests, questioned the application of the proposed standards to employee work areas, maintaining that all employment issues should be subject to title I of the ADA, 42 U.S.C. 12111 *et seq.* These comments indicate a fundamental misunderstanding of the statutory scope of title III coverage and the scope of the 1991 Standards.

The commenters correctly observed that title I prohibits discrimination against individuals with disabilities employed in a business that has fifteen or more employees. Title III has no direct effect on that employer/employee relationship, but does establish requirements for the design, construction, or alteration of both public accommodations and commercial facilities, 42 U.S.C. 12183. As the Department explained in the preamble to its 1991 NPRM to implement title III:

Commercial facilities are those facilities that are intended for nonresidential use by a private entity and whose operations affect commerce. * * * [T]he new construction and alteration requirements of subpart D of the [1991] rule apply to all commercial facilities, whether or not they are places of public accommodation. Those commercial facilities that are not places of public

accommodation are not subject to the requirements of subparts B and C (e.g., those requirements concerning auxiliary aids and general nondiscrimination provisions).

Congress recognized that the employees within commercial facilities would generally be protected under title I (employment) of the Act. However, as the House Committee on Education and Labor pointed out, "[t]o the extent that new facilities are built in a manner that make[s] them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees." H.R. Rep. No. 101-485, Part 2, at 117 (1990). * * * While employers of fewer than 15 employees are not covered by title I's employment discrimination provisions, there is no such limitation with respect to new construction covered under title III. Congress chose not to so limit the new construction provisions because of its desire for a uniform requirement of accessibility in new construction, because accessibility can be accomplished easily in the design and construction stage, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is a place of public accommodation is always a possibility.

56 FR 7455 (Feb. 22, 1991). The Department's proposed rule merely continues this long-standing interpretation of title III's application to commercial facilities (and employee areas within public accommodations). 56 FR 35544, 35547 (July 26, 1991).

Several commenters suggested that the proposed standards would establish new requirements applicable to employee-only areas, such as restrooms, locker rooms, cafeterias, and break rooms. These comments misunderstand the current law. The 1991 Standards apply to the new construction of, or alteration to, commercial facilities (including employee areas of public accommodations), unless a specific exemption applies. Employee common-use areas, such as those listed above, have been subject to title III and to subpart D of the implementing regulation, including the provisions in the 1991 Standards. This coverage means that unless the area is subject to a specific exemption, it must comply with the Standards and it must be on an accessible route. The proposed standards will not change that coverage.

The major change in the rule is in the treatment of employee work areas. Under the 1991 Standards, section 4.1.1(3), areas used only as work areas are only required to permit a person using a wheelchair to approach, enter, and exit the area. Because of public comment suggesting that owners of commercial facilities were not providing accessible routes within the facility, proposed section 206.2.8 contains a

requirement to provide accessible common use circulation paths, subject to several exceptions. Specific comments received on employee work areas are addressed in Appendix A.

Finally, one commenter suggested that the Department should adopt a system for providing formal interpretations of the ADA Standards for Accessible Design, analogous to the code interpretation systems used by the states and the major model codes. Because the ADA is a civil rights statute—rather than a building code—the statute does not contemplate or authorize a formal code interpretation system. The ADA anticipated that there would be a need for close coordination of the ADA building requirements with the state and local requirements. Therefore, the statute authorized the Attorney General to establish an ADA code certification process, which is addressed in subpart F of this rule.

In addition, the Department operates an extensive technical assistance program. The Department anticipates that once this rule is final, it will revise its existing technical assistance materials to provide guidance about the implementation of this rule.

Effective date: Time period. When the ADA was enacted, the effective dates for various provisions were delayed in order to provide time for covered entities to become familiar with their new obligations. Titles II and III of the ADA generally became effective on January 26, 1992, six months after the regulations were published. New construction under title II and alterations under either title II or title III had to comply with the design standards on that date. For new construction under title III, the requirements applied to facilities designed and constructed for first occupancy after January 26, 1993—eighteen months after the 1991 Standards were published by the Department.

The ANPRM presented three options for the effective date time period: Option I, providing that the effective date of the proposed standards would be eighteen months after publication of the final rule; Option II, providing that the effective date of the proposed standards would be six months after publication of the final rule; or Option III, providing that the effective date of the proposed standards would be twelve months after publication of the final rule.

The Department received numerous comments on this issue. The majority of business, trade, and government organizations advocated eighteen months or more from publication of the final rule. In contrast, many disability

advocacy groups and individuals argued that the revised regulation should be effective upon final publication, or very soon thereafter. Many commenters asserted that the importance of providing increased accessibility for people with disabilities necessitates that the proposed standards become effective as soon as possible.

The current situation is substantially different from the conditions that prevailed in 1990 when the ADA was first enacted. Covered entities are no longer dealing with a new statutory obligation. Rather, the Department is dealing with a transition between two similar editions of the title III regulation. Therefore, the Department proposes that covered entities must comply with the proposed standards for construction that begins six months after publication of the final rule as an appropriate balancing of stakeholder concerns.

This approach is consistent with the approach of other federal agencies that are in the process of adopting the 2004 ADAAG: The Department of Transportation (DOT), which is generally responsible for the enforcement of title II of the ADA with respect to public transportation, and the General Services Administration (GSA), which has adopted the Access Board's Architectural Barriers Act (ABA) guidelines to replace the Uniform Federal Accessibility Standards (UFAS). DOT's final rule adopting the 2004 ADAAG became effective shortly after publication. See 71 FR 63263 (Oct. 30, 2006) (to be codified at 49 CFR part 37). Likewise, GSA adopted an effective date of six months following publication of the final rule. See 70 FR 67786 (Nov. 8, 2005).

Effective date: Triggering event. In the ANPRM, the Department suggested "first use" as an alternative triggering event for facilities that do not require building permits or that do not receive certificates of occupancy. The Department received many comments in response to this suggestion, as well as criticisms of the current triggering event for new construction under title III. Some commenters noted that permitting requirements for construction projects covered by title III vary across both states and localities. For example, some jurisdictions in Iowa do not have building codes applying to title III entities, while Kentucky and Chicago do not require building permits and certificates of occupancy for construction under certain monetary thresholds. Owners and operators of play areas and recreational facilities commented that the permitting process for such projects, when it exists, is

different from those involving typical buildings. Specifically, the current title III triggering events are ill-suited for application to many elements of golf and miniature golf sites, amusement rides and attractions, playgrounds, park facilities without electricity, and similar entities.

The information provided by commenters indicates that the first-use approach would not provide adequate guidance on when the proposed standards would apply to certain facilities and elements. Several commenters suggested the start of construction as the triggering event because it would eliminate confusion over facilities that do not require permitting. Using the start of construction as the triggering event would harmonize title III's requirements for new construction with the requirements for new construction and alterations under title II and alterations under title III. Several commenters on this issue urged the Department to use the same triggering events for title II and title III.

The Department has been persuaded by these comments to propose a triggering event paralleling that for the alterations provisions (*i.e.*, the date on which construction begins). This would apply clearly across all types of covered public accommodations, and the Department plans to clarify what constitutes the start of construction based on responses to this NPRM. This approach poses fewer problems than the first-use approach by measuring only the date on which physical construction commences.

For prefabricated elements such as modular buildings and amusement park rides and attractions, or installed equipment such as ATMs, the Department proposes that the start of construction means the date on which the site preparation begins. Site preparation includes providing an accessible route to the element.

Question 50: The Department proposes using the start of construction as the triggering event for applying the proposed standards to new construction under title III. The Department asks for public comment on how to define the start of construction and the practicality of applying commencement of construction as a triggering event. Is the proposed definition of the start of construction sufficiently clear and inclusive of different types of facilities? Please be specific about the situations that are not covered in the proposed definitions, and suggest alternatives or additional language. In addition, the Department asks that the public identify facilities subject to title III for which

commencement of construction would be ambiguous or problematic.

Section 36.406(b) Application of Standards to Fixed Elements

The Department is proposing a new § 36.406(b) that would clarify that the requirements established by this section, including those contained in the proposed standards (and the 2004 ADAAG) prescribe the requirements necessary to ensure that fixed or built-in elements in new or altered facilities are accessible to people with disabilities. Once the construction or alteration of a facility has been completed, all other aspects of programs, services, and activities conducted in that facility are subject to the operational requirements established elsewhere in this regulation. Although the Department often chooses to use the requirements of the 1991 Standards as a guide to determining when and how to make equipment and furnishings accessible, those coverage determinations fall within the discretionary authority of the Department; they do not flow automatically from the Standards.

The Department is also clarifying that the advisory notes, appendix notes, and figures that accompany the 1991 Standards do not establish separately enforceable requirements. This clarification has been made to address concerns expressed by commenters who mistakenly believed that the advisory notes in the 2004 ADAAG established requirements beyond those established in the text of the guidelines (*e.g.*, Advisory 504.4 suggests, but does not require, that covered entities provide visual contrast on stair tread nosings to make them more visible to people with low vision).

Section 36.406(c) Places of Lodging

The Department is proposing to add a new § 36.406(c) to clarify the scope of coverage for places of lodging. For many years the Department has received inquiries from members of the public seeking clarification of ADA coverage of rental accommodations in time-shares, condominium hotels, and mixed-use and corporate hotel facilities that operate as places of lodging (as that term is now defined in § 36.104). This section proposes to address the treatment of these hotel-like facilities that have attributes of both residential dwellings and transient lodging facilities. These hybrid facilities have become increasingly popular since the ADA's enactment in 1990 and make up the majority of new hotel construction in some vacation destinations. The hybrid residential and lodging characteristics of

these new types of facilities complicate determinations of ADA coverage, prompting questions from both industry and individuals with disabilities. While the Department has interpreted the ADA to encompass these hotel-like facilities when they are used to provide transient lodging, the regulation has not specifically addressed them. Therefore, the Department is proposing a new § 36.406(c), entitled, "Places of lodging," which clarifies that places of lodging including time-shares, condominium hotels, and mixed-use and corporate hotel facilities shall comply with the provisions of the proposed standards, including but not limited to the requirements for transient lodging in sections 224 and 806 of the 2004 ADAAG.

The proposed rule, in the definitions section, clarifies that a covered "place of lodging" is a facility that provides guest rooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less), to which the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay, and which operates under conditions and with amenities similar to a hotel, motel, or inn, particularly including factors such as: (1) An on-site proprietor and reservations desk; (2) rooms available on a walk-up basis; (3) linen service; and (4) a policy of accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit. Time-shares and condominiums or corporate hotels that do not meet this definition will not be covered by § 36.406(c) of the proposed regulation, but will likely be covered by the requirements of the Fair Housing Act, 42 U.S.C. 3601 *et seq.* The Department is seeking public input on this proposal.

Question 51: The Department requests comments on determining the appropriate basis for scoping for a time-share or condominium-hotel. Is it the total number of units in the facility, or some smaller number, such as the number of units participating in the rental program, or the number of units expected to be available for rent on an average night the most appropriate measure?

Question 52: The Department's proposed definition of "place of lodging" includes facilities that are primarily short-term in nature, i.e., two weeks or less in duration. Is "two weeks or less" the appropriate dividing line between transient and residential use? Is thirty days a more appropriate dividing line?

Question 53: The Department believes that the scoping and technical requirements for transient lodging, rather than those for residential dwelling units, should apply to these places of lodging. Is this the most appropriate choice?

Question 54: How should the Department's regulation provide for a situation in which a new or converted facility constructs the required number of accessible units, but the owners of those units choose not to participate in the rental program? Does the facility have an obligation to encourage or require owners of accessible units to participate in the rental program? Does the facility developer, the condominium association, or the hotel operator have an obligation to retain ownership or control over a certain number of accessible units to avoid this problem?

Question 55: How should the Department's regulation establish the scoping for a time-share or condominium-rental facility that decides, after the sale of units to individual owners, to begin a rental program that qualifies the facility as a place of lodging? How should the condominium association, operator, or developer determine which units to make accessible?

Section 36.406(d) Social Service Establishments

The Department is proposing a new § 36.406(d) that provides that group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units shall comply with the provisions of the proposed standards applicable to residential facilities, including, but not limited to, the provisions in sections 233 and 809 of the 2004 ADAAG.

The reasons for this proposal are based on two important changes in the 2004 ADAAG. For the first time, residential dwellings are explicitly covered in section 233 of the 2004 ADAAG. Second, the language addressing scoping and technical requirements for homeless shelters, group homes, and similar social service establishments is eliminated. Currently, such establishments are covered in the transient lodging section (section 9.5) of the 1991 Standards. The deletion of section 9.5 creates ambiguity of coverage that must be addressed.

The Department proposed in the ANPRM that the establishments currently covered by section 9.5 be covered as residential dwelling units, which are covered in section 233 of the 2004 ADAAG, rather than as transient lodging guest rooms in section 224 of

the 2004 ADAAG. The Department considers this a prudent action based on its effect on social service providers. Transferring coverage of social service establishments from transient lodging to residential dwellings will alleviate conflicting requirements for social service providers. The Department believes that a substantial percentage of social service providers are recipients of federal financial assistance from HUD. The Department of Health and Human Services (HHS) also provides financial assistance for the operation of shelters through the Administration for Children and Families programs. As such, they are covered both by the ADA (including section 9.5 of the 1991 Standards) and section 504. The two design standards for accessibility (*i.e.*, the 1991 Standards and UFAS) have confronted many social service providers with separate, sometimes conflicting requirements for the design and construction of facilities. To resolve the conflicts, the residential dwelling standards in the 2004 ADAAG have been coordinated with the section 504 requirements. The transient lodging standards, however, are not similarly coordinated. The deletion of section 9.5 of the 1991 Standards from the proposed standards presents two options: (1) Require coverage under the transient lodging standards, and subject such facilities to separate, conflicting requirements for design and construction; or (2) require coverage under the residential dwelling section, which harmonizes the regulatory requirements under the ADA and section 504. The Department chose the option that harmonizes the regulatory requirements.

In response to its request for public comments on this issue, the Department received a total of eleven responses from industry and disability rights groups and advocates. Some commenters representing disability rights groups expressed concern that the residential dwelling requirements in the 2004 ADAAG are less stringent than the revised transient lodging requirements and would result in diminished access for people with disabilities.

The commenters are correct that in some circumstances, the residential requirements are less stringent, particularly with respect to accessibility for people with communication-related disabilities. Other differences are that the residential guidelines do not require elevator access to upper floors if the required accessible features can be provided on a single, accessible level, and the residential guidelines do not expressly require roll-in showers. Despite this, the Department still believes that applying the residential

dwelling unit requirements to homeless shelters and similar social service establishments is appropriate to the nature of the services being offered at those facilities, and because it will harmonize the ADA and section 504 requirements applicable to those facilities. In addition, the Department believes that the proposal is consistent with its obligations under the Regulatory Flexibility Act to provide some regulatory relief to small entities that operate on limited budgets.

Nevertheless, the Department is requesting information from providers who operate homeless shelters, transient group homes, halfway houses, and other social service establishments, and from the clients of these facilities who would be affected by this proposed change.

Question 56: To what extent have conflicts between the ADA and section 504 affected these facilities? What would be the effect of applying the residential dwelling unit requirements to these facilities, rather than the requirements for transient lodging guest rooms?

Another commenter expressed concern about how the Department would address dormitory-style settings in homeless shelters, transient group homes, halfway houses, and other social service establishments if they are scoped as residential dwelling units. The commenter noted that the transient lodging requirements include a specific provision, § 224.3, that in guest rooms with more than twenty-five beds, at least five percent (5%) of the beds must have parallel clear floor space enabling a person using a wheelchair to access and transfer to the bed. The residential dwelling unit section does not explicitly include a similar provision.

In response to this concern, the Department has added § 36.406(d)(1), which states that in settings in which the sleeping areas include more than twenty-five beds, and in which the residential dwelling unit requirements apply, five percent (5%) of the beds must comply with section 806.2.3 of the 2004 ADAAG (*i.e.*, at least five percent (5%) must have parallel clear floor space on both sides of the bed enabling a person using a wheelchair to access and transfer to the bed).

Definitions of residential facilities and transient lodging. The 2004 ADAAG adds a definition of "residential dwelling unit" and modifies the current definition of "transient lodging" in the 1991 Standards. Under section 106.5 of the 2004 ADAAG, a "residential dwelling unit" is defined as "a unit intended to be used as a residence, that is primarily long-term in nature" and does not include transient lodging,

inpatient medical care, licensed long-term care, and detention or correctional facilities. Additionally, section 106.5 of the 2004 ADAAG, changes the definition of “transient lodging” to a building or facility “containing one or more guest room[s] for sleeping that provides accommodations that are primarily short-term in nature” and does not include residential dwelling units intended to be used as a residence. The references to “dwelling units” and “dormitories” in the 1991 Standards definition are omitted in the 2004 ADAAG definition of transient lodging.

The Department said in the ANPRM that by applying the 2004 ADAAG residential facility guidelines to transient group homes, homeless shelters, halfway houses, and other social service establishments, these facilities would be more appropriately classified according to the nature of the services they provide, rather than the duration of those services. Participants in these programs may be housed on either a short-term or long-term basis in such facilities, and variation occurs even within the same programs and same facility. Therefore, duration can be an inconsistent way of classifying facilities.

Several commenters stated that the definitions of residential dwellings and transient lodging are not clear and will confuse social service providers. They noted that including “primarily long-term” and “primarily short-term” in the respective definitions creates confusion when applied to the listed facilities because they serve people for widely varying lengths of time.

The Department is aware of the wide range of services and duration of services provided by social service establishments. Therefore, rather than focus on the length of a person’s stay at a facility, it makes more sense to look at a facility according to the type of services provided. For that reason, rather than saying that social service establishments are residential facilities, the Department has drafted the proposed § 36.406(d) to provide that group homes and other listed facilities shall comply with the provisions in the 2004 ADAAG that would apply to residential facilities.

Finally, the Department received comments from code developers and architects commending the decision to coordinate the 2004 ADAAG with the requirements of section 504, and asking it to coordinate the 2004 ADAAG with the Fair Housing Act’s accessibility requirements. The Department believes that the coordination of the Fair Housing Act with other applicable disability rights statutes is within the

jurisdiction of HUD, which is the agency charged with the responsibility to develop regulations to implement the Fair Housing Act, the Architectural Barriers Act, and the provisions of section 504 applicable to federally funded housing programs.

Section 36.406(e) Housing at a Place of Education

The Department of Justice and the Department of Education share responsibility for regulation and enforcement of the ADA in postsecondary educational settings, including architectural features. Housing types in educational settings range from traditional residence halls and dormitories to apartment or townhouse-style residences. In addition to the ADA and section 504, other federal laws, including the Fair Housing Act of 1968, may apply. Covered entities subject to the ADA must always be aware of, and comply with, any other federal statutes or regulations that govern the operation of residential properties.

Since the enactment of the ADA, the Department has received many questions about how the ADA applies to educational settings, including school dormitories. Neither the 1991 Standards nor the 2004 ADAAG specifically addresses how it applies to housing in educational settings. Therefore, the Department is proposing a new § 36.406(e) that provides that residence halls or dormitories operated by or on behalf of places of education shall comply with the provisions of the proposed standards for transient lodging, including, but not limited to, the provisions in sections 224 and 806 of the 2004 ADAAG. Housing provided via individual apartments or townhouses will be subject to the requirements for residential dwelling units.

Public and private school dormitories have varied characteristics. Like social service establishments, schools are generally recipients of federal financial assistance and are subject to both the ADA and section 504. College and university dormitories typically provide housing for up to one academic year, but may be closed during school vacation periods. In the summer, they are often used for short-term stays of one to three days, a week, or several months. They also are diverse in their layout. Some have double-occupancy rooms and a toilet and bathing room shared with a hallway of others, while others may have cluster, suite, or group arrangements where several rooms are located inside a secure area with

bathing, kitchen, and similar common facilities.

Private schools are subject to title III and are required to make their programs and activities accessible to individuals with disabilities. Throughout the school year and the summer, school dormitories can become program areas in which small groups meet, receptions and educational sessions are held, and social activities occur. The ability to move between rooms—both accessible rooms and standard rooms—in order to socialize, to study, and to use all public and common use areas is an essential part of having access to these educational programs and activities.

Applying the requirements for residential facilities to school dormitories could hinder access to educational programs for students with disabilities. The prior discussion about social service establishments with sleeping accommodations explains that the requirements for dispersing accessible units would not necessarily require an elevator or access to different levels of a facility. Conversely, applying the transient lodging requirements to school dormitories would necessitate greater access throughout the facility for students with disabilities. Therefore, the Department requests public comment on how to scope school dormitories.

Question 57: Would the residential facility requirements or the transient lodging requirements in the 2004 ADAAG be more appropriate for housing at places of education? How would the different requirements affect the cost when building new dormitories and other student housing?

Section 36.406(f) Assembly Areas

The Department is proposing a new § 36.406(f) to supplement the assembly areas requirements in the proposed standards. This provision would impose four additional requirements.

Proposed § 36.406(f)(1) requires wheelchair and companion seating locations to be dispersed so that some seating is available on each level served by an accessible route. This should have the effect of ensuring a choice of ticket prices, services, and amenities offered in the facility. Factors distinguishing specialty seating areas are generally dictated by the type of facility or event, but may include such distinct services and amenities as: Reserved seating (when other seats are sold on a first-come-first-served basis only); reserved seating in sections or rows located in premium locations (e.g., behind home plate or near the home team’s end zone) that are not otherwise available for purchase by other spectators; access to wait staff for in-seat food or beverage

service; availability of catered food or beverages for pre-game, intermission, or post-game meals; restricted access to lounges with special amenities (such as couches or flat-screen televisions); or access to team personnel or facilities for team-sponsored events (e.g., autograph sessions, sideline passes, or facility tours) not otherwise available to other spectators.

Proposed § 36.406(f)(2) reiterates the longstanding requirement that wheelchair and companion seating must be integrated in the seating area, and adds a new prohibition: that the seating may not be placed on temporary platforms or other movable structures. The Department has become aware that a growing trend in the design of large sports facilities is to provide wheelchair seating on removable platforms that seat four or more wheelchair users and their companions. These platforms cover one or more rows of standard seating. The platforms are designed to be removed so that the part of the seating bowl they cover can be used to seat additional ambulatory spectators. The sale of any seats in the covered area requires removal of the platform, thereby eliminating some of the required wheelchair seating locations. In another design that produces a similar result, removable platforms configured to provide multiple, non-wheelchair seats are installed over some or all of the required wheelchair seating locations. In this configuration, selling a ticket for one wheelchair location requires the removal of multiple standard seats.

The Department believes that both of these designs violate both the letter and the intent of this regulation. Both designs have the potential to reduce the number of available wheelchair seating spaces below the level required. Reducing the number of available spaces is likely to result in reducing the opportunity for people who use wheelchairs to have the same choice of ticket prices and access to amenities that are available to other patrons in the facility. In addition, placing wheelchair seating on removable platforms may have a disproportionate effect on the availability of seating for individuals who use wheelchairs and their companions attempting to buy tickets on the day of the event. Use of removable platforms may result in instances where last minute requests for wheelchair and companion seating cannot be met because entire sections of wheelchair seating will be lost when a platform is removed. The use of movable seats, on the other hand, could meet such a demand without eliminating blocks of wheelchair seating at a time, converting only those seats

that are needed for ambulatory spectators and are not wanted by individuals who use wheelchairs and their companions.

For these reasons, the Department believes that it is necessary and appropriate to prohibit the use of temporary platforms in fixed seating areas. Nothing in this section is intended to prohibit the use of temporary platforms to increase the available seating, e.g., platforms that cover a basketball court or hockey rink when the arena is being used for a concert. These areas of temporary seating do not remove required wheelchair locations and, therefore, would not violate the requirements of this regulation. In addition, covered entities would still be permitted to use individual movable seats to infill any wheelchair locations that are not sold to wheelchair users.

Proposed § 36.406(f)(3) requires facilities that have more than 5,000 seats to provide at least five wheelchair locations with at least three companion seats for each wheelchair space. The Department is proposing this requirement to address complaints from many wheelchair users that the practice of providing a strict one-to-one relationship between wheelchair locations and companion seating often prevents family members from attending events together.

Proposed § 36.406(f)(4) provides more precise guidance for designers of stadium-style movie theaters by requiring such facilities to locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

- (i) It is located within the rear sixty percent (60%) of the seats provided in an auditorium; or
- (ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

Section 36.406(g) Medical Care Facilities

The Department is aware that the Access Board sought comment on how dispersion of accessible sleeping rooms can effectively be achieved and maintained in medical care facilities such as hospitals. In response, commenters representing people with disabilities supported a requirement for dispersion of accessible sleeping rooms among all types of medical specialty areas, such as obstetrics, orthopedics, pediatrics, and cardiac care. Conversely,

commenters representing the health care industry pointed out that treatment areas in health care facilities can be very fluid due to fluctuation in the population and other demographic and medical funding trends. The Access Board decided not to add a dispersion requirement because compliance over the lifetime of the facility could prove difficult given the need for flexibility of spaces within such facilities. The Department recognizes that it may be difficult to ensure a perfect distribution of rooms throughout all specialty areas in a hospital, but the Department is concerned that the absence of any dispersion requirement may result in inappropriate concentrations of accessible rooms.

Question 58: Is there a way to ensure that accessible hospital rooms are dispersed throughout the facility in a way that will not unduly restrain the ability of hospital administrators to allocate space as needed? The 1991 Standards require that ten percent (10%) of the patient bedrooms be accessible. If it is not feasible to distribute these rooms among each of the specialty areas, would it be appropriate that required accessible rooms be dispersed so that there are accessible patient rooms on each floor? Are there other methods of dispersal that would be more effective?

Section 36.407 Temporary Suspension of Certain Detectable Warning Requirements

The Department has removed § 36.407, entitled, "Temporary suspension of certain detectable warning requirements," because the suspension has expired.

Other

Miniature Golf Courses. The Department proposes to adopt the requirements for miniature golf courses in the 2004 ADAAG. However, it requests public comment on a suggested change to the requirement for holes to be consecutive. A commenter association argued that the "miniature golf experience" includes not only putting but also enjoyment of "beautiful landscaping, water elements that include ponds, fountain displays, and lazy rivers that matriculate throughout the course and themed structures that allow players to be taken into a 'fantasy-like' area." Thus, requiring a series of consecutive accessible holes would limit the experience of guests with disabilities to one area of the course. To remedy this situation, the association suggests allowing multiple breaks in the sequence of accessible holes while maintaining the requirement that the

accessible holes are connected by an accessible route.

The suggested change would need to be made by the Access Board and then adopted by the Department, and if adopted, it would apply to all miniature golf courses, not only existing miniature golf facilities.

Question 59: The Department would like to hear from the public about the suggestion of allowing multiple breaks in the sequence of accessible holes, provided that the accessible holes are connected by an accessible route. Should the Department ask the Access Board to change the current requirement in the 2004 ADAAG?

Subpart F—Certification of State Laws or Local Building Codes

Subpart F contains procedures implementing section 308(b)(1)(A)(ii) of the ADA, which provides that, on the application of a state or local jurisdiction, the Attorney General may certify that a state or local building code or similar ordinance meets or exceeds the minimum accessibility requirements of the Act. In enforcement proceedings, this certification will constitute rebuttable evidence that the law or code meets or exceeds the ADA's requirements. In its ANPRM, the Department proposed changes that would streamline the process for public entities seeking certification.

In response to the comments received, the Department proposes three changes in Subpart F. First, the Department proposes to delete § 36.603, which establishes the obligations of a submitting authority that is seeking certification of its code. Due to the proposed deletion of § 36.603, §§ 36.604 through 36.608 are renumbered, and § 36.603 in the proposed rule is modified to indicate that the Assistant Attorney General for the Civil Rights Division (Assistant Attorney General) shall make a preliminary determination of equivalency after "receipt and review of all information relevant to a request filed by a submitting official for certification of a code." Second, the Department proposes that the requirement in § 36.605 (proposed § 36.604) (*i.e.*, if the Assistant Attorney General makes a preliminary determination of equivalency, he or she shall hold an informal hearing in Washington, DC) be changed to a requirement that the hearing be held in the state or local jurisdiction charged with administration and enforcement of the code. Third, the Department proposes adding language to § 36.607 (proposed § 36.606) to explain the effect of the proposed standards on the codes of state or local jurisdictions that were

determined in the past to meet or exceed the 1991 Standards. Once the proposed standards take effect, certifications issued under the 1991 Standards would not have any future effect, and states and local jurisdictions with codes certified under the 1991 Standards would need to reapply for certification under the proposed standards once adopted. The Department will make every effort to give these requests priority in the review process. With regard to elements of existing buildings and facilities constructed in compliance with a code when a certification of equivalency was in effect, the proposed rule would require that in any enforcement action this would be treated as rebuttable evidence of compliance with the Act's standards then in effect, which may implicate the barrier removal obligations of existing facilities and the "safe harbor" approach.

Many commenters, including business organizations, a professional association, disability rights groups, and individuals with disabilities, urged that the Department take steps overall to streamline the certification process—including the initial request for certification process—and make it less time consuming and easier to "navigate" for state and local jurisdictions. In response to these comments, the Department has deleted the current language in § 36.603, which established the obligations of a submitting authority seeking certification of its code. The Department anticipates that in place of § 36.603, it will issue regulatory guidance in conjunction with the publication of the final rule that will provide more streamlined submission requirements and greater flexibility in the submission process.

The Department believes that with the adoption of the proposed standards, the certification process will take significantly less time to complete and will be a more straightforward process. In addition, it will be easier for jurisdictions to identify inconsistencies with the ADA in advance of requesting certification, thereby facilitating the certification review process. The Department anticipates these results because of the extensive efforts made by the Access Board, working in conjunction with model code organizations, to harmonize the 2004 ADAAG with the accessibility provisions of the model codes, which form the basis of many state codes.

The Department also supports the views of commenters who stressed the importance of continued harmonization efforts by the Access Board, in addition

to the benefits of providing more technical guidance regarding the consistency of model codes with the ADA's requirements. In that regard, the Department expects to make available, in conjunction with its publication of the proposed standards, information indicating differences between the 1991 Standards and the proposed standards, and the model code of the International Code Council and other model codes.

Many commenters, including a state enforcement agency, business organizations, and individuals with disabilities, urged the Department to eliminate the requirement that an informal hearing be held in Washington, DC, after issuance of a preliminary determination of equivalency, and to add a requirement that the hearing be held within the affected jurisdiction, since it would provide better opportunities for interested parties to attend and participate. Consistent with these comments, the Department has renumbered § 36.605 as § 36.604, and has proposed a new requirement: If the Assistant Attorney General makes a preliminary determination of equivalency, a hearing will be held in the state or local jurisdiction charged with administration and enforcement of the code.

Two commenters, a professional association and a model code organization, urged the Department to add to the process for certifying state and local codes a procedure for determining ADA-compliant design and construction alternatives or equivalent facilitation, or alternatively, to adopt a separate mechanism for such determinations modeled after a state "barrier free" design board. One of these commenters also expressed frustration that local building code officials in jurisdictions with certified codes lacked the authority to issue binding interpretations of ADA compliance and suggested the transfer of such authority in conjunction with a certification determination.

The Department has considered these proposals, but notes that the approaches suggested are not consistent with or permissible under the statutory scheme established by the ADA. Under the ADA, certification of state and local codes serves, to some extent, to mitigate the absence of a federal mechanism for reviewing nationally all architectural plans and inspecting all covered buildings under construction to ensure compliance with the ADA. In this regard, certification operates as a bridge between the obligation to comply with the 1991 Standards in new construction and alterations, and the administrative schemes of state and local governments

that regulate the design and construction process. By ensuring consistency between state or local codes and federal accessibility standards, certification has the additional benefit of streamlining the "regulatory process," thereby making it easier for those in the design and construction industry to satisfy both state and federal requirements.

Although certification has the potential to increase compliance with the ADA, this result, however desirable, is not guaranteed. The ADA contemplated that there could be enforcement actions brought even in states with certified codes, and provided some protection in litigation to builders who adhered to the provisions of the code certified to be ADA-equivalent, without resorting to waivers or variances. The certified code, however, remains within the authority of the adopting state or local jurisdiction to interpret and enforce: certification does not transform a state's building code into federal law. Nor can certification alone authorize state and local building code officials implementing a certified code to do more than they are authorized to do under state or local law, and these officials cannot acquire authority through certification to render binding interpretations of federal law. Therefore, the Department, while understanding the interest in obtaining greater assurance of compliance with the ADA through the interpretation and enforcement of a certified code by local code officials, declines to amend the regulation to reach what are purely state and local processes of code enforcement and administration or to attempt to confer on local officials authority not granted to them under the ADA.

The Department also declines to propose modifications to the regulation to require, as one individual commenter suggested, that the receipt of federal funds be made contingent upon a state or local government's willingness to bring its building code into compliance with the ADA and, ostensibly, obtain certification. The ADA establishes certification as a voluntary process; altering the statutory scheme is beyond the Department's authority.

A comment received from a firm representing several business organizations questioned whether the current certification process could ever provide states with certified codes the opportunity to keep current with changes in model codes because of inflexibility in either the federal rulemaking process or the certification process itself. The commenter also pointed out that there are a number of states with codes that follow the current

"guidelines" but have not received certification. All of these circumstances require that "the certification process * * * start over under a new process." The Department shares the commenter's concern regarding the importance of states with certified codes to update and keep their code certifications current. In that regard, the Department has undertaken significant outreach to remind states of the need to request review from the Department for changes or amendments to a certified code. The Department also has written to states that have not sought code certification to encourage them to do so. However, certification is a voluntary process, and the Department cannot require that states with certified codes submit amendments to a certified code any more than it can require the initial code certification. The Department will continue to remind states with certified codes that the protection in litigation available through compliance with a certified code does not extend to uncertified code amendments.

The Department requested comment in its ANPRM on what impact the proposed standards should have on the status of accessibility requirements that were previously determined to have met or exceeded the 1991 Standards. A number of commenters, including business groups, retail associations, hotel chains, associations of amusement parks, and a national chamber of commerce, urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification after the adoption of the proposed standards under "safe harbor" provisions. Many of the same commenters urged the Department to provide facilities constructed in accordance with currently certified accessibility codes meaningful protection from litigation.

Other commenters expressed a different view concerning the impact the proposed standards should have on currently certified codes. A state enforcement agency urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification only if the relevant jurisdiction could show that its accessibility code meets the proposed standards. An organization representing people with disabilities urged the Department to require each jurisdiction with a certified accessibility code to amend its accessibility code to meet the proposed standards thirty days after they are adopted. Another commenter, an individual with a disability, urged the Department to allow each jurisdiction with a certified accessibility code to retain its certification for a

period of five years so that the relevant jurisdiction could amend its accessibility code to meet the proposed standards once adopted.

Two commenters, an architectural firm and an organization of disability access professionals, suggested that the Department implement a re-certification process to:

(1) Expedite those jurisdictions now certified; and (2) allow those jurisdictions to retain their certifications while amending their accessibility codes to meet the proposed standards. While the Department understands the substantial commitment of time and effort expended by states that have obtained certification of their codes, the Department anticipates requiring certification of equivalency for the accessibility requirements for construction and alteration of title III facilities on the basis of the proposed standards once they take effect. Thus, states with codes certified under the 1991 Standards will need to conform their codes to the proposed standards and obtain certification for the revised code. Any other approach would place the Department in the untenable position of the appearance of sanctioning the continued use of codes in certain parts of the country that are based upon outdated federal standards, while requiring compliance with the proposed standards in the rest of the country. With regard to facilities constructed in compliance with a certified code prior to the proposed standards, and during the period when a certification of equivalency was in effect, the Department is considering an approach that may merge with the basic safe harbor discussed in § 36.304 with respect to existing facilities constructed in compliance with the 1991 Standards. So, for example, if the Department adopts a safe harbor provision for all elements in existing facilities constructed in compliance with the 1991 Standards, then existing facilities in states with certified codes would be eligible for a safe harbor if they were constructed in compliance with an ADA-certified code. In this scenario, compliance with the certified code would be treated as evidence of compliance with the 1991 Standards for purposes of determining the application of the safe harbor provisions. Similarly, the Department believes that builders who constructed in compliance with a certified code should retain the protections in litigation that certification conferred, but only with regard to the ADA Standards in effect at the time. Therefore, in an enforcement action involving elements of existing facilities constructed in compliance

with a certified code, compliance with the certified code would continue to constitute rebuttable evidence of compliance with the ADA Standards then in effect, which could be relevant to a number of issues in the future such as barrier removal and good faith on the part of builders or business owners. Builders of newly constructed or altered facilities, however, would only receive protection in litigation if they constructed in compliance with a code certified as equivalent to the proposed standards.

The Department has amended § 36.607 (proposed § 36.606) that explains the effect of the proposed standards on existing certifications of equivalency issued under the 1991 Standards.

In addition, the Department has considered proposals that the Department “fast-track” a request for re-certification and give greater priority to states seeking re-certification for their codes. The Department plans to facilitate the efforts of states with codes certified under the 1991 Standards to obtain certification under the proposed standards. After publication of the proposed standards, but before their effective date, the Department will concentrate its efforts on assisting states with certified codes to identify the changes needed to conform their existing codes to the proposed standards. Priority in the review process will be given to states with certified codes interested in obtaining re-certification pursuant to the proposed standards. In addition, the Department will consider approaches internally that could result in a more efficient process for satisfying the procedural requirements for issuance of preliminary determinations, such as consolidating the **Federal Register** notices for the comment periods of two or more states if determinations are issued in close proximity to one another, and scheduling informal hearings in a manner that maximizes the ability of the Department’s staff to conduct them within a relatively short time period.

Effect on the certification process of using more than one regulatory scheme at the state or local level to establish accessibility requirements for title III facilities with new design requirements in the proposed standards. The proposed standards will include requirements for elements and spaces that are not addressed specifically in the 1991 Standards, including elements within recreational facilities and play areas such as swimming pools, spas, miniature golf courses, components in play areas, amusement rides, boating

facilities, and fishing piers or platforms. Many of these will be constructed as components of buildings and facilities regulated by state and local governments through their building codes. In other instances, they may not occur in conjunction with a building or facility that is traditionally regulated through the building code. The Department understands that state and local governments may differ in their choices regarding how to incorporate new accessibility requirements for recreational facilities and play areas. The opportunity to seek certification is not limited to jurisdictions that incorporate accessibility requirements into building codes and enforce them through a building code authority. Jurisdictions can adopt legally enforceable accessibility requirements through a variety of regulatory schemes, including the building code, and lodge oversight authority in a governmental entity other than a code authority, such as a human relations commission, a department of public safety, the office of a local fire marshal, or an office that issues business licenses.

The Department is considering what impact the administration of accessibility requirements through more than one regulatory scheme under the authority of more than one state or local agency should have on the certification review process. The Department contemplates that when a jurisdiction uses more than one regulatory scheme to incorporate its accessibility requirements for title III facilities, all of the requirements would be the subject of a request for certification, even if there are “joint” submitting officials representing the respective agencies with enforcement responsibility.

Additional Information:

Withdrawal of Outstanding NPRMs

With the publication of this NPRM, the Department is withdrawing three outstanding NPRMs: the joint NPRM of the Department and the Access Board dealing with children’s facilities, published on July 22, 1996, at 61 FR 37964; the Department’s proposal to extend the time period for providing curb ramps at existing pedestrian walkways, published on November 27, 1995, at 60 FR 58462; and the Department’s proposal to adopt the Access Board’s accessibility guidelines and specifications for state and local government facilities, published as an interim final rule by the Access Board on June 20, 1994, at 59 FR 31676, and by the Department as a proposed rule on June 20, 1994, at 59 FR 31808. To the extent that those proposals were incorporated in the 2004 ADAAG, they

will all be included in the Department’s proposed standards.

Regulatory Process Matters

This NPRM has been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. 58 FR 51735 (Sept. 30, 1993). The Department has evaluated its existing regulations for title II and title III section by section, and many of the proposals in its NPRMs for both titles reflect its efforts to mitigate any negative effects on small entities. The Department has also prepared an initial regulatory impact analysis (RIA), as directed by Executive Order 12866 (amended without substantial change by E.O. 13258, 67 FR 9385 (Feb. 26, 2002), and E.O. 13422, 72 FR 2763 (Jan. 18, 2007)), and OMB Circular A–4.

The Department’s initial regulatory impact analysis measures the incremental benefits and costs of the proposed standards relative to the benefits and costs of the 1991 Standards. The assessment has estimated the benefits and costs of all new and revised requirements as they would apply to newly constructed facilities, altered facilities, and facilities that are removing barriers to access.

A summary of the regulatory assessment, including the Department’s responses to public comments addressing its proposed methodology and approach, is attached as Appendix B to this NPRM. The complete, formal report of the initial regulatory impact analysis is available online for public review on the Department’s ADA Home Page (<http://www.ada.gov>) and at <http://www.regulations.gov>. The report is the work product of the Department’s contractor, HDR/HLB Decision Economics, Inc. The Department has adopted the results of this analysis as its assessment of the benefits and costs that the proposed standards will confer on society. The Department invites the public to read the full report and to submit electronic comments at <http://www.regulations.gov>.

Regulatory Flexibility Act

This NPRM has also been reviewed by the Small Business Administration’s Office of Advocacy pursuant to Executive Order 13272, 67 FR 53461 (Aug. 13, 2002). Because the proposed rule, if adopted, may have a significant economic impact on a substantial number of small entities, the Department has conducted an Initial Regulatory Flexibility Analysis (IRFA) as a component of this rulemaking. The Department’s ANPRM, NPRM, and the RIA include all of the elements of the IRFA required by the Regulatory

Flexibility Act (RFA). *See* 5 U.S.C. 601 *et seq.*, as amended by the SBREFA, 5 U.S.C. 603(b)(1)–(5), 603(c).

Section 603(b) lists specific requirements for an IRFA regulatory analysis. The Department has addressed these IRFA issues throughout the ANPRM, NPRM, and the RIA. In summary, the Department has satisfied its IRFA obligations under section 603(b) by providing the following:

1. *Description of the reasons that action by the agency is being considered.* *See, e.g.,* “The Roles of the Access Board and the Department of Justice,” “The Revised Guidelines,” and “The Advance Notice of Proposed Rulemaking” sections of the titles II and III NPRMs; Section 2.1, “Access Board Regulatory Assessment” of the initial regulatory impact analysis; *see also* Department of Justice ADA Advanced Notice of Proposed Rulemaking, 69 FR 58768, 58768–70, (Sept. 30, 2004) (outlining the regulatory history and rationale underlying DOJ’s proposal to revise its regulations implementing titles II and III of the ADA);

2. *Succinct statement of the objectives of, and legal basis for, the proposed rule.* *See, e.g.,* titles II and III NPRM sections entitled, “Summary,” “Overview,” “Purpose,” “The ADA and Department of Justice Regulations,” “The Roles of the Access Board and the Department of Justice,” “Background (SBREFA, Regulatory Flexibility Act, and Executive Order) Reviews,” and “Regulatory Impact Analysis”; App. B: Regulatory Assessment sections entitled, “Background,” “Regulatory Alternatives,” “Regulatory Proposals with Cost Implications,” and “Measurement of Incremental Benefits”; *see also* 69 FR at 58768–70, 58778–79 (outlining the goals and statutory directives for the regulations implementing titles II and III of the ADA);

3. *Description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.* *See* Section 6, “Small Business Impact Analysis” and App. 5, “Small Business Data of the RIA” (available for review at <http://www.ada.gov>); *see also* App. B: Regulatory Assessment sections entitled, “Regulatory Alternatives,” “Regulatory Proposals with Cost Implications,” and “Measurement of Incremental Benefits” (estimating the number of small entities the Department believes may be impacted by the proposed rules and calculating the likely incremental economic impact of these rules on small facilities/entities versus “typical” (*i.e.*, average-sized) facilities/entities);

4. *Description of the projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.* *See* titles II and III NPRM sections entitled, “Paperwork Reduction Act” (providing that no new record-keeping or reporting requirements will be imposed by the NPRMs). The Department acknowledges that there are other compliance requirements in the NPRMs that may impose costs on small entities. These costs are presented in the Department’s Initial Regulatory Impact Analysis, Chapter 6, “Small Business Impact Analysis” and accompanying App. 5, “Small Business Data” (available for review at <http://www.ada.gov>);

5. *Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.* *See, e.g.,* title II NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ efforts to eliminate duplication or overlap in federal accessibility guidelines), “The ADA and Department of Justice Regulations,” “Social Service Establishments” (§ 35.151(e)), “Streamlining Complaint Investigations and Designated Agency Authority” (§§ 35.171, 35.172, and 35.190), “Executive Order 13132: Federalism” (discussing interplay of section 504 and ADA Standards), “Alterations” (§ 35.151(b)) (discussing interplay of UFAS and ADA Standards); title III NPRM sections entitled, “Analysis of Impact on Small Entities” (generally describing DOJ’s harmonization efforts with other federal accessibility guidelines), “Social Service Establishments” (§ 36.406(d)), “Definitions of Residential Facilities and Transient Lodging,” “Housing at a Place of Education” (§ 36.406(e)) (discussing section 504), “Change ‘Service Animal’ to ‘Assistance Animal,’” “Scope of Coverage” (discussing Fair Housing Act), “Effective Date: Time Period,” and “Social Service Establishments” (discussing UFAS); and

6. *Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any significant impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) use of performance rather than design standards; and (3)*

any exemption from coverage of the rule, or any part thereof, for such small entities.

The Department’s rulemaking efforts satisfy the IRFA requirements for consideration of significant regulatory alternatives. In September 2004, the Department issued an ANPRM to commence the process of revising its regulations implementing titles II and III of the ADA. *See* 69 FR 58768 (Sept. 30, 2004). Among other things, the ANPRM sought public comment on 54 specific questions. Prominent among these questions was the issue of whether (and how) to craft a “safe harbor” provision for existing title III-covered facilities/entities that would reduce the financial burden of complying with the 2004 ADAAG. *See id.* at 58771–58772. The ANPRM also specifically invited comment from small entities concerning the proposed rules’ potential economic impact and suggested regulatory alternatives to ameliorate such impact. *Id.* at 58779 (Question 10). By the end of the comment period, the Department had received over 900 comments, including comments from SBA’s Office of Advocacy and small entities. *See, e.g.,* title II NPRM Preamble and title III NPRM Preamble sections entitled, “The Advance Notice of Proposed Rulemaking” (summarizing public response to the ANPRM). Many small business advocates expressed concern regarding the cost of making older existing title III-covered buildings compliant with new regulations (since many small businesses operate in such facilities) and urged DOJ to issue clearer guidance on barrier removal. *See* title III NPRM Preamble discussion of “Safe harbor and other proposed limitations on barrier removal.” In drafting the NPRMs for titles II and III, the Department expressly addressed small businesses’ collective ANPRM comments and proposed regulatory alternatives to help mitigate the economic impact of the proposed regulations on small entities. For example, the Department’s regulatory proposals:

- Provide a “safe harbor” provision whereby elements in existing title II- or title III-covered buildings or facilities that are compliant with the current 1991 Standards or UFAS need not be modified to comply with the standards in the proposed regulations (*see* “Safe Harbor” and § 35.150(b)(2) of the title II NPRM “Safe Harbor and Other Proposed Limitations on Barrier Removal” and § 36.304 of the title III NPRM);
- Adopt a regulatory alternative for barrier removal that, for the first time, provides a specific annual monetary “cost cap” for barrier removal

obligations for qualified small businesses (*see* title III NPRM sections entitled, “Safe Harbor and Other Proposed Limitations on Barrier Removal” and “Safe Harbor for Qualified Small Businesses Regarding What Is Readily Achievable”);

- Exempt certain existing small recreational facilities (*i.e.*, play areas, swimming pools, saunas, and steam rooms) which, in turn, are often owned or operated by small entities, from barrier removal obligations in order to comply with the standards in the proposed regulations (*see* title II NPRM at § 35.150(b)(4) and (5) and title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”); and
- Reduce scoping for certain other existing recreational facilities (*i.e.*, play areas over 1,000 square feet and swimming pools with over 300 linear feet of pool wall) operated by either title II or title III entities (*see* title II NPRM at § 35.150(b)(4) and (5) and title III NPRM section entitled, “Reduced Scoping for Public Accommodations, Small Facilities, and Qualified Small Businesses”).

Taken together, the foregoing regulatory proposals amply demonstrate that the Department was sensitive to the potential economic impact of the revised regulations on small businesses and attempted to mitigate this impact with a variety of provisions that, to the extent consistent with the ADA, impose reduced compliance standards on small entities.

Section 610 Review. The Department is also required to conduct a periodic regulatory review pursuant to section 610 of the RFA, 5 U.S.C. 601 *et seq.*, as amended by the SBREFA, 5 U.S.C. 610 *et seq.*

The review requires agencies to consider five factors: (1) The continued need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local governmental rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. *See* 5 U.S.C. 610(b). Based on these factors, the agency is required to determine whether to continue the rule without change or to amend or rescind the rule, to minimize any significant economic impact of the rule on a substantial number of small entities. *See id.* at 610(a).

In developing these proposed rules, the Department has gone through its regulations section by section, and, as a result, proposes several clarifications and amendments in both the title II and title III implementing regulations. The proposals reflect the Department’s analysis and review of complaints or comments from the public as well as changes in technology. Many of the proposals aim to clarify and simplify the obligations of covered entities. As discussed in greater detail above, one significant goal of the development of the 2004 ADAAG was to eliminate duplication or overlap in federal accessibility guidelines as well as to harmonize the federal guidelines with model codes. The Department has also worked to create harmony where appropriate between the requirements of titles II and III. Finally, while the regulation is required by statute and there is a continued need for it as a whole, the Department proposes several modifications that are intended to reduce its effects on small entities.

The Department has consulted with the Small Business Administration’s Office of Advocacy about this process. The Office of Advocacy has advised that although the process followed by the Department was ancillary to the proposed adoption of revised ADA Standards, the steps taken to solicit public input and to respond to public concerns is functionally equivalent to the process required to complete a section 610 review. Therefore, this rulemaking fulfills the Department’s obligations under the RFA.

Executive Order 13132: Federalism

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), requires executive branch agencies to consider whether a proposed rule will have federalism implications. That is, the rulemaking agency must determine whether the rule is likely to have substantial direct effects on state and local governments, a substantial direct effect on the relationship between the federal government and the states and localities, or a substantial direct effect on the distribution of power and responsibilities among the different levels of government. If an agency believes that a proposed rule is likely to have federalism implications, it must consult with state and local elected officials about how to minimize or eliminate the effects.

Title II of the ADA covers state and local government programs, services, and activities and, therefore, clearly has some federalism implications. State and local governments have been subject to the ADA since 1991, and the majority

have also been required to comply with the requirements of section 504. Hence, the ADA and the title II regulations are not novel for state and local governments. This proposed rule will preempt state laws affecting entities subject to the ADA only to the extent that those laws directly conflict with the statutory requirements of the ADA. But the Department believes it is prudent to consult with public entities about the potential federalism implications of the proposed title II regulations.

Title III of the ADA covers public accommodations and commercial facilities. These facilities are generally subject to regulation by different levels of government, including federal, state, and local governments. The ADA and the Department’s implementing regulations set minimum civil rights protections for individuals with disabilities that in turn may affect the implementation of state and local laws, particularly building codes. For these reasons, the Department has determined that this NPRM may have federalism implications and requires intergovernmental consultation in compliance with Executive Order 13132.

The Department intends to amend the regulations in a manner that meets the objectives of the ADA while also minimizing conflicts between state law and federal interests. To that end, as a member of the Access Board, the Department has been privy to substantial feedback from state and local governments through the development of the 2004 ADAAG. In addition, the Department solicited and received input from public entities in the September 2004 ANPRM. Some elements of the proposed rules reflect the Department’s work to mitigate federalism implications, particularly the provisions that streamline the administrative process for state and local governments seeking ADA code certification under title III.

The Department is now soliciting comments from elected state and local officials and their representative national organizations through this NPRM. The Department seeks comment from all interested parties, but especially state and local elected officials, about the potential federalism implications of the proposed rule. The Department welcomes comments on whether the proposed rule may have direct effects on state and local governments, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

National Technology Transfer and Advancement Act of 1995

The National Technology Transfer and Advancement Act of 1995 (NTTAA) directs that all federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, which are private, generally non-profit organizations that develop technical standards or specifications using well-defined procedures that require openness, balanced participation among affected interests and groups, fairness and due process, and an opportunity for appeal, as a means to carry out policy objectives or activities. Public Law 104–113 (15 U.S.C. 272(b)). In addition, the NTTAA directs agencies to consult with voluntary, private sector, consensus standards bodies and requires that agencies participate with such bodies in the development of technical standards when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources.

The Department, as a member of the Access Board, was an active participant in the lengthy process of developing the 2004 ADAAG, on which the proposed standards are based. As part of this update, the Board has made its guidelines more consistent with model building codes, such as the International Building Code (IBC), and industry standards. It coordinated extensively with model code groups and standard-setting bodies throughout the process so that differences could be reconciled. As a result, an historic level of harmonization has been achieved that has brought about improvements to the guidelines, as well as to counterpart provisions in the IBC and key industry standards, including those for accessible facilities issued through the American National Standards Institute.

Plain Language Instructions

The Department makes every effort to promote clarity and transparency in its rulemaking. In any regulation, there is a tension between drafting language that is simple and straightforward that also gives full effect to issues of legal interpretation. The Department operates a toll-free ADA Information Line (800–514–0301 (voice); 800–514–0383 (TTY)) that the public is welcome to call at any time to obtain assistance in understanding anything in this rule. If any commenter has suggestions for how the regulation could be written more clearly, please contact Janet L. Blizard, Deputy Chief, Disability Rights Section, whose contact information is provided

in the introductory section of this rule, entitled, **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) requires agencies to clear forms and recordkeeping requirements with OMB before they can be introduced. 44 U.S.C. 3501 *et seq.* This rule does not contain any paperwork or recordkeeping requirements and does not require clearance under the PRA.

Unfunded Mandates Reform Act

Section 4(2) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1503(2), excludes from coverage under that Act any proposed or final federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” Accordingly, this rulemaking is not subject to the provisions of the Unfunded Mandates Reform Act.

List of Subjects for 28 CFR Part 36

Administrative practice and procedure, Buildings and facilities, Business and industry, Civil rights, Individuals with disabilities, Penalties, Reporting and recordkeeping requirements.

By the authority vested in me as Attorney General by law, including 28 U.S.C. 509 and 510, 5 U.S.C. 301, and section 306 of the Americans with Disabilities Act, Public Law 101–336, 42 U.S.C. 12186, and for the reasons set forth in the preamble, Chapter I of title 28 of the Code of Federal Regulations is proposed to be amended as follows:

PART 36—NONDISCRIMINATION ON THE BASIS OF DISABILITY BY PUBLIC ACCOMMODATIONS AND IN COMMERCIAL FACILITIES

Subpart A—General

1. The authority citation for 28 CFR part 36 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12186(b).

2–3. Amend § 36.104 by adding the following definitions of *1991 Standards*, *2004 ADAAG*, *direct threat*, *existing facility*, *other power-driven mobility device*, *place of lodging*, *proposed standards*, *qualified reader*, *qualified small business*, *video interpreting services (VIS)*, and wheelchair in alphabetical order and revising the definitions of *qualified interpreter* and *service animal* to read as follows:

§ 36.104 Definitions.

1991 Standards means the ADA Standards for Accessible Design, as defined in 28 CFR part 36, Appendix A.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191.

* * * * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

* * * * *

Existing facility means a facility that has been constructed and remains in existence on any given date.

* * * * *

Other power-driven mobility device means any of a large range of devices powered by batteries, fuel, or other engines—whether or not designed solely for use by individuals with mobility impairments—that are used by individuals with mobility impairments for the purpose of locomotion, including golf cars, bicycles, electronic personal assistance mobility devices (EPAMDs), or any mobility aid designed to operate in areas without defined pedestrian routes.

* * * * *

Place of lodging. For purposes of this part, a facility is a *place of lodging* if it—

(1) Provides guestrooms for sleeping for stays that are primarily short-term in nature (generally two weeks or less) where the occupant does not have the right or intent to return to a specific room or unit after the conclusion of his or her stay;

(2) Under conditions and with amenities similar to a hotel, motel, or inn, including—

(i) An on-site proprietor and reservations desk,

(ii) Rooms available on a walk-up basis,

(iii) Linen service, and

(iv) Accepting reservations for a room type without guaranteeing a particular unit or room until check-in, without a prior lease or security deposit.

* * * * *

Proposed standards means the requirements set forth in appendices B and D to 36 CFR part 1191 as adopted by the Department of Justice.

* * * * *

Qualified interpreter means an interpreter who is able to interpret effectively, accurately, and impartially using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language

interpreters, oral interpreters, and cued speech interpreters. Oral interpreter means an interpreter who has special skill and training to mouth a speaker's words silently for individuals who are deaf or hard of hearing. Cued speech interpreter means an interpreter who functions in the same manner as an oral interpreter except that he or she also uses a hand code, or cue, to represent each speech sound.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary vocabulary.

Qualified small business means a public accommodation that meets the definition of "business concern" in 13 CFR 121.105 and that, together with its Affiliates, as determined pursuant to the criteria set forth in 13 CFR 121.103, meets the small business size standards established in 13 CFR 121.201, for the industry in which it is primarily engaged, as amended from time to time by the Small Business Administration. The term "primarily engaged" for purposes of this definition is defined in 13 CFR 121.107.

* * * * *

Service animal means any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure, retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term *service animal* includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities. The term *service animal* does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.

* * * * *

Video interpreting services (VIS) means an interpreting service that uses video conference technology over high-speed internet lines. VIS generally consists of a videophone, monitors, cameras, a high-speed internet connection, and an interpreter.

Wheelchair means a device designed solely for use by an individual with a mobility impairment for the primary purpose of locomotion in typical indoor and outdoor pedestrian areas. A wheelchair may be manually operated or power-driven.

Subpart B—General Requirements

§ 36.208 [Amended]

4. Amend § 36.208 by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

5. Amend § 36.211 by adding paragraph (c) to read as follows:

§ 36.211 Maintenance of accessible features.

* * * * *

(c) If the proposed standards reduce the number of required accessible elements below the number required by the 1991 Standards, the number of accessible elements in a facility subject to this part may be reduced in accordance with the requirements of the proposed standards.

Subpart C—Specific Requirements

6. Amend § 36.302 as follows:

a. Revise paragraph (c)(2);

b. Add paragraphs (c)(3) through (c)(8) and paragraphs (e) and (f) to read as follows:

§ 36.302 Modifications in policies, practices, or procedures.

* * * * *

(c) * * *

(2) *Exceptions.* A public accommodation may ask an individual with a disability to remove a service animal from the premises if:

(i) The animal is out of control and the animal's handler does not take effective action to control it;

(ii) The animal is not housebroken or the animal's presence or behavior fundamentally alters the nature of the service the public accommodation provides (e.g., repeated barking during a live performance); or

(iii) The animal poses a direct threat to the health or safety of others that cannot be eliminated by reasonable modifications.

(3) *If an animal is properly excluded.* If a place of accommodation properly excludes a service animal, it shall give the individual with a disability the opportunity to obtain goods, services,

and accommodations without having the service animal on the premises.

(4) *General requirements.* The work or tasks performed by a service animal shall be directly related to the handler's disability. A service animal that accompanies an individual with a disability into a place of public accommodation shall be individually trained to do work or perform a task, housebroken, and under the control of its handler. A service animal shall have a harness, leash, or other tether.

(5) *Care or supervision of service animals.* A public accommodation is not responsible for caring for or supervising a service animal.

(6) *Inquiries.* A public accommodation shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public accommodation may ask if the animal is required because of a disability; and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.

(7) *Access to areas open to the public, program participants, and invitees.* Individuals with disabilities who are accompanied by service animals may access all areas of a place of public accommodation where members of the public, program participants, and invitees are allowed to go.

(8) *Fees or surcharges.* A public accommodation shall not ask or require an individual with a disability to post a deposit, pay a fee or surcharge, or comply with other requirements not generally applicable to other patrons as a condition of permitting a service animal to accompany its handler in a place of public accommodation, even if people accompanied by pets are required to do so. If a public accommodation normally charges its clients or customers for damage that they cause, a customer with a disability may be charged for damage caused by his or her service animal.

* * * * *

(e) *Hotel reservations.* A public accommodation that owns, leases (or leases to), or operates a place of lodging shall:

(1) Modify its policies, practices, or procedures to ensure that individuals with disabilities can make reservations, including reservations made by telephone, in-person, or through a third party, for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms;

(2) Identify and describe accessible features in the hotels and guest rooms offered through the reservations service; and

(3) Guarantee that an accessible guest room reserved through the reservations service will be held for the reserving customer during the reservation period to the same extent that it guarantees reservations made by others.

(f) *Ticketing.* (1) *General.* A public accommodation shall modify its policies, practices, or procedures to ensure that individuals with disabilities can purchase tickets for accessible seating during the same hours, through the same methods of distribution, and in the same types and numbers of ticketing sales outlets, including telephone service, in-person ticket sales at the facility, or third-party ticketing services, as other patrons.

(2) *Availability.* Tickets for accessible seating shall be made available during all stages of ticket sales, including, but not limited to, presales, promotions, lotteries, waitlists, and general sales.

(3) *Identification of accessible seating.* Wheelchair seating and companion seats shall be identified on seating maps, plans, brochures, or other information provided to the general public to describe the seating layout or configurations at an assembly area.

(4) *Notification of accessible seating locations.* A public accommodation that sells or distributes tickets for seating at assembly areas shall, upon inquiry, inform spectators with disabilities and their companions of the locations of all unsold or otherwise available accessible seating for any ticketed event at the facility.

(5) *Sale of season tickets or other tickets for multiple events.* Season tickets or other tickets sold on a multi-event basis to individuals with disabilities and their companions shall be sold under the same terms and conditions as other tickets sold for the same series of events. Spectators purchasing tickets for accessible seating on a multi-event basis shall also be permitted to transfer tickets for single-event use by friends or associates in the same fashion and to the same extent as permitted other spectators holding tickets for the same type of ticketing plan.

(6) *Hold and release of accessible seating.* A public accommodation may release unsold accessible seating to any person with or without a disability following any of the circumstances described below:

(i) When all seating (excluding luxury boxes, club boxes, or suites) for an event have been sold;

(ii) When all seating in a designated area in the facility has been sold and the accessible seating being released is in the same designated area; or

(iii) When all seating in a designated price range has been sold and the accessible seating being sold is within the same designated price range. Nothing in this provision requires a facility to release wheelchair seats for general sale.

(7) *Ticket prices.* The price of tickets for accessible seating shall not be set higher than for tickets to seating located in the same seating section for the same event. Accessible seating must be made available at all price levels for an event. If an existing facility has barriers to accessible seating at a particular price level for an event, then a percentage (determined by the ratio of the total number of seats at that price level to the total number of seats in the assembly area) of the number of accessible seats must be provided at that price level in an accessible location. In no case shall the price of any particular accessible seat exceed the price that would ordinarily be charged for an inaccessible seat in that location.

(8) *Prevention of fraudulent purchase of accessible seating.* A public accommodation may not require proof of disability before selling a wheelchair space.

(i) For the sale of single-event tickets, it is permissible to inquire whether the individual purchasing the wheelchair space uses a wheelchair.

(ii) For season tickets, subscriptions or other multi-events, it is permissible to ask the individual to attest in writing that the wheelchair space is for an individual who utilizes a wheelchair. A public accommodation may investigate the potential misuse of accessible seating where there is good cause to believe that such seating has been purchased fraudulently.

(9) *Purchasing multiple tickets.* (i) Individuals with disabilities and their companions shall be permitted to purchase the same maximum number of tickets for an event per sales transaction as other spectators seeking to purchase seats for the same event. If there is an insufficient number of seats for all members of a party to sit together, seats shall be provided that are as close as possible to the wheelchair spaces. For accessible seating in a designated wheelchair area, a public accommodation shall provide up to three companion seats for each person with a disability who requires a wheelchair space, provided that at the time of purchase there are sufficient available wheelchair spaces.

(ii) For group sales, if a group includes one or more individuals who use a wheelchair, the group shall be placed in a seating area that includes wheelchair spaces so that, if possible, the group can sit together. If it is necessary to divide the group, it should be divided so that the individuals in the group who use wheelchairs are not isolated from their group.

7. Amend § 36.303 as follows:

a. Revise paragraphs (b) introductory text, (b)(1), (b)(2), (c), and (d);

b. Redesignate paragraph (f) as paragraph (h);

c. Add paragraphs (f) and (g) to read as follows:

§ 36.303 Auxiliary aids and services

* * * * *

(b) *Examples.* The term *auxiliary aids and services* includes—

(1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, text telephones (TTYs), videotext displays, video interpreting services (VIS), accessible electronic and information technology, or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers, taped texts, audio recordings, brailled materials and displays, screen reader software, magnification software, optical readers, secondary auditory programs (SAP), large print materials, accessible electronic and information technology, or other effective methods of making visually delivered materials available to individuals who are blind or have low vision; * * *

(c) *Effective communication.* (1) A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities and their companions who are individuals with disabilities.

(i) For purposes of this section, *companion* means a family member, friend, or associate of a program participant who, along with the participant, is an appropriate person with whom the public accommodation should communicate.

(ii) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual, the nature, length, and complexity of the

communication involved, and the context in which the communication is taking place. A public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication.

(2) A public accommodation shall not require an individual with a disability to bring another individual to interpret for him or her.

(3) A public accommodation shall not rely on an individual accompanying an individual with a disability to interpret or facilitate communication, except in an emergency involving a threat to public safety or welfare, or unless the individual with a disability specifically requests it, the accompanying individual agrees to provide the assistance, and reliance on that individual for this assistance is appropriate under the circumstances.

(d) *Telecommunications*—(1) *Telephones*. (i) When a public accommodation uses an automated attendant system for receiving and directing incoming telephone calls, that automated attendant system must provide effective communication with individuals using TTYs or a telecommunications relay system.

(ii) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make available, upon request, public telephones equipped with volume control mechanisms, hearing aid compatible telephones, or text telephones (TTYs) for the use of an individual who is deaf or hard of hearing, or has a speech impairment.

(iii) This part does not require a public accommodation to use public telephones equipped with volume control mechanisms, hearing aid compatible telephones, or TTYs for receiving or making telephone calls incident to its operations.

(iv) A public accommodation shall respond to telephone calls from a telecommunications relay service established under title IV of the Americans with Disabilities Act in the same manner that it responds to other telephone calls.

(2) *Text telephones (TTYs)*. (i) A public accommodation that offers a customer, client, patient, or participant the opportunity to make outgoing telephone calls on more than an incidental convenience basis shall make

available, upon request, a TTY for the use of an individual who is deaf or hard of hearing, or has a speech impairment.

(ii) This part does not require a public accommodation to use a TTY for receiving or making telephone calls incident to its operations.

* * * * *

(f) *Video interpreting services (VIS)*. A public accommodation that chooses to provide qualified interpreters via VIS shall ensure that it provides—

(1) High quality, clear, real-time, full-motion video and audio over a dedicated high-speed internet connection;

(2) A clear, sufficiently large, and sharply delineated picture of the interpreter's head and the participating individual's head, arms, hands, and fingers, regardless of his body position;

(3) Clear transmission of voices; and

(4) Training to nontechnicians so that they may quickly and efficiently set up and operate the VIS.

(g) *Sports stadiums*. One year after the effective date of this regulation, sports stadiums that have a seating capacity of 25,000 or more shall provide captioning on the scoreboards and video monitors for safety and emergency information.

* * * * *

8. Amend § 36.304 as follows:

a. Redesignate paragraph (d)(2) as (d)(6) and in the first sentence remove the reference “(d)(1)” and add “(d)(1) through (5)” in its place;

b. Add paragraphs (d)(2) through (d)(5);

§ 36.304 Removal of barriers.

* * * * *

(d)(2) *Safe harbor*. Elements in existing facilities that are not altered after [insert effective date of final rule], and that comply with the 1991 Standards, are not required to be modified in order to comply with the requirements set forth in the proposed standards.

(3) *Reduced scoping for public accommodations*. For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part for the element being altered, except as follows:

(i) In addition to the provisions of section 240.2.1 of the proposed standards, where an existing play area provides elevated play components, an additional number of ground level play components may be substituted for the number of elevated play components that would have been required to comply with the provisions of section 240.2.2 of the proposed standards; and

(ii) Where an existing swimming pool has at least 300 linear feet of swimming pool wall, it shall comply with the applicable requirements for swimming pools, except that it shall be required to provide only one accessible means of entry that complies with section 1009.2 or section 1009.3 of the proposed standards.

(4) *Exemption for small facilities*. For measures taken to comply with the barrier removal requirements of this section, existing facilities shall comply with the applicable requirements for alterations in § 36.402 and §§ 36.404 through 36.406 of this part, except as follows:

(i) Where an existing play area has less than 1000 square feet or is located in a family child care facility where the proprietor actually resides, it shall be exempt from the provisions of section 240 of the proposed standards;

(ii) Where an existing swimming pool has less than 300 linear feet of swimming pool wall, it shall be exempt from the provisions of section 242.2 of the proposed standards; and

(iii) Where an existing sauna or steam room was designed and constructed to seat only two people, it shall be exempt from the provisions of section 241 of the proposed standards.

(5) *Qualified small business*. A qualified small business has met its obligation to remove architectural barriers where readily achievable for a given year if, during that tax year, the entity has spent an amount equal to at least one percent (1%) of its gross revenue in the preceding tax year on measures undertaken in compliance with the barrier removal requirements of this section.

* * * * *

9. Amend § 36.308 as follows:

a. Revise paragraphs (a)(1)(i), (a)(1)(ii) introductory text, (A), and (B), and (b);

b. Add paragraphs (a)(1)(iii) and (c) to read as follows:

§ 36.308 Seating in assembly areas.

(a)(1) * * *

(i) Provide a reasonable number of wheelchair seating spaces, companion seats, and designated aisle seats; and

(ii) Locate the wheelchair seating spaces and companion seats so that they:

(A) Are an integral part of the seating area and are dispersed to all accessible seating levels; and

(B) Provide viewing angles to the screen, performance area, or other focal point that are equivalent to or better than the average viewing angles provided to all other spectators;

* * * * *

(iii) Companion seats shall be equivalent in size, quality, comfort, and amenities to the other seats in the assembly areas. Companion seats may be fixed or movable. * * *

(b) *New construction and alterations.* The provision and location of wheelchair seating spaces and companion seats and designated aisle seats in newly constructed or altered assembly areas shall be governed by the standards for new construction and alterations in subpart D of this part.

(c) *Modifications of policy—(1) Seating areas.* When designating seating sections of assembly areas providing spectators with, or entitling them to, distinct services or amenities that are not generally available to other spectators, a public accommodation in assembly areas shall ensure that wheelchair seating spaces and companion seating are provided in each such specialty seating area. The number of wheelchair seating spaces and companion seating provided in specialty seating areas shall be included in, rather than in addition to, wheelchair space requirements set forth in Table 221.2.1.1 in the proposed standards.

(2) *Group ticket purchases.* To the extent possible, a public accommodation in assembly areas shall permit wheelchair users to purchase companion tickets on the same terms that tickets are made available to other members of the public. In assembly areas with seating capacities exceeding 5,000, designate at least three companion seats for each of five wheelchair seating spaces in order to provide more flexible seating arrangements for families and other small groups. The group companion seats required by this subsection may be located adjacent to either the wheelchair location or other companion seats.

10. Amend § 36.309 by adding paragraph (b)(1)(iv) to read as follows:

§ 36.309 Examinations and courses.

* * * * *

(b)(1) * * *

(iv) any request for documentation if such documentation is required is reasonable and limited to the need for the modification or aid requested. * * *

* * * * *

11. Amend 28 CFR part 36 by adding § 36.311 to read as follows:

§ 36.311 Mobility devices.

(a) *Use of wheelchairs and manually powered mobility aids.* A public accommodation shall permit individuals with mobility impairments to use wheelchairs, scooters, walkers, crutches, canes, braces, or similar

devices in any areas open to pedestrian use.

(b) *Other power-driven mobility devices.* A public accommodation shall make reasonable modifications in its policies, practices, and procedures to permit the use of other power-driven mobility devices by individuals with disabilities, unless the public accommodation can demonstrate that the use of the device is not reasonable or that its use will result in a fundamental alteration in the nature of the public accommodation's goods, services, facilities, privileges, advantages, or accommodations.

(c) *Development of policies permitting the use of other power-driven mobility devices.* A public accommodation shall establish policies to permit the use of other power-driven mobility devices by individuals with disabilities when it is reasonable to afford a public accommodation's goods, services, facilities, or accommodations to an individual with a disability. Whether a modification is reasonable to allow the use of a class of power-driven mobility device by an individual with a disability in specific venues (e.g., doctors' offices, parks, commercial buildings, etc.) shall be determined based on:

(1) The dimensions, weight, and operating speed of the mobility device in relation to a wheelchair;

(2) The potential risk of harm to others by the operation of the mobility device;

(3) The risk of harm to the environment or natural or cultural resources or conflict with Federal land management laws and regulations; and

(4) The ability of the public accommodation to stow the mobility device when not in use, if requested by the user.

(d) *Inquiry into use of mobility device.* A public accommodation may ask a person using a power-driven mobility device if the mobility device is required because of the person's disability. A public accommodation shall not ask a person using a mobility device questions about the nature and extent of the person's disability.

Subpart D—New Construction and Alterations

12. Amend § 36.403 by adding paragraph (a)(1) and revising (f)(2)(iii) to read as follows:

§ 36.403 Alterations: Path of travel.

(a) * * *

(1) If a private entity has constructed or altered required elements of a path of travel at a place of public accommodation or commercial facility

in accordance with the specifications in the 1991 Standards, the private entity is not required to retrofit such elements to reflect incremental changes in the proposed standards solely because of an alteration to a primary function area served by that path of travel.

* * * * *

(f) * * *

(iii) Costs associated with providing accessible telephones, such as relocating the telephone to an accessible height, installing amplification devices, or installing a text telephone (TTY); * * *

* * * * *

13. Amend § 36.406 as follows:

a. Add the heading “*Applicable standards*” to paragraph (a);

b. Redesignate paragraph (a) as paragraph (a)(1);

c. Revise paragraphs (a)(1) and (b);

d. Add paragraphs (a)(2), (c), (d), (e), (f), and (g);

e. Remove Appendix to § 36.406 to read as follows:

§ 36.406 Standards for new construction and alterations.

(a) *Applicable standards.* (1) New construction and alterations subject to this part shall comply with the 1991 Standards if physical construction of the property commences before [date six months after the effective date of the final rule.]

(2) New construction and alterations subject to this part shall comply with the proposed standards if physical construction of the property commences on or after [date six months after the effective date of the final rule.]

(b) The proposed standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site. Unless specifically stated otherwise, advisory notes, appendix notes, and figures contained in the proposed standards explain or illustrate the requirements of the rule; they do not establish enforceable requirements.

(c) *Places of lodging.* Places of lodging, including inns, hotels, motels, time-shares, condominium hotels, mixed-use, and corporate hotel facilities subject to the proposed standards shall comply with the provisions of the proposed standards that apply to transient lodging, including, but not limited to the requirements for transient lodging guest rooms in sections 224 and 806.

(d) *Social service establishments.* Group homes, halfway houses, shelters, or similar social service establishments that provide temporary sleeping accommodations or residential dwelling units subject to the proposed standards

shall comply with the provisions of the proposed standards that apply to residential facilities, including, but not limited to, the provisions in sections 223 and 809.

(1) In sleeping rooms with more than twenty-five beds covered by this section, a minimum of five percent (5%) of the beds shall have clear floor space complying with section 806.2.3.

(e) *Housing at a place of education.* Dormitories or residence halls operated by or on behalf of places of education that are subject to the proposed standards shall comply with the provisions applicable to transient lodging, including, but not limited to, the requirements for transient lodging guest rooms in sections 224 and 806.

(f) *Assembly areas.* Assembly areas subject to the proposed standards shall comply with the provisions applicable to assembly areas, including, but not limited to, sections 221 and 804. In addition, assembly areas shall ensure that:

(1) Wheelchair and companion seating locations are dispersed to all levels of the facility that are served by an accessible route;

(2) Wheelchair and companion seating locations are not located on (or obstructed by) temporary platforms or other movable structures. When wheelchair seating locations are not required to accommodate people who use wheelchairs, individual, removable seats may be placed in those spaces;

(3) Facilities that have more than 5,000 seats shall provide at least five wheelchair spaces and at least three companion seats for each wheelchair space; and

(4) Stadium-style movie theaters shall locate wheelchair seating spaces and companion seating on a riser or cross-aisle in the stadium section that satisfies at least one of the following criteria:

(i) It is located within the rear sixty percent (60%) of the seats provided in an auditorium; or

(ii) It is located within the area of an auditorium in which the vertical viewing angles (as measured to the top of the screen) are from the 40th to the 100th percentile of vertical viewing angles for all seats as ranked from the seats in the first row (1st percentile) to seats in the back row (100th percentile).

(g) *Medical care facilities.* Medical care facilities subject to the proposed standards shall comply with the provisions applicable to medical care facilities, including, but not limited to,

sections 223 and 805. In addition, medical care facilities that do not specialize in the treatment of conditions that affect mobility shall disperse the accessible patient bedrooms required by section 223.2.1 in a manner that enables patients with disabilities to have access to appropriate specialty services.

§ 36.407 [Removed]

14. Remove § 36.407.

Subpart F—Certification of State Laws or Local Building Codes

§ 36.603 [Removed]

15. Remove § 36.603.

§ 36.604 [Redesignated as § 36.603]

16. Redesignate § 36.604 as § 36.603 and revise it to read as follows:

§ 36.603 Preliminary determination.

Upon receipt and review of all information relevant to a request filed by a submitting official for certification of a code, and after consultation with the Architectural and Transportation Barriers Compliance Board, the Assistant Attorney General shall make a preliminary determination of equivalency or a preliminary determination to deny certification.

§ 36.605 [Redesignated as § 36.604]

17. Redesignate § 36.605 as § 36.604 and revise paragraphs (a), (a)(2), and (b) to read as follows:

§ 36.604 Procedure following preliminary determination of equivalency.

(a) If the Assistant Attorney General makes a preliminary determination of equivalency under § 36.603, he or she shall inform the submitting official, in writing, of that preliminary determination. The Assistant Attorney General also shall:

(2) After considering the information received in response to the notice described in paragraph (a) of this section, and after publishing a separate notice in the **Federal Register**, hold an informal hearing, in the State or local jurisdiction charged with administration and enforcement of the code, at which interested individuals, including individuals with disabilities, are provided an opportunity to express their views with respect to the preliminary determination of equivalency; and

(b) The Assistant Attorney General—after consultation with the Architectural and Transportation Barriers Compliance

Board and consideration of the materials and information submitted pursuant to this section, as well as information previously provided by the submitting official—shall issue either a certification of equivalency or a final determination to deny the request for certification. The Assistant Attorney General shall publish notice of the certification of equivalency or denial of certification in the **Federal Register**.

§ 36.606 [Redesignated as § 36.605]

18. Redesignate § 36.606 as § 36.605 and revise the first sentence of paragraph (a) to read as follows:

§ 36.605 Procedure following preliminary denial of certification.

(a) If the Assistant Attorney General makes a preliminary determination to deny certification of a code under § 36.603, he or she shall notify the submitting official of the determination.

* * *

§ 36.607 [Redesignated as § 36.606]

19. Redesignate § 36.607 as § 36.606 and add a new paragraph (d) to read as follows:

§ 36.606 Effect of certification.

* * *

(d) When the standards of the Act against which a code is deemed equivalent are substantially revised or amended, a certification of equivalency issued under the preexisting standards is no longer effective, as of the date the revised standards take effect. However, construction in compliance with a certified code during the period when a certification of equivalency was effective shall be considered rebuttable evidence of compliance with the Standards then in effect as to those elements of buildings and facilities that comply with the certified code. A submitting official may reapply for certification pursuant to the Act's revised standards, and, to the extent possible, priority will be afforded the request in the review process.

§ 36.608 [Redesignated as § 36.607]

20. Redesignate § 36.608 as § 36.607.

Dated: May 30, 2008.

Michael B. Mukasey,
Attorney General.

[FR Doc. E8-12623 Filed 6-16-08; 8:45 am]

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Federal Register

**Tuesday,
June 17, 2008**

Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1, 20, 25, et al.

**Tax Return Preparer Penalties Under
Sections 6694 and 6695; Proposed Rule**

DEPARTMENT OF THE TREASURY**Internal Revenue Service**

26 CFR Parts 1, 20, 25, 26, 31, 40, 41, 44, 53, 54, 55, 56, 156, 157, and 301

[REG-129243-07]

RIN 1545-BG83

Tax Return Preparer Penalties Under Sections 6694 and 6695

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations implementing amendments to the tax return preparer penalties under sections 6694 and 6695 of the Internal Revenue Code (Code) and related provisions under sections 6060, 6107, 6109, 6696, and 7701(a)(36) reflecting amendments to the Code made by section 8246 of the Small Business and Work Opportunity Tax Act of 2007. The proposed regulations affect tax return preparers and provide guidance regarding the amended provisions. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by August 18, 2008. Outlines of topics to be discussed at the public hearing scheduled for Monday, August 18, 2008, must be received by Monday, August 4, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-129243-07), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-129243-07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov/Regs> (IRS REG-129243-07). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael E. Hara, (202) 622-4910, and Matthew S. Cooper, (202) 622-4940; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina Johnson, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by August 18, 2008. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in §§ 1.6060-1(a)(1), 1.6107-1, 1.6694-2(c)(3), 20.6060-1(a)(1), 20.6107-1, 25.6060-1(a)(1), 25.6107-1, 26.6060-1(a)(1), 26.6107-1, 31.6060-1(a)(1), 31.6107-1, 40.6060-1(a)(1), 40.6107-1, 41.6060-1(a)(1), 41.6107-1, 44.6060-1(a)(1), 44.6107-1, 53.6060-1(a)(1), 53.6107-1, 54.6060-1(a)(1), 54.6107-1, 55.6060-1(a)(1), 55.6107-1, 56.6060-1(a)(1), 56.6107-1, 156.6060-1(a)(1), 156.6107-1, 157.6060-1(a)(1), and 157.6107-1. This information is necessary to make the record of the name, taxpayer identification number, and principal place of work of each tax return preparer, make each return or claim for refund prepared available for inspection by the Commissioner of Internal Revenue, and to document that the tax return preparer advised the taxpayer of the penalty standards applicable to the taxpayer in order for the tax return preparer to avoid penalties under section 6694. The collection of

information is required to comply with the provisions of section 8246 of the Small Business and Work Opportunity Tax Act of 2007. The likely respondents are tax return preparers and their employers.

Estimated total annual reporting burden: 10,679,320 hours.

Estimated average annual burden per respondent: 15.6 hours.

Estimated number of respondents: 684,268.

Estimated frequency of responses: 127,801,426.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1), the Estate Tax Regulations (26 CFR part 20), the Gift Tax Regulations (26 CFR part 25), the Generation-Skipping Transfer Tax Regulations (26 CFR part 26), the Employment Tax and Collection of Income Tax at Source Regulations (26 CFR part 31), the Excise Tax Procedural Regulations (26 CFR part 40), the Highway Use Tax Regulations, (26 CFR part 41), the Wagering Tax Regulations (26 CFR part 44), the Foundation and Similar Excise Tax Regulations (26 CFR part 53), the Pension Excise Tax Regulations (26 CFR part 54), the Excise Tax on Real Estate Investment Trusts and Regulated Investment Companies Regulations (26 CFR part 55), the Public Charity Excise Tax Regulations (26 CFR part 56), the Excise Tax on Greenmail Regulations (26 CFR part 156), the Excise Tax on Structured Settlement Factoring Transactions Regulations (26 CFR part 157), and the Regulations on Procedure and Administration (26 CFR part 301) implementing the amendments to tax return preparer penalties under sections 6694 and 6695 (and the related provisions under sections 6060, 6107, 6109, 6696, and 7701(a)(36)) made by section 8246 of the Small Business and Work Opportunity Tax Act of 2007, Public Law 110-28 (121 Stat. 190) (May 25, 2007) (the 2007 Act).

In accordance with the 2007 Act, these proposed regulations amend existing regulations defining income tax return preparers to broaden the scope of that definition to include preparers of estate, gift, and generation-skipping transfer tax returns, employment tax returns, excise tax returns, and returns of exempt organizations. These proposed regulations also revise current

regulations to amend the standards of conduct that must be met to avoid imposition of the tax return preparer penalty under section 6694. In addition, these proposed regulations reflect changes to the computation of the section 6694 tax return preparer penalty made by the 2007 Act. These regulations also amend current regulations under the penalty provisions of section 6695 to conform them with changes made by the 2007 Act expanding the scope of that statute beyond income tax returns. The Treasury Department and the IRS intend to finalize these proposed regulations by the end of 2008, with the expectation that the final regulations will be applicable to returns and claims for refund filed (and advice given) after the date that final regulations are published in the **Federal Register**, but in no event sooner than December 31, 2008.

History of the Tax Return Preparer Penalty Provisions

The 2007 Act amended section 6694 to expand the definition of tax return preparer, broaden the scope of the tax return preparer penalties to include preparers of returns other than income tax returns, revise the standards of conduct that tax return preparers must meet to avoid imposition of penalties, and change the computation of the tax return preparer penalties. The 2007 Act did not amend a number of other Code sections related to tax return preparer conduct, nor did it directly address the tax regulations, published guidance, and case law that have developed since enactment of the preparer penalty regime as part of the Tax Reform Act of 1976, Public Law 94-455 (90 Stat. 1688) (October 4, 1976) (the 1976 Act).

The Treasury Department and the IRS believe that the recent amendments to the tax return preparer penalty provisions necessitate a comprehensive review and overhaul of all the tax return preparer penalties and related regulatory provisions. These proposed regulations are the first significant step in this process. Because the proposed regulations were drafted with consideration of the existing regulations and the legislative history of the statutory provisions that were amended by the 2007 Act, a brief review of the legislative and regulatory history leading up to the recent amendments is appropriate in order to place the proposed regulatory changes reflecting the 2007 Act amendments in context.

The Tax Reform Act Of 1976

The provisions in section 7701(a)(36) defining income tax return preparers, and the provisions in sections 6694, and 6695, imposing various penalties on

income tax return preparers, were first enacted by the 1976 Act. Sections 6107 and 6109, imposing an obligation on return preparers to furnish and maintain copies of returns and include an identifying number on those returns, were also enacted by the 1976 Act.

As originally enacted, section 7701(a)(36)(A) defined the term *income tax return preparer* to mean any person who prepared for compensation, or who employed one or more persons to prepare for compensation, any income tax return or income tax claim for refund, or a “substantial portion” of such return or claim. Section 7701(a)(36)(B) excluded from the definition of income tax return preparer persons who merely provided mechanical assistance in the preparation of a return or claim for refund, or who prepared returns and claims as an employee of the taxpayer or in a fiduciary capacity. The legislative history to the 1976 Act explained that whether or not a portion of a return constituted a substantial portion of a tax return was to be determined by examining both the length and complexity of that particular portion of the return and the amount of tax liability involved. The legislative history noted, however, that the filling out of a single schedule would generally not be considered a substantial portion of that return unless that particular schedule was the dominant portion of the entire tax return. The legislative history also provided that a person who prepared a return for compensation may be an income tax return preparer even though that person did not actually place figures on a taxpayer's return. See S. Rep. No. 94-938, 94th Cong., 2d Sess. 349-359 (1976).

As originally enacted, section 6694(a) imposed a “first tier” penalty of \$100 if any part of an understatement was due to the negligent or intentional disregard of rules or regulations by an income tax return preparer. Section 6694(b) imposed a “second tier” penalty of \$500 if any part of an understatement was due to a willful attempt in any manner to understate tax liability by an income tax return preparer. Section 6695(b) imposed a penalty of \$25 if an income tax return preparer failed to sign a return or claim for refund in the manner prescribed by regulations. Sections 6695(a), (c), (d), and (e) also imposed penalties of \$25 if an income tax return preparer failed to comply with the various identification rules in sections 6107(a), 6109(a)(4), 6107(b) and 6060.

The House and Senate Reports to the 1976 Act, H. Rep. No. 94-658, 94th Cong., 1st Sess. at 274 (1975) and S. Rep. No. 94-938 at 349-50, and the

Joint Committee on Taxation's General Explanation of the Tax Reform Act of 1976, 94th Cong., 2d Sess. at 346 (1976), explained the need for the new tax return preparer penalty regime by noting the significant number of fraudulent returns and tax return preparers engaged in abusive practices. The legislative history further explained that, under prior law, it was often difficult for the IRS to detect any individual case of improper return preparation. This was because the IRS generally had no way of knowing whether the return was prepared by the taxpayer or by a tax return preparer who may have engaged in abusive practices involving a number of returns. Further, even when the IRS could trace the improper preparation of tax returns to an individual tax return preparer, the only sanctions available were criminal penalties, which were often considered inappropriate, cumbersome, and ineffective deterrents because of the cost and length of time involved in prosecuting those cases. The legislative history makes clear that Congress intended the tax return preparer penalties to aid the IRS in detecting returns that were incorrectly prepared and to deter tax return preparers from engaging in improper conduct. See S. Rep. No. 94-938, at 350-51 (1976).

Regulations implementing certain of the amendments made by the 1976 Act were published on December 29, 1976, as TD 7451, 41 FR 56631, and later amended on March 31, 1977, by TD 7473, 42 FR 17124. Additional regulations were published on April 1, 1977, as TD 7475, 42 FR 17452, and November 23, 1977, as TD 7519, 42 FR 17452 (the November 1977 final regulations).

The November 1977 final regulations applied the tax return preparer penalty provisions to persons who did not sign the return or claim for refund, or make or control the entries on the return or claim for refund, including tax professionals who rendered advice that was directly related to the determination of the existence, characterization, or amount, of an entry on a return or claim for refund. By including a broad definition of tax return preparer, the Treasury Department and the IRS intended the regulations to increase advisor care and to monitor careless or deceptive members of the profession. The November 1977 final regulations reflected the considered view that excluding nonsigning tax professionals from the reach of section 6694 could result in a lack of accountability for positions taken on a return, as taxpayers could escape penalty liability because

they employed tax return preparers, tax return preparers could escape liability because they relied on nonsigning tax professionals' opinions, and nonsigning tax professionals could escape liability because they would not be considered tax return preparers. The November 1977 final regulations also reflected a concern with the possible exemption of tax attorneys and other professionals involved in preparing more complex returns while at the same time subjecting to penalties preparers of less sophisticated returns who did not rely on the work of others.

The November 1977 final regulations also adopted the safe harbor provisions of § 301.7701-15(b)(2), which excluded from the definition of a tax return preparer persons providing tax advice (other than those signing the return) if the amounts of gross income, deductions, or credits giving rise to the understatement were less than \$2,000; or less than \$100,000 and also less than 20 percent of the gross income (or, for an individual, the individual's adjusted gross income) shown on the return or claim for refund.

Omnibus Budget Reconciliation Act of 1989

Sections 6694 and 6695 were amended by the Improved Penalty Administration and Compliance Tax Act of 1989, enacted as title G of the Omnibus Budget Reconciliation Act of 1989 (OBRA 1989), Public Law 101-239 (103 Stat. 2106) (December 19, 1989). The OBRA 1989 amended section 6694(a) to remove the prior link to negligence or intentional disregard of rules or regulations and instead impose a \$250 penalty on an income tax return preparer who understated a taxpayer's tax liability on an income tax return or claim for refund if the understatement was due to a position for which there was not a "realistic possibility" of being sustained on its merits, and the tax return preparer knew or reasonably should have known of such position. The revised section 6694(a) penalty did not apply, however, if the position was "not frivolous" and was adequately disclosed, or if there was reasonable cause for the position taken and the tax return preparer acted in good faith. The OBRA 1989 also amended section 6694(b) to impose a \$1,000 penalty on a tax return preparer who understated a taxpayer's tax liability on an income tax return or claim for refund if the understatement was due to the tax return preparer's willful attempt to understate tax liability or the tax return preparer's reckless or intentional disregard of rules or regulations.

The OBRA 1989 also made uniform the tax return preparer penalties that apply for each failure by a tax return preparer to: (1) Furnish a copy of a return or claim for refund to the taxpayer under section 6695(a); (2) sign the return or claim for refund under section 6695(b); (3) furnish his or her identification number under section 6695(c); or (4) file a correct information return under section 6695(e). The unified penalty amount was \$50 for each failure, with a limit of \$25,000 for the total amount of penalties that could be imposed for any single type of failure.

The OBRA 1989 also consolidated the negligence, substantial understatement and valuation misstatement penalties applicable to taxpayers. These penalties were consolidated into a single accuracy-related penalty regime under section 6662. The new accuracy-related penalty for a substantial understatement of income tax generally would not be imposed, however, if (1) there was "substantial authority" for the taxpayer's treatment of the item giving rise to the understatement, or (2) relevant facts affecting the tax treatment of the item were adequately disclosed in the return or in a statement attached to the return and there was a "reasonable basis" for the tax treatment of the item.

By adopting the "realistic possibility" standard for tax return preparers, and the higher "substantial authority" standard for taxpayers with respect to undisclosed positions, OBRA 1989 created a disparity between the penalty treatment of tax return preparers and most taxpayers subject to income tax.

Regulations were published on December 31, 1991, as TD 8382, 56 FR 67509, which amended the regulations under section 6694 to conform the income tax return preparer regulations with the statutory changes made by OBRA 1989 and to make other changes.

The Small Business and Work Opportunity Tax Act of 2007

Section 8246 of the 2007 Act amended sections 6694 and 7701(a)(36) and made conforming changes to other Code provisions to make tax return preparer penalties applicable to a broader range of tax returns. The 2007 Act's amendments to section 6694 also changed the standards of conduct that tax return preparers must meet in order to avoid imposition of penalties in the event that a return prepared results in an understatement of tax. For undisclosed positions, the 2007 Act replaced the "realistic possibility" standard with a standard requiring the tax return preparer to "reasonably believe that the tax treatment of the

position is more likely than not" the proper treatment. For disclosed positions, the 2007 Act replaced the "not-frivolous" standard with a standard requiring the tax return preparer to have a "reasonable basis" for the tax treatment of the position.

The 2007 Act also increased the first-tier penalty under section 6694(a) from \$250 to the greater of \$1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer from the preparation of a return or claim for refund with respect to which the penalty was imposed. In addition, the 2007 Act increased the second-tier penalty under section 6694(b) from \$1,000 to the greater of \$5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer. The amendments made by the 2007 Act are effective for tax returns prepared after the date of enactment, May 25, 2007.

Notice 2008-13

Notice 2008-13 (2008-3 IRB 282) was released on December 31, 2007 and provided interim guidance under the 2007 Act regarding: (1) The relevant categories of tax returns or claims for refund for purposes of applying the penalty under section 6694(a); (2) the definition of "tax return preparer" under sections 6694 and 7701(a)(36); (3) the date a return is deemed prepared; (4) the standards of conduct applicable to tax return preparers for disclosed and undisclosed positions taken on tax returns; and (5) the penalty compliance obligations applicable to tax return preparers. Additional guidance was provided in Notice 2008-12 (2008-3 IRB 280) with respect to the implementation of the tax return preparer signature requirement of section 6695(b), and in Notice 2008-11 (2008-3 IRB 279), which clarified the earlier transition relief provided in Notice 2007-54 (2007-27 IRB 12 (July 2, 2007)). Notice 2008-46 (2008-18 IRB 868) was released on April 16, 2008 and added certain returns and documents to Exhibits 1, 2, and 3 of Notice 2008-13.

Explanation of Provisions

In developing these proposed regulations, the Treasury Department and the IRS recognize that the majority of tax return preparers serve the interests of their clients and the tax system by preparing complete and accurate returns. Tax return preparers are critical to ensuring compliance with the Federal tax laws and are an important component in the IRS's administration of those laws. The proposed regulations intend to balance the interests of the IRS in curtailing the activities of noncompliant tax return

preparers against the burden imposed on all tax return preparers in complying with the requirements imposed by the 2007 Act and these proposed regulations.

The Treasury Department and the IRS also recognize that the government has a number of tools to monitor and sanction tax return preparers, and will continue to coordinate the application of penalties under sections 6694, 6695, 6695A, 6700, 6701, 6702, and Circular 230, as well as other applicable penalties and criminal sanctions.

The IRS will assess penalties under section 6694 in appropriate cases. In keeping with a balanced enforcement program for tax return preparers, the IRS intends to modify its internal guidance so that a referral by revenue agents to the IRS Office of Professional Responsibility (OPR) will not be per se mandatory when the IRS assesses a tax return preparer penalty under section 6694(a) against a tax return preparer who is also a practitioner within the meaning of Circular 230. This change is consistent with the general administrative recommendations made in the legislative history of the amendments made by OBRA 1989 to the section 6694 penalty. See H.R. Conf. Rep. 101-386, 101st Cong., 1st Sess. at 662 (1989). In matters involving non-willful conduct, the IRS will generally look for a pattern of failing to meet the required penalty standards under section 6694(a) before making a referral to OPR, although any egregious conduct subjecting a tax return preparer to penalty may also form a basis for a referral to OPR.

Proposed Changes

The following is a summary of the proposed changes to the existing regulations affecting tax return preparers. The changes included in these proposed regulations are discussed in order of the Code sections to which they relate. When appropriate, cross-references to definitional sections are included. Significantly, the definition of tax return preparer, which maintains the concepts in the existing regulations of signing and nonsigning tax return preparers, is located at the end of these proposed regulations in § 301.7701-15, and that section is cross-referenced in the relevant sections of the regulations under sections 6694 and 6695.

Furnishing of Copy of the Tax Return

Section 1.6107-1(a), which requires signing tax return preparers to furnish the taxpayer a copy of the prepared return, is proposed to be amended to provide that for electronically filed

Forms 1040EZ, "Income Tax Return for Single Filers and Joint Filers With No Dependents," and Forms 1040A, "U.S. Individual Income Tax Return," filed for the 2009, 2010 and 2011 taxable years, the return information may be provided on a replica of a Form 1040, "U.S. Individual Income Tax Return," that provides all of the return information. For other electronically filed returns, the information may be provided on a replica of an official form that provides all of the information. This amendment addresses the IRS' transitional issues in implementing the Modernized e-File platform for the Form 1040 series of returns.

Date Return Is Prepared

Proposed § 1.6694-1(a)(2) defines the date a return or claim for refund is prepared as the date it is signed by the tax return preparer, and also provides that if the tax return preparer fails to sign the return when otherwise required to do so, the date the return is deemed prepared is the date the return is filed. In the case of a nonsigning tax return preparer, the relevant date is the date the person provides the advice on the position that results in the understatement. This date will be determined based on all the facts and circumstances.

Defining the Preparer Within a Firm

Current § 1.6694-1(b)(1) provides a "one preparer per firm" rule. Specifically, if a signing tax return preparer is associated with a firm, that individual, and no other individual in the firm, is treated as a tax return preparer with respect to the return or claim for purposes of section 6694. Under the current regulations, if two or more individuals associated with a firm are tax return preparers with respect to a return or claim for refund, and none of them is the signing tax return preparer, only one of the individuals is a nonsigning tax return preparer with respect to that return or claim for purposes of section 6694. In such a case, ordinarily, the individual who is a tax return preparer for purposes of section 6694 is the individual with overall supervisory responsibility for the advice given by the firm with respect to the return or claim. The "one preparer per firm" rule and the corollary rule included in § 1.6694-2(d)(5) of the current regulations precluding a tax return preparer from relying on the advice of an individual associated with the tax return preparer's same firm for purposes of penalty protection were intended to eliminate the administrative difficulty of attempting to apply the

section 6694 penalty on an intra-firm basis.

The Treasury Department and the IRS believe that the amendments to section 6694 made by the 2007 Act, together with the evolution in existing business practices and the increased complexity of the Federal tax law that has created an increased need for specialization, require reconsideration of the "one preparer per firm" rule. Specifically, the Treasury Department and the IRS believe this evolution requires the adoption of a framework that centers on the return or claim for refund on a position-by-position basis, with the focus of any penalty on the position(s) giving rise to the understatement on the return or claim for refund and any responsible parties with respect to such position(s). Thus the Treasury Department and the IRS believe that the "one preparer per firm" rule is no longer appropriate and have proposed to adopt a framework defining a preparer-per-position within a firm.

Under both the current and the proposed regulations, an individual is a tax return preparer subject to section 6694 if the individual is primarily responsible for the position on the return or claim for refund giving rise to the understatement.

Under proposed § 6694-1(b)(1), only one person within a firm will be considered primarily responsible for each position giving rise to an understatement and, accordingly, be subject to the penalty. In the course of identifying the individual who is primarily responsible for the position, the IRS may advise multiple individuals within the firm that it may be concluded that they are the individual within the firm who is primarily responsible. In some circumstances, there may be more than one tax return preparer who is primarily responsible for the position(s) giving rise to an understatement if multiple tax return preparers are employed by, or associated with, different firms.

Proposed § 1.6694-1(b)(2) provides that the individual who signs the return or claim for refund as the tax return preparer will generally be considered the person that is primarily responsible for all of the positions on the return or claim for refund giving rise to an understatement. The "one preparer per firm" rule, however, is revised by these proposed regulations if it is concluded based upon information received from the signing tax return preparer (or other relevant information from a source other than the signing tax return preparer) that another person within the signing tax return preparer's same firm was primarily responsible for the position(s)

giving rise to the understatement. In this situation, the “one preparer per firm” rule in the current regulations could unduly limit the IRS to assessing the penalty against a person who may have overall responsibility in terms of signing the return, but who may lack detailed knowledge of, or responsibility for, a problematic return position, and who reasonably relied on another professional at the same firm with greater knowledge of, and responsibility for, the accuracy of a position giving rise to the understatement.

The Treasury Department and the IRS believe that amending the regulations to better target the person or persons responsible for the position(s) giving rise to the understatement will further compliance and result in more equitable administration of the tax return preparer penalty regime.

Proposed § 1.6694–1(b)(3) establishes a similar rule for situations when there are one or more nonsigning tax return preparers at the same firm. If there are one or more nonsigning tax return preparers at the firm and no signing tax return preparer within the firm, the individual within the firm with overall supervisory responsibility for the position(s) giving rise to the understatement is the tax return preparer who is primarily responsible for the position for purposes of section 6694. Additionally, if after the application of proposed § 1.6694–1(b)(2) it is concluded that the signer is not primarily responsible for the position or the IRS cannot conclude which individual (as between the signing tax return preparer and other persons within the firm) is primarily responsible for the position, the individual nonsigning tax return preparer within the firm with overall supervisory responsibility for the position(s) is the tax return preparer who is primarily responsible for the position(s) giving rise to the understatement.

This rule in proposed § 1.6694–1(b)(3) is intended to address the potential for uncertainty regarding the identification of the primarily responsible tax return preparer prior to the time of the expiration of the period of limitations on making an assessment under section 6694(a). The proposed rule is distinguished from the current “one preparer per firm” rule in the current regulations because under the proposed rule the IRS may assess the penalty against either the signing tax return preparer or the nonsigning tax return preparer with overall supervisory responsibility for the position(s) giving rise to an understatement depending on the facts and circumstances. Specifically, when the facts indicate

that the signing tax return preparer is the primarily responsible tax return preparer under proposed § 1.6694–1(b)(1) and (b)(2), the IRS may assess the section 6694 penalty against that individual when appropriate under the statute and regulations. In situations when the facts indicate that the nonsigning tax return preparer with overall supervisory responsibility is the primarily responsible tax return preparer under proposed § 1.6694–1(b)(1) and (b)(3), the IRS may assess the section 6694 penalty against that individual when appropriate. In situations when it is unclear which individual, as between the signer and other nonsigning tax return preparers at the firm, the IRS may assess the section 6694 penalty against the nonsigning tax return preparer with overall supervisory responsibility with respect to the position giving rise to the understatement when appropriate. The Treasury Department and the IRS specifically request comments regarding the approach taken in these proposed regulations and any recommendations to improve this rule.

As described in this preamble, conforming rules are included in § 1.6694–1(f) of the proposed regulations regarding computation of the “income derived (or to be derived)” from the firm and the individual(s) associated with the firm, in order to ensure that the same income is not counted twice in determining the amount of income subject to the section 6694 penalty.

Reliance on Information Provided

Section 1.6694–1(e) of the current regulations allows a tax return preparer generally to rely in good faith without verification upon information furnished by the taxpayer. Proposed § 1.6694–1(e) allows similar reliance, but provides that a tax return preparer may not rely on information provided by taxpayers with respect to legal conclusions on Federal tax issues.

The proposed regulations expand on the current regulations to provide that a tax return preparer may rely in good faith and without verification on information furnished by another advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer's same firm). Similarly, a tax return preparer may rely in good faith without verification upon a tax return that has been previously prepared by a taxpayer or another tax return preparer and filed with the IRS. The tax return preparer, however, may not ignore the implications of information furnished to the tax return

preparer or actually known by the tax return preparer, and must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. The Treasury Department and the IRS believe that this expansion of the current rules regarding reliance is necessary given the heightened standards imposed on tax return preparers by the 2007 Act and the increased complexity of the tax law, which often requires signing and nonsigning tax return preparers to rely on the work of others in ensuring compliance.

Income Derived Determination in Computing Penalty Amount

Proposed § 1.6694–1(f) defines “income derived (or to be derived)” with respect to a return or claim for refund as all compensation the tax return preparer receives or expects to receive with respect to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement. In the situation of a tax return preparer who is not compensated directly by the taxpayer, but rather by a firm that employs the tax return preparer or with whom the tax return preparer is associated, income derived (or to be derived) means all compensation the tax return preparer receives from the firm that can be reasonably allocated to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement. In the situation where a firm that employs the individual tax return preparer (or the firm with which the individual tax return preparer is associated) is subject to a penalty under section 6694(a) or (b), income derived (or to be derived) means all compensation the firm receives or expects to receive with respect to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement.

If the tax return preparer or the tax return preparer's firm has multiple engagements related to the same return or claim for refund, only those engagements relating to the position(s) taken on the return or claim for refund that gave rise to the understatement are considered for purposes of computing the income derived (or to be derived). In the situation of a tax return preparer

who is not compensated directly by the taxpayer, but rather by a firm that employs the tax return preparer or with whom the tax return preparer is associated, income derived (or to be derived) means all compensation the tax return preparer receives from the firm that can be reasonably allocated to the relevant firm engagements.

The proposed regulations also provide that only compensation for time spent on tax advice that is given with respect to events that have occurred at the time the advice is rendered and that relates to the position(s) giving rise to the understatement will be taken into account for purposes of calculating the section 6694 penalty. This rule is intended to be consistent with the definition of tax return preparer in § 301.7701-15(b)(2)(i).

The proposed regulations provide that it may be concluded, based upon information received from the tax return preparer, that an appropriate allocation of compensation attributable to the position(s) giving rise to the understatement on the return or claim for refund is less than the total amount of compensation associated with the engagement. For example, it may be concluded that the number of hours of the engagement spent on the position(s) giving rise to the understatement may be less than the total hours associated with the engagement. If this is concluded, the amount of the penalty will be calculated based upon the compensation attributable to the position(s) giving rise to the understatement. Otherwise, the total amount of compensation from the engagement will be the amount of income derived for purposes of calculating the penalty under section 6694.

The proposed regulations also clarify that the amount of penalties assessed against the individual and the firm shall not exceed 50 percent of the income derived (or to be derived) by the firm from the relevant engagement(s) relating to the position(s) giving rise to an understatement. The portion of the total amount of penalty assessed against the individual tax return preparer shall not exceed 50 percent of the individual's compensation attributable to the engagement that relates to the position(s) giving rise to an understatement. In other words, the same income will not be taken into consideration more than once in calculating the penalty against an individual tax return preparer and the individual tax return preparer's firm. The Treasury Department and the IRS also anticipate that Circular 230 will be revised to state that the IRS generally will not stack the section 6694 penalty

and monetary penalties under 31 U.S.C. section 330 with respect to the same conduct.

Firm Liability

Proposed §§ 1.6694-2(a)(2) and 1.6694-3(a)(2) are the same as §§ 1.6694-2(a)(2) and 1.6694-3(a)(2) of the current regulations regarding when a firm is liable for the section 6694(a) or (b) penalty with one exception. Proposed §§ 1.6694-2(a)(2)(iii) and 1.6694-3(a)(2)(iii) provide that a firm is also subject to the penalty when the firm's review procedures were disregarded by the firm through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) in the formulation of the advice, or the preparation of the return or claim for refund, that included the position for which the penalty is imposed.

Reasonable Belief of More Likely Than Not

Proposed § 1.6694-2(b)(1) provides that the "reasonable belief that the position would more likely than not be sustained on its merits" standard will be satisfied if the tax return preparer analyzes the pertinent facts and authorities and, in reliance upon that analysis, reasonably concludes in good faith that the position has a greater than 50 percent likelihood of being sustained on its merits. Whether a tax return preparer meets this standard will be determined based upon all facts and circumstances, including the tax return preparer's due diligence. In determining the level of diligence in a particular case, the IRS will take into account the tax return preparer's experience with the area of tax law and familiarity with the taxpayer's affairs, as well as the complexity of the issues and facts in the case. The proposed regulations also provide that a tax return preparer may meet the "reasonable belief that the position would more likely than not be sustained on its merits" standard if a position is supported by a well-reasoned construction of the applicable statutory provision despite the absence of other types of authority, or if the tax return preparer relies on information or advice furnished by a taxpayer, advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer's same firm), as provided in proposed § 1.6694-1(e).

Proposed § 1.6694-2(b)(2) provides that a tax return preparer may not rely on unreasonable assumptions, while proposed § 1.6694-2(b)(3) states that the

authorities contained in § 1.6662-4(d)(3)(iii) (or any successor provision) are to be considered in determining whether a position satisfies the "more likely than not" standard. Proposed § 1.6694-2(b)(4) also provides examples that illustrate positions meeting the "reasonable belief that the position would more likely than not be sustained on its merits" standard.

Reasonable Basis

Proposed §§ 1.6694-2(c)(1) and (2) establish that the "reasonable basis" standard that must be met for disclosed positions is the same standard as defined in § 1.6662-3(b)(3) (or any successor provision). The proposed regulations also provide that, to meet the "reasonable basis" standard, a tax return preparer may rely in good faith, without verification, upon information furnished by a taxpayer, advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer's same firm), as provided in proposed § 1.6694-1(e).

Adequate Disclosure

Section 1.6694-2(c)(3) builds on the current regulations and the interim guidance provided in Notice 2008-13 and provides the rules for disclosure of a position for which there is a "reasonable basis" but for which the tax return preparer does not have a "reasonable belief that the position would more likely than not be sustained on its merits."

For a signing tax return preparer within the meaning of § 301.7701-15(b)(1), the proposed regulations provide that a position may be disclosed in one of five ways. First, the position may be disclosed on a properly completed and filed Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement, as appropriate, or on the tax return in accordance with the annual revenue procedure. See Revenue Procedure 2008-14 (2008-7 IRB 435 (February 19, 2008)). Second, for income tax returns, if the position does not meet the "substantial authority" standard described in § 1.6662-4(d), disclosure of the position is adequate if the tax return preparer provides the taxpayer with a prepared tax return that includes the appropriate disclosure. Third, for income tax returns, if the position meets the "substantial authority" standard, disclosure of the position is adequate if the tax return preparer advises the taxpayer of all of the penalty standards applicable to the taxpayer under section 6662. Fourth, for income tax returns, if the position may be described as a tax

shelter under section 6662(d)(2)(C) or a reportable transaction to which section 6662A applies, disclosure of the position is adequate if the tax return preparer advises the taxpayer that there needs to be at a minimum “substantial authority” for the position, that the taxpayer must possess a “reasonable belief that the tax treatment was more likely than not” the proper treatment, and that disclosure will not protect the taxpayer from assessment of an accuracy-related penalty. Fifth, for tax returns or claims for refund that are subject to penalties other than the accuracy-related penalty for substantial understatements under sections 6662(b)(2) and (d), the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer under section 6662. This fifth rule is intended to address the situation when the penalty standard applicable to the taxpayer is based on compliance with requirements other than disclosure on the return (for example, section 6662(e)). In order to establish that the tax return preparer’s disclosure obligation was satisfied, the tax return preparer must document contemporaneously in the tax return preparer’s files that the information or advice required by the proposed regulations was provided.

In the case of a nonsigning tax return preparer within the meaning of § 301.7701–15(b)(2), the position may be disclosed in one of three ways. First, the position may be disclosed on a properly completed and filed Form 8275, “Disclosure Statement,” or Form 8275–R, “Regulation Disclosure Statement,” as appropriate, or on the tax return in accordance with the annual revenue procedure. Second, a nonsigning tax return preparer may meet the disclosure standards if the nonsigning tax return preparer advises the taxpayer of all opportunities to avoid penalties under section 6662 that could apply to the position and advises the taxpayer of the standards for disclosure to the extent applicable. Third, disclosure of a position is adequate if a nonsigning tax return preparer advises another tax return preparer that disclosure under section 6694(a) may be required. The nonsigning tax return preparer must document contemporaneously in the tax return preparer’s files that this advice required by the proposed regulations was provided.

In order to satisfy the disclosure standards when the position is not disclosed on or with the return, each return position for which there is a “reasonable basis” but for which the tax return preparer does not have a “reasonable belief that the position

would more likely than not be sustained on the merits” must be addressed by the tax return preparer. Thus, the advice to the taxpayer with respect to each position must be particular to the taxpayer and tailored to the taxpayer’s facts and circumstances. No form of a general boilerplate disclaimer will satisfy these standards. Proposed § 1.6694–2(c)(iv) provides that disclosure in the case of items attributable to a pass-through entity is adequate if made at the entity level in accordance with the rules in § 1.6662–4(f)(5). For example, a tax return preparer of a partnership tax return need only advise the partnership in order to satisfy any of the above disclosure rules and does not need to advise each individual partner in the partnership of the applicable penalties.

Reasonable Cause

Proposed § 1.6694–2(d) maintains the rules in the current regulations regarding reasonable cause and good faith, except that § 1.6694–2(d) is proposed to be revised to provide that whether a position is supported by a generally accepted administrative or industry practice is an additional factor to consider in determining whether the tax return preparer acted with reasonable cause and good faith. This provision is intended to address situations in the absence of published guidance when administrative or industry practice has developed that would not reasonably be subject to challenge by the IRS.

The reasonable cause factor regarding reliance on advice of another tax return preparer is also expanded to allow a tax return preparer to reasonably rely on information or advice furnished by a taxpayer, advisor, another tax return preparer, or other party (even when the advisor or tax return preparer is within the tax return preparer’s same firm), as provided in proposed § 1.6694–1(e).

Electronically Signed Returns

Proposed § 1.6695–1(b)(2) provides that, in the case of an electronically signed tax return, a tax return preparer need not sign the return prior to presenting a completed copy of the return to the taxpayer. The tax return preparer, however, must furnish all of the information to the taxpayer contemporaneously with furnishing the Form 8879, IRS e-file Signature Authorization, or similar IRS e-file signature form. The information may be furnished on a replica of an official form that provides all of the information.

Due Diligence for Earned Income Credit

Proposed § 1.6695–2(b)(3) establishes a reasonableness standard for signing tax return preparers’ due diligence requirements with respect to determining eligibility for the earned income credit and adds examples.

Claims for Refund or Credit by Tax Return Preparers or Appraisers

Proposed § 1.6696–1, discussing the procedures for filing claims for credit or refund for penalties assessed against tax return preparers under sections 6694 or 6695, is revised to also cover the new appraiser penalty under section 6695A. Section 6695A was enacted by section 1219 of the Pension Protection Act of 2006 (Pub. L. 109–280 (120 Stat. 780, 1084–86) (August 17, 2006)), as amended by the Tax Technical Corrections Act of 2007 (Public Law 110–172 (121 Stat. 2473, 2474) December 29, 2007)). A separate regulation project will provide guidance under section 6695A.

Definition of Tax Return Preparer

Proposed §§ 301.7701–15(b)(1) and (2) add to the section 7701 regulations the definitions of “signing tax return preparer” and “nonsigning tax return preparer” that are included in § 1.6694–1 of the current regulations. Proposed § 301.7701–15(b)(1) provides that a *signing tax return preparer* is any tax return preparer who signs or who is required to sign a return or claim for refund as a tax return preparer pursuant to § 1.6695–1(b).

Proposed § 301.7701–15(b)(2) provides that a *nonsigning tax return preparer* is any tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return or claim for refund within the meaning of § 301.7701–15(b)(3) with respect to events that have occurred at the time the advice is rendered. In determining whether an individual is a nonsigning tax return preparer, the proposed regulations provide that any time spent on advice that is given with respect to events that have occurred, which is less than 5 percent of the aggregate time incurred by the person with respect to the position(s) giving rise to the understatement will not be taken into account in determining whether an individual is a nonsigning tax return preparer. The Treasury Department and the IRS believe that this less than 5 percent test will encourage tax professionals who principally rendered advice regarding events that had not yet occurred to provide follow-up advice requested by a taxpayer without the concern that, by providing

such advice to a taxpayer, the advisor would become a tax return preparer under proposed § 301.7701-15(b)(2) and (3).

Consistent with the current regulations and the legislative history of the 1976 Act, proposed § 301.7701-15(b)(3)(i) clarifies that whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion is determined based upon all facts and circumstances, and a single tax entry may constitute a substantial portion of the tax required to be shown on a return. The proposed regulations include additional factors to consider in determining whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion, such as the size and complexity of the item relative to the taxpayer's gross income and the size of the understatement attributable to the item compared to the taxpayer's reported tax liability.

Proposed § 301.7701-15(b)(3)(ii) increases the de minimis exception in determining a substantial portion of a return or claim for refund for nonsigning tax return preparers. Under the proposed regulations, the de minimis exception applies if the item giving rise to the understatement is (i) less than \$10,000, or (ii) less than \$400,000 if the item is also less than 20 percent of the taxpayer's gross income (or, for an individual, the individual's adjusted gross income). This de minimis rule does not apply for signing tax return preparers within the meaning of § 301.7701-15(b)(1). This change to the regulations updates the current de minimis amounts to reflect the passage of time since those amounts were set in 1977. The Treasury Department and the IRS are considering whether other de minimis rules applicable to nonsigning tax return preparers of non-income tax returns are warranted.

Consistent with the interim guidance set forth in Notice 2008-13, § 301.7701-15(b)(4) is proposed to be amended by revising the definitions of "return" and "claim for refund" to only include preparers of returns and claims for refund that are specifically identified in published guidance in the Internal Revenue Bulletin. The Treasury Department and the IRS will publish this guidance simultaneously with the publication of final regulations and will likely maintain the three tiered approach used in the exhibits to Notice 2008-13, subject to any appropriate modifications. Under the substantial portion rule in section 7701(a)(36)(A), preparation of a broad range of information returns, schedules, and other documents can subject a person to

the section 6694 penalties even though the documents may not themselves give rise to an understatement. Accordingly, the Treasury Department and the IRS believe that including a list of returns or other documents, the preparation of which may subject a tax return preparer to penalties, will further compliance by not unduly increasing the burden on persons preparing information returns and other documents.

Cross-References

Conforming changes are made in §§ 1.6060-1, 1.6107-1, 1.6109-2, 1.6694-0, 1.6694-1, 1.6694-4, 1.6695-1, 1.6695-2, 1.6696-1, and 301.7701-15 to replace references to income tax return preparers with references to tax return preparers, consistent with the provisions of the 2007 Act. Conforming cross references are also made to Part 20, Estate Tax; Estates of Decedents Dying After August 16, 1954; Part 25, Gift Tax; Gifts Made After December 31, 1954; Part 26, Generation-Skipping Transfer Tax Under the Tax Reform Act of 1986; Part 31, Employment Taxes and Collection of Income Tax at Source; Part 40, Procedural Excise Tax; Part 41, Highway Use Tax; Part 44, Wagering Tax; Part 53, Foundation and Similar Excise Taxes; Part 54, Pension Excise Taxes; Part 55, Excise Tax on Real Estate Investment Trusts and Regulated Investment Company Taxes; Part 56, Public Charity Excise Taxes; Part 156, Excise Tax on Greenmail; and Part 157, Excise Tax on Structured Settlement Factoring Transactions; to conform these parts with the provisions in Parts 1 and 301, consistent with the provisions of the 2007 Act.

Availability of IRS Documents

The IRS notices referred to in this preamble are published in the Internal Revenue Bulletin and are available at <http://www.irs.gov>.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (5 U.S.C. chapter 6), requires the agency to "prepare and make available for public comment an initial regulatory flexibility analysis" that will "describe the impact of the proposed rule on small entities." (5 U.S.C. 603(a)). Section 605 of the RFA provides an exception to this

requirement if the agency certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities.

The proposed rules affect tax return preparers. The IRS estimates there are 38,566 tax return preparation firms and 260,338 self-employed tax return preparers that qualify as small entities. Therefore, the IRS has determined that these proposed rules will have an impact on a substantial number of small entities.

The IRS has determined, however, that the impact on entities affected by the proposed rule will not be significant. The statute and proposed regulations would require entities that employ tax return preparers to retain a record of the name, taxpayer identification number and principal place of work of each tax return preparer employed. The IRS estimates that this would not require purchase of additional software and would take five minutes per tax return preparer employed. The statute and proposed regulations would also require tax return preparers to retain a complete copy of a return (or claim for refund) or a list of the name, taxpayer identification number and taxable year for each return (or claim for refund) and the name of the tax return preparer required to sign the return or claim for refund. Many tax return preparers have copying machines or scanners and already make copies of the returns prepared, and the IRS estimates this would not require the purchase of additional equipment. The IRS estimates that it would take an average of five minutes to make copies or prepare a record of the returns prepared. Accordingly, the burden on employers of tax return preparers to make a record of the name, taxpayer identification number, and principal place of work of each employed tax return preparer, and a copy of each return or claim for refund prepared, or a record, is insignificant.

The proposed regulations also allow the tax return preparer to generally avoid imposition of the tax return preparer penalties under section 6694 in cases when a tax return position meets the "substantial authority" standard but not the "reasonable belief that the position would more likely than not be sustained on its merits" standard if the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer, and contemporaneously documents in the tax return preparer's files that this information or advice was provided. Often, tax return preparers will choose not to advise the taxpayer of the applicable penalty standards and will instead disclose the position on a

properly completed and filed Form 8275, "Disclosure Statement," or Form 8275-R, "Regulation Disclosure Statement," as appropriate, or on the tax return in accordance with the annual revenue procedure. In those instances when the tax return preparer elects to advise the taxpayer of the penalty standards, the IRS estimates that it would take an average of 15 minutes to document this advice. Accordingly, the burden on those who choose this option is insignificant.

Although the proposed regulations also conform the standards of conduct and tax return preparer penalties to the provisions of the 2007 Act, tax return preparers already enroll in educational seminars or training programs to keep up to date with the latest changes to the Code, and the provisions of the 2007 Act and the proposed regulations will generally be part of that training.

Moreover, these proposed regulations are required to comply with the provisions of section 8246 of the 2007 Act and flow directly from amendments to the Code contained in the 2007 Act.

Based on these facts, the IRS hereby certifies that the collection of information contained in these regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, a Regulatory Flexibility Analysis is not required.

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. Comments are requested on the examples in the proposed regulations, and commentators are specifically invited to suggest changes to these examples or to suggest new examples that they believe would better illustrate the principles that should be included in the final regulations. The IRS and the Treasury Department also request comments on the accuracy of the certification that the regulations in this document will not have a significant economic impact on a substantial number of small entities. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Monday, August 18, 2008, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by August 18, 2008 and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by Monday, August 4, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are Matthew S. Cooper and Michael E. Hara, Office of the Associate Chief Counsel (Procedure and Administration).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad Retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 40

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 41

Excise, Motor vehicles, Reporting and recordkeeping requirements.

26 CFR Part 44

Excise, Gambling, Reporting and recordkeeping requirements.

26 CFR Part 53

Excise taxes, Foundations, Investments, Lobbying, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 55

Excise taxes, Investments, Reporting and recordkeeping requirements.

26 CFR Part 56

Excise taxes, Lobbying, Nonprofit organizations, Reporting and recordkeeping requirements.

26 CFR Part 156

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 157

Excise taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 26, 31, 40, 41, 44, 53, 54, 55, 56, 156, 157, and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 1.6060-1 also issued under 26 U.S.C. 6060(a). * * *
Section 1.6109-2 also issued under 26 U.S.C. 6109(a). * * *
Section 1.6695-1 also issued under 26 U.S.C. 6695(b). * * *
Section 1.6695-2 also issued under 26 U.S.C. 6695(g). * * *

Par. 2. Section 1.6060-1 is amended by revising the section heading and paragraphs (a) and (c) and adding paragraph (d) to read as follows:

§ 1.6060-1 Reporting requirements for tax return preparers.

(a) *In general.* (1) Each person who employs one or more signing tax return

preparers to prepare any return of tax or claim for refund of tax, other than for the person, at any time during a return period shall satisfy the requirements of section 6060 of the Internal Revenue Code by—

(i) Retaining a record of the name, taxpayer identification number, and principal place of work during the return period of each tax return preparer employed by the person at any time during that period; and

(ii) Making that record available for inspection upon request by the Commissioner.

(2) The record described in this paragraph (a) must be retained and kept available for inspection for the 3-year period following the close of the return period to which that record relates.

(3) The person may choose any form of documentation to be used under this section as a record of the signing tax return preparers employed during a return period. However, the record must disclose on its face which individuals were employed as tax return preparers during that period.

(4) For the definition of the term “signing tax return preparer,” see section 7701(a)(36) and § 301.7701–15(b)(1) of this chapter. For the definition of the term “return period,” see paragraph (b) of this section.

(5)(i) For purposes of this section, any individual who, in acting as a signing tax return preparer, is not employed by another tax return preparer shall be treated as his or her own employer. Thus, a sole proprietor shall retain and make available a record with respect to himself (or herself) as provided in this section.

(ii) A partnership shall, for purposes of this section, be treated as the employer of the partners of the partnership and shall retain and make available a record with respect to the partners and others employed by the partnership as provided in this section.

* * * * *

(c) *Penalty.* For the civil penalty for failure to retain and make available a record of the tax return preparers employed during a return period as required under this section, or for failure to include an item in the record required to be retained and made available under this section, see § 1.6695–1(e).

(d) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 3. Section 1.6107–1 is revised to read as follows:

§ 1.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *Furnishing copy to taxpayer.* A person who is a signing tax return preparer of any return of tax or claim for refund of tax under the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer (or nontaxable entity) not later than the time the return or claim for refund is presented for the signature of the taxpayer (or nontaxable entity). For electronically filed Forms 1040EZ, “Income Tax Return for Single Filers and Joint Filers With No Dependents,” and Form 1040A, “U.S. Individual Income Tax Return,” filed for the 2009, 2010 and 2011 taxable years, the information may be provided on a replica of a Form 1040, “U.S. Individual Income Tax Return,” that provides all of the information. For other electronically filed returns, the information may be provided on a replica of an official form that provides all of the information. The signing tax return preparer may, at its option, request a receipt or other evidence from the taxpayer (or nontaxable entity) sufficient to show satisfaction of the requirement of this paragraph (a).

(b) *Copy or record to be retained.* (1) A person who is a signing tax return preparer of any return or claim for refund shall—

(i)(A) Retain a completed copy of the return or claim for refund; or

(B) Retain a record, by list, card file, or otherwise of the name, taxpayer identification number, and taxable year of the taxpayer (or nontaxable entity) for whom the return or claim for refund was prepared, and the type of return or claim for refund prepared;

(ii) Retain a record, by retention of a copy of the return or claim for refund, maintenance of a list or card file, or otherwise, for each return or claim for refund presented to the taxpayer (or nontaxable entity), of the name of the individual tax return preparer required to sign the return or claim for refund pursuant to § 1.6695–1(b); and

(iii) Make the copy or record of returns and claims for refund and record of the individuals required to sign available for inspection upon request by the Commissioner.

(2) The material described in this paragraph (b) shall be retained and kept available for inspection for the 3-year period following the close of the return period during which the return or claim for refund was presented for signature to the taxpayer (or nontaxable entity). In the case of a return that becomes due (with extensions, if any) during a return period following the return period

during which the return was presented for signature, the material shall be retained and kept available for inspection for the 3-year period following the close of the later return period in which the return became due. For the definition of “return period,” see section 6060(c). If the person subject to the record retention requirement of this paragraph (b) is a corporation or a partnership that is dissolved before completion of the 3-year period, then all persons who are responsible for the winding up of the affairs of the corporation or partnership under state law shall be subject, on behalf of the corporation or partnership, to these record retention requirements until completion of the 3-year period. If state law does not specify any person or persons as responsible for winding up, then, collectively, the directors or general partners shall be subject, on behalf of the corporation or partnership, to the record retention requirements of this paragraph (b). For purposes of the penalty imposed by section 6695(d), such designated persons shall be deemed to be the tax return preparer and will be jointly and severally liable for each failure.

(c) *Tax return preparer.* For the definition of “signing tax return preparer,” see section 7701(a)(36) and § 301.7701–15(b)(1) of this chapter. For purposes of applying this section, in the case of—

(1) An arrangement between two or more signing tax return preparers, the person who employs one or more other signing tax return preparers to prepare any return or claim for refund for compensation other than for the person shall be considered to be the sole signing tax return preparer; and

(2) A partnership arrangement for the preparation of returns and claims for refund, the partnership shall be considered to be the sole signing tax return preparer.

(d) *Penalties.* (1) For the civil penalty for failure to furnish a copy of the return or claim for refund to the taxpayers (or nontaxable entity) as required under paragraph (a) of this section, see section 6695(a) and § 1.6695–1(a).

(2) For the civil penalty for failure to retain a copy of the return or claim for refund, or to retain a record as required under paragraph (b) of this section, see section 6695(d) and § 1.6695–1(d).

(e) *Effective/applicability date.* This section is applicable to returns and claims for refund filed on the date that final regulations are published in the **Federal Register**.

Par. 4. Section 1.6109–2 is amended by revising the section heading and paragraphs (a) and (d) to read as follows:

§ 1.6109-2 Tax return preparers furnishing identifying numbers for returns or claims for refund filed after December 31, 2008.

(a) *Furnishing identifying number.* (1) Each return of tax or claim for refund of tax under the Internal Revenue Code prepared by one or more tax return preparers must include the identifying number of the tax return preparer required by § 1.6695-1(b) to sign the return or claim for refund. In addition, if there is an employment arrangement or association between the individual tax return preparer and another person (except to the extent the return prepared is for the person), the identifying number of the other person must also appear on the return or claim for refund. For the definition of the term “tax return preparer,” see section 7701(a)(36) and § 301.7701-15 of this chapter.

(2) The identifying number of an individual tax return preparer is that individual’s social security account number, or such alternative number as may be prescribed by the Internal Revenue Service in forms, instructions, or other appropriate guidance.

(3) If an individual tax return preparer described in paragraph (a)(2) of this section is employed by, or associated with, a person (whether an individual or entity) and prepares the return or claim for refund (other than a return prepared for the person), the identifying number is the person’s employer identification number.

* * * * *

(d) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**, but no sooner than December 31, 2008. For returns or claims for refund filed before January 1, 2000, see § 1.6109-2A(a).

Par 5. Section 1.6694-0 is revised to read as follows:

§ 1.6694-0 Table of contents.

This section lists the captions that appear in §§ 1.6694-1 through 1.6694-4.

§ 1.6694-1 Section 6694 penalties applicable to tax return preparers.

- (a) Overview.
 - (1) In general.
 - (2) Date return is deemed prepared.
- (b) Tax return preparer.
 - (1) In general.
 - (2) Responsibility of signing tax return preparer.
 - (3) Responsibility of nonsigning tax return preparer.
 - (4) Tax return preparer and firm responsibility.
 - (5) Examples.
 - (c) Understatement of liability.

(d) Abatement of penalty where taxpayer’s liability not understated.

(e) Verification of information furnished by taxpayer or other third party.

- (1) In general.
- (2) Verification of information on previously filed returns.
- (3) Examples.
- (f) Income derived (or to be derived) with respect to the return or claim for refund.

- (1) In general.
- (2) Compensation.
 - (i) Multiple engagements.
 - (ii) Reasonable allocation.
 - (iii) Fee refunds.
- (iv) Reduction of compensation.
- (3) Individual and firm allocation.
- (4) Examples.
- (g) Effective/applicability date.

§ 1.6694-2 Penalty for understatement due to an unreasonable position.

- (a) In general.
- (1) Proscribed conduct.
- (2) Special rule for corporations, partnerships, and other firms.
- (b) Reasonable belief that the position would more likely than not be sustained on its merits.

- (1) In general.
- (2) No unreasonable assumptions.
- (3) Authorities.
- (4) Examples.
- (5) Written determinations.
- (6) When more likely than not standard must be satisfied.

(c) Exception for adequate disclosure of positions with a reasonable basis.

- (1) In general.
- (2) Reasonable basis.
- (3) Adequate disclosure.
 - (i) Signing tax return preparers.
 - (ii) Nonsigning tax return preparers.
- (A) Advice to taxpayers.
- (B) Advice to another tax return preparer.
- (iii) Requirements for advice.
- (iv) Pass-through entities.
- (v) Examples.
- (d) Exception for reasonable cause and good faith.

- (1) Nature of the error causing the understatement.
- (2) Frequency of errors.
- (3) Materiality of errors.
- (4) Tax return preparer’s normal office practice.

- (e) Reliance on advice of others.
- (6) Reliance on generally accepted administrative or industry practice.
- (e) Burden of proof.
- (f) Effective/applicability date.

§ 1.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

- (a) In general.
- (1) Proscribed conduct.
- (2) Special rule for corporations, partnerships, and other firms.
- (b) Willful attempt to understate liability.
- (c) Reckless or intentional disregard.
- (d) Examples.
- (e) Rules or regulations.
- (f) Section 6694(b) penalty reduced by section 6694(a) penalty.
- (g) Burden of proof.
- (h) Effective/applicability date.

§ 1.6694-4 Extension of period of collection when tax return preparer pays 15

percent of a penalty for understatement of taxpayer’s liability and certain other procedural matters.

- (a) In general.
- (b) Tax return preparer must bring suit in district court to determine liability for penalty.
- (c) Suspension of running of period of limitations on collection.
- (d) Effective/applicability date.

Par. 6. Section 1.6694-1 is revised to read as follows:

§ 1.6694-1 Section 6694 penalties applicable to tax return preparers.

(a) *Overview*—(1) *In general.* Sections 6694(a) and (b) impose penalties on tax return preparers for conduct giving rise to certain understatements of liability on a return (including an amended or adjusted return) or claim for refund. The section 6694(a) penalty is imposed in an amount equal to the greater of \$1,000, or 50 percent of the income derived (or to be derived) by the tax return preparer for an understatement of liability with respect to tax that is due to an undisclosed position for which the tax return preparer did not have a reasonable belief that the position would more likely than not be sustained on its merits (or due to a disclosed position for which there is no reasonable basis). The section 6694(b) penalty is imposed in an amount equal to the greater of \$5,000, or 50 percent of the income derived (or to be derived) by the tax return preparer for an understatement of liability with respect to tax that is due to a willful attempt to understate tax liability or that is due to reckless or intentional disregard of rules or regulations. See § 1.6694-2 for rules relating to the penalty under section 6694(a). See § 1.6694-3 for rules relating to the penalty under section 6694(b).

(2) *Date return is deemed prepared.* For purposes of the penalties under section 6694, a return or claim for refund is deemed prepared on the date it is signed by the tax return preparer. If a signing tax return preparer within the meaning of § 301.7701-15(b)(1) of this chapter fails to sign the return, the return is deemed prepared on the date the return is filed. See § 1.6695-1 of this section. In the case of a nonsigning tax return preparer within the meaning of § 301.7701-15(b)(2) of this chapter, the relevant date is the date the nonsigning tax return preparer provides the tax advice with respect to the position giving rise to the understatement. This date will be determined based on all the facts and circumstances.

(b) *Tax return preparer*—(1) *In general.* For purposes of this section, “tax return preparer” means any person who is a tax return preparer within the meaning of section 7701(a)(36) and

§ 301.7701–15 of this chapter. An individual is a tax return preparer subject to section 6694 if the individual is primarily responsible for the position(s) on the return or claim for refund giving rise to an understatement. There is only one individual within a firm who is primarily responsible for each position on the return or claim for refund giving rise to an understatement. In the course of identifying the individual who is primarily responsible for the position, the Internal Revenue Service may advise multiple individuals within the firm that it may be concluded that they are the individual within the firm who is primarily responsible. In some circumstances, there may be more than one tax return preparer who is primarily responsible for the position(s) giving rise to an understatement if multiple tax return preparers are employed by, or associated with, different firms.

(2) *Responsibility of signing tax return preparer.* The signing tax return preparer within the meaning of § 301.7701–15(b)(1) of this chapter will generally be considered the person who is primarily responsible for all of the positions on the return or claim for refund giving rise to an understatement. It may be concluded, however, based upon information received from the signing tax return preparer (or other relevant information from a source other than the signing tax return preparer) that another person within the signing tax return preparer's same firm was primarily responsible for the position(s) on the return or claim for refund giving rise to an understatement.

(3) *Responsibility of nonsigning tax return preparer.* If there are one or more individuals within a firm who are nonsigning tax return preparers within the meaning of § 301.7701–15(b)(2) of this chapter and there is no signing tax return preparer within the meaning of § 301.7701–15(b)(1) of this chapter for the return or claim for refund within that firm, the individual within the firm with overall supervisory responsibility for the position(s) giving rise to the understatement is the tax return preparer who is primarily responsible for the position for purposes of section 6694. Additionally, if, after the application of paragraph (b)(2) of this section, it is concluded that the signing tax return preparer is not primarily responsible for the position or the IRS cannot conclude which individual (as between the signing tax return preparer and other persons within the firm) is primarily responsible for the position, the individual within the firm with overall supervisory responsibility for the position(s) giving rise to the

understatement is the tax return preparer who is primarily responsible for the position for purposes of section 6694.

(4) *Tax return preparer and firm responsibility.* To the extent provided in §§ 1.6694–2(a)(2) and 1.6694–3(a)(2), an individual and the firm that employs the individual, or the firm of which the individual is a partner, member, shareholder, or other equity holder, may both be subject to penalty under section 6694 with respect to the position(s) on the return or claim for refund giving rise to an understatement. If an individual (other than the sole proprietor) who is employed by a sole proprietorship is subject to penalty under section 6694, the sole proprietorship is considered a “firm” for purposes of this paragraph (b).

(5) *Examples.* The provisions of paragraph (b) of this section are illustrated by the following examples:

Example 1. Attorney A provides advice to Client C concerning the proper treatment of an item with respect to which all events have occurred on C's income tax return. In preparation for providing that advice, A seeks advice regarding the proper treatment of the item from Attorney B, who is within the same firm as A, but A is the attorney who signs C's return as a tax return preparer. B provides advice on the treatment of the item upon which A relies. B's advice is reflected on C's income tax return but no disclosure was made in accordance with § 1.6694–2(c)(3). The advice constitutes preparation of a substantial portion of the return within the meaning of § 301.7701–15(b)(3) and the IRS later challenges the position taken on the tax return, giving rise to an understatement of liability. For purposes of the regulations under section 6694, A is initially considered the tax return preparer with respect to C's return and the IRS advises A that A may be subject to the penalty under section 6694 with respect to C's return. Based upon information received from A or another source, it may be concluded that B had primary responsibility for the position taken on the return that gave rise to the understatement because B had overall supervisory responsibility for the position giving rise to an understatement.

Example 2. Same as *Example 1*, except that neither Attorney A nor any other attorney within A's firm signs Client C's return as a tax return preparer. Attorney B is the nonsigning tax return preparer within the firm with overall supervisory responsibility for the position giving rise to an understatement. Accordingly, B is the tax return preparer who is primarily responsible for the position on C's return giving rise to an understatement and is subject to penalty under section 6694.

Example 3. Same as *Example 1*, except Attorney D, who works for a different firm than A, also provides advice on the same position upon which A relies. It may be concluded that D is also primarily responsible for the position on the return.

(c) *Understatement of liability.* For purposes of this section, an “understatement of liability” exists if, viewing the return or claim for refund as a whole, there is an understatement of the net amount payable with respect to any tax imposed by the Internal Revenue Code (Code), or an overstatement of the net amount creditable or refundable with respect to any tax imposed by the Code. The net amount payable in a taxable year with respect to the return for which the tax return preparer engaged in conduct proscribed by section 6694 is not reduced by any carryback. Tax imposed by the Code does not include additions to the tax, additional amounts, and assessable penalties imposed by subchapter 68 of the Code. Except as provided in paragraph (d) of this section, the determination of whether an understatement of liability exists may be made in a proceeding involving the tax return preparer that is separate and apart from any proceeding involving the taxpayer.

(d) *Abatement of penalty where taxpayer's liability not understated.* If a penalty under section 6694(a) or (b) concerning a return or claim for refund has been assessed against one or more tax return preparers, and if it is established at any time in a final administrative determination or a final judicial decision that there was no understatement of liability relating to the position(s) on the return or claim for refund, then—

(1) The assessment shall be abated; and

(2) If any amount of the penalty was paid, that amount shall be refunded to the person or persons who so paid, as if the payment were an overpayment of tax, without consideration of any period of limitations.

(e) *Verification of information furnished by taxpayer or other party—*

(1) *In general.* For purposes of sections 6694(a) and (b) (including meeting the reasonable belief that the position would more likely than not be sustained on its merits and reasonable basis standards in §§ 1.6694–2(b) and (c)(2), and demonstrating reasonable cause and good faith under § 1.6694–2(d)), the tax return preparer generally may rely in good faith without verification upon information furnished by the taxpayer. A tax return preparer, however, may not rely on information provided by a taxpayer with respect to legal conclusions on Federal tax issues. A tax return preparer may also rely in good faith and without verification upon information furnished by another advisor, another tax return preparer or other party (including another advisor

or tax return preparer at the tax return preparer's firm). The tax return preparer is not required to audit, examine or review books and records, business operations, or documents or other evidence to verify independently information provided by the taxpayer, advisor, other tax return preparer, or other party. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known by the tax return preparer. The tax return preparer must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. Additionally, some provisions of the Code or regulations require that specific facts and circumstances exist (for example, that the taxpayer maintain specific documents) before a deduction or credit may be claimed. The tax return preparer must make appropriate inquiries to determine the existence of facts and circumstances required by a Code section or regulation as a condition of the claiming of a deduction or credit.

(2) *Verification of information on previously filed returns.* For purposes of section 6694(a) and (b) (including meeting the reasonable belief that the position would more likely than not would be sustained on its merits and reasonable basis standards in §§ 1.6694–2(b) and (c)(2), and demonstrating reasonable cause and good faith under § 1.6694–2(d)), a tax return preparer may rely in good faith without verification upon a tax return that has been previously prepared by a taxpayer or another tax return preparer and filed with the IRS. For example, a tax return preparer who prepares an amended return (including a claim for refund) need not verify the positions on the original return. The tax return preparer, however, may not ignore the implications of information furnished to the tax return preparer or actually known by the tax return preparer. The tax return preparer must make reasonable inquiries if the information as furnished appears to be incorrect or incomplete. The tax return preparer must confirm that the position being relied upon has not been adjusted by examination or otherwise.

(3) *Examples.* The provisions of this paragraph (e) are illustrated by the following examples:

Example 1. During an interview conducted by Preparer E, a taxpayer stated that he had made a charitable contribution of real estate in the amount of \$50,000 during the tax year, when in fact he had not made this charitable contribution. E did not inquire about the existence of a qualified appraisal or complete a Form 8283, Noncash Charitable

Contributions, in accordance with the reporting and substantiation requirements under section 170(f)(11). E reported a deduction on the tax return for the charitable contribution, which resulted in an understatement of liability for tax, and signed the tax return as the tax return preparer. E is subject to a penalty under section 6694.

Example 2. While preparing the 2008 tax return for an individual taxpayer, Preparer F realizes that the taxpayer did not provide a Form 1099 for a bank account that produced significant taxable income in 2008. When F inquired about any other income, the taxpayer furnished the Form 1099 to F for use in preparation of the 2008 tax return. F did not know that the taxpayer owned an additional bank account that generated taxable income for 2008 and the taxpayer did not reveal this information to the tax return preparer notwithstanding F's general inquiry about any other income. F signed the taxpayer's return as the tax return preparer. F is not subject to a penalty under section 6694.

Example 3. In preparing a tax return, Accountant G relies on the advice of an actuary concerning the limit on deductibility under section 404(a)(1)(A) of a contribution by an employer to a qualified pension trust. On the basis of this advice, G completed and signed the tax return. It is later determined that there is an understatement of liability for tax that resulted from the incorrect advice provided by the actuary. G had no reason to believe that the advice was incorrect or incomplete, and the advice appeared reasonable on its face. G was also not aware at the time the return was prepared of any reason why the actuary did not know all of the relevant facts or that the advice was no longer reliable due to developments in the law since the time the advice was given. G is not subject to a penalty under section 6694. The actuary, however, may be subject to penalty under section 6694 if the advice given by the actuary constitutes a substantial portion of the tax return within the meaning of § 301.7701–15(b)(3) of this chapter.

(f) *Income derived (or to be derived) with respect to the return or claim for refund—(1) In general.* For purposes of sections 6694(a) and (b), *income derived (or to be derived)* means all compensation the tax return preparer receives or expects to receive with respect to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement. In the situation of a tax return preparer who is not compensated directly by the taxpayer, but rather by a firm that employs the tax return preparer or with whom the tax return preparer is associated, *income derived (or to be derived)* means all compensation the tax return preparer receives from the firm that can be reasonably allocated to the engagement of preparing the return or claim for

refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement. In the situation where a firm that employs the individual tax return preparer (or the firm of which the individual tax return preparer is a partner, member, shareholder, or other equity holder) is subject to a penalty under section 6694(a) or (b) pursuant to the provisions in §§ 1.6694–2(a)(2) or 1.6694–3(a)(2), *income derived (or to be derived)* means all compensation the firm receives or expects to receive with respect to the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement.

(2) *Compensation—(i) Multiple engagements.* For purposes of applying paragraph (f)(1) of this section, if the tax return preparer or the tax return preparer's firm has multiple engagements related to the same return or claim for refund, only those engagements relating to the position(s) taken on the return or claim for refund that gave rise to the understatement are considered for purposes of calculating the income derived (or to be derived) with respect to the return or claim for refund.

(ii) *Reasonable allocation.* For purposes of applying paragraph (f)(1) of this section, only compensation for tax advice that is given with respect to events that have occurred at the time the advice is rendered and that relates to the position(s) giving rise to the understatement will be taken into account for purposes of calculating the section 6694(a) and (b) penalties. If a lump sum fee is received that includes amounts not taken into account under the preceding sentence, the amount of income derived will be based on a reasonable allocation of the lump sum fee between the tax advice giving rise to the penalty and the advice that does not give rise to the penalty.

(iii) *Fee refunds.* For purposes of applying paragraph (f)(1) of this section, a refund to the taxpayer of all or part of the amount paid to the tax return preparer or the tax return preparer's firm will not reduce the amount of the section 6694 penalty assessed. A refund in this context does not include a discounted fee or alternative billing arrangement for the services provided.

(iv) *Reduction of compensation.* For purposes of applying paragraph (f)(1) of this section, it may be concluded based upon information provided by the tax return preparer or the tax return

preparer's firm that an appropriate allocation of compensation attributable to the position(s) giving rise to the understatement on the return or claim for refund is less than the total amount of compensation associated with the engagement. For example, the number of hours of the engagement spent on the position(s) giving rise to the understatement may be less than the total hours associated with the engagement. If this is concluded, the amount of the penalty will be calculated based upon the compensation attributable to the position(s) giving rise to the understatement. Otherwise, the total amount of compensation from the engagement will be the amount of income derived for purposes of calculating the penalty under section 6694.

(3) *Individual and firm allocation.* If both an individual within a firm and a firm that employs the individual (or the firm of which the individual is a partner, member, shareholder, or other equity holder) are subject to a penalty under section 6694(a) or (b) pursuant to the provisions in §§ 1.6694–2(a)(2) or 1.6694–3(a)(2), the amount of penalties assessed against the individual and the firm shall not exceed 50 percent of the income derived (or to be derived) by the firm from the engagement of preparing the return or claim for refund or providing tax advice (including research and consultation) with respect to the position(s) taken on the return or claim for refund that gave rise to the understatement. The portion of the total amount of the penalty assessed against the individual tax return preparer shall not exceed 50 percent of the individual's compensation as determined under paragraphs (f)(1) and (2) of this section.

(4) *Examples.* The provisions of this paragraph (f) are illustrated by the following examples:

Example 1. Signing Tax Return Preparer H is engaged by a taxpayer and paid a total of \$21,000. Of this amount, \$20,000 relates to research and consultation regarding a transaction that is later reported on a return, and \$1,000 for the activities relating to the preparation of the return. Based on H's hourly rates, a reasonable allocation of the amount of compensation related to the advice rendered prior to the occurrence of events that are the subject of the advice is \$5,000. The remaining compensation of \$16,000 is considered to be compensation related to the advice rendered after the occurrence of events that are the subject of the advice and return preparation. The income derived by H with respect to the return for purposes of computing the penalty under section 6694(a) is \$16,000, and the amount of the penalty imposed under section 6694(a) is \$8,000.

Example 2. Accountants I, J, and K are employed by Firm L. I is a principal manager

of Firm L and provides corporate tax advice for the taxpayer after all events have occurred subject to an engagement for corporate tax advice. J provides international tax advice for the taxpayer after all events have occurred subject to a different engagement for international tax advice. K prepares and signs the taxpayer's return under a general tax services engagement. I's advice is the source of an understatement on the return and the advice constitutes preparation of a substantial portion of the return within the meaning of § 301.7701–15(b) of this chapter. I is the nonsigning tax return preparer within the firm with overall supervisory responsibility for the position on the taxpayer's return giving rise to an understatement. Thus, I is the tax return preparer who is primarily responsible for the position on the taxpayer's return giving rise to the understatement. Because K's signature as the signing tax return preparer is on the return, the IRS advises K that K may be subject to the section 6694(a) penalty against K to the understatement. K provides information that I is the tax return preparer with primary responsibility for the position that gave rise to the understatement and K formed a reasonable belief that the position would more likely than not be sustained on the merits by relying on the advice provided by I. Furthermore, K has reasonable cause because K relied on I for the advice on the corporate tax matter. The IRS, therefore, assesses the section 6694 penalty against I. The portion of the total amount of the penalty allocable to I does not exceed that part of I's compensation that is attributable to the corporate tax advice engagement. In the event that Firm L is also liable under the provisions in § 1.6694–2(a)(2), the IRS assesses the section 6694 penalty in an amount not exceeding 50 percent of Firm L's firm compensation based on the engagement relating to the corporate tax advice services provided by I where there is no applicable reduction in compensation pursuant to § 1.6694–1(f)(2)(iii).

Example 3. Same facts as *Example 2*, except that I provides the advice on the corporate matter when the events have not yet occurred. I's advice is the cause of an understatement position on the return but I is not a tax return preparer pursuant to § 301.7701–15(b)(2) or (3) of this chapter. K has reasonable cause because K relied on I for the advice on the corporate tax matter and K is not limited to reliance on persons who provide post-transactional advice if such reliance is reasonable and in good faith. I, K and Firm L are not liable for the section 6694 penalty.

(g) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 7. Section 1.6694–2 is revised to read as follows:

§ 1.6694–2 Penalty for understatement due to an unreasonable position.

(a) *In general—(1) Proscribed conduct.* Except as otherwise provided in this

section, a tax return preparer is liable for a penalty under section 6694(a) equal to the greater of \$1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer for any return or claim for refund that it prepares that results in an understatement of liability due to a position if the tax return preparer knew (or reasonably should have known) of the position and either—

(i) The position was not disclosed as provided in this section and there was not a reasonable belief that the position would more likely than not be sustained on its merits; or

(ii) The position was disclosed as provided in this section but there was no reasonable basis for the position.

(2) *Special rule for corporations, partnerships, and other firms.* A firm that employs a tax return preparer subject to a penalty under section 6694(a) (or a firm of which the individual tax return preparer is a partner, member, shareholder or other equity holder) is also subject to penalty if, and only if—

(i) One or more members of the principal management (or principal officers) of the firm or a branch office participated in or knew of the conduct proscribed by section 6694(a);

(ii) The corporation, partnership, or other firm entity failed to provide reasonable and appropriate procedures for review of the position for which the penalty is imposed; or

(iii) Such review procedures were disregarded by the corporation, partnership, or other firm entity through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) in the formulation of the advice, or the preparation of the return or claim for refund, that included the position for which the penalty is imposed.

(b) *Reasonable belief that the position would more likely than not be sustained on its merits—(1) In general.* A tax return preparer may “reasonably believe that a position would more likely than not be sustained on its merits” if the tax return preparer analyzes the pertinent facts and authorities, and in reliance upon that analysis, reasonably concludes in good faith that the position has a greater than 50 percent likelihood of being sustained on its merits. In reaching this conclusion, the possibility that the position will not be challenged by the Internal Revenue Service (IRS) (for example, because the taxpayer's return may not be audited or because the issue may not be raised on audit) is not to be taken into account. The

analysis prescribed by § 1.6662–4(d)(3)(ii) (or any successor provision) for purposes of determining whether substantial authority is present applies for purposes of determining whether the more likely than not standard is satisfied. Whether a tax return preparer meets this standard will be determined based upon all facts and circumstances, including the tax return preparer's diligence. In determining the level of diligence in a particular situation, the tax return preparer's experience with the area of Federal tax law and familiarity with the taxpayer's affairs, as well as the complexity of the issues and facts, will be taken into account. A tax return preparer may reasonably believe that a position more likely than not would be sustained on its merits despite the absence of other types of authority if the position is supported by a well-reasoned construction of the applicable statutory provision. For purposes of determining whether the tax return preparer has a reasonable belief that the position would more likely than not be sustained on the merits, a tax return preparer may rely in good faith without verification upon information furnished by the taxpayer, advisor, other tax return preparer, or other party (including another advisor or tax return preparer at the tax return preparer's firm), as provided in § 1.6694–1(e).

(2) *No unreasonable assumptions.* A position must not be based on unreasonable factual or legal assumptions (including assumptions as to future events) and must not unreasonably rely on the representations, statements, findings, or agreements of the taxpayer or any other person. For example, a position must not be based on a representation or assumption that the tax return preparer knows, or has reason to know, is inaccurate.

(3) *Authorities.* The authorities considered in determining whether a position satisfies the more likely than not standard are those authorities provided in § 1.6662–4(d)(3)(iii) (or any successor provision).

(4) *Examples.* The provisions of paragraphs (b)(1) through (b)(3) of this section are illustrated by the following examples:

Example 1. A new statute is silent as to whether the taxpayer may take advantage of certain tax benefits. The Treasury Department and the IRS have not issued any interpretative guidance for the newly enacted provision. A well-reasoned construction of the statutory text supports the position that a taxpayer may claim the tax benefits. Preparer M may avoid the section 6694(a) penalty by taking the position that M reasonably believed that the taxpayer's

position would more likely than not be sustained on its merits.

Example 2. After the passage of legislation containing a new statutory provision, a taxpayer engaged in a transaction that is adversely affected by the new provision. Prior law supported a position favorable to the taxpayer. Preparer N believes that the new statute is inequitable as applied to the taxpayer's situation. The statutory language, however, is unambiguous as applied to the transaction to deny the result claimed by the taxpayer previously. In considering the new statutory provision as applied to the taxpayer's position, N may not avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that the position would more likely than not be sustained on its merits.

Example 3. While preparing the taxpayer's return, Preparer O determines that a statute is silent as to whether the taxpayer may take a certain position on the taxpayer's 2007 Federal income tax return. Three private letter rulings issued to other taxpayers in 2002 and 2003 support the taxpayer's position. Temporary regulations issued in 2004, however, are clearly contrary to the taxpayer's position. After the issuance of the temporary regulations, the earlier private letter rulings cease to be authorities and are not taken into account in determining whether the taxpayer's position satisfies the reasonable belief that the position would more likely than not be sustained on its merits standard. Preparer O may not avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that the taxpayer's position would more likely than not be sustained on its merits.

Example 4. In the course of researching whether an interpretation of a phrase in the Internal Revenue Code (Code) is a position that more likely than not will be sustained on its merits, Preparer P discovers that the only relevant authorities include decisions of five U.S. courts of appeal. Three U.S. courts of appeal have construed the language as being taxpayer favorable. Two other U.S. courts of appeal, however, have construed the identical language as being favorable to the government's position. The U.S. court of appeals in the jurisdiction where the taxpayer is located has not addressed this issue. P reasonably believes that the taxpayer's facts more closely parallel the facts involved in the three U.S. courts of appeals' decisions that were taxpayer favorable. Under the analysis prescribed by § 1.6662–4(d)(3)(ii), P may avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that a well-reasoned position consistent with the taxpayer favorable interpretation would more likely than not be sustained on its merits.

(5) *Written determinations.* The tax return preparer may avoid the section 6694(a) penalty by taking the position that the tax return preparer reasonably believed that the taxpayer's position satisfies the "more likely than not" standard if the taxpayer is the subject of

a "written determination" as provided in § 1.6662–4(d)(3)(iv)(A).

(6) *When "more likely than not" standard must be satisfied.* For purposes of this section, the requirement that a position satisfies the "more likely than not" standard must be satisfied on the date the return is deemed prepared, as prescribed by § 1.6694–1(a)(2).

(c) *Exception for adequate disclosure of positions with a reasonable basis—(1) In general.* The section 6694(a) penalty will not be imposed on a tax return preparer if the position taken has a reasonable basis and is adequately disclosed within the meaning of paragraph (c)(3) of this section. For an exception to the section 6694(a) penalty for reasonable cause and good faith, see paragraph (d) of this section.

(2) *Reasonable basis.* For purposes of this section, "reasonable basis" has the same meaning as in § 1.6662–3(b)(3) or any successor provision of the accuracy-related penalty regulations. For purposes of determining whether the tax return preparer has a reasonable basis for a position, a tax return preparer may rely in good faith without verification upon information furnished by the taxpayer, advisor, other tax return preparer, or other party (including another advisor or tax return preparer at the tax return preparer's firm), as provided in § 1.6694–1(e).

(3) *Adequate disclosure—(i) Signing tax return preparers.* In the case of a signing tax return preparer within the meaning of § 301.7701–15(b)(1) of this chapter, disclosure of a position for which there is a reasonable basis but for which the tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits is adequate if the tax return preparer meets any of the following standards:

(A) The position is disclosed in accordance with § 1.6662–4(f) (which permits disclosure on a properly completed and filed Form 8275, "Disclosure Statement," or Form 8275–R, "Regulation Disclosure Statement," as appropriate, or on the tax return in accordance with the annual revenue procedure described in § 1.6662–4(f)(2)).

(B) For income tax returns, if the position would not meet the standard for the taxpayer to avoid a penalty under section 6662(d)(2)(B) without disclosure (no substantial authority), the tax return preparer provides the taxpayer with the prepared tax return that includes the disclosure in accordance with § 1.6662–4(f).

(C) For income tax returns, if the position would otherwise meet the standard for nondisclosure under section 6662(d)(2)(B)(i) (substantial

authority), the tax return preparer advises the taxpayer of all the penalty standards applicable to the taxpayer under section 6662. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(D) For income tax returns, if section 6662(d)(2)(B) does not apply because the position may be described in section 6662(d)(2)(C) or section 6662A (a tax shelter, reportable transaction with a significant purpose of tax avoidance or evasion, or a listed transaction), the tax return preparer advises the taxpayer that there needs to be at a minimum substantial authority for the position, that the taxpayer must possess a reasonable belief that the tax treatment was more likely than not the proper treatment in order to avoid a penalty under section 6662(d) or section 6662A as applicable, and that disclosure will not protect the taxpayer from assessment of an accuracy-related penalty if either section 6662(d)(2)(C) or 6662A applies to the position. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(E) For returns or claims for refund that are subject to penalties pursuant to section 6662 other than the substantial understatement penalty under section 6662(b)(2) and (d), the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer under sections 6662. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(ii) Nonsigning tax return preparers. In the case of a nonsigning tax return preparer within the meaning of § 301.7701-15(b)(2) of this chapter, disclosure of a position that satisfies the reasonable basis standard but does not satisfy the reasonable belief that a position would more likely than not be sustained on its merits standard is adequate if the position is disclosed in accordance with § 1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275 or Form 8275-R, as appropriate, or on the return in accordance with an annual revenue procedure described in § 1.6662-4(f)(2)). In addition, disclosure of a position is adequate in the case of a nonsigning tax return preparer if, with respect to that position, the tax return preparer complies with the provisions of paragraph (c)(3)(ii)(A) or (B) of this section, whichever is applicable.

(A) Advice to taxpayers. If a nonsigning tax return preparer provides advice to the taxpayer with respect to a position for which there is a reasonable basis but for which the nonsigning tax

return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, disclosure of that position is adequate if the tax return preparer advises the taxpayer of any opportunity to avoid penalties under section 6662 that could apply to the position, if relevant, and of the standards for disclosure to the extent applicable. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(B) *Advice to another tax return preparer.* If a nonsigning tax return preparer provides advice to another tax return preparer with respect to a position for which there is a reasonable basis but for which the nonsigning tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, disclosure of that position is adequate if the tax return preparer advises the other tax return preparer that disclosure under section 6694(a) may be required. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(iii) *Requirements for advice.* For purposes of satisfying the disclosure standards of paragraphs (c)(3)(i) and (ii) of this section, each return position for which there is a reasonable basis but for which the tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits must be addressed by the tax return preparer. The advice to the taxpayer with respect to each position, therefore, must be particular to the taxpayer and tailored to the taxpayer's facts and circumstances. The tax return preparer is required to contemporaneously document the fact that the advice was provided. There is no general pro forma language or special format required for a tax return preparer to comply with these rules. No form of a general boilerplate disclaimer, however, is sufficient to satisfy these standards. A tax return preparer may choose to comply with the documentation standard in one document covering each position, or in multiple documents covering all of the positions.

(iv) *Pass-through entities.* Disclosure in the case of items attributable to a pass-through entity is adequate if made at the entity level in accordance with the rules in § 1.6662-4(f)(5) or at the entity level in accordance with the rules in paragraphs (c)(3)(i) or (ii) of this section.

(v) *Examples.* The provisions of paragraph (c)(3) of this section are illustrated by the following examples:

Example 1. An individual taxpayer hires Accountant Q to prepare its income tax return. Q does not reasonably believe that a particular position taken on the tax return would more likely than not be sustained on its merits although there is substantial authority for the position. Q prepares and signs the tax return without disclosing the position taken on the tax return, but advises the individual taxpayer of the penalty standards applicable to the taxpayer under section 6662, and contemporaneously documents in Q's files that this advice was provided. The individual taxpayer signs and files the tax return without disclosing the position because the position meets the standards for nondisclosure under section 6662(d)(2)(B)(i). The IRS later challenges the position taken on the tax return, resulting in an understatement of liability. Q is not subject to a penalty under section 6694.

Example 2. Attorney R advises a large corporate taxpayer concerning the proper treatment of complex entries on the corporate taxpayer's tax return. R has reason to know that the tax attributable to the entries is a substantial portion of the tax required to be shown on the tax return within the meaning of § 301.7701-15(b)(3). When providing the advice, R concludes that one position with respect to these entries does not meet the reasonable belief that the position would more likely than not be sustained on the merits standard and also does not have substantial authority, although the position meets the reasonable basis standard. R, in good faith, advises the corporate taxpayer that the position lacks substantial authority and the taxpayer will be subject to an accuracy-related penalty under section 6662 unless the position is disclosed in a disclosure statement included in the return. R also documents the fact that this advice was contemporaneously provided to the corporate taxpayer at the time the advice was provided. Neither R nor any other attorney within R's firm signs the corporate taxpayer's return as a tax return preparer, but the advice by R constitutes preparation of a substantial portion of the tax return and R is the individual with overall supervisory responsibility for the position giving rise to the understatement. Thus, R is a tax return preparer for purposes of section 6694. R, however, will not be subject to a penalty under section 6694.

(d) *Exception for reasonable cause and good faith.* The penalty under section 6694(a) will not be imposed if, considering all the facts and circumstances, it is determined that the understatement was due to reasonable cause and that the tax return preparer acted in good faith. Factors to consider include:

(1) *Nature of the error causing the understatement.* The error resulted from a provision that was complex, uncommon, or highly technical and a competent tax return preparer of tax returns or claims for refund of the type at issue reasonably could have made the error. The reasonable cause and good faith exception, however, does not

apply to an error that would have been apparent from a general review of the return or claim for refund by the tax return preparer.

(2) *Frequency of errors.* The understatement was the result of an isolated error (such as an inadvertent mathematical or clerical error) rather than a number of errors. Although the reasonable cause and good faith exception generally applies to an isolated error, it does not apply if the isolated error is so obvious, flagrant, or material that it should have been discovered during a review of the return or claim for refund. Furthermore, the reasonable cause and good faith exception does not apply if there is a pattern of errors on a return or claim for refund even though any one error, in isolation, would have qualified for the reasonable cause and good faith exception.

(3) *Materiality of errors.* The understatement was not material in relation to the correct tax liability. The reasonable cause and good faith exception generally applies if the understatement is of a relatively immaterial amount. Nevertheless, even an immaterial understatement may not qualify for the reasonable cause and good faith exception if the error or errors creating the understatement are sufficiently obvious or numerous.

(4) *Tax return preparer's normal office practice.* The tax return preparer's normal office practice, when considered together with other facts and circumstances, such as the knowledge of the tax return preparer, indicates that the error in question would rarely occur and the normal office practice was followed in preparing the return or claim for refund in question. Such a normal office practice must be a system for promoting accuracy and consistency in the preparation of returns or claims for refund and generally would include, in the case of a signing tax return preparer, checklists, methods for obtaining necessary information from the taxpayer, a review of the prior year's return, and review procedures. Notwithstanding these rules, the reasonable cause and good faith exception does not apply if there is a flagrant error on a return or claim for refund, a pattern of errors on a return or claim for refund, or a repetition of the same or similar errors on numerous returns or claims for refund.

(5) *Reliance on advice of others.* For purposes of demonstrating reasonable cause and good faith, a tax return preparer may rely without verification upon advice and information furnished by the taxpayer or other party, as provided in § 1.6694-1(e). The tax

return preparer may reasonably rely in good faith on the advice of, or schedules or other documents prepared by, the taxpayer, another advisor, another tax return preparer, or other party (including another advisor or tax return preparer at the tax return preparer's firm), and who the tax return preparer had reason to believe was competent to render the advice or other information. The advice or information may be written or oral, but in either case the burden of establishing that the advice or information was received is on the tax return preparer. A tax return preparer is not considered to have relied in good faith if—

(i) The advice or information is unreasonable on its face;

(ii) The tax return preparer knew or should have known that the other party providing the advice or information was not aware of all relevant facts; or

(iii) The tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the return or claim for refund was prepared, that the advice or information was no longer reliable due to developments in the law since the time the advice was given.

(6) *Reliance on generally accepted administrative or industry practice.* The tax return preparer reasonably relied in good faith on generally accepted administrative or industry practice in taking the position that resulted in the understatement. A tax return preparer is not considered to have relied in good faith if the tax return preparer knew or should have known (given the nature of the tax return preparer's practice), at the time the return or claim for refund was prepared, that the administrative or industry practice was no longer reliable due to developments in the law or IRS administrative practice since the time the practice was developed.

(e) *Burden of proof.* In any proceeding with respect to the penalty imposed by section 6694(a), the issues on which the tax return preparer bears the burden of proof include whether—

(1) The tax return preparer knew or reasonably should have known that the questioned position was taken on the return;

(2) There is reasonable cause and good faith with respect to such position; and

(3) The position was disclosed adequately in accordance with paragraph (c) of this section.

(f) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 8. Section 1.6694-3 is amended by revising paragraphs (a), (c)(2) and (3), (d), (e), (f), (g) and (h) to read as follows:

§ 1.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general*—(1) *Proscribed conduct.* A tax return preparer is liable for a penalty under section 6694(b) equal to the greater of \$5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer if any part of an understatement of liability for a return or claim for refund that is prepared is due to—

(i) A willful attempt in any manner to understate the liability for tax by a tax return preparer on the return or claim for refund; or

(ii) Any reckless or intentional disregard of rules or regulations by any such person.

(2) *Special rule for corporations, partnerships, and other firms.* A firm that employs a tax return preparer subject to a penalty under section 6694(b) (or a firm of which the individual tax return preparer is a partner, member, shareholder or other equity holder) is also subject to penalty if, and only if—

(i) One or more members of the principal management (or principal officers) of the firm or a branch office participated in or knew of the conduct proscribed by section 6694(b);

(ii) The corporation, partnership, or other firm entity failed to provide reasonable and appropriate procedures for review of the position for which the penalty is imposed; or

(iii) Such review procedures were disregarded by the corporation, partnership, or other firm entity through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate or ascertain) in the formulation of the advice, or the preparation of the return or claim for refund, that included the position for which the penalty is imposed.

* * * * *

(c) *Reckless or intentional disregard*—(1) * * *

(2) A tax return preparer is not considered to have recklessly or intentionally disregarded a rule or regulation if the position contrary to the rule or regulation has a reasonable basis as defined in § 1.6694-2(c)(2) and is adequately disclosed in accordance with § 1.6694-2(c)(3). In the case of a position contrary to a regulation, the position must represent a good faith challenge to the validity of the regulation and, when disclosed in accordance with § 1.6694-2(c)(3), the

tax return preparer must identify the regulation being challenged. For purposes of this section, disclosure on the return in accordance with an annual revenue procedure under § 1.6662–4(f)(2) is not applicable.

(3) In the case of a position contrary to a revenue ruling or notice (other than a notice of proposed rulemaking) published by the Internal Revenue Service in the Internal Revenue Bulletin, a tax return preparer also is not considered to have recklessly or intentionally disregarded the ruling or notice if the tax return preparer reasonably believes that the position would more likely than not be sustained on its merits in accordance with § 1.6694–2(b).

(d) *Examples.* The provisions of paragraphs (b) and (c) of this section are illustrated by the following examples:

Example 1. A taxpayer provided Preparer S with detailed check registers reflecting personal and business expenses. One of the expenses was for domestic help, and this expense was identified as personal on the check register. S knowingly deducted the expenses of the taxpayer's domestic help as wages paid in the taxpayer's business. S is subject to the penalty under section 6694(b).

Example 2. A taxpayer provided Preparer T with detailed check registers to compute the taxpayer's expenses. T, however, knowingly overstated the expenses on the return. After adjustments by the examiner, the tax liability increased significantly. Because T disregarded information provided in the check registers, T is subject to the penalty under section 6694(b).

Example 3. Preparer U prepares a taxpayer's return and encounters certain expenses incurred in the purchase of a business. Final regulations provide that such expenses incurred in the purchase of a business must be capitalized. One U.S. Tax Court case has expressly invalidated that portion of the regulations. Under these facts, U will have a reasonable basis for the position as defined in § 1.6694–2(c)(2) and will not be subject to the section 6694(b) penalty if the position is adequately disclosed in accordance with paragraph (c)(2) of this section because the position represents a good faith challenge to the validity of the regulations.

(e) *Rules or regulations.* The term *rules or regulations* includes the provisions of the Internal Revenue Code, temporary or final Treasury regulations issued under the Code, and revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin.

(f) *Section 6694(b) penalty reduced by section 6694(a) penalty.* The amount of any penalty to which a tax return preparer may be subject under section 6694(b) for a return or claim for refund

is reduced by any amount assessed and collected against the tax return preparer under section 6694(a) for the same return or claim for refund.

(g) *Burden of proof.* In any proceeding with respect to the penalty imposed by section 6694(b), the government bears the burden of proof on the issue of whether the tax return preparer willfully attempted to understate the liability for tax. See section 7427. The tax return preparer bears the burden of proof on such other issues as whether—

(1) The tax return preparer recklessly or intentionally disregarded a rule or regulation;

(2) A position contrary to a regulation represents a good faith challenge to the validity of the regulation; and

(3) Disclosure was adequately made in accordance with § 1.6694–3(c)(2).

(h) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 9. Section 1.6694–4 is amended by revising paragraph (a) to read as follows:

§ 1.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* (1) The Internal Revenue Service will investigate the preparation by a tax return preparer of a return of tax under the Internal Revenue Code (Code) or claim for refund of tax under the Code as described in § 301.7701–15(b)(4) of this chapter, and will send a report of the examination to the tax return preparer before the assessment of either—

(i) A penalty for understating tax liability due to a position for which there was not a reasonable belief that the position would more likely than not be sustained on its merits under section 6694(a) (or not a reasonable basis for disclosed positions); or

(ii) A penalty for willful understatement of liability or reckless or intentional disregard of rules or regulations under section 6694(b).

* * * * *

(d) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 10. Section 1.6695–1 is revised to read as follows:

§ 1.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *Failure to furnish copy to taxpayer.*

(1) A person who is a signing tax return preparer as described in § 301.7701–15(b)(1) of this chapter of any return of tax or claim for refund of tax under the Internal Revenue Code (Code), and who fails to satisfy the requirements imposed by section 6107(a) and § 1.6107–1(a) to furnish a copy of the return or claim for refund to the taxpayer (or nontaxable entity), shall be subject to a penalty of \$50 for such failure, with a maximum penalty of \$25,000 per person imposed with respect to each calendar year, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

(2) No penalty may be imposed under section 6695(a) and paragraph (a)(1) of this section upon a tax return preparer who furnishes a copy of the return or claim for refund to taxpayers who—

(i) Hold an elected or politically appointed position with the government of the United States or a state or political subdivision thereof; and

(ii) In order faithfully to carry out their official duties, have so arranged their affairs that they have less than full knowledge of the property that they hold or of the debts for which they are responsible, if information is deleted from the copy in order to preserve or maintain this arrangement.

(b) *Failure to sign return.* (1) An individual who is a tax return preparer as described in § 301.7701–15 of this chapter with respect to a return of tax or claim for refund of tax under the Code that is not signed electronically shall sign the return or claim for refund after it is completed and before it is presented to the taxpayer (or nontaxable entity) for signature. For rules covering electronically signed returns, see paragraph (b)(2) of this section. For purposes of this paragraph (b), a return of tax shall not include information returns under subpart B and subpart C of Part III of Subtitle F. If the tax return preparer is unavailable for signature, another tax return preparer shall review the entire preparation of the return or claim for refund, and then shall sign the return or claim for refund. The tax return preparer shall sign the return in the manner prescribed by the Commissioner in forms, instructions, or other appropriate guidance.

(2) In the case of electronically signed tax returns, the tax return preparer need not sign the return prior to presenting a completed copy of the return to the taxpayer. The tax return preparer, however, must furnish all of the information that will be transmitted as

the electronically signed tax return to the taxpayer contemporaneously with furnishing the Form 8879, "IRS e-file Signature Authorization," or other similar Internal Revenue Service (IRS) e-file signature form. The information may be furnished on a replica of an official form. The tax return preparer shall electronically sign the return in the manner prescribed by the Commissioner in forms, instructions, or other appropriate guidance.

(3) If more than one tax return preparer is involved in the preparation of the return or claim for refund, the individual tax return preparer who has the primary responsibility as between or among the tax return preparers for the overall substantive accuracy of the preparation of such return or claim for refund shall be considered to be the signing tax return preparer for purposes of this paragraph (b) and § 301.7701-15(b)(1) of this chapter. Any other tax return preparer as described in § 301.7701-15(b)(2) of this chapter is not required to sign the return or claim for refund.

(4) *Examples.* The application of this paragraph (b) is illustrated by the following examples:

Example 1. Law Firm A employs B, a lawyer, to prepare for compensation estate tax returns and claims for refund of taxes. Firm A is engaged by C to prepare a Federal estate tax return. Firm A assigns B to prepare the return. B obtains the information necessary for completing the return from C and makes determinations with respect to the proper application of the tax laws to such information in order to determine the estate's tax liability. B then forwards such information to D, a computer tax service that performs the mathematical computations and prints the return by means of computer processing. D then sends the completed estate tax return to B who reviews the accuracy of the return. B is the individual tax return preparer who is primarily responsible for the overall accuracy of the estate tax return. B must sign the return as tax return preparer.

Example 2. Partnership E is a national accounting firm that prepares returns and claims for refund of taxes for compensation. F and G, employees of Partnership E, are involved in preparing the Form 990-T, Exempt Organization Business Income Tax Return, for H, a tax exempt organization. After they complete the return, including the gathering of the necessary information, analyzing the proper application of the tax laws to such information, and the performance of the necessary mathematical computations, I, a supervisory employee of Partnership E, reviews the return. As part of this review, I reviews the information provided and the application of the tax laws to this information. The mathematical computations and carried-forward amounts are reviewed by J, an employee of Partnership E. The policies and practices of

Partnership E require that K, a partner, finally review the return. The scope of K's review includes reviewing the information provided and applying to this information his knowledge of H's affairs, observing that Partnership E's policies and practices have been followed, and making the final determination with respect to the proper application of the tax laws to determine H's tax liability. K may or may not exercise these responsibilities, or may exercise them to a greater or lesser extent, depending on the degree of complexity of the return, his confidence in I (or F and G), and other factors. K is the individual tax return preparer who is primarily responsible for the overall accuracy of H's return. K must sign the return as tax return preparer.

Example 3. L corporation maintains an office in Seattle, Washington, for the purpose of preparing partnership returns for compensation. L makes compensatory arrangements with individuals (but provides no working facilities) in several states to collect information from partners of a partnership and to make decisions with respect to the proper application of the tax laws to the information in order to prepare the partnership return and calculate the partnership's distributive items. M, an individual, who has such an arrangement in Los Angeles with L, collects information from N, the general partner of a partnership, and completes a worksheet kit supplied by L that is stamped with M's name and an identification number assigned to M by L. In this process, M classifies this information in appropriate categories for the preparation of the partnership return. The completed worksheet kit signed by M is then mailed to L. O, an employee in L's office, reviews the worksheet kit to make sure it was properly completed. O does not review the information obtained from N for its validity or accuracy. O may, but did not, make the final decision with respect to the proper application of tax laws to the information provided. The data from the worksheet is entered into a computer and the return form is completed. The return is prepared for submission to N with filing instructions. M is the individual tax return preparer primarily responsible for the overall accuracy of the partnership return. M must sign the return as tax return preparer.

Example 4. P employs R, S, and T to prepare gift tax returns for taxpayers. After R and S have collected the information from a taxpayer and applied the tax laws to the information, the return form is completed by a computer service. On the day the returns prepared by R and S are ready for their signatures, R is away from the city for 1 week on another assignment and S is on detail to another office in the same city for the day. T may sign the gift tax returns prepared by R, provided that T reviews the information obtained by R relative to the taxpayer, and T reviews the preparation of each return prepared by R. T may not sign the returns prepared by S because S is available.

(5) An individual required by this paragraph (b) to sign a return or claim for refund shall be subject to a penalty of \$50 for each failure to sign, with a

maximum of \$25,000 per person imposed with respect to each calendar year, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. If the tax return preparer asserts reasonable cause for failure to sign, the IRS will require a written statement to substantiate the tax return preparer's claim of reasonable cause. For purposes of this paragraph (b), reasonable cause is a cause that arises despite ordinary care and prudence exercised by the individual tax return preparer.

(6) *Effective/applicability date.* This paragraph (b) is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

(c) *Failure to furnish identifying number.* (1) A person who is a signing tax return preparer as described in § 301.7701-15(b)(1) of this chapter of any return of tax under the Code or claim for refund of tax under the Code, and who fails to satisfy the requirement of section 6109(a)(4) and § 1.6109-2(a) to furnish one or more identifying numbers of signing tax return preparers or persons employing the signing tax return preparer (or with which the signing tax return preparer is associated) on a return or claim for refund after it is completed and before it is presented to the taxpayer (or nontaxable entity) for signature shall be subject to a penalty of \$50 for each failure, with a maximum of \$25,000 per person imposed with respect to each calendar year, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

(2) No more than one penalty of \$50 may be imposed under section 6695(c) and paragraph (c)(1) of this section with respect to a single return or claim for refund.

(d) *Failure to retain copy or record.* (1) A person who is a signing tax return preparer as described in § 301.7701-15(b)(1) of this chapter of any return of tax under the Code or claim for refund of tax under the Code, and who fails to satisfy the requirements imposed upon him or her by section 6107(b) and § 1.6107-1(b) and (c) (other than the record requirement described in both § 1.6107-1(b)(2) and (3)) to retain and make available for inspection a copy of the return or claim for refund, or to include the return or claim for refund in a record of returns and claims for refund and make the record available for inspection, shall be subject to a penalty of \$50 for the failure, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.

(2) A person may not, for returns or claims for refund presented to the

taxpayers (or nontaxable entities) during any single return period, be subject to more than \$25,000 in penalties under section 6695(d) and paragraph (d)(1) of this section.

(e) *Failure to file correct information returns.* A person who is subject to the reporting requirements of section 6060 and § 1.6060-1 and who fails to satisfy these requirements shall pay a penalty of \$50 for each such failure, with a maximum of \$25,000 per person imposed for each calendar year, unless such failure was due to reasonable cause and not due to willful neglect.

(f) *Negotiation of check.* (1) No person who is a tax return preparer as described in § 301.7701-15 of this chapter may endorse or otherwise negotiate, directly or through an agent, a check for the refund of tax under the Code that is issued to a taxpayer other than the tax return preparer if the person was a tax return preparer of the return or claim for refund which gave rise to the refund check.

(2) Section 6695(f) and paragraphs (f)(1) and (3) of this section do not apply to a tax return preparer-bank that—

(i) Cashes a refund check and remits all of the cash to the taxpayer or accepts a refund check for deposit in full to a taxpayer's account, so long as the bank does not initially endorse or negotiate the check (unless the bank has made a loan to the taxpayer on the basis of the anticipated refund); or

(ii) Endorses a refund check for deposit in full to a taxpayer's account pursuant to a written authorization of the taxpayer (unless the bank has made a loan to the taxpayer on the basis of the anticipated refund).

(3) A tax return preparer-bank may also subsequently endorse or negotiate a refund check as a part of the check-clearing process through the financial system after initial endorsement or negotiation.

(4) The tax return preparer shall be subject to a penalty of \$500 for each endorsement or negotiation of a check prohibited under section 6695(f) and paragraph (f)(1) of this section.

(g) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 11. Section 1.6695-2 is amended by revising the section heading and paragraphs (a), (b)(3), (c) and (d) to read as follows:

§ 1.6695-2 Tax return preparer due diligence requirements for determining earned income credit eligibility.

(a) *Penalty for failure to meet due diligence requirements.* A person who is

a signing tax return preparer of a tax return or claim for refund under the Internal Revenue Code with respect to determining the eligibility for, or the amount of, the earned income credit (EIC) under section 32 and who fails to satisfy the due diligence requirements of paragraph (b) of this section will be subject to a penalty of \$100 for each such failure.

(b) * * *

(3) *Knowledge—(i) In general.* The tax return preparer must not know, or have reason to know, that any information used by the tax return preparer in determining the taxpayer's eligibility for, or the amount of, the EIC is incorrect. The tax return preparer may not ignore the implications of information furnished to, or known by, the tax return preparer, and must make reasonable inquiries if the information furnished to the tax return preparer appears to be incorrect, inconsistent, or incomplete. A tax return preparer must make reasonable inquiries if a reasonable and well-informed tax return preparer knowledgeable in the law would conclude that the information furnished to the tax return preparer appears to be incorrect, inconsistent, or incomplete. The tax return preparer must also contemporaneously document in the files the reasonable inquiries made and the responses to these inquiries.

(ii) *Examples.* The provisions of paragraph (b)(3)(i) of this section are illustrated by the following examples:

Example 1. A 22 year-old taxpayer wants to claim two sons, ages 10 and 11, as qualifying children for purposes of the EIC. Preparer A must make additional reasonable inquiries regarding the relationship between the taxpayer and the children as the age of the taxpayer appears inconsistent with the ages of the children claimed as sons.

Example 2. An 18 year-old female taxpayer with an infant has \$3,000 in earned income and states that she lives with her parents. Taxpayer wants to claim the infant as a qualifying child for the EIC. This information appears incomplete and inconsistent because the taxpayer lives with her parents and earns very little income. Preparer B must make additional reasonable inquiries to determine if the taxpayer is the qualifying child of her parents and, therefore, ineligible to claim the EIC.

Example 3. In March 2008, Mr. D has Preparer C prepare his tax year 2007 return using Married Filing Separate filing status, and an address of 25 Main Street, Mytown, Mystate. Two weeks later Mrs. D has C prepare her tax year 2007 return, and she asks C to use the Head of Household filing status, claiming two qualifying children, and the EIC. She tells C that her address is 25 Main Street, Mytown, Mystate. Mrs. D's filing status appears incorrect based on the filing status used by Mr. D. Therefore, C must make

additional reasonable inquiries to determine Mrs. D's proper filing status.

Example 4. Taxpayer asks Preparer E to prepare her tax return and tells D that she has a Schedule C business, that she has two qualifying children and that she wants to claim the EIC. Taxpayer indicates that she earned \$10,000 from her Schedule C business, but that she has no expenses. This information appears incomplete because it is very unlikely that someone who is self-employed has no business expenses. E must make additional reasonable inquiries regarding taxpayer's business to determine whether the information regarding both income and expenses is correct.

(c) *Exception to penalty.* The section 6695(g) penalty will not be applied with respect to a particular tax return or claim for refund if the tax return preparer can demonstrate to the satisfaction of the Internal Revenue Service that, considering all the facts and circumstances, the tax return preparer's normal office procedures are reasonably designed and routinely followed to ensure compliance with the due diligence requirements of paragraph (b) of this section, and the failure to meet the due diligence requirements of paragraph (b) of this section with respect to the particular return or claim for refund was isolated and inadvertent.

(d) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 12. Section 1.6696-1 is revised to read as follows:

§ 1.6696-1 Claims for credit or refund by tax return preparers or appraisers.

(a) *Notice and demand.* (1) The Internal Revenue Service (IRS) shall issue to each tax return preparer or appraiser one or more statements of notice and demand for payment for all penalties assessed against the tax return preparer or appraiser under section 6694 and § 1.6694-1, under section 6695 and § 1.6695-1, or under section 6695A (and any subsequently issued regulations).

(2) For the definition of the term "tax return preparer," see section 7701(a)(36) and § 301.7701-15 of this chapter. A person who prepares a claim for credit or refund under this section for another person, however, is not, with respect to that preparation, a tax return preparer as defined in section 7701(a)(36) and § 301.7701-15 of this chapter.

(b) *Claim filed by tax return preparer or appraiser.* A claim for credit or refund of a penalty (or penalties) assessed against a tax return preparer or appraiser under section 6694 and § 1.6694-1, under section 6695 and § 1.6695-1, or under section 6695A (and

any subsequently issued regulations) may be filed under this section only by the tax return preparer or the appraiser (or the tax return preparer's or appraiser's estate) against whom the penalty (or penalties) is assessed and not by, for example, the tax return preparer's or appraiser's employer. This paragraph (b) is not intended, however, to impose any restrictions on the preparation of this claim for credit or refund. The claim may be prepared by the tax return preparer's or appraiser's employer or by other persons. In all cases, however, the claim for credit or refund shall contain the information specified in paragraph (d) of this section and, as required by paragraph (d) of this section, shall be verified by a written declaration by the tax return preparer or appraiser that the information is provided under penalty of perjury.

(c) *Separation and consolidation of claims.* (1) Unless paragraph (c)(2) of this section applies, a tax return preparer shall file a separate claim for each penalty assessed in each statement of notice and demand issued to the tax return preparer.

(2) A tax return preparer may file one or more consolidated claims for any or all penalties imposed on the tax return preparer by a single IRS Office under section 6695(a) and § 1.6695-1(a) (relating to failure to furnish copy of return to taxpayer), section 6695(b) and § 1.6695-1(b) (relating to failure to sign), section 6695(c) and § 1.6695-1(c) (relating to failure to furnish identifying number), or under section 6695(d) and § 1.6695-1(d) (relating to failure to retain copy of return or record), whether the penalties are asserted on a single or on separate statements of notice and demand. In addition, a tax return preparer may file one consolidated claim for any or all penalties imposed on the tax return preparer by a single IRS Office under section 6695(e) and § 1.6695-1(e) (relating to failure to file correct information return), which are asserted on a single statement of notice and demand.

(d) *Content of claim.* Each claim for credit or refund for any penalty (or penalties) paid by a tax return preparer under section 6694 and § 1.6694-1, or under section 6695 and § 1.6695-1, or paid by an appraiser under section 6695A (and any subsequently issued regulations) shall include the following information, verified by a written declaration by the tax return preparer or appraiser that the information is provided under penalty of perjury:

(1) The tax return preparer's or appraiser's name.

(2) The tax return preparer's or appraiser's identification number. If the tax return preparer or appraiser is—

(i) An individual (not described in paragraph (d)(2)(iii) of this section) who is a citizen or resident of the United States, the tax return preparer's or appraiser's social security account number (or such alternative number as may be prescribed by the IRS in forms, instructions, or other appropriate guidance) shall be provided;

(ii) An individual who is not a citizen or resident of the United States and also was not employed by another tax return preparer or appraiser to prepare the document (or documents) with respect to which the penalty (or penalties) was assessed, the tax return preparer's or appraiser's employer identification number shall be provided; or

(iii) A person (whether an individual, corporation, or partnership) that employed one or more persons to prepare the document (or documents) with respect to which the penalty (or penalties) was assessed, the tax return preparer's or appraiser's employer identification number shall be provided.

(3) The tax return preparer's or appraiser's address where the IRS mailed the statement (or statements) of notice and demand and, if different, the tax return preparer's or appraiser's address shown on the document (or documents) with respect to which the penalty (or penalties) was assessed.

(4)(i) The address of the IRS campus or office that issued the statement (or statements) of notice and demand for payment of the penalty (or penalties).

(ii) The date (or dates) and identifying number (or numbers) of the statement (or statements) of notice and demand.

(5)(i) The identification, by amount, type, and document to which related, of each penalty included in the claim. Each document referred to in the preceding sentence shall be identified by the form title or number, by the taxpayer's (or nontaxable entity's) name and taxpayer identification number, and by the taxable year to which the document relates.

(ii) The date (or dates) of payment of the amount (or amounts) of the penalty (or penalties) included in the claim.

(iii) The total amount claimed.

(6) A statement setting forth in detail—

(i) Each ground upon which each penalty overpayment claim is based; and

(ii) Facts sufficient to apprise the IRS of the exact basis of each such claim.

(e) *Form for filing claim.*

Notwithstanding § 301.6402(c) of this chapter, Form 6118, "Claim for Refund of Tax Return Preparer Penalties," is the

form prescribed for making a claim as provided in this section.

(f) *Place for filing claim.* A claim filed under this section shall be filed with the IRS campus or office that issued to the tax return preparer or appraiser the statement (or statements) of notice and demand for payment of the penalty (or penalties) included in the claim.

(g) *Time for filing claim.* (1)(i) Except as provided in section 6694(c)(1) and § 1.6694-2(a)(3)(ii) and (4), and in section 6694(d) and § 1.6694-1(c):

(A) A claim for a penalty paid by a tax return preparer under section 6694 and § 1.6694-1, or under section 6695 and § 1.6695-1, or by an appraiser under section 6695A (and any subsequently issued regulations) shall be filed within three years from the date the payment was made.

(B) A consolidated claim, permitted under paragraph (c)(2) of this section, shall be filed within three years from the first date of payment of any penalty included in the claim.

(ii) For purposes of this paragraph (g)(1), payment is considered made on the date payment is received by the IRS or, if applicable, on the date an amount is credited in satisfaction of the penalty.

(2) For purposes of determining whether a claim is timely filed, the rules under sections 7502 and 7503 and the provisions of §§ 1.7502-1, 1.7502-2, and 1.7503-1 apply.

(h) *Application of refund to outstanding liability of tax return preparer or appraiser.* The IRS may, within the applicable period of limitations, credit any amount of an overpayment by a tax return preparer or appraiser of a penalty (or penalties) paid under section 6694 and § 1.6694-1, under section 6695 and § 1.6695-1, or under section 6695A (and any subsequently issued regulations) against any outstanding liability for any tax (or for any interest, additional amount, addition to the tax, or assessable penalty) owed by the tax return preparer or appraiser making the overpayment. If a portion of an overpayment is so credited, only the balance will be refunded to the tax return preparer or appraiser.

(i) *Interest.* (1) Section 6611 and § 301.6611-1 of this chapter apply to the payment by the IRS of interest on an overpayment by a tax return preparer or appraiser of a penalty (or penalties) paid under section 6694 and § 1.6694-1, under section 6695 and § 1.6695-1, or under section 6695A (and any subsequently issued regulations).

(2) Section 6601 and § 301.6601-1 of this chapter apply to the payment of interest by a tax return preparer or appraiser to the IRS on any penalty (or

penalties) assessed against the tax return preparer under section 6694 and § 1.6694–1, under section 6695 and § 1.6695–1, or under section 6695A (and any subsequently issued regulations).

(j) *Suits for refund of penalty.* (1) A tax return preparer or appraiser may not maintain a civil action for the recovery of any penalty paid under section 6694 and § 1.6694–1, under section 6695 and § 1.6695–1, or under section 6695A (and any subsequently issued regulations), unless the tax return preparer or appraiser has previously filed a claim for credit or refund of the penalty as provided in this section (and the court has jurisdiction of the proceeding). See sections 6694(c) and 7422.

(2)(i) Except as provided in section 6694(c)(2) and § 1.6694–2(b), the periods of limitation contained in section 6532 and § 301.6532–1 of this chapter apply to a tax return preparer's or appraiser's suit for the recovery of any penalty paid under section 6694 and § 1.6694–1, under section 6695 and § 1.6695–1, or under section 6695A (and any subsequently issued regulations).

(ii) The rules under section 7503 and § 301.7503–1 of this chapter apply to the timely commencement by a tax return preparer or appraiser of a suit for the recovery of any penalty paid under section 6694 and § 1.6694–1, under section 6695 and § 1.6695–1, or under section 6695A (and any subsequently issued regulations).

(k) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 13. The authority citation for part 20 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 20.6060–1 also issued under 26 U.S.C. 6060(a). * * *
Section 20.6109–2 also issued under 26 U.S.C. 6109(a). * * *
Section 20.6695–1 also issued under 26 U.S.C. 6695(b). * * *
Section 20.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 14. Section 20.6060–1 is added to read as follows:

§ 20.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of estate tax under chapter 11

of subtitle B of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the recordkeeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 15. Section 20.6107–1 is added to read as follows:

§ 20.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of estate tax under chapter 11 of subtitle B of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the estate, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 16. Section 20.6109–1 is added to read as follows:

§ 20.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each estate tax return or claim for refund prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 17. Section 20.6694–1 is added to read as follows:

§ 20.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of estate tax returns or claims see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 18. Section 20.6694–2 is added to read as follows:

§ 20.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of estate tax under chapter 11 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 19. Section 20.6694–3 is added to read as follows:

§ 20.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of estate tax under chapter 11 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 20. Section 20.6694–4 is added to read as follows:

§ 20.6694–4 Extension of period of collection when preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of the period of collection when a tax return preparer who prepared a return or claim for refund for estate tax under chapter 11 of subtitle B of the Internal Revenue Code pays 15 percent of a penalty for understatement of the taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under sections 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 21. Section 20.6695–1 is added to read as follows:

§ 20.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim

for refund of estate tax under chapter 11 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 22. Section 20.6696–1 is added to read as follows:

§ 20.6696–1 Claims for credit or refund by tax return preparers or appraisers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for estate tax under chapter 11 of subtitle B of the Internal Revenue Code, or by an appraiser that prepared an appraisal in connection with such a return or claim for refund under section 6695A, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 23. Section 20.7701–1 is added to read as follows:

§ 20.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 24. The authority citation for part 25 is amended by adding entries in numerical order to read in part as follows:

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

Section 25.6060–1 also issued under 26 U.S.C. 6060(a). * * *

Section 25.6109–2 also issued under 26 U.S.C. 6109(a). * * *

Section 25.6695–1 also issued under 26 U.S.C. 6695(b). * * *

Section 25.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 25. Section 25.6060–1 is added to read as follows:

§ 25.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of gift tax under chapter 12 of subtitle B of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 26. Section 25.6107–1 is added to read as follows:

§ 25.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of gift tax under chapter 12 of subtitle B of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 27. Section 25.6109–1 is added to read as follows:

§ 25.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each gift tax return or claim for refund prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 28. Section 25.6694–1 is added to read as follows:

§ 25.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of gift tax

returns or claims see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.*

Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 29. Section 25.6694–2 is added to read as follows:

§ 25.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of gift tax under chapter 12 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 30. Section 25.6694–3 is added to read as follows:

§ 25.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of gift tax under chapter 12 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 31. Section 25.6694–4 is added to read as follows:

§ 25.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules for the extension of period of collection when a tax return preparer who prepared a return or claim for refund for gift tax under chapter 12 of subtitle B of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation of, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and

claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 32. Section 25.6695–1 is added to read as follows:

§ 25.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of gift tax under chapter 12 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 33. Section 25.6696–1 is added to read as follows:

§ 25.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for gift tax under chapter 12 of subtitle B of the Internal Revenue Code, or by an appraiser that prepared an appraisal in connection with such a return or claim for refund under section 6695A, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 34. Section 25.7701–1 is added to read as follows:

§ 25.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 26—GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Par. 35. The authority citation for part 26 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 26.6060–1 also issued under 26 U.S.C. 6060(a). * * *
Section 26.6109–2 also issued under 26 U.S.C. 6109(a). * * *
Section 26.6695–1 also issued under 26 U.S.C. 6695(b). * * *
Section 26.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 36. Section 26.6060–1 is added to read as follows:

§ 26.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 37. Section 26.6107–1 is added to read as follows:

§ 26.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the estate, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 38. Section 26.6109–1 is added to read as follows:

§ 26.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each generation-skipping transfer tax return or claim for refund prepared by one or more signing tax return preparers must include the

identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.*

Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 39. Section 26.6694–1 is added to read as follows:

§ 26.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of generation-skipping transfer tax returns or claims see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.*

Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 40. Section 26.6694–2 is added to read as follows:

§ 26.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 41. Section 26.6694–3 is added to read as follows:

§ 26.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This

section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 42. Section 26.6694–4 is added to read as follows:

§ 26.6694–4 Extension of period of collection when preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 43. Section 26.6695–1 is added to read as follows:

§ 26.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 44. Section 26.6696–1 is added to read as follows:

§ 26.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for generation-skipping transfer tax under chapter 13 of subtitle B of the Internal Revenue Code, or by an appraiser that prepared an appraisal in connection with such a return or claim for refund under section 6695A, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 45. Section 26.7701–1 is added to read as follows:

§ 26.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 46. The authority citation for part 31 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
 Section 31.6060–1 also issued under 26 U.S.C. 6060(a). * * *
 Section 31.6109–2 also issued under 26 U.S.C. 6109(a). * * *
 Section 31.6695–1 also issued under 26 U.S.C. 6695(b). * * *
 Section 31.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 47. Section 31.6060–1 is added to read as follows:

§ 31.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 48. Section 31.6107–1 is added to read as follows:

§ 31.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code shall furnish a completed copy of the return

or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 49. Section 31.6109–2 is added to read as follows:

§ 31.6109–2 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each employment tax return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 50. Section 31.6694–1 is added to read as follows:

§ 31.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of employment tax returns or claims of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code, see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 51. Section 31.6694–2 is added to read as follows:

§ 31.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 52. Section 31.6694–3 is added to read as follows:

§ 31.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 53. Section 31.6694–4 is added to read as follows:

§ 31.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 54. Section 31.6695–1 is added to read as follows:

§ 31.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the

Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 55. Section 31.6696–1 is added to read as follows:

§ 31.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for employment tax under chapters 21 through 25 of subtitle C of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 56. Section 31.7701–1 is added to read as follows:

§ 31.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 40—EXCISE TAX PROCEDURAL REGULATIONS

Par. 57. The authority citation for part 40 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 40.6060–1 also issued under 26 U.S.C. 6060(a). * * *
Section 40.6109–2 also issued under 26 U.S.C. 6109(a). * * *
Section 40.6695–1 also issued under 26 U.S.C. 6695(b). * * *
Section 40.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 58. Section 40.6060–1 is added to read as follows:

§ 40.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy

the recordkeeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 59. Section 40.6107–1 is added to read as follows:

§ 40.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 60. Section 40.6109–1 is added to read as follows:

§ 40.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 61. Section 40.6694–1 is added to read as follows:

§ 40.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of returns or claims for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code, see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice

provided, after the date that final regulations are published in the **Federal Register**.

Par. 62. Section 40.6694-2 is added to read as follows:

§ 40.6694-2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694-2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 63. Section 40.6694-3 is added to read as follows:

§ 40.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694-3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 64. Section 40.6694-4 is added to read as follows:

§ 40.6694-4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694-4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 65. Section 40.6695-1 is added to read as follows:

§ 40.6695-1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 66. Section 40.6696-1 is added to read as follows:

§ 40.6696-1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for excise tax under chapters 31, 32 (other than section 4181), 33, 34, 36 (other than section 4461), 38, and 39 of subtitle D of the Internal Revenue Code, the rules under § 1.6696-1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 67. Section 40.7701-1 is added to read as follows:

§ 40.7701-1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701-15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 41—EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

(a) *In general.* For the definition of a tax return preparer, see § 301.7701-15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 41—EXCISE TAX ON USE OF CERTAIN HIGHWAY MOTOR VEHICLES

Par. 68. The authority citation for part 41 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
 Section 41.6060-1 also issued under 26 U.S.C. 6060(a). * * *
 Section 41.6109-2 also issued under 26 U.S.C. 6109(a). * * *
 Section 41.6695-1 also issued under 26 U.S.C. 6695(b). * * *
 Section 41.6695-2 also issued under 26 U.S.C. 6695(g). * * *

Par. 69. Section 41.6060-1 is added to read as follows:

§ 41.6060-1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of excise tax under section 4481 of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 70. Section 41.6107-1 is added to read as follows:

§ 41.6107-1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of excise tax section 4481 of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 71. Section 41.6109–2 is added to read as follows:

§ 41.6109–2 Tax return preparers furnishing identifying numbers for returns or claims for refund filed after December 31, 2008.

(a) *In general.* Each excise tax return or claim for refund under section 4481 prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 72. Section 41.6694–1 is added to read as follows:

§ 41.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund, see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 73. Section 41.6694–2 is added to read as follows:

§ 41.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under section 4481 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 74. Section 41.6694–3 is added to read as follows:

§ 41.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under section 4481 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 75. Section 41.6694–4 is added to read as follows:

§ 41.6694–4 Extension of period of collection when preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for excise tax under section 4481 of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 76. Section 41.6695–1 is added to read as follows:

§ 41.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under section 4481 of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign a return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 77. Section 41.6696–1 is added to read as follows:

§ 41.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for excise tax under section 4481

of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 78. Section 41.7701–1 is added to read as follows:

§ 41.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 44—TAXES ON WAGERING; EFFECTIVE JANUARY 1, 1955

Par. 79. The authority citation for part 44 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 44.6060–1 also issued under 26 U.S.C. 6060(a). * * *
Section 44.6109–2 also issued under 26 U.S.C. 6109(a). * * *
Section 44.6695–1 also issued under 26 U.S.C. 6695(b). * * *
Section 44.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 80. Section 44.6060–1 is added to read as follows:

§ 44.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of tax on wagers under sections 4401 or 4411 of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 81. Section 44.6107–1 is added to read as follows:

§ 44.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax on wagers under sections 4401 or 4411 of the

Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 82. Section 44.6109-1 is added to read as follows:

§ 44.6109-1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund of tax under sections 4401 or 4411 prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695-1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109-2 of this chapter.

(b) *Effective/applicability date.* This section is applicable for returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 83. Section 44.6694-1 is added to read as follows:

§ 44.6694-1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of wagering tax returns or claims for refund under sections 4401 or 4411, see § 1.6694-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 84. Section 44.6694-2 is added to read as follows:

§ 44.6694-2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax on wagers under sections 4401 or 4411 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694-2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 85. Section 44.6694-3 is added to read as follows:

§ 44.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax on wagers under sections 4401 or 4411 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694-3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 86. Section 44.6694-4 is added to read as follows:

§ 44.6694-4 Extension of period of collection when preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for tax on wagers under sections 4401 or 4411 of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694-4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 87. Section 44.6695-1 is added to read as follows:

§ 44.6695-1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax on wagers under sections 4401 or 4411 of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 88. Section 44.6696-1 is added to read as follows:

§ 44.6696-1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax on wagers under sections 4401 or 4411 of the Internal Revenue Code, the rules under § 1.6696-1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 89. Section 44.7701-1 is added to read as follows:

§ 44.7701-1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701-15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 53—FOUNDATION AND SIMILAR EXCISE TAXES

Par. 90. The authority citation for part 53 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
 Section 53.6060-1 also issued under 26 U.S.C. 6060(a). * * *
 Section 53.6109-2 also issued under 26 U.S.C. 6109(a). * * *
 Section 53.6695-1 also issued under 26 U.S.C. 6695(b). * * *
 Section 53.6695-2 also issued under 26 U.S.C. 6695(g). * * *

Par. 91. Section 53.6060-1 is added to read as follows:

§ 53.6060-1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of tax under Chapter 42 of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and

claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 92. Section 53.6107–1 is added to read as follows:

§ 53.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under Chapter 42 of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 93. Section 53.6109–1 is added to read as follows:

§ 53.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund filed.

(a) *In general.* Each tax return or claim for refund under Chapter 42 of the Internal Revenue Code prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 94. Section 53.6694–1 is added to read as follows:

§ 53.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund under Chapter 42 of the Internal Revenue Code, see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 95. Section 53.6694–2 is added to read as follows:

§ 53.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under Chapter 42 of the Internal Revenue Code (Code) shall be

subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 96. Section 53.6694–3 is added to read as follows:

§ 53.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under Chapter 42 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 97. Section 53.6694–4 is added to read as follows:

§ 53.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund of tax under Chapter 42 of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 98. Section 53.6695–1 is added to read as follows:

§ 53.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under Chapter 42 of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the

Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 99. Section 53.6696–1 is added to read as follows:

§ 53.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax under Chapter 42 of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 100. Section 53.7701–1 is added to read as follows:

§ 53.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 54—PENSION EXCISE TAXES

Par. 101. The authority citation for part 54 is amended by adding entries in numerical order to read in part as follows:

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

Section 54.6060–1 also issued under 26 U.S.C. 6060(a). * * *

Section 54.6109–2 also issued under 26 U.S.C. 6109(a). * * *

Section 54.6695–1 also issued under 26 U.S.C. 6695(b). * * *

Section 54.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 102. Section 54.6060–1 is added to read as follows:

§ 54.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund under Chapter 43 of subtitle D of the Internal Revenue Code, other than for the person, at any time during

a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 103. Section 54.6107-1 is added to read as follows:

§ 54.6107-1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under Chapter 43 of subtitle D of the Internal Revenue Code, shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 104. Section 54.6109-1 is added to read as follows:

§ 54.6109-1 Tax return preparers furnishing identifying numbers for returns or claims for refund filed.

(a) *In general.* Each tax return or claim for refund of tax under Chapter 43 of subtitle D prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695-1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109-2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 105. Section 54.6694-1 is added to read as follows:

§ 54.6694-1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund of tax under Chapter 43 of subtitle D, see § 1.6694-1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 106. Section 54.6694-2 is added to read as follows:

§ 54.6694-2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under chapter 43 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694-2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 107. Section 56.6694-3 is added to read as follows:

§ 54.6694-3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapter 43 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694-3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 108. Section 54.6694-4 is added to read as follows:

§ 54.6694-4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for tax under chapter 43 of subtitle D of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694-4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 109. Section 54.6695-1 is added to read as follows:

§ 54.6695-1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim

for refund of tax under chapter 43 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695-1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 110. Section 54.6696-1 is added to read as follows:

§ 54.6696-1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for excise tax under chapter 43 of subtitle D of the Internal Revenue Code, the rules under § 1.6696-1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 111. Section 54.7701-1 is added to read as follows:

§ 54.7701-1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701-15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 55—EXCISE TAX ON REAL ESTATE INVESTMENT TRUSTS AND REGULATED INVESTMENT COMPANIES

Par. 112. The authority citation for part 55 is amended by adding entries in numerical order to read in part as follows:

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

Section 55.6060-1 also issued under 26 U.S.C. 6060(a). * * *

Section 55.6109-2 also issued under 26 U.S.C. 6109(a). * * *

Section 55.6695-1 also issued under 26 U.S.C. 6695(b). * * *

Section 55.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 113. Section 55.6060–1 is added to read as follows:

§ 55.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund under chapter 44 of subtitle D of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 114. Section 55.6107–1 is added to read as follows:

§ 55.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under Chapter 44 of subtitle D of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 115. Section 55.6109–1 is added to read as follows:

§ 55.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund of tax under chapter 44 of Subtitle D prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 116. Section 55.6694–1 is added to read as follows:

§ 55.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties

applicable to preparers of tax returns or claims for refund of tax under chapter 44 of Subtitle D see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 117. Section 55.6694–2 is added to read as follows:

§ 55.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapter 44 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 118. Section 55.6694–3 is added to read as follows:

§ 55.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under chapter 44 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 119. Section 55.6694–4 is added to read as follows:

§ 55.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for excise tax under chapter 44 of subtitle D of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 120. Section 55.6695–1 is added to read as follows:

§ 55.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under chapter 44 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 121. Section 55.6696–1 is added to read as follows:

§ 55.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax under chapter 44 of subtitle D of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 122. Section 55.7701–1 is added to read as follows:

§ 55.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 56—PUBLIC CHARITY EXCISE TAXES

Par. 123. The authority citation for part 56 is amended by adding entries in numerical order to read in part as follows:

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

Section 56.6060–1 also issued under 26 U.S.C. 6060(a). * * *

Section 56.6109–2 also issued under 26 U.S.C. 6109(a). * * *

Section 56.6695–1 also issued under 26 U.S.C. 6695(b). * * *

Section 56.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 124. Section 56.6060–1 is added to read as follows:

§ 56.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund of tax under chapter 41 of subtitle D of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 125. Section 56.6107–1 is added to read as follows:

§ 56.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under Chapter 41 of subtitle D of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the estate, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 126. Section 56.6109–1 is added to read as follows:

§ 56.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund for tax under chapter 41 of subtitle D prepared by one or more tax signing return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in

the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 127. Section 56.6694–1 is added to read as follows:

§ 56.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund of tax under chapter 41 of subtitle D see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 128. Section 56.6694–2 is added to read as follows:

§ 56.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of excise tax under chapter 41 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 129. Section 56.6694–3 is added to read as follows:

§ 56.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under chapter 41 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 130. Section 56.6694–4 is added to read as follows:

§ 56.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for tax under chapter 41 of subtitle D of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 131. Section 56.6695–1 is added to read as follows:

§ 56.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under chapter 41 of subtitle D of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 132. Section 56.6696–1 is added to read as follows:

§ 56.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules relating to claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax under chapter 41 of subtitle D of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 133. Section 56.7701–1 is added to read as follows:

§ 56.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 156—EXCISE TAX ON GREENMAIL

Par. 134. The authority citation for part 156 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
Section 156.6060–1 also issued under 26 U.S.C. 6060(a). * * *
Section 156.6109–2 also issued under 26 U.S.C. 6109(a). * * *
Section 156.6695–1 also issued under 26 U.S.C. 6695(b). * * *
Section 156.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 135. Section 156.6060–1 is added to read as follows:

§ 156.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund under section 5881 of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 136. Section 156.6107–1 is added to read as follows:

§ 156.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under Section 5881 of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 137. Section 156.6109–1 is added to read as follows:

§ 156.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund for tax under section 5881 of the Internal Revenue Code prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 138. Section 156.6694–1 is added to read as follows:

§ 156.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund for tax under section 5881 of the Internal Revenue Code, see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.* Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 139. Section 156.6694–2 is added to read as follows:

§ 156.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under section 5881 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 140. Section 156.6694–3 is added to read as follows:

§ 156.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under section 5881 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and

claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 141. Section 156.6694–4 is added to read as follows:

§ 156.6694–4 Extension of period of collection when tax return preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for tax under section 5881 of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 142. Section 156.6695–1 is added to read as follows:

§ 156.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under section 5881 of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 143. Section 156.6696–1 is added to read as follows:

§ 156.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax under section 5881 of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 144. Section 156.7701–1 is added to read as follows:

§ 156.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 157—EXCISE TAX ON STRUCTURED SETTLEMENT FACTORING TRANSACTIONS

Par. 145. The authority citation for part 157 is amended by adding entries in numerical order to read in part as follows:

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

Section 157.6060–1 also issued under 26 U.S.C. 6060(a). * * *

Section 157.6109–2 also issued under 26 U.S.C. 6109(a). * * *

Section 157.6695–1 also issued under 26 U.S.C. 6695(b). * * *

Section 157.6695–2 also issued under 26 U.S.C. 6695(g). * * *

Par. 146. Section 157.6060–1 is added to read as follows:

§ 157.6060–1 Reporting requirements for tax return preparers.

(a) *In general.* A person that employs (or engages) one or more tax return preparers to prepare a return or claim for refund for tax under section 5891 of the Internal Revenue Code, other than for the person, at any time during a return period, shall satisfy the record keeping and inspection requirements in the manner stated in § 1.6060–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 147. Section 157.6107–1 is added to read as follows:

§ 157.6107–1 Tax return preparer must furnish copy of return to taxpayer and must retain a copy or record.

(a) *In general.* A person who is a signing tax return preparer of any return or claim for refund of tax under section 5891 of the Internal Revenue Code shall furnish a completed copy of the return or claim for refund to the taxpayer, and retain a completed copy or record in the

manner stated in § 1.6107–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 148. Section 157.6109–1 is added to read as follows:

§ 157.6109–1 Tax return preparers furnishing identifying numbers for returns or claims for refund.

(a) *In general.* Each tax return or claim for refund for tax under section 5891 of the Internal Revenue Code prepared by one or more signing tax return preparers must include the identifying number of the preparer required by § 1.6695–1(b) of this chapter to sign the return or claim for refund in the manner stated in § 1.6109–2 of this chapter.

(b) *Effective/applicability date.*

Paragraph (a) of this section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 149. Section 157.6694–1 is added to read as follows:

§ 157.6694–1 Section 6694 penalties applicable to tax return preparer.

(a) *In general.* For general definitions regarding section 6694 penalties applicable to preparers of tax returns or claims for refund for tax under section 5891 of the Internal Revenue Code see § 1.6694–1 of this chapter.

(b) *Effective/applicability date.*

Paragraph (a) of this section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 150. Section 157.6694–2 is added to read as follows:

§ 157.6694–2 Penalties for understatement due to an unreasonable position.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under section 5891 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(a) of the Code in the manner stated in § 1.6694–2 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 151. Section 157.6694–3 is added to read as follows:

§ 157.6694–3 Penalty for understatement due to willful, reckless, or intentional conduct.

(a) *In general.* A person who is a tax return preparer of any return or claim

for refund of tax under section 5891 of the Internal Revenue Code (Code) shall be subject to penalties under section 6694(b) of the Code in the manner stated in § 1.6694–3 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 152. Section 157.6694–4 is added to read as follows:

§ 157.6694–4 Extension of period of collection when preparer pays 15 percent of a penalty for understatement of taxpayer's liability and certain other procedural matters.

(a) *In general.* For rules relating to the extension of period of collection when a tax return preparer who prepared a return or claim for refund for tax under section 5891 of the Internal Revenue Code pays 15 percent of a penalty for understatement of taxpayer's liability, and procedural matters relating to the investigation, assessment and collection of the penalties under section 6694(a) and (b), the rules under § 1.6694–4 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 153. Section 157.6695–1 is added to read as follows:

§ 157.6695–1 Other assessable penalties with respect to the preparation of tax returns for other persons.

(a) *In general.* A person who is a tax return preparer of any return or claim for refund of tax under section 5891 of the Internal Revenue Code (Code) shall be subject to penalties for failure to furnish a copy to the taxpayer under section 6695(a) of the Code, failure to sign the return under section 6695(b) of the Code, failure to furnish an identification number under section 6695(c) of the Code, failure to retain a copy or list under section 6695(d) of the Code, failure to file a correct information return under section 6695(e) of the Code, and negotiation of a check under section 6695(f) of the Code, in the manner stated in § 1.6695–1 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed after the date that final regulations are published in the **Federal Register**.

Par. 154. Section 157.6696–1 is added to read as follows:

§ 157.6696–1 Claims for credit or refund by tax return preparers.

(a) *In general.* For rules for claims for credit or refund by a tax return preparer who prepared a return or claim for refund for tax under section 5891 of the Internal Revenue Code, the rules under § 1.6696–1 of this chapter will apply.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

Par. 155. Section 157.7701–1 is added to read as follows:

§ 157.7701–1 Tax return preparer.

(a) *In general.* For the definition of a tax return preparer, see § 301.7701–15 of this chapter.

(b) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice provided, after the date that final regulations are published in the **Federal Register**.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 156. The authority citation for part 301 continues to read in part as follows:

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

Par. 157. Section 301.7701–15 is amended to read as follows:

§ 301.7701–15 Tax return preparer.

(a) *In general.* A tax return preparer is any person who prepares for compensation, or who employs one or more persons to prepare for compensation, all or a substantial portion of any return of tax or any claim for refund of tax under the Internal Revenue Code (Code).

(b) *Definitions—*(1) *Signing tax return preparer.* A signing tax return preparer is any tax return preparer who signs or who is required to sign a return or claim for refund as a tax return preparer pursuant to § 1.6695–1(b) of this chapter.

(2) *Nonsigning tax return preparer—*(i) *In general.* A nonsigning tax return preparer is any tax return preparer who is not a signing tax return preparer but who prepares all or a substantial portion of a return or claim for refund within the meaning of paragraph(b)(3) of this section with respect to events that have occurred at the time the advice is rendered. In determining whether an individual is a nonsigning tax return preparer, time spent on advice that is given after events have occurred that represents less than 5 percent of the aggregate time incurred by such

individual with respect to the position(s) giving rise to the understatement shall not be taken into account. Examples of nonsigning tax return preparers are tax return preparers who provide advice (written or oral) to a taxpayer (or to another tax return preparer) when that advice constitutes a substantial portion of the return within the meaning of paragraph (b)(3) of this section.

(ii) *Examples.* The provisions of this paragraph (b)(2) are illustrated by the following examples:

Example 1. Attorney A, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding a completed corporate transaction. The advice provided by A is directly relevant to the determination of an entry on the taxpayer's return and this advice constitutes a substantial portion of the return. A, however, does not prepare any other portion of the taxpayer's return and is not the signing tax return preparer of this return. A is considered a tax return preparer.

Example 2. Attorney B, an attorney in a law firm, provides legal advice to a large corporate taxpayer regarding the tax consequences of a proposed corporate transaction. Based upon this advice, the corporate taxpayer enters into the transaction. Once the transaction is completed, the corporate taxpayer does not receive any additional advice from B with respect to the transaction. B did not provide advice with respect to events that have occurred and is not considered a tax return preparer.

Example 3. The facts are the same as *Example 2*, except that Attorney B provides supplemental advice to the corporate taxpayer on a phone call after the transaction is completed. The time incurred on this supplemental advice by B represented less than 5 percent of the aggregate amount of time spent by B providing tax advice on the position. B is not considered a tax return preparer.

(3) *Substantial portion.* (i) Only a person who prepares all or a substantial portion of a return or claim for refund shall be considered to be a tax return preparer of the return or claim for refund. A person who renders tax advice on a position that is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund will be regarded as having prepared that entry. Whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion is determined based upon whether the person knows or reasonably should know that the tax attributable to the schedule, entry, or other portion of a return or claim for refund is a substantial portion of the tax required to be shown on the return or claim for refund. A single tax entry may constitute a substantial portion of the

tax required to be shown on a return. Factors to consider in determining whether a schedule, entry, or other portion of a return or claim for refund is a substantial portion include but are not limited to—

(A) The size and complexity of the item relative to the taxpayer's gross income; and

(B) The size of the understatement attributable to the item compared to the taxpayer's reported tax liability.

(ii)(A) For purposes of applying the rules of paragraph (b)(3)(i) of this section to a nonsigning tax return preparer within the meaning of paragraph (b)(2) of this section only, if the schedule, entry, or other portion of the return or claim for refund involves amounts of gross income, amounts of deductions, or amounts on the basis of which credits are determined that are—

(1) Less than \$10,000; or

(2) Less than \$400,000 and also less than 20 percent of the gross income as shown on the return or claim for refund (or, for an individual, the individual's adjusted gross income), then the schedule or other portion is not considered to be a substantial portion.

(B) If more than one schedule, entry or other portion is involved, all schedules, entries or other portions shall be aggregated in applying this rule. This paragraph shall not apply to a signing tax return preparer within the meaning of paragraph (b)(1) of this section.

(iii) A tax return preparer with respect to one return is not considered to be a tax return preparer of another return merely because an entry or entries reported on the first return may affect an entry reported on the other return, unless the entry or entries reported on the first return are directly reflected on the other return and constitute a substantial portion of the other return. For example, the sole preparer of a partnership return of income or small business corporation income tax return is considered a tax return preparer of a partner's or a shareholder's return if the entry or entries on the partnership or small business corporation return reportable on the partner's or shareholder's return constitute a substantial portion of the partner's or shareholder's return.

(iv) *Examples.* The provisions of this paragraph (b)(3) are illustrated by the following examples:

Example 1. Accountant C prepares a Form 8886, "Reportable Transaction Disclosure Statement", that is used to disclose reportable transactions. C does not prepare the tax return or advise the taxpayer regarding the tax return reporting position of the transaction to which the Form 8886

relates. The preparation of the Form 8886 is not directly relevant to the determination of the existence, characterization, or amount of an entry on a tax return or claim for refund. Rather, the Form 8886 is prepared by C to disclose a reportable transaction. C has not prepared a substantial portion of the tax return and is not considered a tax return preparer under section 6694.

Example 2. Accountant D prepares a schedule for an individual taxpayer's Form 1040, "U.S. Individual Income Tax Return", reporting \$4,000 in dividend income and gives oral or written advice about Schedule A, which results in a claim of a medical expense deduction totaling \$5,000, but does not sign the tax return. D is not a tax return preparer because the total aggregate amount of the deductions is less than \$10,000.

(4) *Return and claim for refund*—(i) *Return.* For purposes of this section, a return of tax is a return (including an amended or adjusted return) filed by or on behalf of a taxpayer reporting the liability of the taxpayer for tax under the Code, if the type of return is identified in published guidance in the Internal Revenue Bulletin. A return of tax also includes any information return or other document identified in published guidance in the Internal Revenue Bulletin, and that reports information that is or may be reported on another taxpayer's return under the Code if the information reported on the information return or other document constitutes a substantial portion of the taxpayer's return within the meaning of paragraph (b)(3) of this section.

(ii) *Claim for refund.* For purposes of this section, a claim for refund of tax includes a claim for credit against any tax that is included in published guidance in the Internal Revenue Bulletin. A claim for refund also includes a claim for payment under section 6420, 6421, or 6427.

(c) *Mechanical or clerical assistance.* A person who furnishes to a taxpayer or other tax return preparer sufficient information and advice so that completion of the return or claim for refund is largely a mechanical or clerical matter is considered a tax return preparer, even though that person does not actually place or review placement of information on the return or claim for refund. See also paragraph (b)(3) of this section.

(d) *Qualifications.* A person may be a tax return preparer without regard to educational qualifications and professional status requirements.

(e) *Outside the United States.* A person who prepares a return or claim for refund outside the United States is a tax return preparer, regardless of the person's nationality, residence, or the location of the person's place of business, if the person otherwise

satisfies the definition of *tax return preparer*. Notwithstanding the provisions of § 301.6109–1(g), the person shall secure an employer identification number if the person is an employer of another tax return preparer, is a partnership in which one or more of the general partners is a tax return preparer, is a firm entity in which one or more of the equity holders is a tax return preparer, or is an individual not employed by another tax return preparer.

(f) *Persons who are not tax return preparers.* (1) The following persons are not tax return preparers:

(i) An official or employee of the Internal Revenue Service (IRS) performing their official duties.

(ii) Any individual who provides tax assistance under a Volunteer Income Tax Assistance (VITA) program established by the IRS, but only with respect to those returns prepared as part of the VITA program.

(iii) Any organization sponsoring or administering a VITA program established by the IRS, but only with respect to that sponsorship or administration.

(iv) Any individual who provides tax counseling for the elderly under a program established pursuant to section 163 of the Revenue Act of 1978, but only with respect to those returns prepared as part of that program.

(v) Any organization sponsoring or administering a program to provide tax counseling for the elderly established pursuant to section 163 of the Revenue Act of 1978, but only with respect to that sponsorship or administration.

(vi) Any individual who provides tax assistance as part of a qualified Low-Income Taxpayer Clinic (LITC), as defined by section 7526, subject to the requirements of paragraphs (f)(2) and (3) of this section, but only with respect to those returns prepared as part of the LITC program.

(vii) Any organization that is a qualified LITC, as defined by section 7526, subject to the requirements of paragraphs (h)(2) and (3) of this section.

(viii) An individual providing only typing, reproduction, or other mechanical assistance in the preparation of a return or claim for refund.

(ix) An individual preparing a return or claim for refund of a person, or an officer, a general partner, member, shareholder, or employee of a person, by whom the individual is regularly and continuously employed or compensated or in which the individual is a general partner.

(x) An individual preparing a return or claim for refund for a trust, estate, or

other entity of which the person either is a fiduciary or is an officer, general partner, or employee of the fiduciary.

(xi) An individual preparing a claim for refund for a taxpayer in response to—

(A) A notice of deficiency issued to the taxpayer; or

(B) A waiver of restriction on assessment after initiation of an audit of the taxpayer or another taxpayer if a determination in the audit of the other taxpayer affects, directly or indirectly, the liability of the taxpayer for tax under subtitle A.

(xii) A person who prepares a return or claim for refund for a taxpayer with no explicit or implicit agreement for compensation, even if the person receives an insubstantial gift, return service, or favor.

(2) Paragraphs (f)(1) (vi) and (vii) of this section apply only if any assistance with a return of tax or claim for refund is directly related to a controversy with the IRS for which the qualified LITC is providing assistance, or is an ancillary part of an LITC program to inform individuals for whom English is a second language about their rights and responsibilities under the Code.

(3) Notwithstanding paragraph (f)(2) of this section, paragraphs (f)(1)(vi) and (f)(1)(vii) of this section do not apply if an LITC charges a separate fee or varies a fee based on whether the LITC provides assistance with a return of tax or claim for refund under the Code, or if the LITC charges more than a nominal fee for its services.

(4) For purposes of paragraph (f)(1)(ix) of this section, the employee of a corporation owning more than 50 percent of the voting power of another corporation, or the employee of a corporation more than 50 percent of the voting power of which is owned by another corporation, is considered the employee of the other corporation as well.

(5) For purposes of paragraph (f)(1)(x) of this section, an estate, guardianship, conservatorship, committee, or any similar arrangement for a taxpayer under a legal disability (such as a minor, an incompetent, or an infirm individual) is considered a trust or estate.

(6) *Examples.* The mechanical assistance exception described in paragraph (f)(1)(viii) of this section is illustrated by the following examples:

Example 1. A reporting agent received employment tax information from a client from the client's business records. The reporting agent did not render any tax advice to the client or exercise any discretion or independent judgment on the client's underlying tax positions. The reporting agent processed the client's information, signed the

return as authorized by the client pursuant to Form 8655, Reporting Agent Authorization, and filed the client's return using the information supplied by the client. The reporting agent is not a tax return preparer.

Example 2. A reporting agent rendered tax advice to a client on determining whether its workers are employees or independent contractors for Federal tax purposes. For

compensation, the reporting agent received employment tax information from the client, processed the client's information and filed the client's return using the information supplied by the client. The reporting agent is a tax return preparer.

(g) *Effective/applicability date.* This section is applicable to returns and claims for refund filed, and advice

provided, after the date that final regulations are published in the **Federal Register**.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E8-12898 Filed 6-16-08; 8:45 am]

BILLING CODE 4830-01-P



Federal Register

**Tuesday,
June 17, 2008**

Part V

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

48 CFR Parts 3, 9, and 52

**Federal Acquisition Regulation; FAR Case
2007-017; Service Contractor Employee
Personal Conflicts of Interest; Proposed
Rule**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 3, 9, and 52**

[FAR Case 2007–017; Docket 2008–0002;
Sequence 2]

RIN 9000–AK97

**Federal Acquisition Regulation; FAR
Case 2007–017; Service Contractor
Employee Personal Conflicts of
Interest**

AGENCIES: Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).

ACTION: Advance notice of proposed
rulemaking; Reopening of comment
period.

SUMMARY: The Civilian Agency
Acquisition Council and the Defense
Acquisition Regulations Council (the
Councils) are interested in determining
if, when, and how service contractor
employees' personal conflicts of interest
(PCI) need to be addressed and whether
greater disclosure of contractor

practices, specific prohibitions, or
reliance on specified principles would
be most effective and efficient in
promoting ethical behavior. The
comment period is reopened for
an additional 30 days to provide
additional time for interested parties to
review and comment on the Advance
notice of proposed rulemaking.

DATES: *Comment Date:* Interested parties
should submit written comments to the
FAR Secretariat on or before July 17,
2008 to be considered in the
formulation of any proposed or interim
rule.

ADDRESSES: Submit comments
identified by FAR case 2007–017, by
any of the following methods:

- Regulations.gov:<http://www.regulations.gov>. Submit comments
via the Federal eRulemaking portal by
inputting “FAR Case 2007–017” under
the heading “Comment or Submission”.
Select the link “Send a Comment or
Submission” that corresponds with FAR
Case 2007–017. Follow the instructions
provided to complete the “Public
Comment and Submission Form”.
Please include your name, company
name (if any), and “FAR Case 2007–
017” on your attached document.

- Fax: 202–501–4067.
- Mail: General Services
Administration, Regulatory Secretariat

(VPR), 1800 F Street, NW, Room 4035,
ATTN: Laurieann Duarte, Washington,
DC 20405.

Instructions: Please submit comments
only and cite FAR case 2007–017, in all
correspondence related to this case. All
comments received will be posted
without change to <http://www.regulations.gov>. Please include
your name and company name (if any)
inside the document.

FOR FURTHER INFORMATION CONTACT For
clarification of content, contact Ms.
Meredith Murphy, at (202) 208–6925.
For information pertaining to status or
publication schedules, contact the FAR
Secretariat, Room 4035, GS Building,
Washington, DC 20405, (202) 501–4755.
Please cite FAR Case 2007–017.

SUPPLEMENTARY INFORMATION: The
Councils published an Advance notice
of proposed rulemaking in the **Federal
Register** at 73 FR 15961, March 26,
2008. To allow additional time for
interested parties to review the Advance
notice of proposed rulemaking and
submit comments, the comment period
is reopened for an additional 30-days.

Dated: June 11, 2008.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. E8–13634 Filed 6–16–08; 8:45 am]

BILLING CODE 6820–EP–S



Federal Register

**Tuesday,
June 17, 2008**

Part VI

The President

Proclamation 8270—Father's Day, 2008

Presidential Documents

Title 3—

Proclamation 8270 of June 12, 2008

The President

Father's Day, 2008

By the President of the United States of America

A Proclamation

On Father's Day, we honor our Nation's fathers for the unconditional love they give to their children and for their selfless dedication to the well-being of their families.

Fathers play a unique and irreplaceable part in the lives of their children and pass along values that help children grow into responsible adults. By providing their sons and daughters with a positive example, fathers help give their children the necessary foundation they need to make wise decisions throughout their lives. Fathers strive to inspire their children to lead lives of integrity, honor, and purpose, and they pray for wisdom and the strength to give their children the love and support they need to achieve their dreams.

All Americans are thankful for the extraordinary efforts of our Nation's fathers, stepfathers, grandfathers, and guardians. Their devotion and encouragement as mentors, providers, and role models help strengthen their families and our country. We are especially grateful for the fathers who serve in our Nation's Armed Forces. These dedicated fathers protect liberty so that all children can have a more promising future. We pray for the safe return of all those serving overseas, and we thank the fathers who support sons and daughters who are defending our freedom around the globe.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, in accordance with a joint resolution of the Congress approved April 24, 1972, as amended (36 U.S.C. 109), do hereby proclaim June 15, 2008, as Father's Day. I encourage all Americans to express their appreciation to all fathers for their many contributions to our Nation's children. I direct the appropriate officials of the Government to display the flag of the United States on all Government buildings on this day. I also call upon State and local governments and citizens to observe this day with appropriate programs, ceremonies, and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of June, 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. 08-1370

Filed 6-16-08; 10:08 am]

Billing code 3195-W8-P

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Financial Crimes Enforcement Network:

Proposed Amendments to the Bank Secrecy Act Regulations; comments due by 6-23-08; published 4-24-08 [FR E8-08955]

**TREASURY DEPARTMENT
Alcohol and Tobacco Tax
and Trade Bureau**

Establishment of the Snipes Mountain Viticultural Area (2007R-300P); comments due by 6-27-08; published 4-28-08 [FR E8-09172]

LIST OF PUBLIC LAWS

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session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-741-6043. This list is also available online at <http://www.archives.gov/federal-register/laws.html>.

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H.R. 1195/P.L. 110-244

SAFETEA-LU Technical Corrections Act of 2008 (June 6, 2008; 122 Stat. 1572)

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