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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[Docket Number AMS–TM–07–0124; TM–07–12FR]

RIN 0581–AC76

National Organic Program (NOP), Sunset Review (2008)

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Agriculture's (USDA) National List of Allowed and Prohibited Substances (National List) regulations to enact recommendations submitted to the Secretary of Agriculture (Secretary) by the National Organic Standards Board (NOSB). The amendments addressed in this final rule pertain to the continued exemption (use) and prohibition of 12 substances in organic production and handling. Consistent with the recommendations from the NOSB, this final rule renews 11 exemptions and 1 prohibition on the National List (along with any restrictive annotations) and corrects the Tartaric acid listings by adding annotations originally recommended to the Secretary.

DATES: *Effective Date:* This final rule becomes effective November 3, 2008.

FOR FURTHER INFORMATION CONTACT: Richard H. Mathews, Chief, Standards Development and Review Branch, Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

The Organic Foods Production Act (OFPA), 7 U.S.C. 6501 *et seq.,* authorizes the establishment of the National List of allowed and prohibited substances. The National List identifies synthetic substances (synthetics) that are exempted (allowed) and nonsynthetic substances (nonsynthetics) that are prohibited in organic crop and livestock production. The National List also identifies nonsynthetics and synthetics that are exempted for use in organic handling.

The exemptions and prohibitions granted under the OFPA are required to be reviewed every 5 years by the NOSB. The Secretary of Agriculture has authority under the OFPA to renew such exemptions and prohibitions. If they are not reviewed by the NOSB within 5 years of their inclusion on the National List and renewed by the Secretary, their authorized use or prohibition expires. This means that synthetic substances Copper sulfate, Ozone gas, Peracetic acid, and EPA List 3 Inerts, currently allowed for use in organic crop production, will no longer be allowed for use after November 3, 2008. Calcium chloride currently prohibited from use in organic crop production, except as a foliar spray to treat a physiological disorder associated with calcium uptake, will be allowed after November 3, 2008. This also means that Agar-agar, Carrageenan, and Tartaric acid, currently allowed for use in organic handling, will be prohibited after November 3, 2008. Finally, Animal enzymes, Calcium sulfate, Glucono delta-lactone, and Cellulose, currently allowed for use in organic handling, will no longer be allowed for use after November 4, 2008.

This final rule reflects recommendations submitted to the Secretary by the NOSB concerning the continued use and prohibition of 12 substances on the National List in organic production and handling. Consistent with the recommendations from the NOSB, this final rule renews 11 exemptions and 1 prohibition on the National List (along with any restrictive annotations) and corrects the Tartaric acid listings by adding annotations originally recommended to the Secretary on November 1, 1995.

Under the authority of the OFPA, as amended, (7 U.S.C. 6501 *et seq.*), the National List can be amended by the Secretary based on proposed amendments developed by the NOSB. Since established, the National List has been amended ten times, October 31, 2003 (68 FR 61987), November 3, 2003 (68 FR 62215), October 21, 2005 (70 CFR 61217), June 7, 2006 (71 FR 32803), September 11, 2006 (71 FR 53299), June 27, 2007 (72 FR 35137), October 16, 2007 (72 FR 58469), December 10, 2007 (72 FR 69569), December 12, 2007 (72 FR 70479), and September 18, 2008 (73 FR 54057).

II. Overview of Amendments

The following provides an overview of the amendments made to designated sections of the National List regulations:

Renewals

This final rule renews the 11 exemptions and 1 prohibition in 7 CFR 205.601, 205.602, and 205.605 of the following substances in organic agricultural production and handling and amends the USDA's national regulations (7 CFR part 205) to add annotations to the Tartaric acid listings of § 205.605:

Section 205.601 Synthetic Substances Allowed for Use in Organic Crop Production

(a) As algicide, disinfectants, and sanitizer, including irrigation system cleaning systems.

(3) Copper sulfate—for use as an algicide in aquatic rice systems, is limited to one application per field during any 24-month period. Application rates are limited to those which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

(5) Ozone gas—for use as an irrigation system cleaner only.

(6) Peracetic acid—for use in disinfecting equipment, seed, and asexually propagated planting material.

(e) As insecticides (including acaricides or mite control).

(3) Copper Sulfate—for use as tadpole shrimp control in aquatic rice production, is limited to one application per field during any 24-month period. Application rates are limited to levels which do not increase baseline soil test values for copper over a timeframe agreed upon by the producer and accredited certifying agent.

(i) As plant disease control.

(7) Peracetic acid—for use to control fire blight bacteria.

(m) As synthetic inert ingredients as classified by the Environmental Protection Agency (EPA), for use with nonsynthetic substances or synthetic

substances listed in this section and used as an active pesticide ingredient in accordance with any limitations on the use of such substances.

(2) EPA List 3—Inerts of unknown toxicity allowed:

(ii) Inerts used in passive pheromone dispensers.

Section 205.602 Nonsynthetic Substances Prohibited for Use in Organic Crop Production

(c) Calcium chloride, brine process is natural and prohibited for use except as a foliar spray to treat a physiological disorder associated with calcium uptake.

Section 205.605 Nonagricultural (Nonorganic) Substances Allowed as Ingredients in or on Processed Products Labeled as ''Organic'' or ''Made with Organic (Specified Ingredients or Food Group(s))''

(a) *Nonsynthetics allowed:*

Agar-agar.

Animal enzymes—(Rennet—animals derived; Catalase—bovine liver; Animal lipase; Pancreatin; Pepsin; and Trypsin).

Calcium sulfate—mined.

Carrageenan.

Glucono delta-lactone—production by the oxidation of D-glucose with bromine water is prohibited.

Tartaric acid—made from grape wine.

(b) *Synthetics allowed:*

Cellulose—for use in regenerative casings, as an anti-caking agent (non-chlorine bleached) and filtering aid.

Tartaric acid—made from malic acid.

Nonrenewals

The NOSB determined that the 11 exemptions and 1 prohibition demonstrated a continued need for authorization. Comments received on the proposed rule (73 FR 40194) supported renewal of the 11 exemptions and 1 prohibition. Accordingly there are no nonrenewals.

Technical Correction

This final rule amends § 205.605(a) by changing ''Carageenan'' to ''Carrageenan'' to correct the spelling of this allowed substance.

III. Related Documents

One advanced notice of proposed rulemaking with request for comments was published in **Federal Register** Notice 72 FR 73667, December 28, 2007, to make the public aware that the allowances and prohibition among 12 synthetic and nonsynthetic substances in organic production and handling will expire, if not reviewed by the NOSB and renewed by the Secretary. The proposed rule for this final rule was published on July 14, 2008 (73 FR 40194).

IV. Statutory and Regulatory Authority

The OFPA, as amended (7 U.S.C. 6501 *et. seq.*), authorizes the Secretary to make amendments to the National List based on proposed amendments developed by the NOSB. Sections 6518(k)(2) and 6518(n) of OFPA authorize the NOSB to develop proposed amendments to the National List for submission to the Secretary and establish a petition process by which persons may petition the NOSB for the purpose of having substances evaluated for inclusion on or deletion from the National List. The National List petition process is implemented under § 205.607 of the NOP regulations. The current petition process (72 FR 2167, January 18, 2007) can be accessed through the NOP Web site at *http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5048809&acct=nopgeninfo.*

A. Executive Order 12866

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

B. Executive Order 12988

Executive Order 12988 instructs each executive agency to adhere to certain requirements in the development of new and revised regulations in order to avoid unduly burdening the court system. This final rule is not intended to have a retroactive effect.

States and local jurisdictions are preempted under the OFPA from creating programs of accreditation for private persons or State officials who want to become certifying agents of organic farms or handling operations. A governing State official would have to apply to USDA to be accredited as a certifying agent, as described in § 2115(b) of the OFPA (7 U.S.C. 6514(b)). States are also preempted under §§ 2104 through 2108 of the OFPA (7 U.S.C. 6503 through 6507) from creating certification programs to certify organic farms or handling operations unless the State programs have been submitted to, and approved by, the Secretary as meeting the requirements of the OFPA.

Pursuant to section 2108(b)(2) of the OFPA (7 U.S.C. 6507(b)(2)), a State organic certification program may contain additional requirements for the production and handling of organically produced agricultural products that are produced in the State and for the certification of organic farm and handling operations located within the State under certain circumstances. Such additional requirements must: (a) Further the purposes of the OFPA, (b) not be inconsistent with the OFPA, (c) not be discriminatory toward agricultural commodities organically produced in other States, and (d) not be effective until approved by the Secretary.

Pursuant to section 2120(f) of the OFPA (7 U.S.C. 6519(f)), this final rule would not alter the authority of the Secretary under the Federal Meat Inspection Act (21 U.S.C. 601 *et seq.*), the Poultry Products Inspections Act (21 U.S.C. 451 *et seq.*), or the Egg Products Inspection Act (21 U.S.C. 1031 *et seq.*), concerning meat, poultry, and egg products, nor any of the authorities of the Secretary of Health and Human Services under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301 *et seq.*), nor the authority of the Administrator of EPA under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*).

Section 2121 of the OFPA (7 U.S.C. 6520) provides for the Secretary to establish an expedited administrative appeals procedure under which persons may appeal an action of the Secretary, the applicable governing State official, or a certifying agent under this title that adversely affects such person or is inconsistent with the organic certification program established under this title. The OFPA also provides that the U.S. District Court for the district in which a person is located has jurisdiction to review the Secretary's decision.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires agencies to consider the economic impact of each rule on small entities and evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities or erecting barriers that would restrict their ability to compete in the market The purpose is to fit regulatory actions to the scale of businesses subject to the action. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

Pursuant to the requirements set forth in the RFA, the Agricultural Marketing Service (AMS) performed an economic impact analysis on small entities in the final rule published in the **Federal Register** on December 21, 2000 (65 FR 80548). The AMS has also considered the economic impact of this action on small entities. The impact on entities affected by this final rule would not be significant. This action would allow the

continued use of substances currently listed for use in organic agricultural production and handling. The AMS concludes that the economic impact of this final rule, if any, would be minimal and entirely beneficial to small agricultural service firms. Accordingly, USDA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Small agricultural service firms, which include producers, handlers, and accredited certifying agents, have been defined by the Small Business Administration (SBA) (13 CFR 121.201) as those having annual receipts of less than $6,500,000 and small agricultural producers are defined as those having annual receipts of less than $750,000. This final rule would have an impact on a substantial number of small entities.

The U.S. organic industry at the end of 2001 included nearly 6,949 certified organic crop and livestock operations. These operations reported certified acreage totaling more than 2.09 million acres of organic farm production. Data on the numbers of certified organic handling operations (any operation that transforms raw product into processed products using organic ingredients) were not available at the time of survey in 2001; but they were estimated to be in the thousands. By the end of 2005, the number of U.S. certified organic crop, livestock, and handling operations totaled about 8,500. Based on 2005 USDA, Economic Research Service, data from USDA-accredited certifying agents, U.S. certified organic acreage increased to 4 million acres.

The U.S. sales of organic food and beverages have grown from $1 billion in 1990 to nearly $17 billion in 2006. The organic industry is viewed as the fastest growing sector of agriculture, currently representing nearly 3 percent of overall food and beverage sales. Since 1990, organic retail sales have historically demonstrated a growth rate between 20 to 24 percent each year including a 22 percent increase in 2006.

In addition, USDA has accredited 95 certifying agents who provide certification services to producers and handlers. A complete list of names and addresses of accredited certifying agents may be found on the NOP Web site, at *http://www.ams.usda.gov/nop.* AMS believes that most of these entities would be considered small entities under the criteria established by the SBA.

D. Paperwork Reduction Act

No additional collection or recordkeeping requirements are imposed on the public by this final rule. Accordingly, OMB clearance is not required by section 350(h) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.,* or OMB's implementing regulation at 5 CFR part 1320.

The AMS is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

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

E. Received Comments on Proposed Rule AMS–TM–07–0124

AMS received 13 comments on proposed rule AMS–TM–07–0124. Twelve of the commenters favored renewing the 11 exemptions and 1 prohibition. The remaining commenter did not refer to subjects within the scope of this rulemaking. Comments were received from consumers, handlers, a certifying agent, trade associations, an organic association, an industry group and ingredient manufacturers. Five comments indicated blanket support for the continued listing of all substances as presented in the proposed rule. Some commenters specifically supported substances that they promote, represent, or rely on. Specific support was received for the following substances (the number in parenthesis represents the number of specific support comments): Agar-agar (2), animal enzymes (1), carrageenan (5), cellulose (3), and tartaric acid (1).

Change Made Based on Comment

The following change has been made based upon a comment received.

Incorrect annotation for Tartaric acid. One commenter noted that the annotation for the nonsynthetic form of Tartaric acid in the proposed rule was inconsistent with the original November 1, 1995, NOSB recommendation. At the May 2008 meeting, the NOSB recommended that the Tartaric acid listings be corrected to reflect the original annotation which had been inadvertently excluded from the rulemaking. The commenter correctly indicated that the NOSB's original recommendation, ''Tartaric acid—made from grape wine,'' was mistakenly listed as ''Tartaric acid—made from organic grape wine'' in the proposed rule. We have revised the annotation by removing the word, ''organic'' from the listing for the nonsynthetic form of tartaric acid.

F. Effective Date

This final rule reflects recommendations submitted to the Secretary by the NOSB for the purpose of fulfilling the requirements of 7 U.S.C. 6517(e) of the OFPA. Section 7 U.S.C. 6517(e) requires the NOSB to review each substance on the National List within 5 years of its publication. The substances being reauthorized for use on the National List were initially authorized for use or prohibition in organic agriculture on November 3, 2003, and November 4, 2003. Because these substances are critical to organic production and handling operations, producers and handlers should be able to continue to use them beyond their 5-year expiration dates of November 3, 2008 and November 4, 2008.

Accordingly, pursuant to 5 U.S.C. 553, it is found and determined that good cause exists for not postponing the effective date of this rule until 30 days after publication in the **Federal Register**. This rule shall be effective on November 3, 2008.

List of Subjects in 7 CFR Part 205

Administrative practice and procedure, Agriculture, Animals, Archives and records, Imports, Labeling, Organically produced products, Plants, Reporting and recordkeeping requirements, Seals and insignia, Soil conservation.

■ For the reasons set forth in the preamble, 7 CFR part 205, Subpart G is amended as follows:

PART 205—NATIONAL ORGANIC PROGRAM

■ 1. The authority citation for 7 CFR part 205 continues to read as follows:

Authority: 7 U.S.C. 6501–6522.

§ 205.605 [Amended]

■ 2. In § 205.605, paragraph (a) the word ''Carageenan'' is removed and the word ''Carrageenan'' is added in its place, and the words ''Tartaric acid'' are removed and the words ''Tartaric acid—made from grape wine'' are added in their place.

■ 3. In § 205.605, paragraph (b) the words ''Tartaric acid'' are removed and the words ''Tartaric acid—made from malic acid'' are added in their place.

Dated: October 6, 2008.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E8–24114 Filed 10–8–08; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1334]

Reserve Requirements of Depository Institutions

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Interim final rule; request for public comment.

SUMMARY: Under authority of section 128 of the Emergency Economic Stabilization Act of 2008, the Board is amending Regulation D, Reserve Requirements of Depository Institutions, to direct Federal Reserve Banks to pay interest on balances held at Reserve Banks to satisfy reserve requirements and on balances held in excess of required reserve balances and clearing balances. The Board is also making associated minor changes to its clearing balance policy and the method for recovering float costs.

DATES: Effective date: This interim final rule is effective October 9, 2008. Comments must be received on or before November 21, 2008.

ADDRESSES: You may submit comments, identified by Docket No. R–1334, by any of the following methods:

Agency Web Site: http://www.federalreserve.gov. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*

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

E-mail: regs.comments@federalreserve.gov. Include the docket number in the subject line of the message.

Fax: (202) 452–3819 or (202) 452–3102.

Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information.

Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Counsel (202/452–3565), Legal Division, or Margaret Gillis DeBoer, Senior Financial Analyst (202/452–3139), Division of Monetary Affairs; for information with respect to the clearing balance policy and float calculations, Jonathan Mueller, Senior Financial Analyst (202–530–6291), Division of Reserve Bank Operations and Payment Systems; for users of Telecommunications Device for the Deaf (TDD) only, contact (202/263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Background

Section 128 of the Emergency Economic Stabilization Act of 2008, enacted on October 3, 2008 (the ''2008 Act''), accelerated the effective date of the authority for the Federal Reserve Banks to pay earnings on balances maintained at the Reserve Banks by or on behalf of depository institutions. The 2008 Act made this authority effective on October 1, 2008. This authority was originally enacted in Title II of the Financial Services Regulatory Relief Act of 2006 (the ''2006 Act'') (Pub. L. 109–351, 120 Stat. 1966 (Oct. 13, 2006), with an original effective date of October 1, 2011. The 2006 Act provides that such earnings must be paid at least once each quarter at a rate not to exceed the general level of short-term interest rates. The 2006 Act also provides that the Board may prescribe regulations concerning the payment of earnings, the distribution of earnings to the depository institutions that maintain balances or on whose behalf balances are maintained, and the responsibilities of correspondents to distribute and credit earnings on balances maintained by the respondent on a pass-through basis with the correspondent.

The Board is publishing this interim final rule amending Regulation D (Reserve Requirements of Depository Institutions) to direct the Federal Reserve Banks to pay interest on balances held at Reserve Banks to satisfy reserve requirements (''required reserve balances'') and balances held in excess of required reserve balances and clearing balances (''excess balances''). Reserve Banks will not pay explicit interest on clearing balances (balances that an institution holds to satisfy a contractual clearing balance agreement). Clearing balances will, however, continue to earn earnings credits under the existing clearing balance policy, although the Board has made minor adjustments to the calculations of earnings credits and float costs to be recovered that are related to reserve requirements. In addition, the Board has eliminated transitional adjustments for reserve requirements in the event of a merger or consolidation.

In the past, the absence of interest payments on required reserve balances acted as a tax on depository institutions' issuance of deposits subject to reserve requirements. To the extent that depository institutions could not satisfy reserve requirements with vault cash, they were required to hold more balances than they otherwise would in a non-interest-bearing account at a Reserve Bank. The absence of interest on excess balances has meant that, when reserve supply significantly exceeds demand, the federal funds rate can fall to as low as zero.

The ability to pay interest on balances held at Reserve Banks should help promote efficiency and stability in the banking sector. Paying interest on excess balances will permit the Federal Reserve to expand its balance sheet as necessary to provide sufficient liquidity to support financial stability while implementing the monetary policy that is appropriate in light of the System's macroeconomic objectives of maximum employment and price stability. Paying interest on excess balances should also help to establish a lower bound on the federal funds rate. Eligible institutions (defined below) will presumably be unwilling to lend balances in the funds market at a rate much below that paid on excess balances maintained at a Reserve Bank. In addition, paying interest on required reserve balances will eliminate much of the reserve tax and lessen the incentive for depository institutions to engage in reserve avoidance behavior, which absorbs real resources and diminishes the efficiency of the banking system.

In light of the current severe strains in financial markets, the amendments to Regulation D will be effective on Thursday, October 9, 2008. Interest will be calculated beginning with the biweekly reserve maintenance period ending October 22, 2008, and the weekly reserve maintenance period ending October 15, 2008. Interest payments will occur within the existing framework for reserve computation and maintenance, which includes reserve averaging, carryover provisions, and reserve deficiency charges. For both excess balances and required reserve balances, interest will be paid on these

balances averaged over the reserve maintenance period. This approach is consistent with the current reserves framework under which compliance with reserve requirements is measured over either a seven-day or a fourteen-day reserve maintenance period, depending generally on the size of the institution. Interest will be credited to eligible institutions 15 days after the close of the maintenance period in order to apply reserve carryover provisions. Further details on the interim final rule are discussed below. Although the amendments to Regulation D are effective on October 9, the Board seeks comments on all aspects of this proposal.

II. Discussion

A. Eligible Institutions

The Act permits Federal Reserve Banks to pay interest on balances held by or on behalf of ''depository institutions.'' The Act's definition of ''depository institution'' has a broader meaning than the definition of that term in section 19(b)(1)(A) of the Federal Reserve Act and Regulation D. To avoid confusion, the Board's rule uses the term ''eligible institution'' to refer to those institutions included in the 2008 Act's broader definition of ''depository institution.'' Therefore, the definition of ''eligible institution'' includes the depository institutions defined in section 19(b)(1)(A) of the Federal Reserve Act, including banks, savings associations, savings banks and credit unions that are federally insured or eligible to apply for federal insurance. ''Eligible institution'' also includes trust companies, Edge and agreement corporations, and U.S. agencies and branches of foreign banks. The definition does not include all entities for which the Reserve Banks hold accounts, such as entities for which the Reserve Banks act as fiscal agents, including Federal Home Loan Banks.

B. Rate

Interest will be paid on average required reserve balances and average excess balances maintained over a reserve maintenance period. The Board has established the initial rate of interest for required reserve balances to be the average targeted federal funds rate over the reserve maintenance period less 10 basis points. Setting this rate below the targeted federal funds rate reflects the fact that federal funds loans are uncollateralized and carry some counterparty risk, whereas deposits at the Federal Reserve Banks are free from such risk. Therefore, establishing some spread below the funds rate reflects the risk-free nature of a deposit at the central bank. The choice of 10 basis points is approximately equal to the average spread between the overnight rate on repurchase agreements secured by general Treasury collateral and the overnight rate on federal funds in recent years but prior to the onset of the current financial turmoil.

The Board has established the rate of interest for excess balances to be the lowest targeted federal funds rate during the reserve maintenance period less 75 basis points. The Board believes the rate on excess balances should be set sufficiently low to provide an incentive for eligible institutions to trade funds in excess of required reserve balances and clearing balances in the federal funds market, but to provide a disincentive to trade funds at rates far below the targeted federal funds rate. The Board may adjust the formula for the interest rate on excess balances in light of experience and evolving market conditions. Basing the rate on excess balances on the lowest rate, rather than the average rate, for the reserve maintenance period will support the funds rate better during periods when the Federal Open Market Committee eases monetary policy. If the average targeted rate were used, then during a maintenance period in which policy was eased, the rate on excess balances might be too close—or even above—the new targeted rate.

C. Treatment of Correspondent Balances

Balances that earn interest. Correspondents provide various services to respondent institutions, such as check and cash services. Under the Federal Reserve Act and Regulation D, certain respondents may also elect to pass their required reserve balances through their correspondents to the Federal Reserve Banks for the purposes of satisfying reserve requirements, rather than holding balances directly with a Reserve Bank. A pass-through correspondent is responsible for holding sufficient balances in its account at the Reserve Bank to satisfy its own required reserve balance, its own clearing balance (if any), and the aggregate required reserve balances of its respondents. In addition, certain institutions may act as pass-through correspondents under the Federal Reserve Act and Regulation D even though they are not themselves ''eligible institutions'' under this interim final rule, such as Federal Home Loan Banks.

Under the interim final rule, the Reserve Banks will pay interest on required reserve balances maintained by or on behalf of an eligible institution, even if the pass-through correspondent for the eligible institution is itself not an eligible institution. In the case of a pass-through correspondent that is not an eligible institution, the required reserve balances held in the correspondent's account will be solely those held to meet its respondent's reserve requirements. Where the pass-through correspondent is an eligible institution, the required reserve balances in the correspondent's account may include those balances held by the correspondent to meet its own reserve requirement, if any, as well as those held to meet its respondent's reserve requirements.

The interim final rule also provides that the Reserve Banks will pay interest on excess balances held by or on behalf of eligible institutions, even if the pass-through correspondent for the eligible institution is itself not an eligible institution but has excess balances in its account. Without imposing additional reporting or accounting requirements, Reserve Banks cannot determine whether all or part of the excess balances in a pass-through correspondent's account at a Reserve Bank are held on behalf of respondents. In light of this problem, and in order to avoid imposing additional reporting or accounting burdens, the interim final rule deems all of the excess balances held in the account of a pass-through correspondent that is not an eligible institution to be held on behalf of that correspondent's respondents. Accordingly, all interest received on excess balances by such pass-through correspondents are attributable solely to the excess balances of their respondents.[1] This provision enables pass-through correspondents and respondents to continue to negotiate the structure of their contractual relationships with maximum flexibility, including negotiations regarding the appropriate distribution of earnings received on behalf of respondent balances.

The Board requests comment on any alternative methods of determining whether all or part of the excess

[1] This provision is similar to others in Regulation D regarding the extent to which the Reserve Bank considers balances to belong to one institution for purposes of the account relationship, even though the funds of more than one institution may be involved. Under Regulation D, the balances in the pass-through correspondent's account are treated as being the property only of the correspondent for purposes of the relationship between the correspondent and the Reserve Bank (12 CFR 204.3(i)(2)). This provision means that the Reserve Bank's debtor-creditor relationship is solely with the pass-through correspondent and not with any of the correspondent's respondents, even though the funds in the correspondent's account may include the passed-through required reserve balances of one or more respondents.

balances in a pass-through correspondent's account at a Federal Reserve Bank are held on behalf of a respondent when the correspondent itself is not an eligible institution. For example, would it be feasible for a pass-through correspondent to report to the Federal Reserve the amount or proportion of its excess balances that are held on behalf of respondents? Should the Board require pass-through correspondents to certify that all or a specified portion of the excess balances in its Reserve Bank account are held on behalf of its respondents? Should the Board require all balances held by a pass-through correspondent on behalf of its respondent institutions to be held in a segregated account separate from the correspondent's other funds? Would a pass-through correspondent that was not an eligible institution be able to track respondent balances such that it could determine what proportion of its balances in its Reserve Bank account are held on behalf of its respondents? Alternately, would it be reasonable for the Board to assume that none of the pass-through correspondent's excess balances are held on behalf of a respondent?

Passing back of interest to respondents. The interim final rule provides that a pass-through correspondent may pass back to its respondent the interest paid on balances held on behalf of that respondent, but it is not required to do so. Permitting, but not requiring, the pass-back of interest earnings is consistent with the treatment of reserve deficiency charges in Regulation D. The Reserve Bank assesses a deficiency charge to the account of the pass-through correspondent for any deficiency in its account balances, even if the deficiency is attributable to a respondent. It is left to the pass-through correspondent to determine whether to assess a deficiency charge on the respondent, or whether to make any adjustments in other aspects of the correspondent-respondent relationship to deal with attribution of deficiency and other charges.

This approach also avoids interfering with existing arrangements between pass-through correspondents and respondents for services, including sweep arrangements or compensating balance requirements. Correspondent banks typically structure their respondent relationships in myriad ways, depending on a number of factors, such as services provided or balances held. Respondents may adjust the level of balances held with a correspondent in response to changes in the rates paid to them or other factors. Respondents that are not satisfied with their existing arrangements with a correspondent may take steps to renegotiate the terms of the relationship or even seek another correspondent.

The Board requests comment on whether it should require, rather than permit, pass-through correspondents to pass back to their respondents the interest payments on balances held on behalf of those respondents. Would that requirement significantly interfere with existing correspondent-respondent arrangements? Would pass-through correspondents be able to track respondent balances such that they could determine how to allocate the interest among their respondents? How would the Federal Reserve ensure that all interest belonging to a respondent had in fact been passed back?

Exemption from Regulation Q. Many eligible institutions are subject to statutory and regulatory prohibitions against payment of interest on demand deposits (*see, e.g.*, 12 U.S.C. 461(i); Regulation Q (Prohibition Against Payment of Interest on Demand Deposits), 12 CFR part 217)). The 2006 Act, however, expressly authorizes the Board to prescribe regulations to allow pass-through correspondents to pass interest back to respondents. Congress therefore contemplated that pass-through correspondents could pass back part or all of the interest received in a correspondent's Reserve Bank account to its respondents, even though the payment of interest on demand deposit accounts is still otherwise prohibited. The interim final rule, therefore, clarifies that when a pass-through correspondent passes back to its respondent interest paid on balances held on behalf of that respondent, such a payment is not a payment of interest on a demand deposit for purposes of Regulation Q.

D. Transitional Adjustments in Mergers

The Board is eliminating the provisions in Regulation D relating to merger-related adjustments to reserve requirements.[2] These provisions, currently set forth in § 204.4 of the regulation, were originally intended to phase-in the burden associated with the higher reserve requirements that result from a merger or consolidation of depository institutions. When two or more separate institutions merge or consolidate into a single institution, the surviving institution typically has a reserve requirement that is higher than the sum of the reserve requirements of the merging institutions. The requirement is higher because the merged institution receives only one low reserve tranche and one exemption amount, while, prior to the merger, each institution had a low reserve tranche and an exemption amount.[3] Section 204.4 of Regulation D permits a phase-in of the higher reserve tax associated with a merger or consolidation over seven quarters. Interest on required reserve balances offers a much more effective method to address the reserve tax associated with mergers or consolidations because the interest earned essentially eliminates the additional tax. Moreover, the length of the adjustment period is sufficiently long that many institutions become part of subsequent mergers, resulting in significant complexities in required reserves calculations. The Board believes that paying interest on required reserve balances effectively negates the need for the complex adjustment provisions and therefore has deleted them in the interim final rule.

E. Clearing Balance Policy Adjustments

Clearing balances provide a way for depository institutions to hold additional balances at the Reserve Banks to meet their clearing needs. These balances currently earn implicit interest in the form of earnings credits that can be used to cover the cost of Federal Reserve priced services. Under the current methodology for pricing Federal Reserve services, the level of clearing balances affect both costs and revenues for Federal Reserve priced services.

In light of the revisions to Regulation D, the Board has approved two related changes to the method in which earnings credits are calculated, along with a similar change to the method in which float costs to be recovered are computed. These changes discontinue practices related to reserve requirements that are no longer necessary. These adjustments previously had been made to ensure that respondents viewed balances at the Federal Reserve Banks and balances at a private-sector correspondent as equivalent.

The first earnings credit adjustment, called the ''imputed reserve requirement adjustment,'' imputes a marginal reserve requirement ratio of 10 percent to the Reserve Banks because a private-sector correspondent would be required to

[2] Adjustments associated with mergers completed prior to October 9, 2008, will be left in place, but no new adjustments would be issued on or after October 9, 2008.

[3] The exemption amount is the amount of an institution's reservable liabilities that are subject to a zero-percent reserve requirement; currently it is set at $10.3 million. The low reserve tranche is the amount of an institution's reservable liabilities that is subject to the three-percent reserve requirement ratio; currently, it is set at 44.4 million.

hold reserves against a respondent's balance. If the correspondent had a marginal reserve requirement ratio of 10 percent, then it would grant credits to the respondent based on only 90 percent of the respondent's balance because it would have to hold the remaining 10 percent in the form of non-interest-earning reserves. The Board has eliminated this adjustment because the reserves on the respondent's balance would now earn interest at the rate on required reserve balances.

The second earnings credit adjustment, called the ''marginal reserve requirement adjustment,'' adjusts for the fact that the respondent could deduct the balance held at a correspondent, but not at the Reserve Bank, from its reservable liabilities. The reserve requirement reduction is equal to the respondent's marginal reserve requirement ratio multiplied by the balance at the correspondent. This reduction has value to the respondent when it frees up balances that can be invested in interest-bearing instruments, such as a federal funds loan. The Board has eliminated this adjustment because the respondent will now be indifferent between holding balances at the Reserve Bank, and earning the rate on required reserves, or maintaining the balance at a private-sector correspondent, taking the due from deduction, and investing those funds.

The Board has also eliminated the imputed reserve requirement adjustment and adjustment for cash items in the process of collection that is applied when measuring float costs to be recovered by Federal Reserve priced services. The Reserve Banks will now have to recover 100 percent of float costs. Previously, floats costs recovered by priced services were reduced by 10 percent. The adjustment imputed a reserve requirement to the Reserve Bank, but it also allowed the Reserve Banks to adjust the imputed required reserves by the adjustment for cash items. This approach mirrored that of a private-sector correspondent. There is no longer a need to impute a reserve requirement to the Reserve Banks because the private-sector correspondent will now earn interest on its required reserve balance. As a result, the Reserve Banks are no longer entitled to an adjustment for cash items.

Administrative Procedure Act

In accordance with the Administrative Procedure Act (''APA'') section 553(b) (5 U.S.C. 553(b)), the Board finds, for good cause, that providing notice and an opportunity for public comment before the effective date of this rule would be contrary to the public interest. In addition, pursuant to APA section 553(d) (5 U.S.C. 553(d)), the Board finds good cause for making this amendment effective without 30 days advance publication. The Board has adopted this rule in light of, and to help address, the continuing unusual and exigent circumstances in the financial markets. This rule provides tools for carrying out monetary policy more effectively. Thus, the Board believes that any delay in implementing the rule would prove contrary to the public interest and would be contrary to Congress's intent in accelerating the Board's authority to use these new tools to help address current market conditions. The Board is requesting comment on all aspects of the rule and will make any changes that it considers appropriate or necessary after review of any comments received.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. 5 U.S.C. 603(a). The Regulatory Flexibility Act provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

Pursuant to section 605(b), the Board certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities. The rule implements a program for paying interest on certain balances held by eligible institutions at the Federal Reserve Banks and will benefit small institutions that receive such interest. There are no new reporting, recordkeeping, or other compliance requirements associated with this rule.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board has reviewed the interim final rule under authority delegated to the Board by the Office of Management and Budget. The rule contains no collections of information pursuant to the Paperwork Reduction Act.

Plain Language

Section 772 of the Gramm-Leach-Bliley Act requires the Board to use ''plain language'' in all proposed and final rules. In light of this requirement, the Board has sought to present the interim final rule in a simple and straightforward manner. The Board invites comment on whether the Board could take additional steps to make the rule easier to understand.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is amending 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 3105.

■ 2. Section 204.4 is removed and reserved.

§ 204.4 [Reserved]

■ 3. Section 204.10 is added to read as follows:

§ 204.10 Payment of interest on balances.

(a) *Payment of interest.* The Federal Reserve Banks shall pay interest on balances maintained at Federal Reserve Banks by or on behalf of an eligible institution as provided in this section and under such other terms and conditions as the Board may prescribe.

(b) *Rate.* Except as provided in paragraph (c) of this section, Federal Reserve Banks shall pay interest at the following rates—

(1) For required reserve balances, at the average targeted federal funds rate over the reserve maintenance period less 10 basis points; and

(2) For excess balances, at the lowest targeted federal funds rate during the reserve maintenance period less 75 basis points.

(c) *Pass-through balances.* Any excess balance held by a pass-through correspondent that is not an eligible institution is deemed to be held on behalf of the pass-through correspondent's respondents. A pass-through correspondent may pass back to its respondent interest paid on balances held on behalf of that respondent. Such a payment is not a payment of interest on a demand deposit for purposes of Part 217 of this chapter (Regulation Q).

(d) *Definitions.* For purposes of this section—

(1) *Clearing balance* means the amount that an eligible institution holds to satisfy a contractual clearing balance agreement with a Federal Reserve Bank, in addition to any required reserve balance.

(2) *Eligible institution* means—

(i) Any depository institution as described in § 204.1(c) of this part;

(ii) Any trust company;

(iii) Any corporation organized under section 25A of the Federal Reserve Act (12 U.S.C. 611 *et seq.*) or having an agreement with the Board under section 25 of the Federal Reserve Act (12 U.S.C. 601 *et seq.*); and

(iv) Any branch or agency of a foreign bank (as defined in section 1(b) of the International Banking Act of 1978, 12 U.S.C. 3101(b)).

(3) *Excess balance* means the average balance held in an account at a Federal Reserve Bank by or on behalf of an eligible institution over a reserve maintenance period that exceeds the sum of the required reserve balance and any clearing balance.

(4) *Required reserve balance* means the average balance held in an account at a Federal Reserve Bank by or on behalf of an eligible institution over a reserve maintenance period to satisfy the reserve requirements of this part.

(5) *Targeted federal funds rate* means the federal funds rate established from time to time by the Federal Open Market Committee.

By order of the Board of Governors of the Federal Reserve System, October 6, 2008.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E8–24003 Filed 10–8–08; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0302; Directorate Identifier 2007–NM–323–AD; Amendment 39–15689; AD 2008–21–05]

RIN 2120–AA64

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

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Boeing Model 767–200, –300, and –400ER series airplanes. That AD currently requires an inspection to determine if the door-mounted escape slide/rafts have certain part numbers. This new AD does not retain that requirement. This new AD continues to require an inspection for excessive tension of the firing cable, and procedures for providing slack in the firing cable or rerouting the firing cable if necessary. For certain airplanes, this new AD also requires a review of the airplane maintenance records to determine if a certain service bulletin has been incorporated, or an inspection to determine if certain door-mounted escape slide/rafts are installed. This new AD also requires modification of certain escape slide/rafts. This AD results from reports of uncommanded inflation inside the airplane of a door-mounted escape slide/raft located in the passenger compartment. We are issuing this AD to prevent injury to maintenance personnel, passengers, and crew during otherwise normal operating conditions and to prevent interference with evacuation of the airplane during an emergency, due to uncommanded inflation of a door-mounted escape slide/raft.

DATES: This AD becomes effective November 13, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 13, 2008.

On June 30, 2005 (70 FR 34638, June 15, 2005), the Director of the Federal Register approved the incorporation by reference of a certain other publication.

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: 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:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2005–12–14, amendment 39–14130 (70 FR 34638, June 15, 2005). The existing AD applies to certain Boeing Model 767–200, –300, and –400ER series airplanes. That NPRM was published in the **Federal Register** on March 18, 2008 (73 FR 14405). That NPRM proposed to continue to require an inspection to determine if the door-mounted escape slide/rafts have certain part numbers. For those door-mounted escape slide/rafts having certain part numbers, the NPRM also proposed to continue to require an inspection for excessive tension of the firing cable, and procedures for providing slack in the firing cable or rerouting the firing cable if necessary. For certain airplanes, the NPRM also proposed to require a review of the airplane maintenance records to determine if a certain service bulletin has been incorporated, or an inspection to determine if certain door-mounted escape slide/rafts are installed. The NPRM also proposed to require modification of certain escape slide/rafts.

Comments

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

Request To Refer to Certain Part Numbers (P/Ns) in the Applicability

Boeing requests that we revise the applicability to Boeing Model 767–200, –300, and –400ER series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 767–25A0395, dated August 31, 2006; equipped with Goodrich door-mounted slide/rafts having P/Ns 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3. As justification, Boeing states that this change clarifies that this AD applies only to certain Goodrich door-mounted slides/rafts. Boeing also states the applicability of the NPRM, as written, might require an alternative method of compliance (AMOC) for airplanes having other door-mounted slides/rafts.

We agree to revise the applicability of this AD as requested by Boeing for the reasons stated above, except that paragraph (c) of this AD refers to Revision 1 of the service bulletin, dated January 25, 2007. Since we have added the affected part numbers for the discrepant door-mounted slides/rafts to the applicability of this AD, it is no longer necessary to require the inspection to determine the part numbers as specified in paragraph (f) of the NPRM. Therefore, we have deleted

that action and reidentified the subsequent paragraphs of this AD accordingly.

Request To Delete Certain Airplanes From the Applicability

Florida West International Airways states that this AD does not apply to Model 767–300GMF airplanes.

We infer that the commenter requests that we delete that model designation from the applicability of this AD. We disagree because that model designation is not identified in the applicability of this AD. Model ''767–300GMF'' is not a valid designation as specified on the type certificate data sheet (TCDS) for Model 767 airplanes. Therefore, the commenter should verify the airplane identification as listed on the airplane data plate. This information will allow the commenter to determine whether this AD is applicable to its airplanes. We have not changed the AD in this regard.

Request To Revise Paragraph (k)(1) of the NPRM

Boeing requests that we revise paragraph (k)(1) of the NPRM as follows: ''* * * Determine if any door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed; by review of the airplane maintenance records, or by a general visual inspection and modify the escape slide/rafts. Note the above slide/rafts may have been installed by Boeing Service Bulletin 767–25–0266.'' Boeing points out that this request also removes the following statement: ''Doing the inspection before the effective date of this AD in accordance with paragraph (f)(1) of this AD is acceptable for compliance with the inspection specified in this paragraph.'' As justification, Boeing states that its suggested changes focus the reader on the specific part numbers to be modified and assures that the escape slide/rafts inspected prior to the effective date of this new AD are modified.

We agree to delete the second sentence of paragraph (k)(1) of the NPRM, since it is no longer necessary to provide relief for operators who, in accordance with paragraph (f)(1) of AD 2005–12–14, have previously inspected to determine if the discrepant slides/rafts are installed. However, we disagree with revising the first sentence of paragraph (k)(1) of the NPRM because Boeing's suggested changes and the language used in paragraph (j)(1) of this AD have essentially the same meaning. (As stated previously, paragraph (k) of the NPRM is reidentified as paragraph (j) in this AD.) Further, the language that we use is similar to what is stated in the Accomplishment Instructions of Boeing Alert Service Bulletin 767–25A0395, Revision 1.

Conclusion

We have carefully reviewed the available data, including the comments that have been received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 1,225 airplanes of the affected design in the worldwide fleet. This AD affects about 355 airplanes of U.S. registry.

The actions that are required by AD 2005–12–14 and retained in this AD take up to 6 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 for U.S. operators is $170,400, or is $480 per airplane.

The new required actions take up to 6 work hours per airplane, at an average labor rate of $80 per work hour. The parts manufacturer states that it will supply the required parts to operators at no cost. Based on these figures, the estimated cost of the new actions specified in this AD for U.S. operators is $170,400, or $480 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14130 (70 FR 34638, June 15, 2005) and by adding the following new airworthiness directive (AD):

2008–21–05 Boeing: Amendment 39–15689. Docket No. FAA–2008–0302; Directorate Identifier 2007–NM–323–AD.

Effective Date

(a) This AD becomes effective November 13, 2008.

Affected ADs

(b) This AD supersedes AD 2005–12–14.

Applicability

(c) This AD applies to Boeing Model 767–200, –300, and –400ER series airplanes, certificated in any category; as identified in Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007; equipped with Goodrich door-mounted escape slide/rafts having part numbers (P/N) 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3.

Unsafe Condition

(d) This AD results from reports of uncommanded inflation inside the airplane

of a door-mounted escape slide/raft located in the passenger compartment. We are issuing this AD to prevent injury to maintenance personnel, passengers, and crew during otherwise normal operating conditions and to prevent interference with evacuation of the airplane during an emergency, due to uncommanded inflation of a door-mounted escape slide/raft.

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.

Restatement of Certain Requirements of AD 2005–12–14

Inspection for Excessive Tension on the Firing Cable

(f) If any door-mounted escape slide/raft having any part number specified in paragraph (c) of this AD is installed: Within 30 days after June 30, 2005 (the effective date of AD 2005–12–14), perform a tension check on the firing cable of the slide/raft, in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005. If no excessive tension is detected, no further action is required by this AD, except for the requirements of paragraph (i) of this AD.

Note 1: Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, references Goodrich Alert Service Bulletin 5A3294/5A3295–25A356, dated May 11, 2005, as an additional source of service information.

Corrective Action for Excessive Tension on the Firing Cable

(g) If any excessive tension of the firing cable is detected, before further flight, do the applicable corrective actions in accordance with the Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005.

Previous Accomplishment

(h) Inspections of the firing cables for excessive tension in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, that were accomplished before June 30, 2005, are acceptable for compliance with the requirements of paragraph (f) of this AD, provided that any applicable corrective action was completed.

Parts Installation

(i) As of June 30, 2005, no person may install on any airplane any Goodrich door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3, unless the tension of the firing cable has been checked and the applicable corrective action completed in accordance with Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005, or the escape slide/raft has been repacked in accordance with Goodrich Packing Instructions, Evacuation Slide/Raft, Document 501636, Revision G, dated May 16, 2005; Goodrich Packing Instructions, Evacuation Slide/Raft, LH, Document 501637, Revision E, dated May 16, 2005; or Goodrich Packing Instructions, Evacuation Slide/Raft, RH, Document 501638, Revision D, dated May 16, 2005; as applicable.

New Requirements of This AD

Modification

(j) Within 36 months after the effective date of this AD, do the applicable actions specified in paragraph (j)(1) or (j)(2) of this AD, by accomplishing all of the applicable actions specified in the Accomplishment Instructions of the Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007.

(1) For Groups 1 and 2 airplanes as identified in the service bulletin: Review the airplane maintenance records to determine if Boeing Service Bulletin 767–25–0266 has been incorporated, or do a general visual inspection to determine if any door-mounted escape slide/raft having P/N 5A3294–1, 5A3294–2, 5A3295–1, or 5A3295–3 is installed, and before further flight do all the applicable corrective actions.

(2) For Groups 3, 4, 5, and 6 airplanes as identified in the service bulletin: Modify the escape slide/rafts.

Note 2: 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 modifying a door-mounted escape slide/raft.

Alternative Methods of Compliance (AMOCs)

(k)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Keith Ladderud, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6435; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(3) AMOCs approved previously in accordance with AD 2005–12–14 are approved as AMOCs for the corresponding provisions of paragraphs (f), (g), (h), (i), and (j) of this AD.

Material Incorporated by Reference

(l) You must use Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005; and Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 767–25A0395, Revision 1, dated January 25, 2007, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) On June 30, 2005 (70 FR 34638, June 15, 2005), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 767–25A0390, dated May 13, 2005.

(3) Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on September 26, 2008.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23667 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0147; Directorate Identifier 2007–NM–294–AD; Amendment 39–15686; AD 2008–21–02]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, –700, –700C, –800, and –900 Series Airplanes Equipped With CFM56–7 Engines

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Boeing Model 737–600, –700, and –800 series airplanes. That AD currently requires repetitive inspections to detect damage of the aft strut insulation blanket, and eventual replacement of the insulation blankets with new, improved blankets. This new AD adds airplanes to the applicability and requires installation of a new heat insulation blanket and new cover plate on the left and right side engine struts. This new AD does not retain the requirements of the existing AD but does terminate the requirements of the existing AD. This AD results from reports of damaged heat insulation blankets on the engine struts. We are issuing this AD to prevent exposure of the lower surface of the strut to extreme high temperatures, consequent creation of a source of fuel ignition, and increased risk of an uncontrollable fire and possible fuel tank explosion.

DATES: This AD becomes effective November 13, 2008.

The Director of the Federal Register approved the incorporation by reference

of a certain publication listed in the AD as of November 13, 2008.

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Samuel Spitzer, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6510; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 99–04–11, amendment 39–11035 (64 FR 6791, February 11, 1999). The existing AD applies to certain Boeing Model 737–600, –700, and –800 series airplanes. That NPRM was published in the **Federal Register** on February 8, 2008 (73 FR 7484). That NPRM proposed to add airplanes to the applicability of the existing AD and require installation of a new heat insulation blanket and new cover plate on the left and right side engine struts, which would terminate the requirements of the existing AD.

Comments

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

Support for the NPRM

Boeing concurs with the contents of the NPRM. AirTran Airways (AirTran) and Continental Airlines (CAL) agree with the rule.

Request To Delay AD Until Service Bulletin Is Revised

CAL notes that Boeing has released Information Notice (IN) 737–54–1045 IN 01, dated December 4, 2007. CAL notes that this IN states that Figures 2 and 4 of Boeing Special Attention Service Bulletin 737–54–1045, dated July 25, 2007, do not correctly illustrate the proper configuration of the insulation blanket. (We cited Boeing Special Attention Service Bulletin 737–54–1045 in the NPRM as the appropriate source of service information.) Therefore, CAL requests that Boeing revise the service bulletin before we enact the AD.

We disagree with waiting until Boeing revises its service bulletin before we issue the AD. We have determined that an unsafe condition exists and that the actions in this AD must be done to ensure continued safety. We do not consider that delaying this action until after the release of the manufacturer's planned service bulletin is warranted since sufficient instructions currently exist to do the required replacement within the compliance time. Paragraph (h) of this AD provides operators the opportunity to request an extension of the compliance time if data are presented to justify the extension. However, we agree that the information in IN 737–54–1045 IN 01, which relates to the configuration of the insulation blanket, is important. Therefore, we have revised paragraph (f) of this AD to include the relevant information from the IN.

Request To Identify Supplier Part Numbers (P/Ns)

AirTran points out that P/N S315A213–57, as specified in paragraph (f) of the NPRM, is a specification number and that P/N 99A9257M is the supplier part number for the insulation blanket that is listed in the Boeing Model 737–700 Illustrated Parts Catalog. AirTran also points out a similar supplier part number exists for the insulation blankets that are prohibited from installation as specified in paragraph (g) of the NPRM. Therefore, AirTran requests that we identify both the Boeing specification number and the supplier part number in the AD.

We disagree with the request to include supplier part numbers. The Boeing specification number (P/N) S315A213–57 is the high-level identifier for the part. This specification number is printed on each authorized vendor part that is made to Boeing specifications in accordance with the Boeing specification control document. Each authorized vendor can have a different part number. Therefore, using the specification P/N S315A213–57 should prevent any confusion. We have not changed the AD in this regard.

Request To Extend Compliance Time

Air Transport Association (ATA), on behalf of its member American Airlines (AA), is concerned with the proposed 60-month compliance period. The commenters note that the industry standard maintenance interval for the affected Boeing Model 737 airplanes is 72 months. Therefore, a 60-month compliance period would unnecessarily increase out-of-service time and related costs. The commenters propose a 72-month compliance time, which would align more economically with industry standard maintenance review board (MRB) task intervals.

We do not agree with the request to extend the compliance time. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the fact that the modification takes 4 work hours. According to the manufacturer, an ample number of required parts will be available to do the installation on the U.S. fleet within the proposed compliance time. In consideration of these items, we have determined that a 60-month compliance time will ensure an acceptable level of safety. However, according to the provisions of paragraph (h) of this AD, we may approve requests to adjust the compliance time if the request includes data that prove that the new compliance time would provide an acceptable level of safety. We have not changed the AD in this regard.

Request To Allow Additional Time for Parts Installation

CAL notes that paragraph (g) of the NPRM states that operators may not install a heat insulation blanket, P/N S315A213–42 or –47, on any airplane after the effective date of the AD. CAL requests that operators be given an additional 60 days after the effective date of the AD to ensure ''illegal'' parts are purged from the inventory and Boeing is able to supply spare parts.

We contacted CAL to obtain additional technical information in respect to this comment. CAL indicated that they initially had concerns over parts availability and long lead times to obtain P/N S315A213–57 heat insulation blankets. CAL stated that after checking with Boeing, parts availability and lead times are adequate and their comment is no longer relevant. We have not changed the AD in this regard.

Conclusion

We have carefully reviewed the available data, including the comments

that have been received, and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Costs of Compliance

There are about 2,148 airplanes of the affected design in the worldwide fleet. This AD affects about 740 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD. The average labor rate is $80 per work hour.

ESTIMATED COSTS

Action	Work hours	Parts	Cost per airplane	Fleet cost
Installation (new action)	4	$4,730	$5,050	$3,737,000

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–11035 (64 FR 6791, February 11, 1999) and by adding the following new airworthiness directive (AD):

2008–21–02 Boeing: Amendment 39–15686. Docket No. FAA–2008–0147; Directorate Identifier 2007–NM–294–AD.

Effective Date

(a) This AD becomes effective November 13, 2008.

Affected ADs

(b) This AD supersedes AD 99–04–11.

Applicability

(c) This AD applies to Boeing Model 737–600, –700, –700C, –800, and –900 series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 737–54–1045, dated July 25, 2007.

Unsafe Condition

(d) This AD results from reports of damaged heat insulation blankets on the engine struts. We are issuing this AD to prevent exposure of the lower surface of the strut to extreme high temperatures, consequent creation of a source of fuel ignition, and increased risk of uncontrollable fire and possible fuel tank explosion.

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.

Installation

(f) Within 60 months after the effective date of this AD, install a new heat insulation blanket, part number (P/N) S315A213–57, and a new cover plate on the left and right side engine struts in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–54–1045, dated July 25, 2007, except Figure 2 and Figure 4 of the service bulletin should show four holes on the aft edge of the heat insulation blanket instead of two. Operators should also note that on installation of the heat insulation blanket, the two inner holes on the aft edge of the heat insulation blanket are not used or filled.

Parts Installation

(g) As of the effective date of this AD, no person may install a heat insulation blanket, P/N S315A213–42 or –47, on any airplane.

Alternative Methods of Compliance (AMOCs)

(h)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Samuel Spitzer, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6510; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

Material Incorporated by Reference

(i) You must use Boeing Special Attention Service Bulletin 737–54–1045, dated July 25, 2007, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue,

SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on September 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23573 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION (DOT)

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1067; Directorate Identifier 2008–CE–052–AD; Amendment 39–15688; AD 2008–21–04]

RIN 2120–AA64

Airworthiness Directives; Hawker Beechcraft Corporation Model 390 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Hawker Beechcraft Corporation Model 390 airplanes. This AD requires you to modify the cabin barometric pressure switch and cabin altitude high switch installations and perform a functional test of the switches and related systems. This AD results from the possibility of barometric pressure switch electrical connections being incorrectly connected or inadvertently disconnected. We are issuing this AD to modify the cabin barometric pressure switch and cabin altitude high switch to prevent them from becoming incorrectly connected or inadvertently disconnected, which may result in no CABIN ALT HI annunciation in the cockpit and no automatic deployment of the cabin oxygen masks. This failure could lead to incapacitation of the crew due to hypoxia with possible inability to control the airplane.

DATES: This AD becomes effective on October 20, 2008.

On October 20, 2008, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

We must receive any comments on this AD by December 8, 2008.

ADDRESSES: Use one of the following addresses to comment on this AD.

- *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.

To get the service information identified in this AD, contact Hawker Beechcraft Corporation, P.O. Box 85, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140; *http://pubs.hawkerbeechcraft.com*.

To view the comments to this AD, go to *http://www.regulations.gov*. The docket number is FAA–2008–1067; Directorate Identifier 2008–CE–052–AD.

FOR FURTHER INFORMATION CONTACT: Erik Brown, Aerospace Engineer, Wichita Aircraft Certification Office, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4132; fax: (316) 946–4107.

SUPPLEMENTARY INFORMATION:

Discussion

We received reports of three occurrences of incorrectly connected barometric pressure switches on Hawker Beechcraft Corporation Model 390 airplanes. This issue was discovered when an unannunciated cabin altitude high event occurred on one of the affected airplanes. Because the electrical connections of the barometric switches are identical, they have the potential of being incorrectly connected. Also, the wire cannot be positively secured to the switch, and it may become inadvertently disconnected. Either condition could cause loss of ability to annunciate a cabin altitude high condition.

This condition, if not corrected, could result in no CABIN ALT HI annunciation in the cockpit and no automatic deployment of the cabin oxygen masks. This failure could lead to incapacitation of the crew due to hypoxia with possible inability to control the airplane.

Relevant Service Information

We reviewed Hawker Beechcraft Mandatory Service Bulletin SB 21–3899, issued: May 2008. The service information describes procedures for modifying the cabin barometric pressure switch and cabin altitude high switch installations and performing a functional test of the switches and related systems.

FAA's Determination and Requirements of this AD

We are issuing this AD because we evaluated all the information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design. This AD requires you to modify the cabin barometric pressure switch and cabin altitude high switch installations and perform a functional test of the switches and related systems.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because occurrences of incorrectly connected barometric switches have been reported. Also, the terminal used on the switches may be inadvertently dislodged while performing airplane maintenance in the pedestal area. A potential consequence of an incorrectly connected or dislodged barometric switch is no CABIN ALT HI annunciation in the cockpit and no automatic deployment of the cabin oxygen masks. This failure could lead to incapacitation of the crew due to hypoxia with possible inability to control the airplane. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and an opportunity for public comment. We invite you to send any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under the **ADDRESSES** section. Include the docket number ''FAA–2008–1067; Directorate Identifier 2008–CE–052–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

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

substantive verbal contact we receive concerning this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

Examining the AD Docket

You may examine the AD docket that contains the AD, the regulatory evaluation, any comments received, and other information 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 Docket Office (telephone (800) 647–5527) is located at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–21–04 Hawker Beechcraft Corporation: Amendment 39–15688; Docket No. FAA–2008–1067; Directorate Identifier 2008–CE–052–AD.

Effective Date

(a) This AD becomes effective on October 20, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Model 390 airplanes, serial numbers RB–1 and RB–4 through RB–238, that are certificated in any category.

Unsafe Condition

(d) This AD is the result of reported occurrences of incorrectly connected barometric switches. Also, the terminal used on the switches may be inadvertently dislodged while performing airplane maintenance in the pedestal area. We are issuing this AD to modify the cabin barometric pressure switch and cabin altitude high switch to prevent them from becoming incorrectly connected or inadvertently disconnected, which may result in no CABIN ALT HI annunciation in the cockpit and no automatic deployment of the cabin oxygen masks. This failure could lead to incapacitation of the crew due to hypoxia with possible inability to control the airplane.

Compliance

(e) To address this problem, you must do the following, unless already done:

Action	Compliance	Procedures
(1) Modify the cabin barometric pressure switch and cabin altitude high switch installations.	Within 25 hours time-in-service (TIS) after October 20, 2008 (the effective date of this AD) or within 30 days after October 20, 2008 (the effective date of this AD), whichever occurs first.	Follow Hawker Beechcraft Mandatory Service Bulletin SB 21–3899, original issue, dated May 2008.
(2) Perform a functional test of the switches and related systems: (i) If, before the effective date of this AD, you did the flight test method in Part II of the Accomplishment Instructions of the service bulletin referenced in the Procedures column of this paragraph, then the action of paragraph (e)(2) of this AD is not required provided it was done after the modification required in paragraph (e)(1) of this AD. (ii) After the effective date of this AD, the flight test method described in paragraph (e)(2)(i) of this AD is prohibited.	Before further flight after the modification of the cabin barometric pressure switch and cabin altitude high switch installations specified in paragraph (e)(1) of this AD.	Following Part I—Ground Test Method paragraph 3, Accomplishment Instructions of Hawker Beechcraft Mandatory Service Bulletin SB 21–3899 original issue, dated May 2008.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Wichita Aircraft Certification Office (ACO), 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: Erik Brown, Aerospace Engineer, Wichita ACO, 1801 Airport Road, Room 100, Wichita, Kansas 67209; telephone: (316) 946–4132; fax: (316) 946–4107. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Material Incorporated by Reference

(g) You must use Hawker Beechcraft Mandatory Service Bulletin SB 21–3899, original issue, dated May 2008, to do the actions required by this AD, unless the AD specifies otherwise.

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

(2) For service information identified in this AD, contact Hawker Beechcraft Corporation, P.O. Box 85, Wichita, Kansas 67201–0085; telephone: (800) 429–5372 or (316) 676–3140; *http://pubs.hawkerbeechcraft.com*.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Kansas City, Missouri, on September 30, 2008.

John Colomy,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23643 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–0357; Directorate Identifier 2008–NM–005–AD; Amendment 39–15687; AD 2008–21–03]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Boeing Model 737–300, –400, and –500 series airplanes. This AD requires repetitive inspections for discrepancies of the fuse pins of the inboard and outboard midspar fittings of the nacelle strut, and corrective actions if necessary. This AD results from a report of corrosion damage of the chrome runout on the head side found on all four midspar fuse pins of the nacelle strut. Additionally, a large portion of the chrome plate was missing from the corroded area of the shank. We are issuing this AD to detect and correct discrepancies of the fuse pins of the inboard and outboard midspar fittings of the nacelle strut, which could result in reduced structural integrity of the fuse pins and consequent loss of the strut and separation of the engine from the airplane.

DATES: This AD is effective November 13, 2008.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of November 13, 2008.

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6432; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR Part 39 to include an airworthiness directive (AD) that would apply to all Boeing Model 737–300, –400, and –500 series airplanes. That NPRM was published in the **Federal Register** on March 26, 2008 (73 FR 15959). That NPRM proposed to require repetitive inspections for discrepancies of the fuse pins of the inboard and outboard midspar fittings of the nacelle strut, and corrective actions if necessary.

Comments

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

Support for the NPRM

Boeing supports the NPRM.

Deutsche Lufthansa (DLH) states that during inspections done per the AMM, for which the left- and right-hand pylons have to be removed, it observed several instances of corrosion or damaged chrome plating of the midspar fuse pins; the defective pins were replaced. Therefore, DLH supports the repetitive inspections of the fuse pins.

Request for Credit for Initial Inspection

DLH asks that the initial inspection procedure done per Maintenance Planning Document (MPD) Item 54–322–01, of the applicable airplane maintenance manual (AMM), be acceptable for compliance with the initial inspection required by the NPRM. In addition, DLH does not support the compliance times for the initial inspection. DLH feels that the inspection of the fuse pins done during its maintenance check per the AMM provides the same level of safety as the initial inspection done per the service bulletin referenced in the NPRM.

We do not agree. The AMM only includes procedures for access and does not provide inspection procedures; therefore, the service bulletin provides the inspection procedures. If DLH believes that its inspection procedures provide an acceptable alternative, under the provisions of paragraph (g) of this AD, we will consider requests for approval of an alternative method of compliance if sufficient data are submitted to substantiate that the alternative inspection would provide an acceptable level of safety.

Conclusion

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

Costs of Compliance

We estimate that this AD will affect 616 airplanes of U.S. registry. We also estimate that it will take 4 work-hours per product to comply with the inspection in this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of

this AD to the U.S. operators to be $197,120, or $320 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

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

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

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

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

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

You can find our regulatory evaluation and the estimated costs of compliance in the AD Docket.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2008–21–03 Boeing: Amendment 39–15687. Docket No. FAA–2008–0357; Directorate Identifier 2008–NM–005–AD.

Effective Date

(a) This airworthiness directive (AD) is effective November 13, 2008.

Affected ADs

(b) None.

Applicability

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

Unsafe Condition

(d) This AD results from a report of corrosion damage of the chrome runout on the head side found on all four midspar fuse pins of the nacelle strut. Additionally, a large portion of the chrome plate was missing from the corroded area of the shank. We are issuing this AD to detect and correct damage of the fuse pins of the inboard and outboard midspar fittings of the nacelle strut, which could result in reduced structural integrity of the fuse pins and consequent loss of the strut and separation of the engine from the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Repetitive Inspections/Corrective Actions

(f) At the applicable time specified in paragraph 1.E., ''Compliance'' of Boeing Special Attention Service Bulletin 737–54–1044, dated December 10, 2007; except, where the service bulletin specifies a compliance time after the date on the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD: Do a detailed inspection for discrepancies of the fuse pins of the inboard and outboard midspar fittings of the nacelle strut by doing all the actions, including all applicable corrective actions, in accordance with the Accomplishment Instructions of the service bulletin. Do all applicable corrective actions before further flight. Repeat the inspection at the time specified in paragraph 1.E. of the service bulletin.

Alternative Methods of Compliance (AMOCs)

(g)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, ATTN: Allen Rauschendorfer, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle ACO, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6432; fax (425) 917–6590; has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

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

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Commercial Airplanes Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane.

Material Incorporated by Reference

(h) You must use Boeing Special Attention Service Bulletin 737–54–1044, dated December 10, 2007, to do the actions required by this AD, unless the AD specifies otherwise.

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

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

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

Issued in Renton, Washington, on September 29, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23658 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30630; Amdt. No. 3289]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure

Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective October 9, 2008. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 9, 2008.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located;

3. The National Flight Procedures Office, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

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

Availability—All SIAPs are available online free of charge. Visit *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Harry J. Hodges, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082 Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (FDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of Title 14 of the Code of Federal Regulations.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAP and the corresponding effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP as modified by FDC/P–NOTAMs.

The SIAPs, as modified by FDC P–NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under DOT Regulatory Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, and Navigation (Air).

Issued in Washington, DC, on September 19, 2008.

James J. Ballough,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97, 14 CFR part 97, is amended by amending Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

FDC date	State	City	Airport	FDC No.	Subject
07/10/08	MI	MANISTEE	MANISTEE CO.–BLACKER	8/6401	VOR RWY 27, ORIG
09/04/08	GQ	AGANA	GUAM INTL	8/6576	ILS OR LOC/DME RWY 6L, AMDT 3B
09/05/08	CO	DENVER	ROCKY MOUNTAIN METROPOLITAN	8/6770	GPS RWY 29L, ORIG–A
09/05/08	CO	DENVER	ROCKY MOUNTAIN METROPOLITAN	8/6771	GPS RWY 29R, ORIG–A
09/05/08	MT	BUTTE	BERT MOONEY	8/6864	ILS Y RWY 15, AMDT 6
09/05/08	MT	ANACONDA	BOWMAN FIELD	8/6866	VOR/DME OR GPS A, AMDT 1
09/05/08	OR	EUGENE	MAHLON SWEET FIELD	8/6867	ILS OR LOC/DME RWY 16L, ORIG
09/05/08	AK	PERRYVILLE	PERRYVILLE	8/6868	RNAV (GPS) RWY 2, ORIG
09/08/08	KY	DANVILLE	STUART POWELL FIELD	8/7015	LOC/DME RWY 30, AMDT 1A
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7062	RNAV (GPS) RWY 7, ORIG–B
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7064	VOR/DME OR TACAN RWY 7, AMDT 11B
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7065	RNAV (GPS) RWY 25, ORIG–B
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7067	ILS OR LOC RWY 25, AMDT 21D
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7068	ILS OR LOC RWY 7, ORIG–B
09/08/08	AR	FORT SMITH	FORT SMITH RGNL	8/7069	VOR OR TACAN RWY 25, AMDT 20G
09/10/08	OK	TULSA	TULSA INTL	8/7352	ILS OR LOC RWY 18R, AMDT 7
09/10/08	CA	VAN NUYS	VAN NUYS	8/7460	ILS RWY 16R, AMDT 5A
09/11/08	VA	DUBLIN	NEW RIVER VALLEY	8/7673	ILS OR LOC RWY 6, AMDT 4A
09/12/08	LA	LAFAYETTE	LAFAYETTE REGIONAL	8/7965	TAKEOFF MINIMUMS AND (OBSTACLE) DEPARTURE PROCEDURES (ODP), AMDT 1

[FR Doc. E8–23916 Filed 10–8–08; 8:45 am]
BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 203 and 205

[Docket No. FDA–2005–N–0345] (formerly Docket No. 2005N–0428)

Distribution of Certain Drug Products by Registered Blood Establishments and Comprehensive Hemophilia Diagnostic Treatment Centers That Qualify as Health Care Entities; Prescription Drug Marketing Act of 1987; Prescription Drug Amendments of 1992; Policies, Requirements and Administrative Procedures

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to allow certain registered blood establishments and comprehensive hemophilia diagnostic treatment centers that are also health care entities to distribute certain drug products. The final rule amends limited provisions of the regulations implementing the Prescription Drug Marketing Act of 1987 (PDMA), as modified by the Prescription Drug Amendments of 1992 (PDA). These regulations, among other things, restrict the sale, purchase, or trade of, or the offer to sell, purchase, or trade, prescription drugs purchased by hospitals and other health care entities.

DATES: This rule is effective November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Jennifer J. Ross, Center for Biologics Evaluation and Research (HFM–10), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–0372.

SUPPLEMENTARY INFORMATION:

I. Background

The PDMA (Public Law 100–293) was enacted on April 22, 1988, and was modified by the PDA (Public Law 102–353) on August 26, 1992. The PDMA, as modified, amended the Federal Food, Drug, and Cosmetic Act (the act) to establish restrictions and requirements relating to various aspects of human prescription drug marketing and distribution. Among other things, the PDMA prohibited, with certain exceptions, the sale, purchase, or trade (or offer to sell, purchase, or trade) of any prescription drug that was purchased by a hospital or other health care entity. Section 503(c)(3)(A)(ii)(I) of the act (21 U.S.C. 353(c)(3)(A)(ii)(I)). Section 503(c)(3) also states that ''[f]or purposes of this paragraph, the term 'entity' does not include a wholesale distributor of drugs or a retail pharmacy licensed under State law * * *.''

In the **Federal Register** of March 14, 1994 (59 FR 11842), we issued a proposed rule to implement certain provisions of the PDMA. The proposed rule contained provisions on prescription drug reimportation; wholesale distribution of prescription drugs by unauthorized distributors; the resale of prescription drugs by hospitals, health care entities, and charitable institutions; and distribution of prescription drug samples. After consideration of comments, we issued a final rule in the **Federal Register** of December 3, 1999 (64 FR 67720) (the December 1999 final rule), with an effective date of December 4, 2000.

After publication of the December 1999 final rule, we received many comments on, and held several meetings to discuss the implications of, the final regulations for registered blood establishments that distribute blood-derived products and provide limited health care services to hospitals and patients. According to comments, implementing the December 1999 final rule as published would interfere with longstanding relationships between blood centers and other health care providers such as hospitals and hemophilia treatment centers.

Section 203.20(a) (21 CFR 203.20(a)) of the December 1999 final rule stated, in relevant part, that no person may sell, purchase, or trade, or offer to sell, purchase, or trade any prescription drug that was purchased by a health care entity. ''Health care entity,'' in turn, was defined in § 203.3(q) (21 CFR 203.3(q))

as any person that provides diagnostic, medical, surgical, or dental treatment, or chronic or rehabilitative care, but did not include any retail pharmacy or wholesale distributor. That definition specifically stated that ''[a] person cannot simultaneously be a 'health care entity' and a retail pharmacy or wholesale distributor.''

Thus, under the December 1999 final rule as written, blood establishments and hemophilia treatment centers functioning as health care entities would be prohibited from engaging in wholesale distribution of prescription drugs except for blood and blood components intended for transfusion, which are exempted from the regulations under § 203.1 (21 CFR 203.1) (see also 21 CFR 203.22(g)). As discussed in the preamble to the December 1999 final rule (64 FR 67720 at 67725 to 67727), blood derivatives are not blood components and were therefore subject to this prohibition on wholesale distribution. Therefore, under the December 1999 final rule, a blood establishment or a hemophilia treatment center could not generally resell blood derivatives to entities other than consumers or patients and simultaneously provide health care, such as medical services associated with those products. Examples of blood derivatives that are prescription drugs include, but are not limited to, albumin, antihemophilic factor, Coagulation Factor IX, alpha-1 proteinase inhibitor, and immune globulin.

On May 3, 2000, we delayed until October 1, 2001, the effective date of several provisions of the December 1999 final rule and reopened the administrative record (65 FR 25639). In the **Federal Register** of March 1, 2001 (66 FR 12850), we announced our decision to further delay until April 1, 2002, the applicability of § 203.3(q) (definition of ''health care entity'') to the wholesale distribution of blood derivatives by health care entities. Further delays of effective dates followed until December 1, 2008, to give us additional time to consider whether regulatory changes were appropriate and, if so, to initiate such changes (67 FR 6645, February 13, 2002; 68 FR 4912, January 31, 2003; 69 FR 8105, February 23, 2004; 71 FR 66108, November 13, 2006).

In the **Federal Register** of February 1, 2006 (71 FR 5200), we published a proposed rule (the February 2006 proposal) to amend § 203.22, which excludes certain activities from the sales restrictions in § 203.20. As proposed, § 203.22 would have provided a limited exclusion for registered blood establishments that qualify as health care entities. The February 2006 proposal, as a result, would have allowed certain registered blood establishments that qualify as health care entities to distribute blood derivatives. The proposal sought information about the functions of registered blood establishments to assist us in determining whether further modification of the December 1999 final rule would be warranted in the interest of public health. We also requested comments on whether the proposal should be expanded to allow registered blood establishments that also provide health care services to distribute drugs other than blood derivatives that might be used to treat blood disorders. In addition, we sought comment on whether hemophilia treatment centers should be included within the scope of the exclusion.

After reviewing the comments on the February 2006 proposal, we have made several changes to the rule, as described in the following table:

TABLE 1.—PRINCIPAL CHANGES BETWEEN THE PROPOSED AND FINAL RULE

Proposed Rule	Final Rule
Exclusion would apply to a registered blood establishment that qualifies as a health care entity, as long as all of the health care services that it provides are related to its activities as a registered blood establishment.	Exclusion applies to a registered blood establishment that qualifies as a health care entity, as long as all of the health care services that the establishment provides are related to its activities as a registered blood establishment or the health care services consist of collecting, processing, storing, or administering human hematopoietic stem/progenitor cells or performing diagnostic testing of specimens provided that these specimens are tested together with routine donor testing.
Exclusion would apply to the sale, purchase, or trade of, or the offer to sell, purchase, or trade any blood derivative.	Exclusion applies to the sale, purchase, or trade of, or the offer to sell, purchase, or trade any: (1) Drug indicated for a bleeding or clotting disorder, or anemia; (2) blood collection container approved under section 505 of the act; or (3) drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative).
Exclusion did not apply to hemophilia treatment centers.	Exclusion applies to the sale, purchase, or trade of, or the offer to sell, purchase, or trade, by a comprehensive hemophilia diagnostic treatment center that is receiving a grant under section 501(a)(2) of the Social Security Act and that qualifies as a health care entity, any drug indicated for a bleeding or clotting disorder, or anemia, or any drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative).

We describe and respond to the comments on the February 2006 proposal in section II of this document. We grouped into comment categories those comments with similar types of issues. To make it easier to identify the comment category and our response, the word ''Comment,'' in parentheses, will appear before the comment category's description, and the word ''Response,'' in parentheses, will appear before our response. We have also numbered each comment category to help distinguish between different comment types. The number assigned to each comment category is purely for organizational purposes and does not signify the comment category's value or importance or the order in which a particular comment was received.

II. Comments on the February 2006 Proposal

We received several types of comments on the proposed rule.

(Comment 1) Some comments requested that the exclusion be expanded to allow registered blood establishments to distribute other drugs, in addition to blood derivatives, that are used to treat bleeding disorders. According to the comments, a number of blood centers in effect act as regional centers of transfusion medicine and as part of their core blood-related mission also supply their hospital customers with certain blood-related products that are not blood derivatives. Further, the

comments maintained that the current system is cost-effective whereby blood centers offer community hospitals the full range of blood-related products and trained personnel and expertise in handling those products. The comments contended that patients also benefit from blood centers' commitment to maintaining an adequate supply of blood-related products.

(Response) We agree that the exclusion should be expanded to allow registered blood establishments to distribute certain drugs in addition to blood derivatives and therefore have modified the final rule to include within the scope of the exclusion any:

- Drug indicated for a bleeding disorder,
- Drug indicated for a clotting disorder,
- Drug indicated for anemia,
- Blood collection container approved under section 505 of the act (21 U.S.C. 355), and
- Drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative).

(Comment 2) One comment stated that some blood centers, as part of their core blood-related mission, also supply their hospital customers with certain blood-related products not derived from human blood. For example, blood centers distribute recombinant erythropoietin, which is used to stimulate the production of red blood cells.

(Response) Under the final rule as revised, drugs indicated for anemia, such as erythropoiesis-stimulating agents, are subject to the exclusion in § 203.22(h).

(Comment 3) One comment, through a survey of blood centers, described drugs other than blood derivatives distributed by some blood centers. These drugs included TRASYLOL (aprotinin injection), STIMATE nasal spray (desmopressin acetate nasal spray), tetanus and diphtheria (Td) vaccine, and the rabies vaccines RABAVERT and IMOVAX.

(Response) The manufacturer of TRASYLOL (aprotinin) is removing the drug from the U.S. market due to safety concerns and therefore at this time access to TRASYLOL is limited to investigational use of the drug according to the procedures described in a special treatment protocol. Desmopressin acetate injection is indicated for treatment of certain types of blood disorders such as Hemophilia A and von Willebrand's disease (Type I). It is therefore included in the § 203.22(h) exclusion for any drug indicated for a bleeding or clotting disorder, or anemia. Desmopressin acetate nasal spray, however, is not indicated for a bleeding or clotting disorder, or anemia, and it is not a blood derivative (or a recombinant or synthetic form of a blood derivative), and therefore is not included within the exclusion in § 203.22(h).

Tetanus and diphtheria (Td) vaccine and rabies vaccines are not included within the exclusion in § 203.22(h) because they are not indicated for a bleeding or clotting disorder, or anemia, and they are not blood derivatives (or recombinant or synthetic forms of blood derivatives). Therefore, the further distribution by a registered blood establishment of Td vaccine and rabies vaccines is prohibited by § 203.20.

(Comment 4) One comment stated that as biotechnology advances, additional, partial substitutes for human blood are expected to become available. For example, the comment noted that hemoglobin-based oxygen carriers derived from bovine blood are in development. Blood centers would logically be involved in the supply chain of such drug products.

(Response) We agree that flexibility is needed to provide for the potential future development of drugs, such as blood substitutes, that would be used to treat bleeding disorders. For purposes of this discussion, the use of the term ''blood substitute'' refers to products such as hemoglobin-based oxygen carriers, which may partially or transitionally replace the function of blood elements. Our intent is that the exclusions in § 203.22(h) and (i) could apply to a blood substitute product that might be licensed or approved in the future.

(Comment 5) One comment suggested that hemophilia treatment centers should be included within the scope of the exclusion. According to the comment, hemophilia treatment centers currently play a critical role in the distribution of clotting factor to ensure the appropriate care of persons with hemophilia and related bleeding disorders. Thus, prohibiting hemophilia treatment centers from distributing clotting factor would have a tremendous detrimental effect on access to care for patients with hemophilia and related bleeding disorders.

(Response) We agree. We recognize the role of hemophilia treatment centers in ensuring the appropriate care of persons with hemophilia and related bleeding disorders. We have revised § 203.22(i) to exclude from the sales restrictions in § 203.20 the sale, purchase, or trade of, or the offer to sell, purchase, or trade, by a comprehensive hemophilia diagnostic treatment center that is receiving a grant under section 501(a)(2) of the Social Security Act[1] and that qualifies as a health care entity, any drug indicated for a bleeding or clotting disorder, or anemia; or any drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative).

(Comment 6) One comment stated that certain registered blood establishments can also be hemophilia treatment centers. According to the comment, at least two federally funded hemophilia treatment centers are also registered blood establishments. The comment expressed concern that, if these entities provide health care services unrelated to their activities as a registered blood establishment, they would not be eligible for the exclusion. The comment suggested the final rule should clarify that the health care services provided by a registered blood establishment that is also a hemophilia treatment center should be considered related to its activities as a registered blood establishment. The routine distribution of clotting factor by such an establishment would be prohibited if it were determined that the services it provides to persons with hemophilia are not considered related to its activities as a registered blood establishment.

(Response) We agree with the issue presented in this comment and have modified the final rule to add an exclusion (§ 203.22(i)) for comprehensive hemophilia diagnostic treatment centers receiving a grant under section 501(a)(2) of the Social Security Act. This exclusion does not require that the services provided by a comprehensive hemophilia diagnostic treatment center be related to its activities as a registered blood establishment. Thus, a comprehensive hemophilia diagnostic treatment center that is also a registered blood establishment may utilize the exclusion in § 203.22(i).

(Comment 7) One comment expressed concern that because blood centers also distribute blood bags containing anticoagulant, the presence of anticoagulants in the blood bags makes these products drugs and therefore subjects the blood bags to the provisions of the PDMA.

(Response) We agree with the concern expressed in this comment. A blood bag that contains an anticoagulant is regulated under the drug authorities. We do not want to interfere with current practices and potentially create

[1] Comprehensive hemophilia diagnostic treatment centers receive funding, as part of the National Hemophilia Program, through grants administered by the Department of Health and Human Services Health Resources and Services Administration under the authority provided in section 501(a)(2) of the Social Security Act (42 U.S.C. 701(a)(2)).

shortages of products collected in blood bags. Therefore, any blood collection container approved under section 505 of the act (*i.e.*, a blood bag containing an anticoagulant) is included in the exclusion in § 203.22(h).

(Comment 8) Some comments suggested the reference to ''blood derivatives'' should be modified to clarify that the exclusions cover all antihemophilic factor, both recombinant and plasma-derived.

(Response) We agree with these comments and have modified the exclusions in § 203.22(h) and (i) to clarify that the exclusions extend to recombinant or synthetic forms of blood derivatives.

(Comment 9) Some comments suggested the exclusion in § 203.22 should be broadened to include registered blood establishments that qualify as health care entities, as long as any health care services they provide are predominantly related to their activities as a registered blood establishment.

(Response) We believe that the substitution of the word ''predominantly'' for ''all'' in the phrase referring to the health care services that a registered blood establishment provides would make the provision too broad and would not provide the protections intended in the PDMA. However, we recognize that certain blood establishments, due to their specialized medical expertise, routinely collect, store and administer human hematopoietic stem/progenitor cells and conduct diagnostic testing of specimens concurrently with specimens undergoing routine donor testing. Our intent is to not interfere with the current practice of blood establishments to provide these specialized health care services. Therefore, instead of replacing ''all'' with ''predominantly,'' we extended the exclusion in § 203.22(h) to those registered blood establishments that collect, process, store, or administer human hematopoietic stem/progenitor cells or perform diagnostic testing of specimens provided that these specimens are tested together with specimens undergoing routine donor testing. Thus, a registered blood establishment that provides any health care services unrelated to its activities as a registered blood establishment is not eligible for the exclusion provided in the rule unless the unrelated health care services consist of collecting, processing, storing, or administering human hematopoietic stem/progenitor cells or performing diagnostic testing of specimens provided these specimens are tested together with specimens undergoing routine donor testing.

Examples of health care services that we view as related to registered blood establishments' activities and that would therefore allow these establishments to utilize the exclusion in § 203.22(h) include: Therapeutic hemapheresis, therapeutic phlebotomies, plasma exchange, transfusion services, and ordinary donor screening activities for donor suitability (*e.g.*, measuring a donor's temperature, blood pressure, and hematocrit or hemoglobin). We also consider preventive health care services intended to maintain a healthy donor population, such as administering influenza virus vaccines and testing the levels of prostate specific antigen and cholesterol in potential donors, to be related activities.

An example of a health care service that would prevent a registered blood establishment from utilizing the exclusion in § 203.22(h) is administering to a patient antibiotics intended to treat a respiratory infection unrelated to transfusion medicine. If a registered blood establishment engages in this activity, the establishment would not be permitted to distribute any drug indicated for a bleeding or clotting disorder, or anemia, any blood collection container approved under section 505 of the act, or any drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative). Without this limit on the types of health care services that may be provided, we are concerned the rule would encourage hospitals and other health care entities to register as blood establishments strictly to take advantage of this exclusion.

(Comment 10) One comment suggested the exclusion should extend to any distribution of drug products used in cellular and related biological therapies.

(Response) The reference to cellular and related biological therapy products goes beyond the scope of the proposed rule. Therefore, we decline to incorporate these products into the exclusions as part of this final rule.

III. Description of the Final Rule

This document modifies part 203 (21 CFR part 203) to allow a registered blood establishment[2] that provides certain health care services[3] and that also distributes certain drugs, to continue in both capacities. The distribution of these drug products, however, is permitted under this rule only if ''all of the health care services that the [registered blood] establishment provides are related to its activities as a registered blood establishment or the health care services consist of collecting, processing, storing, or administering human hematopoietic stem/progenitor cells or performing diagnostic testing of specimens provided that these specimens are tested together with specimens undergoing routine donor testing.'' This document also modifies part 203 to allow certain hemophilia treatment centers[4] that provide health care services and that also distribute certain drugs to continue in both capacities.

The final rule amends § 203.22, which contains exclusions from the sales restrictions in § 203.20. New paragraph (h) provides a limited exclusion for certain registered blood establishments that also qualify as health care entities. Under the exclusion, the sales restrictions in § 203.20 would not apply to the sale, purchase, or trade of (or the offer to sell, purchase, or trade) any: (1) Drug indicated for a bleeding or clotting disorder, or anemia; or (2) blood collection container approved under section 505 of the act; or (3) drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative), by a registered blood establishment that qualifies as a health care entity as long as all of the health care services that the establishment provides are related to its activities as a registered blood establishment or the health care services consist of collecting, processing, storing, or administering human hematopoietic stem/progenitor cells or performing diagnostic testing of specimens provided that these specimens are tested together with specimens undergoing routine donor testing.

For a registered blood establishment located within a hospital, such as a blood bank or transfusion service, we consider the registered blood establishment to be that part of the hospital that functions as a registered blood establishment and, for the purposes of this final rule, to be

[2] Establishment is defined as ''a place of business under one management at one general physical location. The term includes, among others, human blood and plasma donor centers, blood banks, transfusion services, other blood product manufacturers and independent laboratories that engage in quality control and testing for registered blood product establishments'' (21 CFR 607.3(c)). Owners or operators of establishments that engage in the manufacturing of blood products are required to register as described in 21 CFR 607.7(a).

[3] Health care services are provided by a health care entity defined in relevant part in § 203.3(q) as ''any person that provides diagnostic, medical, surgical, or dental treatment, or chronic or rehabilitative care, but does not include any retail pharmacy or any wholesale distributor.''

[4] The exclusion in the final rule extends to comprehensive hemophilia diagnostic treatment centers receiving grants under section 501(a)(2) of the Social Security Act.

included in the § 203.22(h) exclusion. If, however, on a case-by-case basis, the facts show that a registered blood establishment located in a hospital is taking advantage of the exclusion but is providing health care services beyond those specified in § 203.22(h), then that registered blood establishment is in violation of this final rule and the PDMA and may be subject to administrative or regulatory action, or criminal prosecution, for any such violation.

New § 203.22(i) provides a limited exclusion for certain hemophilia treatment centers that qualify as health care entities. Under the exclusion, the sales restrictions in § 203.20 would not apply to the sale, purchase, or trade of (or the offer to sell, purchase, or trade) any drug indicated for a bleeding or clotting disorder, or anemia, or any drug that is a blood derivative (or a recombinant or synthetic form or a blood derivative), by a comprehensive hemophilia diagnostic treatment center that is receiving a grant under section 501(a)(2) of the Social Security Act and that qualifies as a health care entity.

The exclusions in § 203.22(h) and (i) are intended to allow for the sale, purchase, trade of (or offer to sell, purchase, or trade) drugs related to the hematological needs of a patient related to bleeding, anemia, or hematological replacement therapies. These drugs include clotting factors such as Factor VIII, Factor IX, and von Willebrand Factor used to treat hemophilic disorders; pharmaceuticals such as tranexamic acid used to prevent bleeding from clot lysis; and, erythropoiesis stimulating agents used to treat anemia. Examples of drugs that are blood derivatives, which are included in the exclusions, are immune globulins, coagulation proteins, and human serum albumin. Recombinant and synthetic forms of blood derivatives, such as coagulation proteins and antihemophilic clotting factor, are also included in the exclusions. In addition, blood bags containing anticoagulant are covered by the exclusion's provision for blood collection containers approved under section 505 of the act.

The exclusions in § 203.22(h) and (i) apply only to a registered blood establishment (§ 203.22(h)) or a comprehensive hemophilia diagnostic treatment center (§ 203.22(i)), and not to other entities. These exclusions are narrow and apply only to certain registered blood establishments and comprehensive hemophilia diagnostic treatment centers that qualify as health care entities and that meet other specific criteria. These exclusions do not exempt any person or entity from the other requirements in part 203 *Prescription Drug Marketing* .

IV. Paperwork Reduction Act of 1995

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) is not required.

V. Environmental Impact

The agency has determined under 21 CFR 25.30 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.

VI. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VII. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this final rule is not a significant regulatory action under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because this rule proposes a narrow revision that is intended to maintain the status quo, the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $130 million, using the most current (2007) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

List of Subjects

21 CFR Part 203

Labeling, Prescription drugs, Reporting and recordkeeping requirements, Warehouses.

21 CFR Part 205

Intergovernmental relations, Prescription drugs, Reporting and recordkeeping requirements, Security measures, Warehouses.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 203 and 205 are amended as follows:

PART 203—PRESCRIPTION DRUG MARKETING

■ 1. The authority citation for 21 CFR part 203 continues to read as follows:

Authority: 21 U.S.C. 331, 333, 351, 352, 353, 360, 371, 374, 381.

■ 2. Section 203.3 is amended by revising paragraph (q) to read as follows:

§ 203.3 Definitions.

* * * * *

(q) *Health care entity* means any person that provides diagnostic, medical, surgical, or dental treatment, or chronic or rehabilitative care, but does not include any retail pharmacy or any wholesale distributor. Except as provided in § 203.22(h) and (i), a person cannot simultaneously be a ''health care entity'' and a retail pharmacy or wholesale distributor.

* * * * *

■ 3. Section 203.22 is amended by adding paragraphs (h) and (i) to read as follows:

§ 203.22 Exclusions.

* * * * *

(h) The sale, purchase, or trade of, or the offer to sell, purchase, or trade, by a registered blood establishment that qualifies as a health care entity any:

(1) Drug indicated for a bleeding or clotting disorder, or anemia;

(2) Blood collection container approved under section 505 of the act; or

(3) Drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative); as long as all of the health care services that the establishment provides are related to its activities as a registered blood establishment or the health care services consist of collecting, processing, storing, or administering human hematopoietic stem/progenitor cells or performing diagnostic testing of specimens provided that these specimens are tested together with specimens undergoing routine donor testing. Blood establishments relying on the exclusion in this paragraph must satisfy all other requirements of the act and this part applicable to a wholesale distributor or retail pharmacy.

(i) The sale, purchase, or trade of, or the offer to sell, purchase, or trade, by a comprehensive hemophilia diagnostic treatment center that is receiving a grant under section 501(a)(2) of the Social Security Act and that qualifies as a health care entity, any drug indicated for a bleeding or clotting disorder, or anemia, or any drug that is a blood derivative (or a recombinant or synthetic form of a blood derivative). Comprehensive hemophilia diagnostic treatment centers relying on the exclusion in this paragraph must satisfy all other requirements of the act and this part applicable to a wholesale distributor or retail pharmacy.

PART 205—GUIDELINES FOR STATE LICENSING OF WHOLESALE PRESCRIPTION DRUG DISTRIBUTORS

■ 4. The authority citation for 21 CFR part 205 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 353, 371, 374.

■ 5. Section 205.3 is amended by revising paragraph (h) to read as follows:

§ 205.3 Definitions.

* * * * *

(h) *Health care entity* means any person that provides diagnostic, medical, surgical, or dental treatment, or chronic or rehabilitative care, but does not include any retail pharmacy or any wholesale distributor. Except as provided in § 203.22(h) and (i) of this chapter, a person cannot simultaneously be a ''health care entity'' and a retail pharmacy or wholesale distributor.

Dated: October 3, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–24050 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8073]

Income, Excise, and Estate and Gift Taxes; Effective Dates and Other Issues Arising Under the Employee Benefit Provisions of the Tax Reform Act of 1984; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to temporary regulations (TD 8073) that were published in the **Federal Register** on Tuesday, February 4, 1986 (51 FR 4312) relating to effective dates and certain other issues arising under sections 91, 223, and 511–561 of the Tax Reform Act of 1984. This action is necessary because of changes to the applicable tax law made by the Tax Reform Act of 1984. The temporary regulations will affect qualified employee benefit plans, welfare benefit funds and employees receiving benefits through such plans.

DATES: This correction is effective October 9, 2008, and is applicable after December 31, 1985.

FOR FURTHER INFORMATION CONTACT: Melissa A. D'Ambrose, (202) 622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations that are the subject of this document are under sections 72, 79, 125, 133, 402, 404, 419, 461, 463, 505, 512, and 1042 of the Internal Revenue Code.

Need for Correction

As published, temporary regulations (TD 8073) contain an error that may prove to be misleading and is in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendment:

PART 1—INCOME TAXES

■ **Paragraph 1**. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2**. Section 1.512(a)–5T A–3: (b) is amended by revising the second sentence to read as follows:

§ 1.512(a)–5T Questions and answers relating to the unrelated business taxable income of organizations described in paragraphs (9), (17) or (20) of section 501(c) (temporary).

* * * * *

A–3: * * *

(b) * * * For purposes of section 512(a)(3)(B), member contributions include both employee contributions and employer contributions to the VEBA, SUB, or GLSO.

* * * * *

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E8–23917 Filed 10–8–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[DOD–2007–OS–0025]

RIN 0790–AI08

32 CFR Part 112

Indebtedness of Military Personnel

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This part contains uniform Department of Defense policies for indebtedness of military personnel. This updated rule contains editorial changes only as required for internal Department of Defense mandated reconsideration every five years.

DATES: *Effective Date:* This rule is effective November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Lieutenant Colonel Tom Williams, Office of the Deputy Under Secretary of Defense for Program Integration, 4000 Defense Pentagon, Washington, DC 20301–4000.

SUPPLEMENTARY INFORMATION: The proposed rule was published on April 17, 2007 at 72 FR 19136. One editorial

comment was received and accepted. The rule is therefore adopted as published below.

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

It has been determined that 32 CFR part 112 is not a significant regulatory action. The rule does not:

1. Have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

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

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

It has been certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

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

It has been certified that this rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been certified that this rule does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;

2. The relationship between the National Government and the States; or

3. The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 112

Claims, Credit, Military personnel.

■ Accordingly, 32 CFR Part 112 is revised as follows:

PART 112—INDEBTNESS OF MILITARY PERSONNEL

Sec.

112.1 Purpose.
112.2 Applicability and Scope.
112.3 Definitions.
112.4 Policy.
112.5 Processing of Debt Complaints.
112.6 Processing of Involuntary Allotments.
112.7 Responsibilities.

Authority: 5 U.S.C. 5520a(k) and 10 U.S.C. 113(d).

§ 112.1 Purpose.

This part:

(a) Updates DoD policies and assigns responsibilities governing delinquent indebtedness of members of the Military Services and prescribes policy for processing involuntary allotments from the pay of military members to satisfy judgment indebtedness in accordance with 5 U.S.C. 5520a(k).

(b) Establishes responsibility for procedures implementing 5 U.S.C. 5520a(k), 15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1665a, 1666–1666j, and 1667–1667e (''Truth in Lending Act''), and 15 U.S.C. 1601 note, and 1692–1692o (''Fair Debt Collection Practices Act'').

§ 112.2 Applicability and Scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as a Service in the Navy, under agreement with the Department of Homeland Security), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) This part does not apply to:

(1) Indebtedness of a member of the Military Services to the Federal Government.

(2) Processing of indebtedness claims to enforce judgments against military members for alimony or child support.

(3) Claims by State or municipal governments under the processing guidelines for complaints, including tax collection actions.

§ 112.3 Definitions.

(a) *Absence.* A member's lack of an ''appearance,'' at any stage of the judicial process, as evidenced by failing to physically attend court proceedings; failing to be represented at court proceedings by counsel of the member's choosing; or failing to timely respond to pleadings, orders, or motions.

(b) *Court.* A court of competent jurisdiction within any State, territory, or possession of the United States.

(c) *Debt Collector.* An agency or agent engaged in the collection of debts described under 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act'').

(d) *Exigencies of Military Duty.* A military assignment or mission-essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the Military Services from appearance at a judicial proceeding or prevents the member from being able to respond to a notice of application for an involuntary allotment. Exigency of military duty is normally presumed during periods of war, national emergency, or when the member is deployed.

(e) *Judgment.* A final judgment must be a valid, enforceable order or decree, by a court from which no appeal may be taken, or from which no appeal has been taken within the time allowed, or from which an appeal has been taken and finally decided. The judgment must award a sum certain amount and specify that the amount is to be paid by an individual who, at the time of application for the involuntary allotment, is a member of the Military Services.

(f) *Just Financial Obligation.* A legal debt acknowledged by the military member in which there is no reasonable dispute as to the facts or the law; or one reduced to judgment that conforms to Sections 501–591 of title 50 Appendix, United States Code (The Servicemembers Civil Relief Act, as amended), if applicable.

(g) *Member of the Military Services.* For the purposes of this part, any member of the Regular Army, Air Force, Navy, Marine Corps, or Coast Guard, and any member of a Reserve component of the Army, Air Force, Navy, Marine Corps, or Coast Guard (including the Army National Guard of the United States and the Air National Guard of the United States) on active duty pursuant to a call or order for a period in excess of 180 days at the time an application for involuntary allotment is received by the Director, DFAS, or Commanding Officer, Coast Guard Pay and Personnel Center. The following shall not be considered members:

(1) Retired personnel, including those placed on the temporary or permanent disabled retired list; and

(2) Personnel in a prisoner of war or missing in action status, as determined

by the Secretary of the Military Department concerned.

§ 112.4 Policy.

(a) Members of the Military Services are expected to pay their just financial obligations in a proper and timely manner. A Service member's failure to pay a just financial obligation may result in disciplinary action under the Uniform Code of Military Justice (10 U.S.C. 801–940) or a claim pursuant to Article 139 of the Uniform Code of Military Justice. Except as stated in this section, and in paragraphs (a)(1) and (a)(2) of this section, the DoD Components have no legal authority to require members to pay a private debt or to divert any part of their pay for satisfaction of a private debt.

(1) Legal process instituted in civil courts to enforce judgments against military personnel for the payment of alimony or child support shall be acted on pursuant to 42 U.S.C. 651–665, and Chapter 50, of Department of Defense Regulation 7000.14–R Volume 7A.[1]

(2) Involuntary allotments under 5 U.S.C. 5520a(k) shall be established in accordance with this part.

(b) Whenever possible, indebtedness disputes should be resolved through amicable means. Claimants may contact military members by having correspondence forwarded through the military locator services for an appropriate fee.

§ 112.5 Processing of Debt Complaints.

(a) Debt complaints meeting the requirements of this part and procedures established by the Under Secretary of Defense for Personnel and Readiness, as required by § 112.7(a)(1) shall receive prompt processing assistance from commanders.

(b) Assistance in indebtedness matters shall not be extended to those creditors:

(1) Who have not made a bona fide effort to collect the debt directly from the military member;

(2) Whose claims are patently false and misleading; or

(3) Whose claims are obviously exorbitant.

(c) Some States have enacted laws prohibiting creditors from contacting a debtor's employer about indebtedness or communicating facts on indebtedness to an employer unless certain conditions are met. The conditions that must be met to remove this prohibition are generally such things as reduction of a debt to judgment or obtaining written permission of the debtor.

(1) At DoD installations in States having such laws, the processing of debt complaints shall not be extended to those creditors who are in violation of the State law. Commanders may advise creditors that this rule has been established because it is the general policy of the Military Services to comply with State law when that law does not infringe upon significant military interests.

(2) The rule in paragraph (c)(1) of this section shall govern even though a creditor is not licensed to do business in the State where the debtor is located. A similar practice shall be started in any State enacting a similar law regarding debt collection.

(3) Pursuant to 15 U.S.C. 1601 note and 1692–1692o (''Fair Debt Collection Practices Act''), contact by a debt collector with third parties, such as commanding officers, for aiding debt collection is prohibited without a court order or the debtor's prior consent given directly to the debt collector. Creditors are generally exempt from this requirement, but only when they collect on their own behalf.

§ 112.6 Processing of Involuntary Allotments.

Pursuant to 5 U.S.C. 5520a(k): (a) In those cases in which the indebtedness of a military member has been reduced to a judgment, an application for an involuntary allotment from the member's pay may be made under procedures prescribed by the Under Secretary of Defense (Comptroller). Such procedures shall provide the exclusive remedy available.

(b) An involuntary allotment from a member's pay shall not be permitted in any indebtedness case in which:

(1) Exigencies of military duty caused the absence of the member from the judicial proceeding at which the judgment was rendered; or

(2) There has not been compliance with the procedural requirements of the Servicemembers Civil Relief Act 50, U.S.C. Appendix, sections 501–591.

§ 112.7 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness shall:

(1) In consultation with the Under Secretary of Defense (Comptroller), establish procedures for the processing of debt complaints.

(2) Have policy oversight on the assistance to be provided by military authorities to creditors of military personnel who have legitimate debt complaints.

(b) The Under Secretary of Defense (Comptroller) shall:

(1) In consultation with the Under Secretary of Defense for Personnel and Readiness establish procedures for processing debt complaints, and administer and process involuntary allotments from the pay of members of the Military Services. This includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

(2) Ensure that the Director, Defense Finance and Accounting Service:

(i) Implements procedures established by the Under Secretary of Defense for Personnel and Readiness and the Under Secretary of Defense (Comptroller).

(ii) Considers whether Servicemembers Civil Relief Act 50 U.S.C. Appendix, sections 501–591 has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Publishes, prints, stocks, redistributes, and revises DoD forms necessary to process involuntary allotments.

(c) The Heads of the DoD Components shall urge military personnel to meet their just financial obligations, since failure to do so damages their credit reputation and affects the public image of all DoD personnel. See DoD Directive 5500.7.[2]

(d) The Secretaries of the Military Departments shall:

(1) Establish, as necessary, procedures to administer and process involuntary allotments from the pay of members of the Military Services. This includes designating those commanders, or other officials who may act in the absence of the commander, who shall be responsible for determining whether a member's absence from a judicial proceeding was caused by exigencies of military duty, and establishing appeal procedures regarding such determinations.

(2) Require commanders to counsel members to pay their just debts, including complying, as appropriate, with court orders and judgments for the payments of alimony or child support.

(3) Emphasize prompt command action to assist with the processing of involuntary allotment applications.

(e) The Chief, Office of Personnel and Training, for the Coast Guard shall:

(1) Establish, as necessary, procedures supplemental to those promulgated by the Under Secretary of Defense for Personnel and Readiness or the Under Secretary of Defense (Comptroller) to administer and process involuntary allotment from the pay of members of the Military Services; this includes the authority to promulgate forms necessary for the efficient administration and processing of involuntary allotments.

[1] Copies may be obtained from the DoD Directives Web page at: *http://www.dtic.mil/whs/directives.*

[2] See footnote 1 to § 112.4(a)(1).

(2) Ensure that the Commanding Officer, Coast Guard Pay and Personnel Center:

(i) Implements procedures established by the Under Secretary of Defense for Personnel and Readiness, the Under Secretary of Defense (Comptroller), and Chief, Office of Personnel and Training.

(ii) Considers whether the Servicemembers Civil Relief Act, as amended (50 U.S.C. Appendix, sections 501–591) has been complied with pursuant to 5 U.S.C. 5520a(k) prior to establishing an involuntary allotment against the pay of a member of the Military Services.

(iii) Acts as the Coast Guard manager for forms necessary to process involuntary allotments.

Dated: September 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–23977 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DoD–2008–HA–0035]

RIN 0720–AA69

Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Voluntary Disenrollment From the TRICARE Retiree Dental Program (TRDP)

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule implements section 726 of the Floyd D. Spence National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2001, which amended 10 U.S.C. 1076c to allow for voluntary disenrollment from the TRICARE Retiree Dental Program (TRDP) in certain circumstances.

DATES: *Effective Date:* This rule is effective November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Colonel Gary Martin, TMA, TRICARE Policy and Operations, telephone (703) 681–0039.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule Provisions

Section 726 of the Floyd D. Spence NDAA for FY 2001 (Pub. L. 106–398), amended 10 U.S.C. 1076c by directing the Department to allow an enrollee to the TRDP to disenroll at the beginning of the prescribed enrollment period and to permit disenrollment thereafter under limited circumstances providing that the fiscal integrity of the dental program is not jeopardized. The amendment specifies the inclusion of the following circumstances: a period of up to 30 days at the beginning of the prescribed minimum enrollment period during which an enrollee may disenroll; assignment of Federal employment outside dental plan jurisdiction that prevents utilization of the plan's benefits; a serious medical condition that prevents utilization of the plan's benefits; and, severe financial hardship. The final rule expands the voluntary termination provision of the TRDP provided by the Department and originally contained in a final rule published in the **Federal Register** on January 30, 2002 (67 FR 4353). Under the statutory mandate for voluntary enrollment required by section 704 of the NDAA for FY 2000 (Pub. L. 106–65), that provision implemented a grace period in which a new enrollee could voluntarily disenroll during the first 30 days following the beginning date of coverage on the condition that no benefits had been used and, effectively, nullify the enrollment. It also designated the TRDP contractor as the authority for grace period disenrollment decisions.

This final rule provides another opportunity for voluntary disenrollment from the TRDP during the enrollment lock-in period that could occur upon an enrollee's request without any penalty and is based on the extenuating circumstances specified in the Floyd D. Spence NDAA for FY 2001. The TRDP contractor continues as the authority for voluntary disenrollment decisions but only at the initial level. The final rule allows a process for enrollees to appeal to the TMA all adverse decisions made by the contractor in response to requests for voluntary disenrollment.

The final rule also makes administrative corrections.

II. Review of Public Comments

We published the proposed rule on January 30, 2002 (67 FR 4375) and provided a 60-day comment period. We received no public comments.

III. Regulating Procedures

Executive Order 12866 requires that a comprehensive regulatory impact analysis be performed on any economically significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts. The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule is not an economically significant regulatory action and will not have a significant impact on a substantial number of small entities for purposes of the RFA, thus this final rule is not subject to any of these requirements.

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

This rule will not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (Title 44, U.S.C., 3501–3511).

We have examined the impact(s) of the final rule under Executive Order 13132 and it does not have policies that have federalism implications that would have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, therefore, consultation with State and local officials is not required.

List of Subjects in 32 CFR Part 199

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

■ Accordingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for 32 CFR part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

■ 2. Section 199.22 is amended by revising paragraph (b)(4); the first two sentences of paragraph (d)(1)(iv) introductory text; and paragraphs (d)(4)(ii), (d)(5)(ii), (e)(2) and (k) to read as follows:

§ 199.22 TRICARE Retiree Dental Program (TRDP).

* * * * *

(b) * * *

(4) Except as otherwise provided in this section or by the Assistant Secretary of Defense (Health Affairs) or designee, the TRDP is administered in a manner similar to the TRICARE Dental Program under § 199.13 of this part.

* * * * *

(d) * * *

(1) * * *

(iv) Eligible dependents of a member described in paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section when the member is not enrolled in the program and the member meets at least one of the conditions in paragraphs (d)(1)(iv)(A) through (C) of this section. Already enrolled members must satisfy any remaining enrollment commitment prior to enrollment of dependents becoming effective under this paragraph, at which time the dependent-only enrollment will continue on a voluntary basis as specified in paragraph (d)(4) of this section. * * *

* * * * *

(4) * * *

(ii) *Enrollment period for enhanced benefits.* The initial enrollment period for enhanced benefit coverage described in paragraph (f)(2) of this section shall be established by the Director, TMA, or designee, to be a period of not less than 12 months and not more than 24 months. The initial enrollment period shall be followed by renewal enrollment periods of up to 12 months as long as the enrollee chooses to continue enrollment and remains eligible. An enrollee who chooses not to continue enrollment upon completion of an enrollment period may re-enroll at any time. However, an enrollee who is disenrolled from the TRDP before completion of an initial or subsequent enrollment period for reasons other than those in paragraphs in (d)(5)(ii)(A) and (B) of this section shall incur a lockout period of 12 months before re-enrollment can occur. Former enrollees who re-enroll following a lockout period or following a period of disenrollment after completion of an enrollment period must comply with all provisions that apply to new enrollees, including a new enrollment commitment.

(5) * * *

(ii) *Voluntary termination.* All enrollee requests for termination of TRDP coverage before the completion of an enrollment period shall be submitted to the TRDP contractor for determination of whether the enrollee qualifies to be disenrolled under paragraphs (d)(5)(ii)(A) or (B) of this section.

(A) *Enrollment grace period.* Regardless of the reason, TRDP coverage shall be cancelled, or otherwise terminated, upon request from an enrollee if the request is received by the TRDP contractor within 30 calendar days following the enrollment effective date and there has been no use of TRDP benefits under the enrollment during that period. If such is the case, the enrollment is voided and all premium payments are refunded. However, use of benefits during this 30-day enrollment grace period constitutes acceptance by the enrollee of the enrollment and the enrollment period commitment. In this case, a request for termination of enrollment under paragraph (d)(5)(ii)(A) of this section will not be honored, and premiums will not be refunded.

(B) *Extenuating circumstances.* Under limited circumstances, TRDP enrollees shall be disenrolled by the contractor before the completion of an enrollment period commitment upon request by an enrollee if the enrollee submits written, factual documentation that independently verifies that one of the following extenuating circumstances occurred during the enrollment period. In general, the circumstances must be unforeseen and long-term and must have originated after the effective date of TRDP coverage.

(*1*) The enrollee is prevented by a serious medical condition from being able to utilize TRDP benefits,

(*2*) The enrollee would suffer severe financial hardship by continuing TRDP enrollment; or

(*3*) Any other circumstances which the Secretary considers appropriate.

(C) *Effective date of voluntary termination.* For cases determined to qualify for disenrollment under the grace period provisions in paragraph (d)(5)(ii)(A) of this section, enrollment is completely nullified effective from the beginning date of coverage. For cases determined to qualify for disenrollment under the extenuating circumstances provisions in paragraph (d)(5)(ii)(B) of this section, the effective date of disenrollment is the first of the month following the contractor's initial determination on the disenrollment request or the first of the month following the last use of TRDP benefits under the enrollment, whichever is later.

(D) *Appeal process for denied voluntary enrollment termination.* An enrollee has the right to appeal the contractor's determination that a disenrollment request does not qualify under paragraphs (d)(5)(ii)(A) or (B) of this section. The enrollee may appeal that determination by submitting a written appeal to the TMA, Office of Appeals and Hearings, with a copy of the contractor's determination notice and relevant documentation supporting the disenrollment request. This appeal must be received by TMA within 60 days of the date on the contractor's determination notice. The burden of proof is on the enrollee to establish affirmatively by substantial evidence that the enrollee qualifies to be disenrolled under paragraphs (d)(5)(ii)(A) or (B) of this section. TMA will issue written notification to the enrollee and the contractor of its appeal determination within 60 days from the date of receipt of the appeal request. That determination is final.

* * * * *

(e) * * *

(2) *Effects of failure to make premium payments.* Failure to make premium payments will result in the enrollee's disenrollment from the TRDP and a lockout period of 12 months. Following this period of time, eligible individuals will be able to re-enroll.

* * * * *

(k) *Appeal procedures.* All levels of appeal established by the contractor shall be exhausted prior to an appeal being filed with the TMA. Procedures comparable to those established for appeal of benefit determinations under § 199.10 of this part shall apply together with the procedures for appeal of voluntary disenrollment determinations described in paragraph (d)(5)(ii)(D) of this section.

* * * * *

Dated: September 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–24001 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 212

[DoD–2006–OS–0041; 0790–AI35]

Procedures and Support for Non-Federal Entities Authorized To Operate on Department of Defense (DoD) Installations

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This rule updates responsibilities and procedures to define and reestablish a framework for non-Federal entities (NFEs) (previously called ''private organizations'') authorized to operate on DoD installations. It requires the Heads of DoD Components to conduct periodic reviews of facilities, programs, services, and membership provisions of NFEs operating on DoD installations and authorizes installation commanders or higher authority to determine if an NFE detracts from DoD programs and to eliminate duplication. The rule also

identifies those NFEs having statutory authorization for particular support and restates DoD policy on sponsorship of NFEs by DoD personnel acting in an official capacity, specifically as it applies to chartering Boy Scout organizations authorized to operate on DoD installations.

DATES: *Effective Date:* This rule is effective November 10, 2008.

FOR FURTHER INFORMATION CONTACT: Pam Crespi, 703–602–5004.

SUPPLEMENTARY INFORMATION: The Department of Defense published a proposed rule on October 2, 2007 (72 FR 56021–56025). Comments were received from the Boy Scouts of America.

Comments: (1) Footnote 11 should be deleted as the district court ruling was reversed; (2) Other provisions of the Support Our Scouts Act make clear that Boy Scouts and certain other youth organizations are entitled to the same support from Federal agencies that they have traditionally received; and (3) Clarify support may be provided to groups that are non-traditional affiliates of the Boy Scouts such as the Exploring/Learning for Life Programs.

Response: (1) Footnote 11 has been deleted; (2) Support for Youth Organizations and the authorities Section 1058 of Public Law 109–163 (Note to Section 301 of title 5 U.S.C.) and Section 8126 of Public Law 109–148 (Note to Section 101 of title 10 U.S.C. and Section 301 of title 5 U.S.C.) were added to Appendix A that lists the Non-Federal Entities Having Statutory Authorization For Particular Support; and (3) section 212.6(c)(4)(2) has been revised to read ''* * * DoD support to Boy Scouts or their official affiliates * * *''

Also, minor administrative amendments have been made in this final rule to bring it into consistency with 32 CFR part 213.

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

This regulatory action is not a significant regulatory action, as defined by Executive Order 12866 and does not:

(1) Have an annual effect to the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Unfunded Mandates Reform Act (Sec. 202, Pub. L. 104–4)

This regulatory action does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

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

This regulatory action is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule establishes policy and assigns executive agent responsibilities but taken cumulatively, those changes would not have a significant impact on a substantial number of small entities.

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

This regulatory action does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

This regulatory action does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;

2. The relationship between the National Government and the States; or

3. The distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 212

Armed forces, Foreign relations, Statistics, Taxes.

■ Accordingly, 32 CFR part 212 is revised to read as follows:

PART 212—PROCEDURES AND SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DEPARTMENT OF DEFENSE (DOD) INSTALLATIONS

Sec.

212.1 Purpose.
212.2 Applicability.
212.3 Definitions.
212.4 Policy.
212.5 Responsibilities.
212.6 Procedures.

Appendix A to Part 212—Non-Federal Entities Having Statutory Authorization for Particular Support

Authority: 5 U.S.C. 301; 10 U.S.C. 2554; 10 U.S.C. 2606; and 36 U.S.C. 300110

§ 212.1 Purpose.

This part:

(a) Implements 32 CFR part 213.

(b) Updates responsibilities and procedures to define and reestablish a framework for non-Federal entities authorized to operate on Department of Defense (DoD) installations.

§ 212.2 Applicability.

(a) This part applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(2) Non-Federal entities authorized to operate on DoD installations.

(b) This part shall not apply to:

(1) Military relief societies.

(2) Banks or credit unions according to 32 CFR part 230.

(3) Support provided under Innovative Readiness Training according to DoD Directive 1100.20.[1]

§ 212.3 Definitions.

DoD installation: As used in this instruction, a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility or, in the case of an activity in a foreign country, under the operational control of the Department of Defense. This term does not include any facility used primarily for civil works, rivers and harbor projects, or flood control projects.

Non-Federal entities. A self-sustaining organization, incorporated or unincorporated, that is not an agency or instrumentality of the Federal government. This part addresses only those entities that operate on DoD installations with the express consent of the installation commander or higher authority. Membership of these organizations consists of individuals acting exclusively outside the scope of

[1] Copies of unclassified DoD Directives, Instructions, Publications, and Administrative Instructions may be obtained at *http://www.dtic.mil/whs/directives/.*

any official capacity as officers, employees, or agents of the Federal Government. Non-Federal entities include a State, interstate, Indian tribal, or local government, as well as private organizations.

United States. As used in this part, the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, Guam, American Samoa, Johnston Atoll, Kingman Reef, Midway Island, Nassau Island, Palmyra Island, Wake Island, and any other territory or possession of the United States, and associated navigable waters, including the territorial seas.

§ 212.4 Policy.

It is DoD policy, consistent with 32 CFR part 213, that procedures be established for the operation of non-Federal entities on DoD installations to prevent official sanction, endorsement, or support by the DoD Components except as authorized in DoD 5500.7–R and applicable law. The Department recognizes that non-Federal entity support of Service members and their families can be important to their welfare. Non-Federal entities are not entitled to sovereign immunity and privileges accorded to Federal agencies and instrumentalities. The DoD Components shall take action to preclude unauthorized expenditures of appropriated funds, commissary surcharge, or nonappropriated funds (NAF) in support of these organizations.

§ 212.5 Responsibilities.

(a) The Principal Deputy Under Secretary for Personnel and Readiness, under the Under Secretary of Defense for Personnel and Readiness and in coordination with the Deputy Under Secretary of Defense for Installations and Environment and subject to DoD Directive 4165.6, shall be responsible for implementing policy and oversight of non-Federal entities on DoD installations.

(b) The Heads of the DoD Components shall:

(1) Implement this part.

(2) Be aware of all non-Federal entities operating on installations under their jurisdiction.

(3) Conduct reviews to ensure installation commanders periodically review facilities, programs, and services provided by non-Federal entities operating on DoD installations. Installation commanders will also review membership provisions and the original purpose for which each organization was originally approved. Substantial changes to those original conditions shall necessitate further review, documentation, and approval for continued permission to operate on the installation.

§ 212.6 Procedures.

(a) To prevent the appearance of official sanction or support by the Department of Defense:

(1) Non-Federal entities may not use the seals, logos, or insignia of the Department of Defense or any DoD Component, DoD organizational unit, or DoD installation on organization letterhead, correspondence, titles, or in association with organization programs, locations, or activities.

(2) Non-Federal entities operating on DoD installations may use the name or abbreviation of the Department of Defense, a DoD Component, organizational unit, or installation in its name provided that its status as a non-Federal entity is apparent and unambiguous and there is no appearance of official sanction or support by the Department of Defense. The following applies:

(i) The non-Federal entity must have approval from the appropriate DoD organization whose name or abbreviation is to be used before using the name or abbreviation.

(ii) Any use of the name or abbreviation of a DoD Component, organizational unit, or installation must not mislead members of the public to assume a non-Federal entity is an organizational unit of the Department of Defense.

(iii) A non-Federal entity must prominently display the following disclaimer on all print and electronic media mentioning the entity's name confirming that the entity is not a part of the Department of Defense: ''THIS IS A NON-FEDERAL ENTITY. IT IS NOT A PART OF THE DEPARTMENT OF DEFENSE OR ANY OF ITS COMPONENTS AND IT HAS NO GOVERNMENTAL STATUS.'' This disclaimer must also be provided in appropriate oral communications and public announcements when the name of the entity is used.

(b) Activities of non-Federal entities covered by this part shall not in any way prejudice or discredit the DoD Components or other Federal Government agencies.

(c) Subject to DoD Directive 4165.6 as it relates to real property, installation commanders shall approve written agreements that indicate permission to operate on the installation and any logistical support that will be provided. DoD personnel acting in an official capacity will not execute any charter that will serve as the legal basis for the non-Federal entity. The nature, function, and objectives of a non-Federal entity covered by this part shall be delineated in articles of incorporation, a written constitution, bylaws, charters, articles of agreement, or other authorization documents before receiving approval from the installation commander to operate on the installation. That documentation shall also include:

(1) Description of eligible membership in the non-Federal entity.

(i) No person because of race, color, creed, sex, age, disability, or national origin shall be unlawfully denied membership, unlawfully excluded from participation, or otherwise subjected to unlawful discrimination by any non-Federal entity or other private organization covered by this part.

(ii) Installation commanders will distribute information on procedures for individuals to follow when they suspect unlawful discrimination by the organization.

(2) Designation of management responsibilities, including the accountability for assets, satisfaction of liabilities, disposition of any residual assets on dissolution, and other documentation that shows responsible financial management.

(3) A certification indicating that members understand they are personally liable, as provided by law, if the assets of the non-Federal entity are insufficient to discharge all liabilities.

(4) Guidance relating to professional scouting organizations operating at U.S. military installations located overseas can be found in DoD Instruction 1015.9.

(i) In accordance with DoD 5500.7–R, which contains a policy on sponsorship of non-Federal entities by DoD personnel acting in an official capacity, DoD personnel acting in an official capacity shall not execute charters that serve as the legal basis for the creation of Boy Scouts organizations (including Boy Scouts, Cub Scout Packs, or Venturer Crews).

(ii) In accordance with U.S. District Court for the Northern District of Illinois, Eastern Division, Decision No. 1999 CV 02424, while such chartering is not allowed, nothing in this part is intended to preclude, if otherwise authorized by law or regulation, DoD support to Boy Scouts or their official affiliates; Boy Scouts activities on DoD installations; or sponsorship of Boy Scout organizations by DoD personnel in their personal capacity. Existing charters executed by DoD personnel in their official capacity shall be terminated or amended to substitute sponsorship by an appropriate individual, volunteer, group, or

organization, consistent with DoD policy.[2]

(d) A non-Federal entity covered by this part shall not offer programs or services on DoD installations that compete with appropriated or NAF activities, but may, when specifically authorized, supplement those activities.

(1) Installation commanders, or higher authorities if the installation commander has not been delegated such authority, will determine if the services of a non-Federal entity conflict with or detract from local DoD programs. The cognizant commander has discretionary authority over the operations of non-Federal entities on DoD installations. Commanders are authorized to eliminate duplication of services, particularly when these services compete with the installation's revenue-generating activities.

(2) Background checks are required for employees and volunteers of non-Federal entities who have contact with children under the age of 18 in DoD-operated, -contracted, or community-based programs that are used to supplement or expand child care or youth services, according to DoD Instruction 1402.5.

(e) Non-Federal entities covered by this part shall be self-sustaining, primarily through dues, contributions, service charges, fees, or special assessment of members. There shall be no financial assistance to such an entity from a NAF Instrumentality (NAFI) in the form of contributions, repairs, services, dividends, or other donations of money or other assets. Fundraising and membership drives are governed by DoD 5500.7–R.

(f) Non-Federal entities are not entitled to DoD support. However, support may be provided when it is consistent with and supportive of the military mission of the DoD Component concerned. Such support may be provided only when it can be offered within the capability of the installation commander without detriment to the commander's ability to fulfill the military mission, and when it is permitted under applicable Status of Forces Agreements. The DoD Components may provide logistical support to non-Federal entities with appropriated funds to the extent authorized by DoD 5500.7–R and applicable law. NAFI funds or assets shall not be directly or indirectly transferred to non-Federal entities according to DoD Instruction 1015.15.

(g) Personal and professional participation in non-Federal entities by DoD employees is governed by DoD 5500.7–R. DoD personnel acting in an official capacity will not execute charters that serve as the legal basis for any non-Federal entity or other private organization.

(h) Neither appropriated fund activities nor NAFIs may assert any claim to the assets, or incur or assume any obligation, of any non-Federal entity covered by this part, except as may arise out of contractual relationships or as provided by law. Property shall not be abandoned on the installation by a non-Federal entity and may only be acquired by the DoD installation by purchase or through donation agreed to by the Department of Defense.

(i) The non-Federal entity shall have adequate insurance, as defined by the DoD Component concerned, to protect against liability and property damage claims or other legal actions that may arise due to its activities, those of its members, or the operation of its equipment or devices. The DoD Components will not assume liability (through insurance or other means) for any activities or assets of non-Federal entities.

(j) Non-Federal entities shall comply with applicable fire and safety regulations; environmental laws; local, State, and Federal tax codes; and any other applicable statutes or regulations.

(k) Income from a non-Federal entity or its activities shall not accrue to individual members of a non-Federal entity except through wages and salaries as employees of the non-Federal entity or as award recognition for services rendered to the non-Federal entity or military community. This prohibition is not meant to preclude operation of investment clubs, in which the investment of members' personal funds result in a return on investment directly and solely to the individual members.

(l) Employees of non-Federal entities are not employees of the United States or of an instrumentality of the United States. Applicable laws on labor standards for employment shall be observed, including worker's compensation insurance. Employees of non-Federal entities shall not participate in NAF employee benefit programs based upon their affiliation with the non-Federal entity.

(m) Non-Federal entities that have statutory authorization for particular support are listed at Appendix A to this part.

(n) Certain unofficial activities conducted on DoD installations do not need formal authorization because of the limited scope of their activities. Examples are office coffee funds, flower funds, and similar small, informal activities and funds. The DoD Components shall establish the basis upon which such informal activities and funds shall operate.

Appendix A to Part 212—Non-Federal Entities Having Statutory Authorization for Particular Support

NON-FEDERAL ENTITIES HAVING STATUTORY AUTHORIZATION FOR PARTICULAR SUPPORT

Non-Federal entity	Authority
Certain banks and credit unions	Chapter 1770 of title 12, United States Code (U.S.C.). Title 32, Code of Federal Regulations (CFR), part 230.
United Service Organization	Section 220101 of title 36, U.S.C. Title 32, CFR, part 213. Memorandum of Understanding (MOU) between DoD and the United Service Organization.
Labor organizations	Title 5, U.S.C., Chapter 71. DoD 1400.25–M, subchapter 711.
Combined Federal Campaign	Executive Order 12353. Title 5, CFR, part 950. DoD Instruction 5035.1. DoD Instruction 5035.5.
American Registry of Pathology	Section 177 of title 10 U.S.C.
Henry M. Jackson Foundation for the Advancement of Military Medicine	Section 178 of title 10 U.S.C.

[2] Paragraph mandated by ''Partial Settlement Agreement Between Plaintiffs and Secretary Rumsfeld'', United States District Court for the Northern District of Illinois, Eastern Division, No. 1999 CV 02424 (*Eugene Winkler, et al.,* v. *Chicago School Reform Board of Trustees, et al.*)

NON-FEDERAL ENTITIES HAVING STATUTORY AUTHORIZATION FOR PARTICULAR SUPPORT—Continued

Non-Federal entity	Authority
American National Red Cross	Section 2552 of title 10 U.S.C. Section 2602 of title 10 U.S.C. Secretary of The Army Memorandum. "Support to the Red Cross During Times of Conflict". Title 32, CFR, part 213. MOU between the Department of Justice and American Red Cross.
Boy Scouts Jamborees	Section 2554 of title 10 U.S.C.
Girl Scouts International Events (Transportation)	Section 2555 of title 10 U.S.C. DoD Instruction 1015.9.
Shelter for Homeless	Section 2556 of title 10 U.S.C.
National Military Associations; Assistance at National Conventions	Section 2558 of title 10 U.S.C. DoD Directive 5410.18. DoD Instruction 5410.19.
National Veterans' Organizations (Beds and Barracks)	Section 2551 of title 10 U.S.C.
United Seamen's Service Organization	Section 2604 of title 10 U.S.C. Title 32, CFR, part 213.
Scouting: Cooperation and Assistance in Foreign Areas	Section 2606 of title 10 U.S.C. DoD Instruction 1015.9.
Civil Air Patrol	Section 9441 of title 10 U.S.C. Section 9442 of title 10 U.S.C. Section 40301 of title 36 U.S.C.
Assistance for certain youth and charitable organizations	Section 508 of title 32 U.S.C. DoD Directive 1100.20.
Presidential Inaugural Ceremonies	Section 2553 of title 10 U.S.C.
Specified Sporting Events (Olympics)	Section 2564 of title 10 U.S.C. DoD Directive 2000.15.
Fire Protection Agreements	Section 1856 of title 42 U.S.C. et seq.
Armed Services Young Men's Christian Association	Section 2012 of title 10 U.S.C. Section 2648 of title 10 U.S.C. Section 508 of title 32, U.S.C. MOU between DoD and the Armed Services YMCA.
Support for Youth Organizations	Section 1058 of Public Law 109–163 (Note to Section 301 of title 5 U.S.C.). Section 8126 of Public Law 109–148 (Note to Section 101 of title 10 U.S.C. and Section 301 of title 5 U.S.C.).

Dated: September 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–23970 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0246]

RIN 1625–AA00

Safety Zone; BWRC Annual Thanksgiving Regatta; Lake Moolvalya, Parker, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the navigable waters of Lake Moolvalya region on the lower Colorado River in support of the Bluewater Resort and Casino Annual Thanksgiving Regatta. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 6 a.m. on November 28, 2008 through 6 p.m. on November 30, 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–2008–0246 and are available online at *http://www.regulations.gov,* selecting the Advanced Docket Search option on the right side of the screen, inserting USCG–XXXX–XXXX in the Docket ID box, pressing Enter, and then clicking on the item in the Docket ID column. 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 the U.S. Coast Guard Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Petty Officer Kristen Beer, USCG, Waterways Management, U.S. Coast Guard Sector San Diego at (619) 278–7233. 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 June 11, 2008, we published a notice of proposed rulemaking (NPRM) entitled Safety zone; BWRC Annual Thanksgiving Regatta; Lake Moolvalya, Parker, Arizona in the **Federal Register** (73 FR 33028). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

Southern California Speedboat Club is sponsoring the Bluewater Resort and Casino Annual Thanksgiving Regatta. The event is a circle boat race consisting of 85 powerboats ranging from 12 to 22 feet in length. This safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and other users of the waterway.

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.

This determination is based on the size and location of the safety zone. Commercial vessels will not be hindered by the safety zone because they may seek authorization from the Captain of the Port or his designated representative to travel through the safety zone. Recreational vessels will not be allowed to transit through the designated safety zone during the specified times.

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 anchor in the region of Lake Moolvalya on the lower Colorado River from 6 a.m. to 6 p.m. on November 28, 2008 through November 30, 2008.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This rule will be in effect for 12 hours per day for a period of three days. Although the safety zone will apply to the entire width of the river, traffic will be allowed to pass through the zone with the permission of the Captain of the Port or his designated representative. Before the effective period, we will publish a local notice to mariners (LNM) and will issue broadcast notice to mariners (BNM) alerts via marine channel 16 VFH before the safety zone is enforced.

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.

Indian Tribal Governments

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

Energy Effects

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

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their

regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

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

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 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

■ 2. Add § 165.T11–034 to read as follows:

§ 165.T11–034 Safety zone; BWRC Annual Thanksgiving Regatta; Lake Moolvalya, Parker, AZ.

(a) *Location.* The limits of the proposed safety zone are as follows: the Headgate Dam at 34°10.15′ N, 114°16.62′ W to 34°10.08′ N, 114°16.61′ W following the river east to a line at 34°10.25′ N, 114°15.70′ W to 34°10.37′ N, 114°15.74′ W.

(b) *Enforcement Period.* This section will be enforced daily from 6 a.m. to 6 p.m. on November 28, 2008 through November 30, 2008. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

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

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: September 25, 2008.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. E8–23906 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0245]

RIN 1625–AA00

Safety Zone; BWRC '300' Enduro; Lake Moolvalya, Parker, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard establishes a safety zone, on the navigable waters of Lake Moolvalya region on the lower Colorado River, in support of the Bluewater Resort and Casino '300' Enduro. This safety zone is necessary to provide for the safety of the participants, crew, spectators, participating vessels, and other vessels and users of the waterway. Persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative.

DATES: This rule is effective from 6 a.m. on October 24, 2008 through 6 p.m. on October 26, 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–2008–0245 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 the U.S. Coast Guard Sector San Diego, 2710 N. Harbor Drive, San Diego, CA 92101 between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call Petty Officer Kristen Beer, USCG, Waterways Management, U.S. Coast Guard Sector San Diego at (619) 278–7233. 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 June 11, 2008, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone; BWRC '300' Enduro; Lake Moolvalya, Parker, Arizona in the **Federal Register** (73 FR 33033). We received no letters commenting on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date would be contrary to the public interest, since immediate action is needed to ensure the public's safety.

Background and Purpose

RPM Racing Enterprises is sponsoring the Bluewater Resort and Casino '300' Enduro. The event is a closed boat endurance race consisting of 30 to 50 powerboats ranging from 16 to 26 feet in length. The sponsor will provide four water rescue boats and eight patrol boats for this event. This safety zone is necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and other users of the waterway.

Discussion of Comments and Changes

There were no issues raised by this proposed event. There are no changes from the NPRM posted in the **Federal Register**.

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.

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 anchor in a region of Lake Moolvalya on the lower Colorado River from 6 a.m. to 6 p.m. on October 24–26, 2008.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will be in effect for 12 hours a day for a period of three days. Although the safety zone will apply to the entire width of the river, traffic will be allowed to pass through the zone with the permission of the Coast Guard patrol commander. Before the effective period, we will publish a local notice to mariners (LNM) and will issue broadcast notice to mariners (BNM) alerts via marine channel 16 VFH before the safety zone is enforced.

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.

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 Department of Homeland Security Management Directive 5100.1 and Commandant Instruction M16475.lD, 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 under the Instruction 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 (water), Reporting and recordkeeping requirements, Security measures, and Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 710, 3306, 3703; 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 new temporary safety zone § 165.T11–033:

§ 165.T11–033 Safety zone; BWRC '300' Enduro; Lake Moolvalya, Parker, AZ.

(a) *Location.* The limits of the safety zone are as follows: The Headgate Dam at 34°11.20 N, 114°13.74 W following the river northeast to 34°10.10 N, 114°16.61 W.

(b) *Enforcement Period.* This section will be enforced each day from 6 a.m. to 6 p.m. on October 24, 2008 through October 26, 2008. If the event concludes prior to the scheduled termination time, the Captain of the Port will cease enforcement of this safety zone and will announce that fact via Broadcast Notice to Mariners.

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

(d) *Regulations.* (1) Entry into, transit through or anchoring within this safety zone is prohibited unless authorized by the Captain of the Port of San Diego or his designated representative.

(2) Mariners requesting permission to transit through the safety zone may request authorization to do so from the Patrol Commander (PATCOM). The PATCOM may be contacted on VHF–FM Channel 16.

(3) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated representative.

(4) Upon being hailed by U.S. Coast Guard patrol personnel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

(5) The Coast Guard may be assisted by other Federal, State, or local agencies.

Dated: September 25, 2008.

T.H. Farris,

Captain, U.S. Coast Guard, Captain of the Port Sector San Diego.

[FR Doc. E8–23903 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

37 CFR Part 10

[Docket No. PTO–C–2005–0013]

RIN 0651–AB55

Changes to Representation of Others Before the United States Patent and Trademark Office

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule; correction.

SUMMARY: The United States Patent and Trademark Office (Office) published a final rule in the **Federal Register** on August 14, 2008, adopting new rules governing the conduct of disciplinary investigations, issuing warnings when closing such investigations, disciplinary proceedings, non-disciplinary transfer to disability inactive status and reinstatement to practice before the Office. This document corrects omissions in that final rule and amends the Rules of Practice for consistency with the final rule.

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Harry I. Moatz, Director of Enrollment and Discipline (OED Director), directly by telephone (571) 272–6069, by facsimile to (571) 273–6069 marked to the attention of Mr. Moatz, or by mail addressed to: Mail Stop OED—Ethics Rules, U.S. Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450.

SUPPLEMENTARY INFORMATION: The Office published a final rule in the **Federal Register** of August 14, 2008 (73 FR 47650), entitled ''Changes to Representation of Others Before the United States Patent and Trademark Office.'' In that final rule, 37 CFR 10.4 is replaced and supplemented by § 11.23. Also in that final rule, there are several references to ''violation of any of the Mandatory Disciplinary Rules identified in § 10.20(b) of this subchapter.'' This document corrects erroneous omissions from that final rule as discussed below.

Section 10.4 inadvertently continued to remain in Part 10 although it should have been removed and reserved. Seven of the examples of conduct that constitute a violation of Mandatory Disciplinary Rule § 10.23—i.e., §§ 10.23(c)(5), (c)(6), (c)(13), (c)(14), (c)(15), (c)(16) and (c)(19)—and Mandatory Disciplinary Rule § 10.31(c) inadvertently continue to refer to rules in Part 10 although the referenced rules have been removed. They should refer to existing rules. This document corrects the text in the provisions of §§ 10.23 and 10.31 to reference the appropriate existing rules.

The final rule is corrected as follows. Section 10.4 is removed and reserved (the substance of § 10.4 has been transferred and supplanted by § 11.23). Section 10.23(c)(5) changes its reference from ''§ 10.6(c)'' to ''§ 11.6(c)'' (the substance of the former § 10.6(c) was transferred to § 11.6(c)). Section 10.23(c)(6) changes its reference from ''§ 10.158'' to ''§ 11.58'' (the substance of the former § 10.158 was transferred to § 11.58). Section 10.23(c)(13) changes its

reference from ''§ 10.10(b)'' to ''§ 11.10(b)'' (the substance of the former § 10.10(b) was transferred to § 11.10(b)). Section 10.23(c)(14) changes its reference from ''§ 10.6'' to ''§ 11.6'' (the substance of the former § 10.6 was transferred to § 11.6). Section 10.23(c)(15) changes its reference from ''10.18'' to ''11.18'' (the substance of the former 10.18 was transferred to 11.18). Section 10.23(c)(16) changes its reference from ''paragraph (b) of § 10.131'' to ''§ 11.22(b)'' (the substance of the former § 10.131(b) was included in § 11.22(b)). Section 10.23(c)(19) changes its reference from ''§ 10.10(c)'' to ''§ 11.10(d)'' (the substance of the former § 10.10(c) was transferred to § 11.10(d)). Section 10.31(c) changes its reference from ''§ 10.14(b)'' to ''§ 11.14(b)'' (the substance of the former § 10.14(b) was transferred to § 11.14(b)).

Section 553(d) of the Administrative Procedure Act (5 U.S.C. 553(d)) ordinarily requires a 30-day delay in the effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest. The change to 37 CFR 10.4 corrects a technical error inasmuch as the substance of § 10.4 was transferred to and supplemented by § 11.23. The changes in 37 CFR 10.23(c)(5), (c)(6), (c)(13), (c)(14), (c)(15), (c)(16) and (c)(19) and 10.31(c) correct a technical error in referencing sections. The changes in 37 CFR 10.23(c)(5), (c)(6), (c)(13), (c)(14), (c)(15), (c)(16) and (c)(19) and 10.31(c) do not change the conduct expected of practitioners from the final rule published on August 14, 2008, but merely correct the language consistent with the existing and intended text. The Office finds it impracticable to have a 30-day delayed effective date for these technical corrections as practitioners should not be misled or confused by rules referring to removed provisions of Part 10, and practitioners should not be expected to abide by rules that have been removed from Part 10. Furthermore, the Office finds that it is in the public's interest to correct the changes in text to avoid misleading constructions of the rules. Therefore, the Office is waiving the 30-day delay in effective date for the technical corrections in this notice.

■ Accordingly, the Patent and Trademark Office makes the following correcting amendments to 37 CFR part 10:

PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE

■ 1. The authority citation for 37 CFR part 10 continues to read as follows:

Authority: 5 U.S.C. 500; 15 U.S.C. 1123; 35 U.S.C. 2, 6, 32, 41.

§ 10.4 [Removed and reserved]

■ 2. Section 10.4 is removed and reserved.

■ 3. Section 10.23 is amended by revising paragraphs (c)(5), (c)(6), (c)(13), (c)(14), (c)(15), (c)(16) and (c)(19) to read as follows:

§ 10.23 Misconduct.

* * * * *

(c) * * *

(5) Suspension or disbarment from practice as an attorney or agent on ethical grounds by any duly constituted authority of a State or the United States or, in the case of a practitioner who resides in a foreign country or is registered under § 11.6(c), by any duly constituted authority of:

(i) A State,

(ii) The United States, or

(iii) The country in which the practitioner resides.

(6) Knowingly aiding or abetting a practitioner suspended or excluded from practice before the Office in engaging in unauthorized practice before the Office under § 11.58.

* * * * *

(13) Knowingly preparing or prosecuting or providing assistance in the preparation or prosecution of a patent application in violation of an undertaking signed under § 11.10(b).

(14) Knowingly failing to advise the Director in writing of any change which would preclude continued registration under § 11.6.

(15) Signing a paper filed in the Office in violation of the provisions of § 11.18 or making a scandalous or indecent statement in a paper filed in the Office.

(16) Willfully refusing to reveal or report knowledge or evidence to the Director contrary to § 10.24 or § 11.22(b).

* * * * *

(19) Action by an employee of the Office contrary to the provisions set forth in § 11.10(d).

* * * * *

■ 4. Section 10.31 is amended by revising paragraph (c) to read as follows:

§ 10.31 Communications concerning a practitioner's services.

* * * * *

(c) Unless authorized under § 11.14(b), a non-lawyer practitioner shall not hold himself or herself out as authorized to practice before the Office in trademark cases.

* * * * *

Dated: October 1, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–23908 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–16–P

POSTAL REGULATORY COMMISSION

39 CFR Part 3020

[Docket Nos. MC2008–7, CP2008–16 and CP2008–17; Order No. 112]

Administrative Practice and Procedure, Postal Service

AGENCY: Postal Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Commission is adding a new product identified as Global Plus 2 Negotiated Service Agreements to the Mail Classification Schedule Competitive Product List. This action is consistent with changes in a recent law governing postal operations. Re-publication of the lists of market dominant and competitive products is also consistent with new requirements in the law.

DATES: Effective October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: *Regulatory History,* 73 FR 49723 (August 22, 2008).

The Postal Service seeks to add a new product identified as Global Plus 2 Negotiated Service Agreements to the Competitive Product List. For the reasons discussed below, the Commission approves the Request.

I. Background

On August 8, 2008, the Postal Service filed a Request with the Commission for the addition of a new product, which it identifies as Global Plus 2 Negotiated Service Agreements, to the Mail Classification Schedule's Competitive Product List for prices not of general applicability. A concurrent Notice announces issuance of a Governors' Decision authorizing the new product and the Postal Service's execution, under this authority, of two contracts it considers functionally equivalent.[1]

[1] Request of the United States Postal Service to Add Global Plus 2 Negotiated Service Agreements to the Competitive Product List, and Notice of

The proposed new product includes three services: Global Bulk Economy (GBE), Global Direct, and Global Plus 2 contracts.[2] Mail classification language accompanying the Request describes each of these services. Global Plus 2 contracts are described as a combination of GBE and Global Direct designed for high-volume mailers or Postal Qualified Wholesalers. They require a mailer to have the capability, on an annualized basis, of either tendering at least 5,000 pieces of international mail to the Postal Service or paying at least $100,000 in international postage to the Postal Service, and meeting other requirements. Governors' Decision, Attachment 1, Attachment A–3, at 1 (§ 2610.6) (Global Plus 2). *Id.,* Attachments A–1 and A–3 (GBE and Global Direct, respectively).

Commission Order No. 98 provided formal notice of the Request and related submissions; established the captioned dockets to consider the Request; appointed an officer of the Commission to represent the interests of the general public; and set August 27, 2008 as the deadline for comments.[3]

Commission decision. The Commission has reviewed the filing in terms of relevant statutory provisions, and concludes that the filing is consistent with all pertinent statutory considerations. It finds that Global Plus 2 is appropriately classified as a competitive product. Accordingly, it grants the Request to add the Global Plus 2 product to the Competitive Product List. It also classifies the two contracts filed in Docket Nos. CP2008–16 and CP2008–17 as falling within the Global Plus 2 product, based on a finding that they are functionally equivalent.

II. Comments

A. Public Representative's Comments

The Public Representative finds the Postal Service's filing consistent with requirements in the Postal Accountability and Enhancement Act (PAEA) and related Commission regulations. In particular, he concludes that pricing for the two proffered contracts satisfies 39 U.S.C. 3633 and falls within the floor and ceiling for the ''shell''—or umbrella—classification in the Governors' Decision.[4] He also concludes that the Postal Service has ''concisely justified'' the extent of confidentiality it seeks in this filing; states that contractual provisions on preparation and volume requirements ensure that some economies of scale will result from implementation; and finds that the two contracts appear to be functionally equivalent. *Id.* at 2–4.

However, the Public Representative expresses concern that the inclusion of Global Direct as a component of Global Plus 2 service raises a question about the appropriateness of assigning Global Plus 2 to the Competitive Product List because:

—Global Direct appears to provide shipments of First-Class Mail to a destination country;
—Single-piece outbound International First-Class Mail has been classified as a market dominant product; and
—The PAEA assigns ''single piece'' international mail to the market dominant product line and ''bulk'' international to the competitive line. *Id.* at 2–8.[5]

B. The Postal Service's Reply Comments

The Postal Service maintains that the treatment of competitive products under the PAEA and an assessment of competitive market characteristics support a conclusion that Global Plus 2 is properly classified as a competitive product.[6] It acknowledges that the PAEA requires that international mail be classified as either market dominant or competitive depending upon whether it is ''single-piece'' or ''bulk,'' but maintains that the PAEA does not further define those terms or seek to provide guidance on the existing and future international mail categories they are intended to encompass. *Id.* at 2. However, it notes that when classifying postal products [in Docket No. RM2007–1] as either market dominant or competitive, the Commission proposed to define bulk international mail by reference to bulk commercial services, which may be satisfied by volume commitments or other types of annual guarantees. *Id.* The Postal Service further observes that the Commission included International Customized Mail (ICM) agreements among the products classified as ''bulk,'' and that each ICM was further initially defined as an individual product. *Id.*

Applying this line of reasoning to the instant case, the Postal Service says that the Global Plus 2 contracts are tied to revenue commitments, just as are the Global Plus 1 contracts, and thus appear to satisfy the Commission's determination that an annual revenue guarantee would suffice to define a product as ''bulk.'' It therefore contends that even if pieces under the contract were mailed individually, this should not change the fact that the annual revenue guarantee ensures that this is a bulk product. Moreover, it contends that because the Commission views the contract as the product, as opposed to the individual services under the contract (which include both Global Direct and Global Bulk Economy services), it would seem that even assuming that a piece of Global Direct mail were sent individually, this likewise should not convert a bulk product into a single-piece product. *Id.* at 2–3.

In addition, the Postal Service maintains that as a practical matter, Global Direct is not a single-piece service, so each mailing involving Global Bulk Economy and Global Direct is, in fact, a bulk mailing. *Id.* at 3. In support of this position, it asserts that Global Direct service has only been available through customized agreements; notes that a customer cannot walk into a post office and deposit a single piece bearing foreign indicia; states that retail Global Direct service does not exist; and says that both Global Plus 2 contracts provide that postage payments are to be made by permit imprint. *Id.*

The Postal Service provides a hypothetical example involving a single-piece mailing, but asserts that this example does not reflect routine mailer behavior. Instead, it maintains that the customers are large volume, Postal Qualified Wholesalers who are required under the terms of the contract

Filing (Under Seal) the Enabling Governors' Decision and Two Functionally Equivalent Agreements, August 8, 2008 (collectively referred to as Request). The Request was filed pursuant to 39 U.S.C. 3642 and implementing regulations at 39 CFR 3020.30 *et seq.* A public (redacted) version of the referenced Governors' Decision appears as Attachment 1 to the Request. *See* Decision of the Governors of the United States Postal Service on the Establishment of Prices and Classifications for Global Direct, Global Bulk Economy, and Global Plus Contracts (Governors' Decision No. 08–10), July 16, 2008 (Governors' Decision).

[2] The Governors' Decision notes that the classifications for Global Direct and Global Bulk Economy contracts are contained in the Mail Classification Schedule language originally proposed by the Postal Service as modified in attachments to the instant decision. Eligible customers may also contract separately for GBE and Global Direct service. Governors' Decision at 1, n.1.

[3] *See* Notice and Order Concerning Global Plus 2 Negotiated Service Agreements, August 14, 2008 (Order No. 98). Order No. 98 appears at 73 FR 49723 (August 22, 2008).

[4] Public Representative Comments in Response to United States Postal Service Request to Add Global Plus 2 Negotiated Service Agreements to the Competitive Products List, August 27, 2008 at 4 (Public Representative Comments).

[5] The Public Representative notes that he also raised the issue of whether a proposed service is a ''hybrid'' product in Docket No. MC2008–6. *Id.* at 4–5.

[6] Reply of United States Postal Service to Public Representative Comments in Response to United States Postal Service Request to Add Global Plus 2 Negotiated Service Agreements to the Competitive Products List, August 29, 2008 at 1–2 (Postal Service Reply Comments).

to deposit their Global Direct mail at specific locations designated by the Postal Service and who also must comply with foreign postal administrations' preparation requirements. *Id.* at 3–4. It says it is more than likely that any one mailing will contain multiple Global Direct pieces. In fact, it says that the Postal Service does not recall ever seeing a postage statement containing only one piece of Global Direct mail. *Id.* at 4.

The Postal Service acknowledges that certain items sent using Global Direct services, including under Global Plus 2 contracts, are ''letters'' within the meaning of 39 CFR 310.1(a). *Id.* It notes, however, that private entities are entitled to offer service for outbound letters '' 'to a foreign country for deposit in its domestic or international mails for delivery to an ultimate destination outside the United States.' '' *Id.* (footnote omitted).

''The Postal Service asserts that Congress codified this statutory exception to the so-called letter monopoly in the PAEA, and that competition exists in the outbound letter market, with a variety of entities providing services comparable to the Postal Service's. It further states that in addition to facing competing providers, the Postal Service must also contend with mailers' prerogative to carry their own letters out of the United States and deposit them in the destination country's mailstream. *Id.*

The Postal Service then says that for reasons described more fully in the Statement of Supporting Justification filed in these dockets, it operates within competitive constraints in offering Global Plus 2 contracts, including their Global Direct components, rather than from a position of market dominance. Thus, it says that under the descriptive criteria in 39 U.S.C. 3642(b) and 39 CFR 3020.32, these contracts should be construed as competitive products. *Id.* at 4–5.

III. Commission Analysis

A. Statutory Requirements

The Commission's statutory responsibilities, in this instance, entail assigning Global Plus 2 to either the Market Dominant List or the Competitive Product List. 39 U.S.C. 3642. As part of this responsibility, the Commission also preliminarily reviews the proposals for compliance with PAEA requirements. This includes, for proposed competitive products, a review of the provisions applicable to rates for competitive products. 39 U.S.C. 3633.

Product list assignment. 39 U.S.C. 3642 governs the assignment of new products to a list, in terms of the contract or product as a whole, not an individual component. In context, it is apparent that Global Direct—which is the source of the Public Representative's classification concern—is a bulk service. In particular, Global Direct is:

—A service that imposes minimum annual volume or revenue requirements on mailers;
—Intended for high-volume users and Postal Qualified Wholesalers; and
—Not available as a retail service for individuals.

Postal Service Reply Comments at 3–4. Thus, the Global Plus 2 contracts are appropriately classified as competitive products.

The Commission must also consider the Postal Service's market position in determining appropriate product classification. The main consideration is whether

> the Postal Service exercises sufficient market power that it can effectively set the price of such product substantially above costs, raise prices significantly, decrease quality, or decrease output, without risk of losing a significant level of business to other firms offering similar products.

39 U.S.C. 3642(b)(1).

Review of a statement provided by Frank Cebello, the Postal Service's executive director of Global Business Management, provides adequate support for a finding that the Postal Service's position with respect to Global Plus 2 precludes it from being able to take any of the actions referred to in the referenced provision without risk of losing a significant level of business to other firms or offering similar products. *See* Request, Attachment 2.

Cost considerations. The Commission has reviewed the financial analyses provided under seal as well as the comments and the reply comments. This preliminary review indicates that each contract comports with the provisions applicable to rates for competitive products. In particular, based on the information provided, the Commission finds that the proposed contracts should cover their individual attributable costs (39 U.S.C. 3633(a)(2)); should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and each should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)).

B. Nature of the Agreements

The Postal Service requests that the Commission classify the two Global Plus 2 contracts as part of the same product. The Commission finds that these contracts are premised on similar cost and market characteristics. It concludes that these two contracts are functionally equivalent in all pertinent respects, and can be appropriately classified as one product within the Competitive Product List.

C. Updating the Mail Classification Schedule

The Commission is adding the new product, Global Plus 2, to the Competitive Product List, as requested. As noted, the two related contracts fall within that product. The changes to the product list are shown below the signature on this Order, and shall become effective upon publication in the **Federal Register**.

The Postal Service shall notify the Commission of the effective date of each contract on the same date it notifies the contracting parties. The Commission notes that each Global Plus 2 contract contains a provision for early termination. The Postal Service shall promptly notify the Commission of an early termination no later than the actual termination date. The Commission will then remove the contract from the Mail Classification Schedule at the earliest possible opportunity.

IV. Ordering Paragraphs

It is Ordered:

1. Global Plus 2 is added as a new product to the Competitive Product List.

2. The Negotiated Service Agreement submitted in Docket No. CP2008–16 and the Negotiated Service Agreement submitted in Docket No. CP2008–17 fall within the Global Plus 2 product.

3. The Postal Service shall notify the Commission of the effective date of the Global Plus 2 contracts (in Docket Nos. CP2008–16 and CP2008–17) on the same date it notifies the contracting parties.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

List of Subjects in 39 CFR Part 3020

Administrative practice and procedure, Postal Service.

By the Commission.

Steven W. Williams,

Secretary.

■ For the reasons stated in the preamble, under the authority at 39 U.S.C. 503, the Postal Regulatory Commission amends 39 CFR part 3020 as follows:

PART 3020—PRODUCT LISTS

■ 1. The authority citation for part 3020 continues to read as follows:

Authority: 39 U.S.C. 503; 3622; 3631; 3642; 3682.

■ 2. Revise Appendix A to subpart A of part 3020 to read as follows:

Appendix A to Subpart A of Part 3020—Mail Classification Schedule

Part A—Market Dominant Products
1000 Market Dominant Product List
First-Class Mail
- Single-Piece Letters/Postcards
- Bulk Letters/Postcards
- Flats
- Parcels
- Outbound Single-Piece First-Class Mail International
- Inbound Single-Piece First-Class Mail International

Standard Mail (Regular and Nonprofit)
- High Density and Saturation Letters
- High Density and Saturation Flats/Parcels
- Carrier Route
- Letters
- Flats
- Not Flat-Machinables (NFMs)/Parcels

Periodicals
- Within County Periodicals
- Outside County Periodicals

Package Services
- Single-Piece Parcel Post
- Inbound Surface Parcel Post (at UPU rates)
- Bound Printed Matter Flats
- Bound Printed Matter Parcels
- Media Mail/Library Mail

Special Services
- Ancillary Services
- International Ancillary Services
- Address List Services
- Caller Service
- Change-of-Address Credit Card Authentication
- Confirm
- International Reply Coupon Service
- International Business Reply Mail Service
- Money Orders
- Post Office Box Service

Negotiated Service Agreements
- HSBC North America Holdings Inc. Negotiated Service Agreement
- Bookspan Negotiated Service Agreement
- Bank of America Corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement

Market Dominant Product Descriptions
First-Class Mail [Reserved for Class Description]
- Single-Piece Letters/Postcards [Reserved for Product Description]
- Bulk Letters/Postcards [Reserved for Product Description]
- Flats [Reserved for Product Description]
- Parcels [Reserved for Product Description]
- Outbound Single-Piece First-Class Mail International [Reserved for Product Description]
- Inbound Single-Piece First-Class Mail International [Reserved for Product Description]

Standard Mail (Regular and Nonprofit) [Reserved for Class Description]
- High Density and Saturation Letters [Reserved for Product Description]
- High Density and Saturation Flats/Parcels [Reserved for Product Description]
- Carrier Route [Reserved for Product Description]
- Letters [Reserved for Product Description]
- Flats [Reserved for Product Description]
- Not Flat-Machinables (NFMs)/Parcels [Reserved for Product Description]

Periodicals [Reserved for Class Description]
- Within County Periodicals [Reserved for Product Description]
- Outside County Periodicals [Reserved for Product Description]

Package Services [Reserved for Class Description]
- Single-Piece Parcel Post [Reserved for Product Description]
- Inbound Surface Parcel Post (at UPU rates) [Reserved for Product Description]
- Bound Printed Matter Flats [Reserved for Product Description]
- Bound Printed Matter Parcels [Reserved for Product Description]
- Media Mail/Library Mail [Reserved for Product Description]

Special Services [Reserved for Class Description]
- Ancillary Services [Reserved for Product Description]
- Address Correction Service [Reserved for Product Description]
- Applications and Mailing Permits [Reserved for Product Description]
- Business Reply Mail [Reserved for Product Description]
- Bulk Parcel Return Service [Reserved for Product Description]
- Certified Mail [Reserved for Product Description]
- Certificate of Mailing [Reserved for Product Description]
- Collect on Delivery [Reserved for Product Description]
- Delivery Confirmation [Reserved for Product Description]
- Insurance [Reserved for Product Description]
- Merchandise Return Service [Reserved for Product Description]
- Parcel Airlift (PAL) [Reserved for Product Description]
- Registered Mail [Reserved for Product Description]
- Return Receipt [Reserved for Product Description]
- Return Receipt for Merchandise [Reserved for Product Description]
- Restricted Delivery [Reserved for Product Description]
- Shipper-Paid Forwarding [Reserved for Product Description]
- Signature Confirmation [Reserved for Product Description]
- Special Handling [Reserved for Product Description]
- Stamped Envelopes [Reserved for Product Description]
- Stamped Cards [Reserved for Product Description]
- Premium Stamped Stationery [Reserved for Product Description]
- Premium Stamped Cards [Reserved for Product Description]
- International Ancillary Services [Reserved for Product Description]
- International Certificate of Mailing [Reserved for Product Description]
- International Registered Mail [Reserved for Product Description]
- International Return Receipt [Reserved for Product Description]
- International Restricted Delivery [Reserved for Product Description]
- Address List Services [Reserved for Product Description]
- Caller Service [Reserved for Product Description]
- Change-of-Address Credit Card Authentication [Reserved for Product Description]
- Confirm [Reserved for Product Description]
- International Reply Coupon Service [Reserved for Product Description]
- International Business Reply Mail Service [Reserved for Product Description]
- Money Orders [Reserved for Product Description]
- Post Office Box Service [Reserved for Product Description]

Negotiated Service Agreements [Reserved for Class Description]
- HSBC North America Holdings Inc. Negotiated Service Agreement [Reserved for Product Description]
- Bookspan Negotiated Service Agreement [Reserved for Product Description]
- Bank of America Corporation Negotiated Service Agreement
- The Bradford Group Negotiated Service Agreement

2000 Part B—Competitive Products
Competitive Product List
Express Mail
- Express Mail
- Outbound International Expedited Services
- Inbound International Expedited Services
- Inbound International Expedited Services 1 (CP2008–7)

Priority Mail
- Priority Mail
- Outbound Priority Mail International
- Inbound Air Parcel Post

Parcel Select
Parcel Return Service
International
- International Priority Airlift (IPA)
- International Surface Airlift (ISAL)
- International Direct Sacks—M-Bags
- Global Customized Shipping Services
- Inbound Surface Parcel Post (at non-UPU rates)
- International Money Transfer Service
- International Ancillary Services

Special Services
- Premium Forwarding Service

Negotiated Service Agreements
- Domestic
- Express Mail Contract 1 (MC2008–5)
- Outbound International
- Global Expedited Package Services (GEPS) Contracts
- GEPS 1 (CP2008–5, CP2008–11, CP2008–12, and CP2008–13, CP2008–18, CP2008–19, CP2008–20, CP2008–21, CP2008–22, CP2008–23 and CP2008–24)
- Global Plus Contracts
- Global Plus 1 (CP2008–9 and CP2008–10)
- Global Plus 2 (MC2008–7, CP2008–16 and CP2008–17)
- Inbound Direct Entry Contracts with Foreign Postal Administrations (MC2008–6, CP2008–14 and CP2008–15)

Competitive Product Descriptions
Express Mail [Reserved for Group Description]
Express Mail [Reserved for Product Description]
Outbound International Expedited Services [Reserved for Product Description]
Inbound International Expedited Services [Reserved for Product Description]
Priority [Reserved for Product Description]
Priority Mail [Reserved for Product Description]
Outbound Priority Mail International [Reserved for Product Description]
Inbound Air Parcel Post [Reserved for Product Description]
Parcel Select [Reserved for Group Description]
Parcel Return Service [Reserved for Group Description]
International [Reserved for Group Description]
International Priority Airlift (IPA) [Reserved for Product Description]
International Surface Airlift (ISAL) [Reserved for Product Description]
International Direct Sacks—M—Bags [Reserved for Product Description]
Global Customized Shipping Services [Reserved for Product Description]
International Money Transfer Service [Reserved for Product Description]
Inbound Surface Parcel Post (at non-UPU rates) [Reserved for Product Description]
International Ancillary Services [Reserved for Product Description]
International Certificate of Mailing [Reserved for Product Description]
International Registered Mail [Reserved for Product Description]
International Return Receipt [Reserved for Product Description]
International Restricted Delivery [Reserved for Product Description]
International Insurance [Reserved for Product Description]
Negotiated Service Agreements [Reserved for Group Description]
Domestic [Reserved for Product Description]
Outbound International [Reserved for Group Description]
Part C—Glossary of Terms and Conditions [Reserved]
Part D—Country Price Lists for International Mail [Reserved]

[FR Doc. E8–24054 Filed 10–8–08; 8:45 am]
BILLING CODE 7710–FW–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0659; FRL–8727–2]

Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Approval of Section 110(a)(1) Maintenance Plans for the 1997 8-Hour Ozone Standard for the Parishes of Calcasieu and St. James

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to the Louisiana State Implementation Plan (SIP) concerning maintenance plans addressing the 1997 8-hour ozone standard for the parishes of Calcasieu and St. James. On July 20, 2007, and August 24, 2007, the State of Louisiana submitted separate SIP revisions containing maintenance plans for the 1997 ozone standard for Calcasieu and St. James Parishes, respectively. These plans ensure the continued attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) through the year 2014. On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 ozone standard. Requirements for these areas under the 2008 standard will be addressed in future actions. These maintenance plans meet the statutory and regulatory requirements, and are consistent with EPA's guidance. EPA is approving the revisions pursuant to section 110 of the Federal Clean Air Act (CAA).

DATES: This rule is effective on *December 8, 2008* without further notice, unless EPA receives relevant adverse comment by November 10, 2008. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2007–0659, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6coment.htm.* Please click on ''6PD'' (Multimedia) and select ''Air'' before submitting comments.
- *E-mail:* Mr. Guy Donaldson at *donaldson.guy@epa.gov*. Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2007–0659. 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.

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 Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Louisiana Department of Environmental Quality, Public Records Center, Room 127, 602 N. Fifth Street, Baton Rouge, Louisiana 70821.

FOR FURTHER INFORMATION CONTACT: Ellen Belk, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–2164; fax number 214–665–7263; e-mail address *belk.ellen@epa.gov*.

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

Outline

I. Background
II. Analysis of the State's Submittals
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

Under section 107 of the 1977 CAA, Louisiana's Calcasieu and St. James Parishes were designated as nonattainment areas because they did not meet the National Ambient Air Quality Standards (NAAQS) for 1-hour ozone (40 CFR 81.319). Under the 1990 CAA Amendments, the Calcasieu and St. James Parish nonattainment areas continued to be designated nonattainment for the 1-hour ozone NAAQS by operation of law since Louisiana had not yet collected the required three years of data necessary to petition for redesignation to attainment.

In two separate submittals in the mid-1990's, Louisiana submitted requests to redesignate Calcasieu Parish and St. James Parish to attainment for the 1-hour ozone standard. As part of each submittal, the State provided the required ozone monitoring data and maintenance plan for each parish (each area includes only the one Parish) to ensure the areas would remain in attainment for 1-hour ozone for a period of 10 years. EPA approved Louisiana's requests to redesignate these Parishes to attainment for the 1-hour ozone standard and approved the maintenance plan on May 2, 1997 (62 FR 24036), with an effective date of June 2, 1997.

On April 30, 2004, EPA designated and classified areas for the 1997 8-hour ozone NAAQS (69 FR 23858), and published the final Phase 1 rule for implementation of the 1997 ozone NAAQS (69 FR 23951). Calcasieu and St. James Parishes were designated as unclassifiable/attainment for the 1997 ozone standard, effective June 15, 2004. Consequently, both of these attainment areas were required to submit a 10-year maintenance plan under section 110(a)(1) of the CAA and the Phase 1 rule. On May 20, 2005, EPA issued guidance providing information regarding how a state might fulfill the maintenance plan obligation established by the Act and the Phase 1 rule (Memorandum from Lydia N. Wegman to Air Division Directors, *Maintenance Plan Guidance Document for Certain 8-hour Ozone Areas Under Section 110(a)(1) of Clean Air Act,* May 20, 2005). This SIP revision satisfies the section 110(a)(1) CAA requirements for a plan that provides for implementation, maintenance, and enforcement of the 1997 8-hour ozone NAAQS in the Calcasieu and St. James Parish unclassifiable/attainment areas.

On December 22, 2006, the United States Court of Appeals for the District of Columbia Circuit issued an opinion that vacated EPA's Phase 1 Implementation Rule for the 1997 8-Hour Ozone Standard. (*South Coast Air Quality Management District.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006). Petitions for rehearing were filed with the Court, and on June 8, 2007, the Court modified the scope of the vacatur of the Phase 1 rule. See 489 F.3d 1245 (D.C. Cir. 2007), *cert. denied,* 128 S.Ct. 1065 (2008). The Court vacated those portions of the Rule that provide for regulation of the 1997 8-hour ozone NAAQS nonattainment areas under Subpart 1 in lieu of Subpart 2 and that allow backsliding with respect to new source review, penalties, milestones, contingency plans, and motor vehicle emission budgets. Consequently, the Court's modified ruling does not alter any requirements under the Phase 1 implementation rule for the 1997 8-hour ozone NAAQS for maintenance plans.

II. Analysis of the State's Submittals

On July 20, 2007, and August 24, 2007, the State of Louisiana submitted separate SIP revisions containing maintenance plans for the 1997 ozone NAAQS for Calcasieu and St. James Parishes. These July and August revisions provide 1997 ozone NAAQS maintenance plans for the two parishes named above, as required by section 110(a)(1) of the CAA and the provisions of EPA's Phase 1 Implementation Rule (*see* 40 CFR 51.905(a)(4)). The purpose of these plans is to ensure continued attainment and maintenance of the 1997 ozone NAAQS in Calcasieu and St. James Parishes.

In this action, EPA is approving the State's maintenance plans for the 1997 ozone NAAQS for the areas of Calcasieu and St. James Parishes because EPA finds that the LDEQ submittal meets the requirements of section 110(a)(1) of the CAA, EPA's rule, and is consistent with EPA's guidance. As required, these plans provide for continued attainment and maintenance of the 1997 ozone NAAQS in the area for 10 years from the effective date of the area's designation as unclassifiable/attainment for the 1997 ozone NAAQS, and include components illustrating how each Parish will continue in attainment of the 1997 ozone NAAQS and contingency measures. Each of the section 110(a)(1) plan components is discussed below.

(a) Attainment Inventory. The LDEQ developed comprehensive inventories of VOC and NO_X emissions from area, stationary, and mobile sources using 2002 as the base year to demonstrate maintenance of the 1997 ozone NAAQS for Calcasieu and St. James Parishes. The year 2002 is an appropriate year for the LDEQ to base attainment level emissions because States may select any one of the three years on which the 8-hour attainment designation for the 1997 ozone NAAQS was based (2001, 2002, and 2003). The State's submittals contain the detailed inventory data and summaries by source category. The 2002 base year inventory is a good choice. Using the 2002 inventory as a base year reflects one of the years used for calculating the air quality design values on which the 8-hour ozone designation decisions were based. It also is one of the years in the 2002–2004 period used to establish baseline visibility levels for the regional haze program.

A practical reason for selecting 2002 as the base year emission inventory is that Section 110(a)(2)(B) of the CAA and the Consolidated Emissions Reporting Rule (67 FR 39602, June 10, 2002)

require States to submit emissions inventories for all criteria pollutants and their precursors every three years, on a schedule that includes the emissions year 2002. The due date for the 2002 emissions inventory is established in the rule as June 2004. In accordance with these requirements, the State of Louisiana compiles a statewide EI for point sources on an annual basis. For stationary point sources, for Calcasieu and St. James Parishes, the LDEQ provided estimates for each commercial or industrial operation that emits 100 tons or more per year of VOC or NO_X in Appendix A of each maintenance plan. Stationary non-point source data was provided by E.H. Pechan & Associates, Inc., through the Central Regional Air Planning Association (CENRAP) using the methodology in ''Consolidation of Emissions Inventories'', section C, page 26. On-road mobile emissions of VOC and NO_X were estimated using EPA's MOBILE6.2 motor vehicle emissions factor computer model. Non-road mobile emissions data were derived from the ''Emission Inventory Development For Mobile Sources and Agricultural Dust Sources for the Central States'' produced by Sonoma Technology, Inc. for CENRAP in October 2004 using EPA's NONROAD 2004 non-road mobile emissions computer model. EPA finds that the LDEQ prepared the 2002 base year emissions inventories for the two Parishes consistent with EPA's long-established guidance memoranda.

In projecting data for the attainment year 2014 inventory, LDEQ used several methods to project data from the base year 2002 to the years 2008, 2011, and 2014. These projected inventories were developed using EPA-approved technologies and methodologies. Point source and non-point source projections were derived from the Emissions Growth Analysis System version 4.0 (EGAS 4.0). Non-road mobile projections were derived from EGAS 4.0, as well as from the National Mobile Inventory Model.

The following tables provide VOC and NO_X emissions data for the 2002 base attainment year inventory, as well as projected VOC and NO_X emission inventory data for the years 2008, 2011, and 2014. Please see the Technical Support Document (TSD) for additional emissions inventory data including projections by source category for each parish.

CALCASIEU PARISH VOC AND NO_X EMISSIONS INVENTORY BASELINE (2002) AND PROJECTIONS (2008, 2011, AND 2014)

[Tons per day]

Emissions	2002	2008	2011	2014
Total VOC	49.59	48.40	48.56	48.93
Total NO_X	133.35	133.18	135.99	138.94

As shown in the Table, total VOC and total NO_X emissions for Calcasieu Parish are projected to decrease slightly, and increase slightly, respectively, over the 10-year period of the maintenance plan. While emission projections for VOC indicate a downward trend through 2014, NO_X emission projections through 2014 show an increase of 5.59 tons per day, or approximately 4 percent (from 133.35 to 138.94 tpd). This projected increase is relatively small considering that it occurs over a period of approximately twelve (as from the 2002 baseline) years. The slightly upward trend in NO_X emissions results from projected increases in emissions for the point and non-point source categories. The EGAS system for projecting emissions tends to overstate future emissions since the system relies principally on economic growth for the projections. Specifically, the projected future emissions from NO_X point sources is overstated because the projections do not include reductions from regulatory or permit controls, or account for reductions from consent decrees. The control measures contained in rules for point and non-point stationary sources, which were not included in the EGAS program, which was used to project emissions for Calcasieu Parish, are expected to fully offset the slight increase in NO_X in Calcasieu Parish which was projected without the controls. Emissions of NO_X from non-road mobile and on-road mobile sources are projected to decrease.

ST. JAMES PARISH VOC AND NO_X EMISSIONS INVENTORY BASELINE (2002) AND PROJECTIONS (2008, 2011, AND 2014)

[Tons per day]

Emissions	2002	2008	2011	2014
Total VOC	7.81	7.90	8.09	8.28
Total NO_X	38.83	40.74	42.02	42.98

As shown in the table above, total VOC and total NO_X emissions for St. James Parish are both projected to increase slightly over the 10-year period of the maintenance plan. Emission projections for VOC indicate an increase of 0.47 tons through 2014, which is an increase of approximately 6 percent (from 7.81 to 8.28 tpd). The slightly upward trend in VOC emissions results primarily from the point source category, although there is also projected to be a very small increase from the nonpoint source category. VOC emissions from nonroad mobile and onroad mobile sources are projected to decrease. For NO_X, emission projections through 2014 show an increase of 4.15 tons per day, or approximately 10 percent (from 38.83 to 42.98 tpd). These projected increases are relatively small considering that they occur over a period of approximately twelve (as from the 2002 baseline) years. The slightly upward trend in NO_X emissions results from projected increases in emissions for the point and non-road mobile source categories. One will note that the absolute number of tons per day for both VOC and NO_X is very small, making any change (either an increase or a decrease) appear more pronounced when it is calculated as a percentage. In absolute terms, these are de minimis increases. Additionally, Louisiana's projections for the total NO_X emissions in 2014 did not

take into account regulatory controls which will reduce actual VOC and NO_X emissions from point and stationary non-point (area) sources, as well as non-road mobile sources. National rules which were not included in the growth estimates include EPA's rules for VOC emission standards for Consumer and Commercial Products and EPA's Locomotive and Marine Compression-Ignition Engines rule. Also, a consent decree which includes a large refinery in the area that was not accounted for in the projections is expected to further reduce actual VOC and NO_X emissions.

EPA is aware that a company has applied for a permit with the LDEQ to construct a large facility in St. James. We do not want to prejudge whether the permit will be issued, but the proposed emissions in the company's permit application for this facility: (1) Are large relative to this rural area's emissions (as noted above, the absolute number of tons per day for both VOC and NO_X is very small in this area), (2) ordinarily would not be accounted for using the EPA's methodologies for growth estimates in a maintenance plan, and (3) could potentially impact the Baton Rouge ozone nonattainment area. The company, however, will have to satisfy the Prevention of Significant Deterioration (PSD) SIP permitting requirements by demonstrating that this facility will not interfere with maintenance in St. James and will not contribute to nonattainment in the Baton Rouge area. With this safeguard, we believe continued maintenance in the St. James Parish will be protected.

Please see the TSD for more information on EPA's analysis and review of the State's methodologies, modeling data and performance, etc. for developing the base and attainment year inventories for the two areas. As shown in the tables and discussion above, the State has demonstrated that the future year ozone precursor emissions will be less than or similar to the 2002 base attainment year's emissions. The attainment inventories submitted by the LDEQ for these areas are consistent with the criteria as discussed in the EPA Maintenance Plan Guidance memo dated May 20, 2005 and in other guidance documents (please see the docket for additional information). Considering emissions projections together with reductions from measures not accounted for in the state's projections, EPA finds that the future emissions levels in 2008, 2011 and 2014 are expected to be less than or similar to emissions levels in 2002.

(b) Maintenance Demonstration. The primary purpose of a maintenance plan is to demonstrate how an area will continue to remain in compliance with the 1997 ozone standard for the 10-year period following the effective date of designation as unclassifiable/attainment. The end projection year is 10 years from the effective date of the attainment designation for the 1997 ozone NAAQS, which for Calcasieu and St. James Parishes was June 15, 2004. Therefore, these plans must demonstrate attainment through 2014. As discussed in section (a) Attainment Inventory above, Louisiana has identified the level of ozone-forming emissions in Calcasieu and St. James Parishes that were consistent with attainment of the NAAQS for ozone in 2002. Louisiana has projected VOC and NO_X emissions for the years 2008, 2011, and 2014 in Calcasieu and St. James Parishes and EPA finds that the future emissions levels in those years are expected to be similar to or below the emissions levels in 2002. Please see the TSD for more information on EPA's review and evaluation of the State's 2008, 2011, and 2014 projected emissions inventories.

Louisiana relies on several air quality measures that will provide for additional 8-hour ozone emissions reductions in Calcasieu and St. James Parishes. These measures include the following, among others: (1) Implementation of EPA's National Rules for VOC Emission Standards: For Automobile Refinish Coatings (63 FR 48806), for Consumer Products (63 FR 48819), and Architectural Coatings (63 FR 48848), for Consumer and Commercial Products Group II (Flexible Packaging Printing Materials, Lithographic Printing Materials, Letterpress Printing Materials) (71 FR 58745), for Consumer and Commercial Products Group III (Paper, Film, and Foil Coatings, Metal Furniture Coatings, and Large Appliance Coatings) (72 FR 57215), and for Consumer and Commercial Products Group IV (to be published in the fall of 2008); (2) enacting of specific requirements from EPA's Tier 2 Motor Vehicle Emission Standards (65 FR 6697), EPA's Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements (66 FR 5001), as well as EPA's Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control requirements (65 FR 6697); (3) EPA's required control of emissions from Non-road Diesel Engines and Fuels (69 FR 38958); and (4) EPA's Locomotive and Marine Compression-Ignition Engines rule (73 FR 16435). The purpose of these control measures is to reduce levels of 8-hour ozone, including the areas of Calcasieu and St. James Parishes.

(c) Ambient Air Quality Monitoring. The State of Louisiana has committed in its maintenance plans for Calcasieu and St. James Parishes to provide operation of an appropriate ozone monitoring network and to work with EPA in compliance with 40 CFR part 58 with regard to the continued adequacy of such a network.

The Convent monitoring site in St. James Parish has monitored attainment with the 1997 ozone standard from 2002 through 2007. The 1997 ozone NAAQS is 0.08 parts per million based on the three-year average of the fourth-highest daily maximum 8-hour average ozone concentration measured at each monitor within an area. The 1997 ozone standard is considered to be attained at 84 parts per billion (ppb). At the time the maintenance plan was submitted by LDEQ, the three most recent 8-hour ozone design values for the Convent site in St. James Parish are 73 ppb for 2003, 73 ppb for 2004, and 76 ppb for 2005. Also, the design value for St. James Parish for 2006 is 76 ppb, and the design value for 2007 is 77 ppb.

In Calcasieu Parish there are three monitoring sites, each of which has monitored attainment with the 1997 ozone standard from 2002 through 2005. At the time the maintenance plan was submitted by LDEQ, the three most recent 8-hour ozone design values for Calcasieu Parish are 78 ppb for 2003, 80 ppb for 2004, and 83 ppb for 2005. Also, the design value for Calcasieu Parish for 2006 is 82 ppb, and the design value for 2007 is 81 ppb.

(d) Contingency Plan. The section 110(a)(1) maintenance plans include contingency provisions to correct promptly any violation of the 1997 ozone NAAQS that occurs. The contingency indicator for the Calcasieu and St. James Parish maintenance plans is based upon monitoring data. The triggering mechanism for activation of contingency measures is a monitoring violation of the 1997 ozone standard. In these maintenance plans, if contingency measures are triggered, LDEQ is committing to implement the measures as expeditiously as practicable, but no longer than 24 months following the trigger.

The following contingency measures are identified for implementation: (1) Lowering VOC RACT applicability thresholds for Stage 1 gasoline controls, (2) NO_X controls on major sources (100 tpy and greater), (3) Emission offsets for permits (1.10 ratio for VOC and NO_X), and (4) Other measures deemed appropriate at the time as a result of advances in control technologies. These contingency measures and schedules for implementation satisfy EPA's long-standing guidance on the requirements of section 110(a)(1) of continued

attainment. Continued attainment of the 1997 ozone NAAQS in the areas of Calcasieu and St. James Parishes will depend, in part, on the air quality measures discussed previously (see II.(b) above). In addition, Louisiana commits to verify the 8-hour ozone status in each maintenance plan through appropriate ambient air quality monitoring, and to quality assure air quality monitoring data according to federal requirements.

III. Final Action

Pursuant to section 110 of the Act, EPA is approving the 1997 8-hour ozone maintenance plans for Calcasieu and St. James Parishes, which were submitted by LDEQ on July 20, 2007 and August 24, 2007, respectively, which ensure continued attainment of the 1997 8-hour ozone NAAQS through the year 2014. We have evaluated the State's submittals and have determined that they meet the applicable requirements of the Clean Air Act and EPA regulations, and is consistent with EPA policy.

EPA is publishing this rule without prior proposal because we view this as a non-controversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the SIP revision if relevant adverse comments are received. This rule will be effective on *December 8, 2008* without further notice unless we receive adverse comment by *November 10, 2008*. If we receive adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so now. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 8, 2008. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: September 29, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart T—Louisiana

■ 2. In § 52.970, the table in paragraph (e) entitled, ''EPA APPROVED LOUISIANA NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES'', is amended by adding two new entries to the end of the table as follows:

§ 52.970 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED LOUISIANA NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES

Name of SIP provision	Applicable geographic or non-attainment area	State submittal date/effective date	EPA approval date	Explanation
*	* *	*	*	* * *
1997 8-Hour Ozone Section 110 Maintenance Plan.	Calcasieu Parish (Lake Charles Area), LA.	7/20/07	10/09/08 [Insert FR page number where document begins].	
1997 8-Hour Ozone Section 110 Maintenance Plan.	St. James Parish, LA	8/24/07	10/09/08 [Insert FR page number where document begins].	

■ 3. Section 52.975, entitled, ''Redesignations and maintenance plans; ozone'', is amended by adding a new paragraph (j) as follows:

§ 52.975 Redesignations and maintenance plans; ozone.

* * * * *

(j) Approval. The Louisiana Department of Environmental Quality (LDEQ) submitted 1997 8-hour ozone NAAQS maintenance plans for the areas of Calcasieu and St. James Parishes on July 20, 2007, and August 24, 2007, respectively. The two areas are designated unclassifiable/attainment for the 1997 8-hour ozone standard. EPA determined these requests for Calcasieu and St. James Parishes were complete on October 5, 2007, and October 16, 2007, respectively. The maintenance plans meet the requirements of section 110(a)(1) of the Clean Air Act, and are consistent with EPA's maintenance plan guidance document dated May 20, 2005. The EPA therefore approved the 1997 8-hour ozone NAAQS maintenance plans for the areas of Calcasieu and St. James Parishes on *October 9, 2008*.

* * * * *

[FR Doc. E8–23867 Filed 10–8–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA–R06–RCRA–2008–0418; SW–FRL–8727–8]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Exclusion

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Environmental Protection Agency (EPA) is granting a petition submitted by Lockheed Martin Aeronautics Company to exclude (or delist) the sludge from its wastewater treatment plant generated by Lockheed Martin Aeronautics Company in Fort Worth, Texas from the lists of hazardous wastes. This final rule responds to the petition submitted by Lockheed Martin Aeronautics Company to delist F019 sludge generated from the facility's wastewater treatment plant.

After careful analysis and use of the Delisting Risk Assessment Software (DRAS), EPA has concluded the petitioned waste is not hazardous waste. This exclusion applies to 90 cubic yards per year of the F019 sludge. Accordingly, this final rule excludes the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA) when it is disposed in a Subtitle D Landfill.

DATES: *Effective Date:* October 9, 2008.

ADDRESSES: The public docket for this final rule is located at the Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and is available for viewing in EPA Freedom of Information Act review room on the 7th floor from 8 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Call (214) 665–6444 for appointments. The reference number for this docket is EPA–R06–RCRA–2008–0418. The public may copy material from any regulatory docket at no cost for the first 100 pages and at a cost of $0.15 per page for additional copies.

FOR FURTHER INFORMATION CONTACT: Ben Banipal, Section Chief of the Corrective Action and Waste Minimization Section, Multimedia Planning and Permitting Division (6PD–C), Environmental Protection Agency Region 6, 1445 Ross Avenue, Dallas, Texas 75202.

For technical information concerning this notice, contact Wendy Jacques, Environmental Protection Agency Region 6, 1445 Ross Avenue, (6PD–F), Dallas, Texas 75202, at (214) 665–7395, or *jacques.wendy@epa.gov.*

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Overview Information
A. What action is EPA finalizing?
B. Why is EPA approving this action?
C. What are the limits of this exclusion?
D. How will Lockheed Martin Aeronautics Company manage the waste if it is delisted?
E. When is the final delisting exclusion effective?
F. How does this final rule affect states?
II. Background
A. What is a delisting?
B. What regulations allow facilities to delist a waste?
C. What information must the generator supply?
III. EPA's Evaluation of the Waste Information and Data
A. What waste did Lockheed Martin Aeronautics Company petition EPA to delist?
B. How much waste did Lockheed Martin Aeronautics Company propose to delist?
C. How did Lockheed Martin Aeronautics Company sample and analyze the waste data in this petition?
IV. Public Comments Received on the proposed exclusion
Who submitted comments on the proposed rule?
V. Statutory and Executive Order Reviews

I. Overview Information

A. What action is EPA finalizing?

After evaluating the petition, EPA proposed, on May 19, 2008, to exclude the wastewater treatment plant sludge from the lists of hazardous waste under 40 CFR 261.31 and 261.32 (see 70 FR 41358). EPA is finalizing the decision to grant Lockheed Martin Aeronautics Company's delisting petition to have its waste water treatment sludge managed and disposed as non-hazardous waste provided certain verification and monitoring conditions are met.

B. Why is EPA approving this action?

Lockheed Martin Aeronautics Company's petition requests a delisting from the F019 waste listing under 40 CFR 260.20 and 260.22. Lockheed Martin Aeronautics Company does not

believe that the petitioned waste meets the criteria for which EPA listed it. Lockheed Martin Aeronautics Company also believes no additional constituents or factors could cause the waste to be hazardous. EPA's review of this petition included consideration of the original listing criteria and the additional factors required by the Hazardous and Solid Waste Amendments of 1984. See section 3001(f) of RCRA, 42 U.S.C. 6921(f), and 40 CFR 260.22 (d)(1)–(4) (hereinafter all sectional references are to 40 CFR unless otherwise indicated). In making the final delisting determination, EPA evaluated the petitioned waste against the listing criteria and factors cited in § 261.11(a)(2) and (a)(3). Based on this review, EPA agrees with the petitioner that the waste is non-hazardous with respect to the original listing criteria. If EPA had found, based on this review, that the waste remained hazardous based on the factors for which the waste as originally listed, EPA would have proposed to deny the petition. EPA evaluated the waste with respect to other factors or criteria to assess whether there is a reasonable basis to believe that such additional factors could cause the waste to be hazardous. EPA considered whether the waste is acutely toxic, the concentration of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and waste variability. EPA believes that the petitioned waste does not meet the listing criteria and thus should not be a listed waste. EPA's final decision to delist waste from Lockheed Martin Aeronautics Company's facility is based on the information submitted in support of this rule, including descriptions of the wastes and analytical data from the Fort Worth, Texas facility.

C. What are the limits of this exclusion?

This exclusion applies to the waste described in the petition only if the requirements described in 40 CFR part 261, Appendix IX, Table 1 and the conditions contained herein are satisfied.

D. How will Lockheed Martin Aeronautics Company manage the waste if it is delisted?

The sludge from Lockheed Martin Aeronautics Company will be disposed of in a RCRA Subtitle D landfill.

E. When is the final delisting exclusion effective?

This rule is effective October 9, 2008. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA, 42 U.S.C. 6930(b)(1), allows rules to become effective less than six months after the rule is published when the regulated community does not need the six-month period to come into compliance. That is the case here because this rule reduces, rather than increases, the existing requirements for persons generating hazardous waste. This reduction in existing requirements also provides a basis for making this rule effective immediately, upon publication, under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d).

F. How does this final rule affect states?

Because EPA is issuing this exclusion under the Federal RCRA delisting program, only states subject to Federal RCRA delisting provisions would be affected. This would exclude states which have received authorization from EPA to make their own delisting decisions.

EPA allows states to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA, 42 U.S.C. 6929. These more stringent requirements may include a provision that prohibits a Federally issued exclusion from taking effect in the state. Because a dual system (that is, both Federal (RCRA) and State (non-RCRA) programs) may regulate a petitioner's waste, EPA urges petitioners to contact the State regulatory authority to establish the status of their wastes under the State law.

EPA has also authorized some states (for example, Louisiana, Oklahoma, Georgia, and Illinois) to administer an RCRA delisting program in place of the Federal program; that is, to make state delisting decisions. Therefore, this exclusion does not apply in those authorized states unless that state makes the rule part of its authorized program. If Lockheed Martin Aeronautics Company transports the petitioned waste to or manages the waste in any state with delisting authorization, Lockheed Martin Aeronautics Company must obtain delisting authorization from that state before it can manage the waste as non-hazardous in the state.

II. Background

A. What is a delisting petition?

A delisting petition is a request from a generator to EPA, or another agency with jurisdiction, to exclude or delist from the RCRA list of hazardous waste, certain wastes the generator believes should not be considered hazardous under RCRA.

B. What regulations allow facilities to delist a waste?

Under §§ 260.20 and 260.22, facilities may petition EPA to remove their wastes from hazardous waste regulation by excluding them from the lists of hazardous wastes contained in §§ 261.31 and 261.32. Specifically, § 260.20 allows any person to petition the Administrator to modify or revoke any provision of 40 CFR parts 260 through 265 and 268. Section 260.22 provides generators the opportunity to petition the Administrator to exclude a waste from a particular generating facility from the hazardous waste lists.

C. What information must the generator supply?

Petitioners must provide sufficient information to EPA to allow EPA to determine that the waste to be excluded does not meet any of the criteria under which the waste was listed as a hazardous waste. In addition, the Administrator must determine, where he/she has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste and that such factors do not warrant retaining the waste as a hazardous waste.

III. EPA's Evaluation of the Waste Information and Data

A. What waste did Lockheed Martin Aeronautics Company petition EPA to delist?

On February 21, 2006, Lockheed Martin Aeronautics Company petitioned EPA to exclude from the lists of hazardous wastes contained in § 261.31, sludge (F019) generated from its facility located in Forth Worth, Texas. The waste falls under the classification of listed waste pursuant to § 261.31.

B. How much waste did Lockheed Martin Aeronautics Company propose to delist?

Specifically, in its petition, Lockheed Martin Aeronautics Company requested that EPA grant a standard exclusion for 90 cubic yards per year of sludge resulting from the treatment of waste waters from the manufacturing processes at its facility.

C. How did Lockheed Martin Aeronautics Company sample and analyze the waste data in this petition?

To support its petition, Lockheed Martin Aeronautics Company submitted:

- Analytical results of the toxicity characteristic leaching procedure and total constituent analysis for volatile

and semi volatile organics, pesticides, herbicides, dioxins/furans, PCBs and metals for six sludge samples;

- Analytical results from multiple pH leaching of metals; and
- Descriptions of the wastewater treatment process.

IV. Public Comments Received on the Proposed Exclusion

Who submitted comments on the proposed rule?

No comments were received on the Proposed Rule.

V. Statutory and Executive Order Reviews

Under Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it applies to a particular facility only. Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in section 203 of UMRA. Because this rule will affect only a particular facility, this final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, ''Federalism'', (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule. Similarly, because this rule will affect only a particular facility, this final rule does not have tribal implications, as specified in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this rule. This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The basis for this belief is that the Agency used the DRAS program, which considers health and safety risks to infants and children, to calculate the maximum allowable concentrations for this rule. This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866. This rule does not involve technical standards; thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988, ''Civil Justice Reform'', (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report which includes a copy of the rule to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability.

Lists of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Sec. 3001(f) RCRA, 42 U.S.C. 6921(f)

Dated: October 1, 2008.

Bill Luthans,

Acting Director, Multimedia Planning and Permitting Division, Region 6.

■ For the reasons set out in the preamble, 40 CFR part 261 is proposed to be amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

■ 2. In Table 1 of Appendix IX of Part 261 add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Waste Excluded Under §§ 260.20 and 260.22

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * *
Lockheed Martin Aeronautics Company.	Fort Worth, TX	Sludge (EPA Hazardous Waste Number F019) generated at a maximum rate of 90 cubic yards per calendar year after October 9, 2008. For the exclusion to be valid, Lockheed Martin Aeronautics Company must implement a verification testing program that meets the following Paragraphs: (1) Delisting Levels: All concentrations for those constituents must not exceed the maximum allowable concentrations in mg/l specified in this paragraph. Sludge Leachable Concentrations (mg/l): Antimony—8.45; Arsenic—0.657; Barium—100.0; Cadmium—1.00; Chromium—5.0; Chromium, Hexavalent—5.0; Cobalt—1040; Copper—1810; Cyanide—240; Lead—5.0; Mercury—0.20; Nickel—1040; Selenium—1.0; Silver—5.0; Vanadium—51.5; Zinc—15800; Acetone—40600; Acetonitrile—766; Carbon Disulfide—4400; Ethylbenzene—846; Methyl Ethyl Ketone—200.0; Methyl Isobutyl Ketone—3610; Methylene Chloride—6.16; Toluene—1180; Xylenes—745. (2) Waste Holding and Handling:

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		(A) Waste classification as non-hazardous can not begin until compliance with the limits set in paragraph (1) for sludge has occurred for two consecutive quarterly sampling events. (B) If constituent levels in any sample taken by Lockheed Martin Aeronautics Company exceed any of the delisting levels set in paragraph (1) for the sludge, Lockheed Martin Aeronautics Company must do the following: (i) notify EPA in accordance with paragraph (6) and (ii) manage and dispose the sludge as hazardous waste generated under Subtitle C of RCRA. (3) Testing Requirements: Upon this exclusion becoming final, Lockheed Martin Aeronautics Company may perform quarterly analytical testing by sampling and analyzing the sludge as follows: (A) Quarterly Testing: (i) Collect two representative composite samples of the sludge at quarterly intervals after EPA grants the final exclusion. The first composite samples may be taken at any time after EPA grants the final approval. Sampling should be performed in accordance with the sampling plan approved by EPA in support of the exclusion. (ii) Analyze the samples for all constituents listed in paragraph (1). Any composite sample taken that exceeds the delisting levels listed in paragraph (1) for the sludge must be disposed as hazardous waste in accordance with the applicable hazardous waste requirements. (iii) Within thirty (30) days after taking each quarterly sample, Lockheed Martin Aeronautics Company will report its quarterly analytical test data to EPA. If levels of constituents measured in the samples of the sludge do not exceed the levels set forth in paragraph (1) of this exclusion for two consecutive quarters or sampling events, Lockheed Martin Aeronautics Company can manage and dispose the non-hazardous sludge according to all applicable solid waste regulations. (B) Annual Testing: (i) If Lockheed Martin Aeronautics Company completes the quarterly testing specified in paragraph (3) above and no sample contains a constituent at a level which exceeds the limits set forth in paragraph (1), Lockheed Martin Aeronautics Company may begin annual testing as follows: Lockheed Martin Aeronautics Company must test two representative composite samples of the sludge for all constituents listed in paragraph (1) at least once per calendar year. (ii) The samples for the annual testing shall be a representative composite sample according to appropriate methods. As applicable to the method-defined parameters of concern, analyses requiring the use of SW–846 methods incorporated by reference in 40 CFR 260.11 must be used without substitution. As applicable, the SW–846 methods might include Methods 0010, 0011, 0020, 0023A, 0030, 0031, 0040, 0050, 0051, 0060, 0061, 1010A, 1020B, 1110A, 1310B, 1311, 1312, 1320, 1330A, 9010C, 9012B, 9040C, 9045D, 9060A, 9070A (uses EPA Method 1664, Rev. A), 9071B, and 9095B. Methods must meet Performance Based Measurement System Criteria in which the Data Quality Objectives are to demonstrate that samples of the Lockheed Martin Aeronautics Company sludge are representative for all constituents listed in paragraph (1). (iii) The samples for the annual testing taken for the second and subsequent annual testing events shall be taken within the same calendar month as the first annual sample taken. (iv) The annual testing report should include the total amount of waste in cubic yards disposed during the calendar year. (4) Changes in Operating Conditions: If Lockheed Martin Aeronautics Company significantly changes the process described in its petition or starts any processes that generate(s) the waste that may or could affect the composition or type of waste generated (by illustration, but not limitation, changes in equipment or operating conditions of the treatment process), it must notify EPA in writing and it may no longer handle the wastes generated from the new process as non-hazardous until the wastes meet the delisting levels set in paragraph (1) and it has received written approval to do so from EPA. Lockheed Martin Aeronautics Company must submit a modification to the petition complete with full sampling and analysis for circumstances where the waste volume changes and/or additional waste codes are added to the waste stream. (5) Data Submittals: Lockheed Martin Aeronautics Company must submit the information described below. If Lockheed Martin Aeronautics Company fails to submit the required data within the specified time or maintain the required records on-site for the specified time, EPA, at its discretion, will consider this sufficient basis to reopen the exclusion as described in paragraph (6). Lockheed Martin Aeronautics Company must: (A) Submit the data obtained through paragraph (3) to the Chief, Corrective Action and Waste Minimization Section, Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Dallas, Texas, 75202, within the time specified. All supporting data can be submitted on CD–ROM or some comparable electronic media. (B) Compile records of analytical data from paragraph (3), summarized, and maintained on-site for a minimum of five years. (C) Furnish these records and data when either EPA or the State of Texas requests them for inspection.

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES—Continued

Facility	Address	Waste description
		(D) Send along with all data a signed copy of the following certification statement, to attest to the truth and accuracy of the data submitted: ''Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (pursuant to the applicable provisions of the Federal Code, which include, but may not be limited to, 18 U.S.C. 1001 and 42 U.S.C. 6928), I certify that the information contained in or accompanying this document is true, accurate and complete. As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate and complete. If any of this information is determined by EPA in its sole discretion to be false, inaccurate or incomplete, and upon conveyance of this fact to the company, I recognize and agree that this exclusion of waste will be void as if it never had effect or to the extent directed by EPA and that the company will be liable for any actions taken in contravention of the company's RCRA and CERCLA obligations premised upon the company's reliance on the void exclusion.'' (6) Reopener: (A) If, anytime after disposal of the delisted waste Lockheed Martin Aeronautics Company possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or ground water monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified for the delisting verification testing is at level higher than the delisting level allowed by the Division Director in granting the petition, then the facility must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data. (B) If either the quarterly or annual testing of the waste does not meet the delisting requirements in paragraph 1, Lockheed Martin Aeronautics Company must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data. (C) If Lockheed Martin Aeronautics Company fails to submit the information described in paragraphs (5), (6)(A) or (6)(B) or if any other information is received from any source, the Division Director will make a preliminary determination as to whether the reported information requires EPA action to protect human health and/or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (D) If the Division Director determines that the reported information requires action by EPA, the Division Director will notify the facility in writing of the actions the Division Director believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing the facility with an opportunity to present information as to why the proposed EPA action is not necessary. The facility shall have 10 days from the date of the Division Director's notice to present such information. (E) Following the receipt of information from the facility described in paragraph (6)(D) or (if no information is presented under paragraph (6)(D)) the initial receipt of information described in paragraphs (5), (6)(A) or (6)(B), the Division Director will issue a final written determination describing EPA actions that are necessary to protect human health and/or the environment. Any required action described in the Division Director's determination shall become effective immediately, unless the Division Director provides otherwise. (7) *Notification Requirements:* Lockheed Martin Aeronautics Company must do the following before transporting the delisted waste. Failure to provide this notification will result in a violation of the delisting petition and a possible revocation of the decision. (A) Provide a one-time written notification to any state Regulatory Agency to which or through which it will transport the delisted waste described above for disposal, 60 days before beginning such activities. (B) Update one-time written notification, if it ships the delisted waste into a different disposal facility. (C) Failure to provide this notification will result in a violation of the delisting variance and a possible revocation of the decision.
*	*	* * * * *

[FR Doc. E8–24009 Filed 10–8–08; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

42 CFR Part 100

RIN 0906–AA55

National Vaccine Injury Compensation Program: Removal of Separate Category for Vaccines Containing Live, Oral, Rhesus-Based Rotavirus From the Vaccine Injury Table

AGENCY: Health Resources and Services Administration, HHS.

ACTION: Interim final rule.

SUMMARY: Through this interim final rule, the Secretary removes the category of vaccines containing live, oral, rhesus-based rotavirus, Category XII, from the Vaccine Injury Table (Table). The Table includes a list of covered vaccines under the National Vaccine Injury Compensation Program (VICP). The VICP provides a system of no-fault compensation for certain individuals who have been injured by covered childhood vaccines. This interim final rule is technical in nature. Even prior to the publication of this final rule, Category XII, the category that is being removed from the Table, only applied to vaccines that were administered on or before August 26, 2002. Given the applicable statute of limitations and the fact that Category XII limited its application to vaccines administered on or before August 26, 2002, the Secretary believes that no persons have claims that could be pursued under that category. Petitioners may still be able to file petitions relating to rotavirus vaccines under Category XI of the Table, the category of ''rotavirus vaccines,'' which does not include any associated injuries. Although the Secretary believes that the changes made in this interim final rule are noncontroversial as they do not affect the rights of any potential petitioners with the VICP, the Department is seeking public comment on this interim final rule. Written comments must be submitted on or before November 10, 2008. The Department will consider the comments received and will decide whether to amend the Table based on such comments.

DATES: This regulation is effective November 10, 2008.

ADDRESSES: You may submit written comments, identified by the Regulatory Information Number (RIN) 0906–AA55 by an any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: gevans@hrsa.gov.* Include RIN 0906–AA55 in the subject line of the message.
- *Mail:* Geoffrey Evans, M.D., Director, Division of Vaccine Injury Compensation, Healthcare Systems Bureau, Health Resources and Services Administration (HRSA), Room 11C–26, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.
- *Instructions:* All submissions received must include the agency name and RIN for this rulemaking. All comments received will be available for public inspection and copying without charge, including any personal information provided, at Parklawn Building, 5600 Fishers Lane Room 11C–26, Rockville, Maryland 20857, weekdays (Federal holidays excepted) between the hours of 8:30 a.m. and 5 p.m.

FOR FURTHER INFORMATION CONTACT: Geoffrey Evans, M.D., Director, Division of Vaccine Injury Compensation, Healthcare Systems Bureau, Health Resources and Services Administration, Parklawn Building, Room 11C–26, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number (301) 443–6593.

SUPPLEMENTARY INFORMATION:

The National Childhood Vaccine Injury Act of 1986, title III of Public Law 99–660 (42 U.S.C. 300aa–10 *et seq.*) established the National Vaccine Injury Compensation Program (VICP) for persons found to be injured by vaccines. Under this Federal program, petitions for compensation are filed with the United States Court of Federal Claims (Court). The Court, acting through special masters, makes findings as to eligibility for, and amount of, compensation. In order to gain entitlement to compensation under title XXI of the Public Health Service (PHS) Act for a covered vaccine, a petitioner must establish a vaccine-related injury or death, either by proving that the first symptom of an injury/condition, as defined by the Qualifications and Aids to Interpretation, occurred within the time period listed on the Vaccine Injury Table (Table), and therefore presumed to be caused by a vaccine (unless another cause is found), or by proof of vaccine causation, if the injury/condition is not on the Table or did not occur within the time period specified on the Table.

The statute authorizing the VICP provides for the inclusion of additional vaccines in the VICP when they are recommended by the Centers for Disease Control and Prevention (CDC) for routine administration to children. See section 2114(e)(2) of the PHS Act, 42 U.S.C. 300aa–14(e)(2). Consistent with section 13632(a)(3) of Public Law 103–66, the regulations governing the VICP provide that such vaccines will be included in the Table as of the effective date of an excise tax to provide funds for the payment of compensation with respect to such vaccines. (42 CFR 100.3(c)(5)). The statute authorizing the VICP also authorizes the Secretary to create and modify a list of injuries, disabilities, illnesses, conditions, and deaths (and their associated time frames) associated with each category of vaccines included on the Table. See sections 2114(c)(3) and 2114(e)(2) of the PHS Act, 42 U.S.C. 300aa–14(c)(3) and 300aa–14(e)(2).

Because the prerequisites for adding rotavirus vaccines to the VICP occurred, the Secretary published a final rule in the **Federal Register** (FR) on July 27, 1999, adding vaccines against rotavirus to the Table (64 FR 40517). Because the Secretary had not identified any illness, disease, injury or condition caused by vaccines against rotavirus, the category of vaccines was added to the Table with ''[n]o condition specified.'' The Secretary made clear that if he learned of any such illness, disease, injury or condition, he would consider amending the Table.

In a notice of proposed rulemaking published on July 13, 2001, the Secretary announced his findings that the condition of intussusception could reasonably be determined in some circumstances to be caused by vaccines containing live, oral, rhesus-based rotavirus (66 FR 36735). Based on those findings, the Secretary proposed amending the Table by adding to the Table vaccines containing live, oral, rhesus-based rotavirus (trade name Rotashield) as a distinct category, with intussusception listed as a covered Table injury. This proposal was based upon the recommendation by the CDC that Rotashield, the only rotavirus vaccine licensed in the United States (U.S.) at the time, no longer be administered to infants in the U.S. based on review of data indicating a strong association between Rotashield and intussusception in the 1 to 2 weeks following vaccination.

In a final rule published July 25, 2002, the Secretary made the changes proposed in the earlier rule (67 FR 48558). After these amendments, the Table included two categories of

rotavirus vaccines. The first, the general category of rotavirus vaccines (current Category XI), did not include an associated injury. This category of vaccines was effective as of October 22, 1998, the effective date of the excise tax enacted for rotavirus vaccines. See 42 CFR 100.3(a), 100.3(c)(3). The second, the more specific category of vaccines containing live, oral, rhesus-based rotavirus (current Category XII), contained an associated injury of intussusception with an onset interval of 0–30 days. This category of vaccines was also effective on October 22, 1998, but only applied to vaccines administered on or before August 26, 2002 (the effective date of the final rule imposing this category). Because the manufacturer of the only U.S.-licensed rotavirus vaccine voluntarily ceased distribution of the vaccine in July 1999, and because the CDC recommended that this vaccine no longer be routinely administered to children in the United States in October 1999, the Secretary concluded that it was unlikely that potential claims under Category XII would arise after the rule's publication. Because that final rule limited the Table injury of intussusception to live, oral, rhesus-based rotavirus vaccines administered on or before the effective date of the final rule, individuals who sought compensation for injuries related to such a vaccine administered after the effective date of the final rule were not entitled to the presumption of a Table injury for intussusception. Such individuals were still able to file claims under the Table's general category for rotavirus vaccines. No claims had been filed under the general category of rotavirus vaccines from August 2004 to January 2008. Licensure of a new rotavirus vaccine in 2006 led to one claim filed under this general category since January 2008.

The Secretary views this rule as technical in nature because he does not believe that any potential petitioners would be able to file a claim relying on the Table condition set forth in Category XII if it were retained on the Table. As explained above, petitioners are already limited to filing claims relying on this Category if the underlying rotavirus vaccine was administered on or before August 26, 2002. Moreover, petitioners are only entitled to the presumption of causation conferred by the Table injury associated with Category XII if the injury of intussusception's first symptom or manifestation of onset occurred within 0–30 days after the vaccine's administration. Because the applicable statute of limitations requires petitioners to file claims within three years of the injury's first symptom or manifestation of onset (or four years from such onset and two years from the date of death, in death cases), the Secretary believes that any person with a potential Table claim under Category XII would be time-barred. The statute of limitations available to certain petitioners for vaccines or injuries newly added to the Table under section 2116(b) of the PHS Act, 42 U.S.C. 300aa–16(b), would no longer be available for potential claims concerning the rotavirus vaccine because that section imposes a limitations period of two years from the effective date of the Table change.

Although the CDC in 1999 recommended that the only then-available rotavirus vaccine licensed in the U.S. (which was a live, oral, rhesus-based product), no longer be administered to infants in the U.S., FDA has subsequently licensed two additional rotavirus vaccines, and the excise tax passed for rotavirus vaccines remains in effect. Thus, the general category of rotavirus vaccines continues to be covered under the VICP under the Table's Category XI for all newly licensed rotavirus vaccines. No corresponding injury/condition is listed in this category since no injuries have been associated with these products.

Because the Table category of rotavirus vaccines with the associated injury of intussusception is no longer available to prospective petitioners, this interim final rule is an effort to minimize confusion relating to available Table categories.

All petitions filed concerning rotavirus vaccines are still subject to the applicable statute of limitations. The filing limitations applicable to petitions filed with the VICP are set out in section 2116(a) of the PHS Act (42 U.S.C. 300aa–16(a)). Although section 2116(b) of the PHS Act lays out specific exceptions to these statutes of limitations that apply when the effect of a revision to the Table makes a previously ineligible person eligible to receive compensation or when an eligible person's likelihood of obtaining compensation significantly increases, this change would not trigger that section.

Justification for Omitting Notice of Proposed Rulemaking

This amendment to 42 CFR 100.3 is technical in nature. As explained above, the Secretary believes that no persons have claims that could be pursued under the category that is being removed from the Table through this interim final rule. For this reason, the Secretary has determined under 5 U.S.C. 553 and Departmental policy that it is unnecessary and impractical to follow proposed rulemaking procedures.

Economic and Regulatory Impact

Regulatory Flexibility Act and Executive Order 12866

Executive Order 12866, as amended by Executive Orders 13258 and 13422, directs agencies to assess all costs and benefits of available regulatory alternatives and, when rulemaking is necessary, to select regulatory approaches that provide the greatest net benefits (including potential economic, environmental, public health, safety, distributive and equity effects). In addition, under the Regulatory Flexibility Act, if a rule has a significant economic effect on a substantial number of small entities the Secretary must specifically consider the economic effect of a rule on small entities and analyze regulatory options that could lessen the impact of the rule. Executive Order 12866, as amended by Executive Orders 13258 and 13422, requires that all regulations reflect consideration of alternatives, of costs, of benefits, of incentives, of equity, and of available information. Regulations must meet certain standards, such as avoiding an unnecessary burden. Regulations which are ''significant'' because of cost, adverse effects on the economy, inconsistency with other agency actions, effects on the budget, or novel legal or policy issues, require special analysis.

The Secretary has determined that no resources are required to implement the requirements in this Interim Final Rule. Therefore, in accordance with the Regulatory Flexibility Act of 1980 (RFA), and the Small Business Regulatory Enforcement Act of 1996, which amended the RFA, the Secretary certifies that this rule will not have a significant impact on a substantial number of small entities.

The Secretary has also determined that this Interim Final Rule does not meet the criteria for a major rule as defined by Executive Order 12866, as amended by Executive Orders 13258 and 13422, and would have no major effect on the economy or Federal expenditures. The Secretary has determined that the Interim Final Rule is not a ''major rule'' within the meaning of the statute providing for Congressional Review of Agency Rulemaking, 5 U.S.C. 801.

Unfunded Mandates Reform Act of 1995

Similarly, it will not have effects on State, local, and tribal governments and on the private sector such as to require

consultation under the Unfunded Mandates Reform Act of 1995.

Federalism Impact Statement

The Secretary has also reviewed this Interim Final Rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The Interim Final Rule would not have ''substantial direct effects on the States, or on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Impact on Family Well-Being

This Interim Final Rule will not adversely affect the following family elements of family well-being: family safety, family stability, marital commitment; parental rights in the education, nurture and supervision of their children; family functioning, disposable income or poverty; or the behavior and personal responsibility of youth, as determined under section 654(c) of the Treasury and General Government Appropriations Act of 1999. As stated above, this Interim Final Rule will modify the Table included in the regulations governing the VICP based on legal authority.

Impact of the New Rule

This Interim Final Rule is technical in nature and will not prevent otherwise eligible individuals with claims of injuries or deaths allegedly resulting from rotavirus vaccines (including vaccines containing live, oral, rhesus-based rotavirus) from filing claims with the VICP.

Paperwork Reduction Act

This rule has no information collection requirements.

List of Subjects in 42 CFR Part 100

Biologics, Health insurance, and Immunization.

Dated: July 30, 2007.

Elizabeth M. Duke,

Administrator, HRSA.

Approved: June 23, 2008.

Michael O. Leavitt,

Secretary, HHS.

Editorial Note: This document was received in the Office of the Federal Register on Monday, October 6, 2008.

■ Accordingly, 42 CFR part 100 is amended as set forth below.

PART 100—VACCINE INJURY COMPENSATION

■ 1. The authority citation for 42 CFR part 100 continues to read as follows:

Authority: Sec. 215 of the PHS Act (42 U.S.C. 216); secs. 312 and 313 of Public Law 99–660, 100 Stat. 3779–3782 (42 U.S.C. 300aa–1 note); sec. 2114(c) and (e) of the PHS Act, 100 Stat. 3766 and 107 Stat. 645–646 (42 U.S.C. 300aa–14(c) and (e)); sec. 904(b) of Public Law 105–34, 111 Stat. 873; sec. 1503 of Public Law 105–277, 112 Stat. 2681–741; and sec. 523(a) of Public Law 106–170, 113 Stat. 1927–1928.

§ 100.3 [Amended]

■ 2. Section 100.3 is amended as follows:

■ A. In paragraph (a) in the Vaccine Injury Table remove Item XII and redesignate Items XIII and XIV as XII and XIII respectively.

■ B. In paragraph (c)(3) remove the second sentence; in paragraph (c)(4) remove the words ''(Item XIII of the Table)'' and add in their place ''(Item XII of the Table)''; in paragraph (c)(5) remove the words ''(Item XIV of the Table)'' and add in their place ''(Item XIII of the Table)''.

[FR Doc. E8–24017 Filed 10–8–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 393

[Docket No. MARAD–2008 0096]

RIN 2133–AB70

America's Marine Highway Program

AGENCY: Maritime Administration, DOT.

ACTION: Interim final rule with request for comments.

SUMMARY: The purpose of this interim final rule is to solicit recommendations for short sea transportation routes to be designated as Marine Highway Corridors and to solicit applications from interested parties to participate in a short sea transportation Project, as required by section 55605(c) of Public Law 110–140, the Energy Independence and Security Act of 2007. Section 55601(d) specifically states, that ''[t]he Secretary may designate a project to be a short sea transportation project if the Secretary determines that the project may—offer a waterborne alternative to available landside transportation services using documented vessels; and provide transportation services for passengers or freight (or both) that may reduce congestion on landside infrastructure using documented vessels.'' Further, section 55605 defines short sea transportation as meaning ''the carriage by vessel of cargo that is contained in intermodal cargo containers and loaded by crane on the vessel or loaded on the vessel by means of wheeled technology; and that is loaded at a port in the United States and unloaded either at another port in the United States or at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States.'' Section 55605(c) directs the Secretary of Transportation to promulgate interim regulations not later than 90 days after the date of enactment of this Act. The Secretary of Transportation will delegate authority to the Maritime Administrator to administer this program. Final regulations are to be issued no later than October 1, 2008. The program established in Section 55605 will be titled ''America's Marine Highway Program.'' A final regulation will be published following this public comment period. Solicitations from applicants desiring Marine Highway Project designation will be initiated through notification in the **Federal Register** at a future date.

DATES:

The effective date of this interim regulation is November 10, 2008. Any further comments are due by February 6, 2009.

ADDRESSES: You may submit comments [identified by DOT Docket Number MARAD–2008–0096] by any of the following methods:

- *Web Site: http://www.regulations.gov.* Follow the instructions for submitting comments on the electronic docket site.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 of the Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC, between 9 am and 5 pm, 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 under Regulatory Notices.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room PL–401 of the Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Michael Gordon, Office of Intermodal System Development, Marine Highways and Passenger Services, at (202) 366–5468, via e-mail at *michael.gordon@DOT.gov,* or by writing to the Office of Marine Highways and Passenger Services, MAR–520, Suite W21–315, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Background

Congestion is one of the single largest threats to America's economic prosperity and way of life. Overall, the Department of Transportation estimates that congestion on our roads, bridges, railways, and in certain ports costs the United States as much as $200 billion a year and this figure will continue to grow. In addition to significant existing congestion, an increasing growth in trade will place even more demands on our capability to move freight and people through an already strained transportation network.

Over the next 15 years, experts project that cargoes moving through our ports will nearly double. Federal Highway Administration, ''The Freight Story: A National Perspective on Enhancing Freight Transportation''. Most of this additional cargo will ultimately move along our surface transportation corridors, many of which are already at or beyond capacity. Since 92 percent of all domestic freight currently moves on road and rail infrastructure, the implications of this growth are significant. U.S. Department of Transportation ''Freight Analysis Framework''.

The challenge we face is to use all transportation modes available to address the looming crisis. America's Marine Highway can be a viable alternative transportation mode. Expanding the Marine Highway can be cost effective and will require less new infrastructure than surface transportation alternatives, represents significant fuel savings, while offering a resilient and redundant means of transportation. The Marine Highway, consisting of more than 25,000 miles of inland, intracoastal, and coastal waterways, already transports about 1 billion tons of domestic cargo annually, and has considerable room to grow. U.S. Army Corps of Engineers, ''Waterborne Commerce of the United States'' (2005). The following is an example of the benefit the Marine Highway can offer. An East Coast container-on-barge operation that currently runs between Baltimore, MD, and Norfolk, VA, relieves the busy I–95 and I–64 corridors of almost 2,000 trucks every week. That is equal to 3 lanes of bumper-to-bumper trucks eight miles long for about ⅛ the amount of fuel. Transporting freight by water has traditionally been used for the movement of bulk commodities such as coal, petroleum, grain, and lumber, yet growing freight congestion on certain highway Corridors, combined with innovative approaches, could encourage shippers to consider marine transportation for container cargo.

In many cases, the Marine Highway runs parallel to some of the most congested highway Corridors in the country. On September 10, 2007, the Department of Transportation announced six interstate routes as Corridors of the Future: I–95 from Florida to the Canadian border; I–70 in Missouri, Illinois, Indiana, and Ohio; I–15 in Arizona, Utah, Nevada, and California; I–5 in California, Oregon, and Washington, I–10 from California to Florida, and I–69 from Michigan to Texas. The designation of waterways along some of these and other clogged roadways and rail routes as Marine Highway Corridors could reduce congestion, pollution, and energy usage, increase freight system reliability, and improve the life of citizens who live in proximity to the highway.

The Secretary, in consultation with the EPA, will submit a Report to Congress by December 19, 2008. The report will include a description of the activities conducted under the program, and any recommendations for further legislative or administrative action that the Secretary of Transportation considers appropriate.

Program Description

In this rulemaking, the Department of Transportation is establishing interim procedures for the implementation of a new short sea transportation program, America's Marine Highway Program. Within this program, this rulemaking sets forth procedures for recommendations for designation of Marine Highway Corridors, and separate procedures for applications for Marine Highway Projects.

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This rulemaking is not significant under section 3(f) of Executive Order 12866, and as a consequence, the Office of Management and Budget (OMB) did not review the rule. This rulemaking is also not significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). It is also not considered a major rule for purposes of Congressional review under Public Law 104–121. Designation of Marine Highway Corridors and Marine Highway Projects does not have an immediate economic impact. Following designation, individual Corridor and Project components that may have an economic impact will be determined as they are identified.

Executive Order 13132

We analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism'') and have determined that it does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. The regulations herein have no substantial effects on the States, the current Federal-State relationship, or the current distribution of power and responsibilities among local officials. Therefore, we did not consult with State and local officials because it was not necessary.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires us to assess the impact that regulations will have on small entities. After analysis of this proposed rule, the Maritime Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, although we do anticipate that a small number of small entities will participate in the program and any financial impact is expected to be minimal.

Environmental Assessment

We have analyzed this proposed rule for purposes of compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and we have concluded that designation of Marine Highway Corridors and Marine Highway Projects does not have an immediate environmental impact. Following designation, individual Corridor and Project components that may have an environmental impact will be determined as they are identified.

This program envisions the use of coastwise vessels to relieve congestion on highways, and any overall environmental impact should be positive. The Texas Transportation Institute, ''A Modal Comparison of Domestic Freight Transportation Effects on the General Public'' (December 2007).

Paperwork Reduction Act

This interim regulation establishes a new requirement for the collection of information. The Office of Management and Budget (OMB) will be requested to review and approve the information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. Sec. 3501, *et seq.*).

In accordance with the Paperwork Reduction Act, this document announces the Maritime Administration's intentions to request approval for the public to review this interim regulation.

—Copies of this request may be obtained from the Office of Marine Highways and Passenger Services, MAR–520, Suite W21–315, 1200 New Jersey Avenue, SE., Washington, DC 20590.
—*Title of Collection:* America's Marine Highway Program, 46 CFR Part 393.
—*Type of Request:* New request for information collection.
—*OMB Control Number:* 2133–NEW.
—*Form Number:* None.
—*Expiration Date of Approval:* Three years following approval by the Office of Management and Budget.
—*Summary of Collection of Information:* Persons seeking to make recommendations for designation of Marine Highway Corridors may provide those recommendations in the form of comments to this interim final rulemaking. Persons seeking nomination of a Project under America's Marine Highway Program will be required to file a written application. No form or particular format will be required for the application. However, information about the applicant and the proposal will be necessary for proper analysis of the nominated project.
—*Need for and Use of the Information:* The information collected will be used to revise and publish a final regulation implementing America's Marine Highway Program. Without the information the Maritime Administration would not benefit from public review of the program.
—*Description of Respondents:* Individuals, partnerships or coalitions seeking designation.
—*Annual Responses:* Once the Program is implemented, Applications for designation as Projects will be solicited 1–2 times per year, depending on level of interest in the program. The agency anticipates receiving approximately 20 responses per year. Recommendations for future designations of Marine Highway Corridors may be provided at any time, although it is not anticipated that additional Marine Highway Corridors will be designated for several years following implementation of the Program.
—*Annual Burden:* 30 hours.

Unfunded Mandates Reform Act

This rulemaking does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of $100 million or more to either State, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative that achieves this objective of U.S. policy. Department of Transportation guidance requires the use of a revised threshold figure of $136.1 million, which is the value of $100 million in 2008 after adjusting for inflation.

Consultation and Coordination With Indian Tribal Governments

Executive Order 13175—Consultation and Coordination With Indian Tribal Governments, dated November 6, 2000, seeks to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian Tribal Governments, and to reduce the imposition of unfunded mandates upon Indian tribes. Designation of Marine Highway Corridors and Marine Highway Projects does not have an immediate impact on Indian tribes. Following designation, individual Corridor and Project components that may have an impact on Indian tribes will be determined as they are identified.

Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.regulations.gov*.

List of Subjects in 46 CFR Part 393

Marine Highway, Short sea transportation, Vessels.

■ Accordingly, the Maritime Administration amends 46 CFR chapter II by adding part 393 to read as follows:

PART 393—AMERICA'S MARINE HIGHWAY PROGRAM

Sec.

393.1 Purpose.
393.2 Definitions.
393.3 Marine Highway Corridors.
393.4 Marine Highway Projects.
393.5 Incentives, Impediments and Solutions.
393.6 Research on Marine Highway Transportation.
Appendix to Part 393—Criteria for Initial Assessment of Marine Highway Project Applications.

Authority: Energy Independence and Security Act of 2007, Sections 1121, 1122, and 1123 of Public Law 110–140, approved December 19, 2007 (121 STAT. 1492).

§ 393.1 Purpose.

(a) This part prescribes interim regulations establishing a short sea transportation program as set forth in the Energy Independence and Security Act of 2007 (Sections 1121, 1122, and 1123 of Pub. L. 110–140, approved December 19, 2007 (121 STAT. 1492)).

(b) The purpose of America's Marine Highway Program is described in Section 1121. Section 1121 states that ''[t]he Secretary shall designate short sea transportation routes as extensions of the surface transportation system to focus public and private efforts to use the waterways to relieve landside congestion along coastal corridors.'' America's Marine Highway Program consists of four primary components:

(1) Marine Highway Corridor Designations: This regulation establishes the goals and methods by which specific Marine Highway Corridors will be identified and designated by the Secretary of Transportation. The purpose of designating Marine Highway Corridors is to integrate America's Marine Highway into the surface transportation system. The Marine Highway Corridors will serve as extensions of the surface transportation system and consist of the

navigable coastal, inland, and intracoastal waters of the United States, to support the movement of passengers and cargo between U.S. ports, or between U.S. ports and unloaded either at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States, relieving landside congestion. America's Marine Highway Program will encourage the development of multi-jurisdictional coalitions and focus public and private efforts and investment on shifting freight and passengers from congested roads and rail lines to effectively utilize Marine Highway Corridors.

(2) Marine Highway Project Designations: This regulation establishes the goals and methods by which specific Marine Highway Projects will be identified and designated by the Secretary of Transportation. The purpose is to mitigate landside congestion by designating projects that, if successfully started, expanded, or otherwise enhanced, would provide the greatest benefit to the public in terms of congestion relief, improved air quality, reduced energy consumption, infrastructure construction and maintenance savings, improved safety, and long-term economic viability. Designated Marine Highway Projects may receive direct support from the Department of Transportation as described in this section.

(3) Incentives, Impediments and Solutions: This section outlines how the Department of Transportation, in partnership with public and private entities, will identify potential incentives, seek solutions to impediments to encourage utilization of America's Marine Highway and incorporate it, including ferries, in State and regional transportation planning.

(4) Research: This section describes the research that the Department of Transportation, working with the Environmental Protection Agency, will conduct to support America's Marine Highway, within the limitations of available resources, and to encourage multi-state planning. Research would include environmental and transportation impacts (benefits and costs), technology, vessel design, and solutions to impediments to the Marine Highway.

(c) In addition, vessels engaged in Marine Highway operations are qualified for Capital Construction Fund (CCF) benefits. This program was created to assist owners and operators of U.S.-flag vessels in accumulating the capital necessary for the modernization and expansion of the U.S. merchant marine by encouraging construction, reconstruction, or acquisition of vessels through the deferment of Federal income taxes on certain deposits of money placed into a CCF.

§ 393.2 Definitions.

For the purposes of this part:

Administrator. The Maritime Administrator, U.S. Maritime Administration, U.S. DOT, who will be authorized by the Secretary of Transportation to administer America's Marine Highway Program.

Applicant. An entity that applies for designation of a Marine Highway Corridor or Project under this regulation.

Coastwise Shipping Laws. Laws, including the Jones Act, as set forth in Chapter 551 of Title 46, United States Code.

Corridor Sponsor. An entity that recommends a Corridor for designation as a Marine Highway. Corridor sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, State governments (including Departments of Transportation) and port authorities, who may submit recommendations for designation as a Marine Highway Corridor.

Domestic Trade. Trade between points in the United States.

Lift-on/Lift-off (LO/LO) Vessel. A vessel of which the loading and discharging operations are carried out by cranes and derricks.

Marine Highway Corridor. A short sea transportation route that serves as an extension of the surface transportation system to relieve landside congestion along the highway corridor. It is one or more navigable waterways that, if used to transport freight or passengers, would provide measurable benefits to a surface transportation route in terms of reduced congestion, energy savings, reduced emissions, improved safety, and/or reduced infrastructure costs.

Marine Highway (or Short Sea Transportation). The carriage by vessel of passengers and/or cargo that is loaded at a port in the United States and unloaded either at another port in the United States, or that is loaded at a port in the United States and unloaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System; or loaded at a port in Canada located in the Great Lakes Saint Lawrence Seaway System and unloaded at a port in the United States.

Project Sponsor. Project sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, state governments (including State Departments of Transportation) and port authorities, who may submit applications for designation as a Marine Highway Project.

Roll-on/Roll-off (RO/RO) Vessel. Any vessel that has ramps allowing cargo to be loaded and discharged by means of wheeled vehicles so that cranes are not required.

Secretary. The Secretary of Transportation.

United States Documented Vessel. A vessel documented under *46 U.S.C. Chapter 121.*

§ 393.3 Marine Highway Corridors.

(a) *Summary.* The purpose of this section is to designate specific routes as Marine Highway Corridors. Corridors will be established by the Maritime Administrator. The goal of this designation process is to accelerate the development of multi-State and multi-jurisdictional Marine Highway Corridors to relieve landside congestion along highway and railroad corridors. Designation will encourage public/private partnerships, and help focus investment on those Marine Highway Corridors that offer the maximum potential public benefit in congestion reduction, energy efficiency, emissions reduction and other categories. Navigable waterways that parallel Corridors already designated as ''Corridors of the Future'' under DOT's National Strategy to Reduce Congestion will be fast-tracked for designation as Marine Highway Corridors.

(b) *Objectives.* The primary objectives of the designation of Marine Highway Corridors are to:

(1) Establish Marine Highway Corridors as ''extensions of the surface transportation system'' as provided by Section 1121 of the Energy Independence and Security Act of 2007.

(2) Develop multi-jurisdictional coalitions that focus public and private efforts to use the waterways to relieve landside congestion along freight and passenger Corridors.

(3) Obtain public benefit by shifting freight and passengers in measurable terms from congested highway and railroad routes to Marine Highway Corridors. Benefits, while primarily aimed at reducing congestion, can also include air quality and emissions improvements, reduced energy consumption, improved freight reliability and enhanced safety.

(4) Identify potential savings that could be realized by providing an alternative to surface transportation infrastructure construction and maintenance.

(c) *Designation of Marine Corridors.* The Department of Transportation will solicit recommendations for designation of specific routes as Marine Highway Corridors. Recommendations will be accepted from Corridor sponsors. Corridor sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, state governments (including State Departments of Transportation) and port authorities. When responding to specific solicitations for Marine Highway Corridors by the Secretary of Transportation, the following information will be required:

(1) *Physical Description of Proposed Marine Highway Corridor:* The recommendation should describe the proposed Marine Highway Corridor, and its connection to existing or planned transportation infrastructure and intermodal facilities. Include key navigational factors such as available draft, channel width, bridge or lock clearance and identify if they could limit service.

(2) *Surface Transportation Corridor Served:* Provide a summary of the surface transportation Corridor that the Marine Highway would benefit. Include a description of the Corridor, its primary users, the nature, locations and occurrence of congestion, urban areas affected, and other geographic or jurisdictional issues that impact its overall operation and performance.

(3) *Involved Parties:* Provide the organizational structure of parties recommending the Corridor designation including business affiliations, and private sector stakeholders. Multi-jurisdictional coalitions may include State Departments of Transportation, Metropolitan Planning Organizations, municipalities and other governmental entities that have been engaged and the extent to which they support the corridor designation.

(4) *Passengers and Freight:* Identify number of likely passengers and/or quantity of freight that are candidates for shifting to the proposed Marine Highway Corridor. If known, include specific shippers, manufacturers, distributors or other entities that could benefit from a Marine Highway alternative, and the extent to which these entities have been engaged.

(5) *Congestion Reduction:* Describe extent to which the proposed Corridor could relieve landside congestion in measurable terms. Include any known offsetting infrastructure savings (either construction or maintenance) that would result from the project.

(6) *Public environmental, energy or safety benefits:* The recommendation should provide, if known, the savings over status quo in fuel, emissions, or safety improvements that could be derived from shifting some capacity to the proposed Marine Highway Corridor. It should also consider the implications future growth may have on the proposal and include any affiliations with environmental advocacy groups or community groups that support the Corridor designation.

(7) *Impediments:* Describe known or anticipated obstacles to shifting capacity to the proposed Marine Highway Corridor. Include any strategies, either in place or proposed, to deal with the impediments.

(d) *Action by the Department of Transportation.* All Marine Highway Corridor designation recommendations will be evaluated based upon the preceding criteria. An announcement of waterways designated as Marine Highway Corridors will appear in the **Federal Register**. In certain cases the Secretary of Transportation may designate a Marine Highway Corridor without receipt of a recommendation. The Department of Transportation will coordinate with Corridor sponsors to identify the most appropriate actions to support the Corridors. Support could include any of the following, as appropriate and within agency resources:

(1) Promote the Corridor with appropriate governmental, State and local transportation planners, private sector entities or other decision-makers.

(2) Coordinate with ports, State Departments of Transportation, Metropolitan Planning Organizations, localities, other public agencies and the private sector to support the designated corridor. Efforts can be aimed at obtaining access to land or terminals, developing landside facilities and infrastructure, and working with regional, State or local governmental entities to remove barriers to self-supporting operations.

(3) Pursue memorandums of agreement with other federal entities to transport federally owned or generated cargo using waterborne transportation along the Marine Highway Corridor, when practical or available.

(4) Assist with collection and dissemination of data for the designation and delineation of Marine Highway Corridors as available resources permit.

(5) Work with Federal entities and state and local governments to include designated Corridors in transportation planning.

(6) Bring specific impediments to the attention of the Marine Highway Advisory Board.

(7) Conduct research on issues specific to designated Corridors as available resources permit.

(8) Communicate with designated Corridor coalitions to provide ongoing support and identify lessons learned and best practices for the overall Marine Highway program.

(9) Collect data and disseminate data for the designation and delineation of short sea transportation routes.

§ 393.4 Marine Highway Projects.

(a) *Summary.* The purpose of this section is to designate specific Marine Highway Projects to mitigate landside congestion. The goal is to identify Projects that, if successfully started, expanded, or otherwise enhanced, would provide the greatest benefit to the public. Public benefits to be considered include road and railroad congestion relief (particularly in urban areas and along corridors with national significance), reduced emissions or energy consumption, infrastructure construction and maintenance savings, improved safety, and long-term economic viability. Designation can help focus public and private investment on pre-identified projects that offer the maximum potential public benefit. Designated Marine Highway Projects may receive support from the Department of Transportation as described in this section.

(b) *Objectives.* The primary objectives of the designation of Marine Highway Projects are:

(1) Reduce landside congestion.

(2) Identify proposed services that represent the greatest public benefit as measured in congestion relief, energy savings, reduced emissions and improved safety.

(3) Focus resources on those projects that offer the greatest likelihood of success.

(4) Identify potential savings by providing an alternative to surface transportation infrastructure construction and maintenance.

(5) Develop best practices for the Marine Highway Program.

(6) Provide specific examples with performance measures and quantifiable outcomes for the Marine Highway.

(c) *Designation of Marine Highway Projects.* The Department of Transportation will solicit applications for designation as specific Marine Highway Projects. Applications will be accepted from a Project sponsor. Project sponsors must be public entities, including but not limited to, Metropolitan Planning Organizations, state governments (including State Departments of Transportation) and port authorities. Project sponsors are

encouraged to develop coalitions and public/private partnerships with the common objective of developing the specific Marine Highway Project. Potential partners can include vessel owners and operators, third party logistics providers, trucking companies, shippers, port authorities, state, regional and local transportation planners, or any combination of entities working in collaboration under a single application. Candidate Projects can be new starts or existing Marine Highway operations where expansion or improvements present maximum public benefit. Applications must meet the requirements of coastwise shipping laws and all applicable federal, state and local laws.

(d) *Action by the Department of Transportation.* (1) The Department will evaluate and select Projects based on a cost-benefit analysis and technical review of the information provided by the applicant. The Department will publish, and update periodically, the application information required and the factors that will be considered in the evaluation. Each factor will be weighed according to its relative cost or benefit. Applicants may request that other factors be considered in the cost-benefit analyses.

(2) Projects that support a designated Marine Highway Corridor, receive a favorable technical review, and meet other minimum standards as defined by the Department, may be nominated by the Maritime Administrator for selection by the Secretary.

(3) Upon designation as a Marine Highway Project, the Department of Transportation will coordinate with the Project sponsor to identify the most appropriate Departmental actions to support the project. Support could include any of the following, as appropriate and within agency resources:

(i) Promote the service with appropriate governmental, regional State or local transportation planners, private sector entities or other decision makers.

(ii) Coordinate with ports, State Departments of Transportation, Metropolitan Planning Organizations, localities, other public agencies and the private sector to support the designated service. Efforts can be aimed at identifying resources, obtaining access to land or terminals, developing landside facilities and infrastructure, and working with regional, State or local governmental entities to remove barriers to success.

(iii) Pursue memorandums of agreement with other federal entities to transport federally owned or generated cargo using the services of the designated project, when practical or available.

(iv) In cases where transportation infrastructure is needed, Project sponsors may request to be designated on the Secretary of Transportation's list of high-priority transportation infrastructure projects under Executive Order 13274, ''Environmental Stewardship and Transportation Infrastructure Project Review.'' For these projects, Executive Order 13274 provides that Federal agencies shall, to the maximum extent practicable, expedite their reviews for relevant permits or other approvals and take related actions as necessary, consistent with available resources and applicable laws.

(v) Assist with developing individual performance measures as described in this rule.

(vi) Work with Federal entities and State and local governments to include designated Projects in transportation planning.

(vii) Bring specific impediments to the attention of Marine Highway Advisory Board.

(viii) Conduct research on issues specific to designated Projects.

(ix) Maintain liaison with representatives of designated Projects to provide ongoing support and identify lessons learned and best practices for other projects and the overall Marine Highway program.

(e) *Application for Designation as a Marine Highway Project.* Marine Highway Project designation will be based on evaluation of the criteria outlined in this rule. When responding to specific solicitations for Marine Highway projects by the Department of Transportation, the following information will be required:

(1) *Proposed project:* The application should describe the overall operation; which ports and terminals will be served, number and type of vessels, size, quantity and type of cargo and/or passengers, routes, frequency, and other relevant information. Additional project components applicants should address include the following:

(i) Identify which, if known, designated Marine Highway Corridors will be utilized.

(ii) Provide the organizational structure of the proposed project, including business affiliations, environmental non-profit organizations and governmental or private sector stakeholders.

(iii) Documents affirming commitment or support from entities involved in the project.

(iv) State Departments of Transportation, Metropolitan Planning Organizations, municipalities and other governmental entities that have been engaged and extent to which they support the service.

(2) *Shippers:* Identify shippers that have indicated an interest in and level of commitment to the proposed service, or describe the specific commodities, market, and shippers the service will attract, and the extent to which these entities have been engaged. Applications should include the marketing strategy.

(3) *Potential relief to surface transportation congestion:* Describe extent to which the proposed project will relieve landside congestion in measurable terms, such as reductions in vehicle miles traveled. Include the landside corridors that stand to benefit from the operation, and any known infrastructure savings (either construction or maintenance) that would result from the project.

(4) *Environmental, energy or safety benefits:* The application should address the savings over the current practice in fuel, emissions, or safety improvements that would result from the proposed operation. Include any affiliations with environmental groups or additional benefits the service would offer.

(5) *Finance Plan and Private Sector Participation:* Provide projected revenues and expenses. Include labor and operating costs, fixed and recurring infrastructure costs. Include commitments from terminals, shippers, operators and other entities. A cost benefit analysis should be provided, if available. Note that prior to final designation as a project, a cost benefit analysis will be required, if not provided in the original application.

(6) *Impediments:* Describe any known or anticipated obstacles to either start-up or long-term success of the project. Include any strategies, either in place or proposed, to mitigate impediments.

(7) *Proposed Project Timeline:* The Application should include a proposed project time-line with estimated start dates and key milestones. Include the point in the timeline at which the enterprise is anticipated to attain self-sufficiency (if applicable).

(8) *Cost and Benefits:* Applicants will describe, to the extent known, the benefits to be derived from the designation of the project in monetary terms, including the items described in number 1 through 7 above, such as the environmental improvements, reduction in fuel usage, reduction in landside congestion, increase in employment, increase in taxes paid or other revenues derived therefrom, safety improvements

including potential saving of human life and property from fewer traffic accidents, decrease in time required for delivery of cargo or passengers and the costs associated with construction of new infrastructure if any, the costs of additional operations or maintenance of the project, including any public funds needed for support of the project. Upon receipt by the Maritime Administrator, the application will be evaluated using weight-based criteria during a technical review. The review will assess factors such as project scope, impact, public benefit, offsetting costs, cost to the Government (if any), the likelihood of long-term self-supporting operations, and its relationship with Marine Highway Corridors, once designated (See 46 CFR 393.3 Marine Highway Corridors). Additional factors may be considered during the evaluation process. *All factors will be quantified and weighted by their relative costs and benefits.* Project sponsors will be notified in writing by the Maritime Administration if they receive designation.

(9) *Evaluation Criteria:* To view the criteria which will be used in the initial assessment of Project applications, please see the Appendix to part 393.

(10) *Performance Measures:* Once designated projects enter the operational phase (either start of a new service, or expansion of existing service), they will be evaluated regularly to determine if the project's objectives are being achieved. Overall project performance will be in one of three categories—exceeds, meets, or does not meet original projected unit cost. Unit cost at time of project designation will be compared to the unit cost during the performance evaluation. Unit cost will be calculated by dividing Public benefit by Public cost, then multiplying it by the Timeliness factor, each of which are described below:

(i) *Public benefit:* Does the project meet the stated goals in shifting specific numbers of vehicles (number of trucks, rail cars or automobiles) off the designated landside routes (measured in miles, weighted for either urban or rural)? Other public benefits, including congestion reduction, energy savings, reduced emissions, and safety improvements will be assumed to be a direct derivative of either numbers of vehicles shifted, or vehicle/ton miles avoided, unless specific factors change (such as a change in vessel fuel or emissions).

(ii) Public cost: Is the overall cost to the Federal government (if any) on track with estimates at the time of designation? The overall cost to the Federal government represents the amount of Federal investment (either direct funding, loan guarantees or similar mechanisms) reduced by the offsetting savings the project represents (road/bridge wear and tear avoided, infrastructure construction or expansion deferred).

(iii) *Timeliness factor:* Is the project on track for the point at which the enterprise is projected to attain self-sufficiency? For example, if the project was anticipated to attain self-sufficiency after 36 months of operation, is it on track at the point of evaluation to meet that objective? This can be determined by assessing revenues, freight trends, expenses and other factors established in the application review process.

§ 393.5. Incentives, Impediments and Solutions.

(a) *Summary.* The purpose of this section is to identify short term incentives and solutions to impediments in order to encourage use of the Marine Highway for freight and passengers.

(b) *Objectives.* This section is aimed at increasing the use of the Marine Highways through the following primary objectives:

(1) Encourage the integration of Marine Highways in transportation plans at the State, regional and local levels.

(2) Develop short term incentives aimed at expanding existing or starting new Marine Highway operations.

(3) Identify and seek solutions to impediments to the Marine Highway.

(c) *Federal, State, Local, and Regional Transportation Planning.* The Department of Transportation will coordinate with Federal, state and local governments and metropolitan planning organizations to develop strategies to encourage the use of America's Marine Highway for transportation of passengers and cargo. Activities will include the following:

(1) Work with State Departments of Transportation to assess plans and develop strategies, where appropriate, to incorporate Marine Highway transportation, including ferries, and other marine transportation solutions for regional and interstate transport of freight and passengers in their statewide and metropolitan transportation plans.

(2) Facilitating groups of States and multi-State transportation entities to determine how Marine Highway transportation can address congestion, bottlenecks, and other interstate transportation challenges to their mutual benefit.

(3) Identify other federal agencies that have jurisdiction over the Project or which currently provide funding for components of the project in order to determine the extent to which those agencies should be consulted with and invited to assist in the coordination process.

(3) Consult with Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Federal Transit Administration and other entities within DOT, as appropriate to evaluate costs and benefits of proposed Marine Highway Corridors and Projects.

(d) *Short-Term Incentives.* The Department of Transportation will develop proposed short-term incentives that would encourage the use, initiation, or expansion of Marine Highway services. This will be done in consultation with shippers and other participants in transportation logistics, and government entities, as appropriate.

(e) *Impediments and Solutions.* The Department of Transportation will establish a Board in accordance with the Federal Advisory Committee Act (FACA) whose role is to identify impediments that hinder effective use of the Marine Highway and recommend solutions. The Board will meet regularly and report its findings and recommended solutions to the Maritime Administrator. Board membership will evolve as impediments are identified and the area of focus changes. Representation could include Federal Departments and Agencies, State Departments of Transportation, Metropolitan Planning Organizations and other local public entities and private sector stakeholders. The Department of Transportation will take actions, as appropriate, to address impediments to the Marine Highway.

§ 393.6. Research on Marine Highway Transportation.

(a) *Summary.* The Department of Transportation will work in consultation with the Environmental Protection Agency and other entities as appropriate, within the limits of available resources, to conduct research in support of America's Marine Highway. Research can be general in nature, or in direct support of designated Marine Highway Corridors and Projects.

(b) *Objectives.* The primary objectives of selected research Projects are to:

(1) Identify and quantify environmental and transportation-related benefits that can be derived from utilization of the Marine Highway as compared to other modes of surface transportation.

(2) Identify existing or emerging technology, vessel design, and other improvements that would reduce

emissions, increase fuel economy, and lower costs of Marine Highway transportation and increase the efficiency of intermodal transfers.

Appendix to Part 393—Criteria for Initial Assessment of Marine Highway Project Applications

Criteria for Initial Assessment of Marine Highway Project Applications

1. Evaluate each application as strong, medium, or weak in reference to the criteria listed below.
2. Collapse the criteria-specific ratings into a single "initial assessment rating" – strong, medium or weak.

Criteria	Central Question	Areas to Consider
Overall Benefit of Project:		
Scope	How much freight or passenger traffic would be affected?	- How many truck/rail car miles are likely to be saved? - How many passenger vehicle miles will be saved?
Impact	Are the reductions in critical areas?	- Miles saved in urban areas? - Miles saved in rural areas? - Does the project represent a segment of a Marine Highway Corridor or include an area designated in DOT's Urban Partnership Program? - Does it support another DOT project or initiative?
Public benefit	What are the benefits to the public in the following? – Congestion Reduction – Energy Savings – Reduced Emissions – Safety Improvements	- Number of urban and rural miles saved - Energy consumption between vessel & truck or rail - Using available data, emission reductions (SOX/NOX/Particulates) - What is the statistical savings in highway/rail accidents
Return on Investment/Feasibility		
Offsetting Costs	What publicly funded expenses does this project alleviate? – Road Repair due to wear and tear – Construction/Expansion of existing Roads/Rail lines	- Utilize a formula of trucks/cars per dollar of maintenance - Does the proposed project delay or eliminate need for new construction?
Feasibility	Is the project likely to achieve self-sustaining operation?	- Identify current/future impediments to successful operation - Is the business model feasible? – Is there adequate freight/passenger load? – Is the cost difference between modes minimal? – What variables will influence success? – Is it likely to begin/expand on time?
Cost Effectiveness (Government)	What is the cost to the Government to support the project?	- If there is a Federal cost, what is the return against: - Offsetting costs? - Public benefit received?

By Order of the Secretary.

Dated: October 2, 2008.

Leonard Sutter,

Maritime Secretary.

[FR Doc. E8–23834 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–81–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 12

[EB Docket No. 06–119; WC Docket No. 06–63; FCC 07–107]

Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: On August 12, 2008, the Office of Management and Budget (OMB) approved the information collection contained in § 12.3 of the Federal Communications Commission's rules, regarding 911 and E911 analyses and reports, as adopted by the Federal Communications Commission (Commission) in its Order addressing the report and recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks. 72 FR 37655, July 11, 2007. The effective date for § 12.3 of the Commission's rules was deferred until OMB approved this information collection. In this document, the Commission provides notice that § 12.3 of the Commission's rules is effective on October 9, 2008.

DATES: Section 12.3 of the Commission's rules, 47 CFR 12.3, (72 FR 37655, July 11, 2007) is effective on October 9, 2008. Respondents are required to submit their reports by February 6, 2009.

ADDRESSES: Entities required to file reports through the E911 Architecture Information System should obtain login identifications, passwords and the URL for the system from John Healy in the Commission's Public Safety and Homeland Security Bureau at 202–418–2448 or *John.Healy@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about this information collection contact Jeffery Goldthorp, Chief, Communications Systems Analysis Division, Public Safety and Homeland Security Bureau, Federal Communications Commission at 202–418–1096.

SUPPLEMENTARY INFORMATION: In response to the report and recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, the Commission took a number of steps to improve the reliability and resiliency of communications networks. Among the actions taken by the Commission was the adoption of § 12.3 of the Commission's rules, which requires local exchange carriers (LECs), commercial mobile radio service (CMRS) providers required to comply with § 20.18 of the Commission's rules, and interconnected Voice over Internet Protocol (VoIP) service providers to analyze their 911 and E911 networks and/or systems and provide reports addressing the redundancy, resiliency and reliability of those networks and/or systems. The Commission exempts the following entities from this rule: (1) LECs that meet the definition of a Class B company set forth in § 32.11(b)(2) of the Commission's rules; (2) non-nationwide CMRS providers with no more than 500,000 subscribers at the end of 2001; and (3) interconnected VoIP service providers with annual revenues below the revenue threshold established pursuant to § 32.11 of the Commission's rules. The effective date for § 12.3 of the Commission's rules was deferred until OMB approved the information collection. 72 FR 37655, July 11, 2007. On August 12, 2008, the Office of Management and Budget approved this information collection. 73 FR 50012, August 25, 2008. (OMB Control Number: 3060–1119.) The details of this information collection were set forth in a previous notice. 73 FR 39305, July 9, 2008. Section 12.3 of

the Commission's rules is effective on October 9, 2008.

The Commission delegated authority to the Public Safety and Homeland Security Bureau (Bureau) to implement and activate a process through which these reports would be submitted. The Bureau has since created an electronic system, the E911 Architecture Information System, which will be activated upon release of this document on October 9, 2008. Respondent LECs, CMRS providers, and interconnected VoIP service providers are required to submit their reports through the E911 Architecture Information System by February 6, 2009.

Entities required to file reports through the E911 Architecture Information System should obtain login identifications and passwords from John Healy at 202–418–2448 or *John.Healy@fcc.gov.* Once this contact has been made, Mr. Healy will provide the URL for the E911 Architecture Information System where entities should download the reporting form and submit the completed form by February 6, 2009.

As stated in § 12.3 of the Commission's rules, these reports will be afforded confidential treatment. The reports will be shared pursuant to a protective order with only the following three entities, if the entities file a request for the reports: (1) The National Emergency Number Association; (2) The Association of Public Safety Communications Officials; and (3) The National Association of State 9–1–1 Administrators. Such entities should submit requests for these reports to Jean Ann Collins, Deputy Chief, Communications Systems Analysis Division, Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street, SW., Room 7–A363, Washington, DC 20554 or *JeanAnn.Collins@fcc.gov.* All other access to these reports must be sought pursuant to procedures set forth in § 0.461 of the Commission's rules. Notice of any requests for inspection of these reports will be provided to the filers of the reports pursuant to § 0.461(d)(3) of the Commission's rules.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–23769 Filed 10–8–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

49 CFR Part 1

[OST Docket No. DOT–OST–1999–6189]

RIN 9991–AA54

Organization and Delegation of Powers and Duties Delegations to the Maritime Administrator

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Secretary of Transportation (Secretary) is delegating to the Maritime Administrator the authorities of the Secretary under title XI, subtitle C of Public Law 110–140 dated December 19, 2007; and entitled Energy Independence and Security Act of 2007.

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Richard Weaver, Director, Office of Management and Administrative Services, Maritime Administration, MAR–390, Room W28–302, 1200 New Jersey Avenue, SE., Washington, DC 20590, Phone: (202) 366–2811.

SUPPLEMENTARY INFORMATION: The Secretary is delegating this authority under title XI, subtitle C of Public Law 110–140 to the Maritime Administrator. The delegation authorizes the Maritime Administrator to carry out certain responsibilities of the Secretary prescribed in sections 1122, Short Sea Shipping Eligibility for Capital Construction Fund; and 1123, Short Sea Transportation Report.

The Secretary is delegating this authority to the Maritime Administrator because it falls within the purview of the Maritime Administration's statutory mission to maintain and improve the maritime industry.

This final rule adds paragraph (ii) to 49 CFR 1.66 to reflect the Secretary of Transportation's delegation of these authorities. Since this rulemaking relates to departmental organization, procedure and practice, notice and comment is unnecessary under 5 U.S.C. 553(b). Further, since the rulemaking expedites the Maritime Administration's ability to meet the statutory intent of the applicable laws and regulations covered by this delegation, the Secretary finds good cause under 5 U.S.C. 553(d)(3) for this final rule to be effective on the date of publication in the **Federal Register**.

List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

■ In consideration of the foregoing, Part 1 of Title 49, Code of Federal Regulations, is amended, effective upon publication, to read as follows:

PART 1—[AMENDED]

■ 1. The authority citation for Part 1 is revised to read as follows:

Authority: 49 U.S.C. 322; 46 U.S.C. 2104(a); 28 U.S.C. 2672; 31 U.S.C. 3711(a)(2); Pub. L. 101–552, 104 Stat. 2736; Pub. L. 106–159, 113 Stat. 1748; Pub. L. 107–71, 115 Stat. 597; Pub. L. 107–295, 116 Stat. 2064; Pub. L. 108–136, 117 Stat. 1392; Pub. L. 101–115, 103 Stat. 691; Pub. L. 108–293, 118 Stat. 1028; Pub. L. 109–364, 120 Stat. 2083; Pub. L. 110–140, 121 Stat. 1492. 2. Section 1.66 is amended by adding paragraph (ii) to read as follows:

§ 1.66 Delegations to Maritime Administrator.

* * * * *

(ii) Carry out the functions and exercise the authorities vested in the Secretary of Transportation under Title 46, Chapter 556, of the United States Code, except for those found in 46 U.S.C. 55601(c) and (d).

Issued at Washington, DC, this 26th day of August, 2008.

Mary E. Peters,

Secretary of Transportation.

[FR Doc. E8–23983 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 071106671–8010–02]

RIN 0648–XL08

Fisheries of the Exclusive Economic Zone Off Alaska; Pollock in Statistical Area 610 in the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for pollock in Statistical Area 610 in the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2008 total allowable catch (TAC) of pollock for Statistical Area 610 in the GOA.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 6, 2008, through 2400 hrs, A.l.t., December 31, 2008.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the

GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson–Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2008 TAC of pollock in Statistical Area 610 of the GOA is 17,602 metric tons (mt) as established by the 2008 and 2009 harvest specifications for groundfish of the GOA (73 FR 10562, February 27, 2008).

In accordance with § 679.20(d)(1)(i), the Regional Administrator has determined that the 2008 TAC of pollock in Statistical Area 610 of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 17,552 mt, and is setting aside the remaining 50 mt as incidental catch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for pollock in Statistical Area 610 of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of pollock in Statistical Area 610 of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 5, 2008.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: October 6, 2008.

Emily H. Menashes

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–24000 Filed 10–6–08; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register

Vol. 73, No. 197

Thursday, October 9, 2008

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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

RIN 3150–AI27

[NRC–2008–0269]

Categorical Exclusions From Environmental Review

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations describing the categories of actions which do not require an environmental review under the requirements of the National Environmental Policy Act of 1969 (NEPA) because they have no significant effect on the human environment. The proposed revisions would eliminate the preparation of environmental assessments for NRC actions that are minor, administrative, or procedural in nature. The proposed rule would not change any requirements for licensees but would provide for more timely NRC action.

DATES: The comment period expires December 23, 2008. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2008–0269]. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallager@nrc.gov.*

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415–1966.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm during Federal workdays. (Telephone (301) 415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415–1101.

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area Room O F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee.

NRC's Agencywide Document Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, or (301) 415–4737, or by e-mail to *PDR.Resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Cardelia H. Maupin, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–2312, e-mail, *Cardelia.Maupin@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
- A. General Overview of Categorical Exclusion
- B. NRC Categorical Exclusion Regulations
- C. Amendments to NRC Categorical Exclusion Regulations
- D. Basis for Proposed Amendment of Categorical Exclusion Regulation

II. Discussion
- A. What Is a Categorical Exclusion?
- B. What Is NRC's Definition of Categorical Exclusion?
- C. How Should a Categorical Exclusion Be Applied?
- D. What Action Is the NRC Taking?
- E. Who Would This Action Affect?

III. Discussion of Proposed Amendments by Section
IV. Agreement State Compatibility
V. Plain Language
VI. Voluntary Consensus Standards
VII. Environmental Assessment and Finding of No Significant Environmental Impact
VIII. Paperwork Reduction Act Statement
IX. Public Protection Notification
X. Regulatory Analysis
XI. Regulatory Flexibility Certification
XII. Backfit Analysis

I. Background

The National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321–4370f, requires Federal agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. The NRC's NEPA regulations are contained in 10 CFR Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.''

A. General Overview of Categorical Exclusion

There are three types of NEPA analysis: An environmental impact statement (EIS), an environmental assessment (EA), or a categorical exclusion. An EIS documents an agency's evaluation of the environmental impacts of a major Federal action significantly affecting the quality of the human environment. An EA is a concise, publicly available document that provides sufficient evidence and analysis for determining whether to prepare an EIS or make a finding of no significant impact (FONSI). If an EA supports a FONSI, the environmental review process is complete. If the EA reveals that the proposed action may have a significant effect on the human environment, the Federal agency then normally prepares an EIS. A categorical exclusion, in contrast, is a category of actions that do not have a significant effect on the human environment, as defined by a Federal agency in its procedures implementing NEPA. If the Federal agency finds that actions in a given

category have repeatedly been shown to have no significant effect on the human environment, either individually or cumulatively, then the agency may establish a categorical exclusion for that category of action. Once it has established a categorical exclusion, the agency is not required to prepare an EA or EIS for any action that falls within the scope of the categorical exclusion, unless the agency finds, for any particular action, that there are special (*e.g.*, unique, unusual or controversial) circumstances that may have a significant effect on the human environment. Categorical exclusions streamline the NEPA process, saving time, effort, and resources.

B. NRC Categorical Exclusion Regulations

On March 12, 1984 (49 FR 9352), the NRC published 10 CFR Part 51, ''Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments.'' The regulation included NRC's first list of 18 categorical exclusions in 10 CFR 51.22, ''Criterion for categorical exclusion: identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.''

C. Amendments to NRC Categorical Exclusion Regulations

Over the past 24 years, NRC has made 14 amendments to the categorical exclusions in § 51.22. Nine of these amendments were minor, corrective, or conforming changes, and four were more substantive. All resulted from rulemaking efforts addressing other parts of NRC regulations. As a result of the 14 amendments, the list of categorical exclusions in § 51.22(c) increased from 18 to 23 categorical exclusions. The NRC's categorical exclusions include administrative, organizational, or procedural amendments to certain types of NRC regulations, licenses, and certificates; minor changes related to application filing procedures; certain personnel and procurement activities; and activities when environmental review by NRC is excluded by statute.

D. Basis for Proposed Amendment of Categorical Exclusion Regulation

The NRC is proposing additional amendments to the 10 CFR 51.22 categorical exclusions to reflect regulatory experience gained since the development of this regulation in March 1984. Prior to this rulemaking effort, there has been no comprehensive review and update of § 51.22 since its development over 24 years ago. The proposed rulemaking is based, in part, on the Council on Environmental Quality (CEQ) September 2003 NEPA Task Force Report (Task Force Report) ''Modernizing NEPA Implementation,'' *http://www.nepa.gov/ntf/report/pdftoc.html.* The Task Force Report notes that the development and updating of categorical exclusions by Federal agencies occurs infrequently and recommends that Federal agencies examine their categorical exclusion regulations to identify potential revisions that would eliminate unnecessary and costly EAs. It also provides recommendations for categorical exclusion development and revision.

The Task Force Report notes that in developing new or broadening existing categorical exclusions, a key issue is how to evaluate whether a proposed categorical exclusion is appropriate and how to support the determination that it describes a category of actions that do not individually or cumulatively have a significant impact on the human environment. It recommends the use of information from past actions to establish the basis for the no significant impact determination. It further advises Federal agencies to evaluate past actions that occurred during a particular period to determine how often the NEPA analyses resulted in FONSIs for the category of actions being considered. The Task Force Report indicates that an adequate basis for developing new or broadening existing categorical exclusions exists if all the evaluated past actions resulted in FONSIs. It also provides that criteria for identifying new categorical exclusions should include: (1) Repetitive actions that do not individually or cumulatively have significant effects on the human environment; (2) actions that generally require limited environmental review; and (3) actions that are noncontroversial.

The proposed rule is also based upon a review of NRC regulatory actions. As noted, the Task Force Report recommends that agencies evaluate past EA/FONSIs for particular categories of actions to develop new or broaden existing categorical exclusions. To comply with this recommendation, an NRC search of files for EA/FONSIs completed during the 20-year period from 1987 to 2007 was conducted. The search revealed that more than 1,500 actions resulted in EA/FONSIs. NRC conducted an in-depth review of the EA/FONSIs issued during the last 5 years. That review identified several recurring categories of regulatory actions that are not addressed in 10 CFR 51.22, and have no significant effect on the human environment, either individually or cumulatively. These categories of actions were considered in the proposed revisions.

II. Discussion

A. What Is a Categorical Exclusion?

The CEQ regulations note that many actions taken by Federal agencies would have no significant effect on the human environment and introduced the term ''categorical exclusion.'' The CEQ developed the categorical exclusion process to reduce the amount of unnecessary paperwork and delays associated with NEPA compliance. If a certain type of regulatory action, such as the issuance of regulations, would not normally result in any significant effect upon the human environment, then it is unnecessary to spend time and effort to repeatedly document that fact. The CEQ definition of a ''categorical exclusion'' also provides for ''extraordinary circumstances'' (essentially, the NRC equivalent of special circumstances) in which a normally excluded action may have a significant environmental effect, and thus require preparation of an EA or an EIS.

B. What Is NRC's Definition of Categorical Exclusion?

A ''categorical exclusion'' is defined in NRC's regulations in 10 CFR 51.14 as a category of actions which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect in accordance with procedures set out in § 51.22, and for which, therefore, neither an EA nor an EIS is required. The NRC has determined that the categorical exclusions listed in 10 CFR 51.22 do not have a significant effect on the human environment.

C. How Should a Categorical Exclusion Be Applied?

Before using a categorical exclusion for a proposed action, it should be considered whether there may be any special (*e.g.*, unique, unusual or controversial) circumstances arising from or related to that proposed action that may result in the potential for a significant effect to the human environment. If such special circumstances are, or are likely to be present, the NRC would then prepare an EA and, if necessary, an EIS. If special circumstances are not present, then the categorical exclusion may be applied and the NRC will satisfy its NEPA obligation for that proposed action. The determination of whether special

circumstances are present is a matter of NRC discretion. The determination that special circumstances are not present will not require the preparation of any specific or additional documentation beyond the documentation normally prepared, if any, indicating that the categorical exclusion is being invoked for the proposed action.

D. What Action Is the NRC Taking?

The NRC is proposing changes to its list of categorical exclusions to clarify the scope of existing categories and to add new categories of actions that have been shown to have no significant effect on the human environment. For example, the provisions in § 51.22(c)(10) cover administrative and procedural changes to a license or permit. However, because of the ambiguity of the language in this provision, the NRC has prepared numerous EA/FONSIs for changes to a licensee's name, address, or telephone number. The proposed action would also expand the categorical exclusion that addresses decommissioning activities and add categorical exclusions that address the awarding of education grants, and the granting of exemptions from certain regulatory requirements.

The proposed revisions of the categorical exclusion regulations would minimize inefficiencies and inconsistencies in the implementation of NRC's regulatory program. The amendment would eliminate the need to prepare unnecessary and costly EAs for NRC regulatory actions that have no significant effect on the human environment. The proposed revisions would also support the NRC's organizational excellence objectives of ensuring that its actions are effective, efficient, realistic, and timely.

E. Who Would This Action Affect?

This amendment would not impose any new requirements on NRC licenses, but would ensure that licensees' amendment requests are completed in a more efficient, effective, and timely manner, and would result in cost savings to the NRC and licensees. The proposed amendments would eliminate the preparation of EA/FONSIs for actions that routinely have been shown to have no effect on the human environment, *e.g.*, administrative, procedural, or organizational licensee requests. Current ambiguities in the categorical exclusion regulations have created delays in licensee decisions when organizational name changes occur, because these decisions must await the completion of an EA/FONSI and publication in the **Federal Register** by the NRC.

III. Discussion of Proposed Amendments by Section

A. Why Revise the Description of Categorical Exclusions in 10 CFR 51.22(a)?

A change is proposed to § 51.22(a) to clarify that the types of actions eligible for a categorical exclusion include ''administrative'' actions in addition to ''licensing'' and ''regulatory'' actions.

B. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(1) Which Addresses Amendments to 10 CFR Parts That Pertain Solely to Organizational, Administrative or Procedural Matters?

Since the adoption of 10 CFR 51.22(c)(1) on March 12, 1984, the Commission adopted additional organizational, administrative, or procedural regulations to 10 CFR, and conforming revisions to this section were inadvertently omitted. The proposed amendment would update § 51.22(c)(1) to include such references to those 10 CFR Parts that were inadvertently omitted. The 10 CFR Parts referenced in this section relate to matters regarding Commission organization, administration, or procedure. They serve the dual purpose of making information readily available to the public and of establishing administrative procedures for the orderly conduct of Commission business. It was previously established that these types of regulations comprise actions which do not individually or cumulatively have a significant effect on the human environment.

The proposed amendment would update 10 CFR 51.22(c)(1) to include references to the following Commission organizational, administrative, or procedural requirements in the following 10 CFR Parts:

Part 5—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. This part is designed to eliminate (with certain exceptions) sex discrimination in any education program or activity receiving Federal financial assistance.

Part 12—Implementation of the Equal Access to Justice Act in Agency Proceedings. This part establishes regulatory requirements for awarding of attorney fees to eligible individuals and entities in certain administrative proceedings before the Commission.

Part 13—Program Fraud Civil Remedies. This part establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, false, fictitious, or fraudulent claims. It also specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties.

Part 15—Debt Collection Procedures. This part establishes administrative procedures for the Commission to collect the payment of debts owed to the United States Government in the form of money or property, unless a different procedure is specified in a statute, regulation, or contract.

Part 16—Salary Offset Procedures for Collecting Debts Owed by Federal Employees to the Federal Government. This part establishes procedures for the collection by administrative offset of a Federal employee's salary without his or her consent to satisfy certain debts owed to the Federal Government.

Part 26—Fitness for Duty Programs. This part prescribes requirements and standards for the establishment and maintenance of certain aspects of fitness-for-duty programs and procedures.

Part 160—Trespassing on Commission Property. This part provides for the protection and security of NRC facilities, installations, and properties from unauthorized entry and from unauthorized weapons or dangerous materials.

C. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(2) Which Addresses Minor or Corrective Amendments to NRC Regulations?

The current § 51.22(c)(2) provides a categorical exclusion for amendments to the regulations that are ''corrective or of a minor or nonpolicy nature and do not substantially modify existing regulations.'' The proposed rule would amend this section to clarify and expand the scope of categorical exclusions to include amendments to the NRC's regulations that update requirements. The proposed amendment would clarify that these types of minor amendments to NRC regulations are excluded from the environmental review process. For example, the NRC routinely modifies the requirements in 10 CFR 50.55a, ''*Codes and standards*,'' to update incorporation by reference of the NRC-approved American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code (BPV Code) and the Code for Operation and Maintenance of Nuclear Power Plants (OM Code). The ASME frequently updates its BPV Code and OM Code as advances in technologies are made, new procedures are developed, and new information becomes available. Generally, these changes to the ASME Codes streamline operations, enhance safety, or reduce public exposure to radiation. In the intervals between the issuance of the updated ASME BPV

Code and OM Code Editions and Addenda, the various ASME Committees meet and publish Code Cases on a quarterly basis. These Code Cases are alternatives to the ASME BPV and OM Code requirements, and often reflect improvements in technology, new information, or improved procedures.

The NRC's practice has been to review ASME Code Cases and find them acceptable, conditionally acceptable, or unacceptable for use by NRC facility licensees. The acceptable and conditionally acceptable Code Cases are then listed in NRC regulatory guides that are incorporated by reference in the NRC's regulations in § 50.55a, ''Codes and standards.'' Because 10 CFR 51.22(c)(2), as presently worded, is not clear, each time the NRC updates its regulations to incorporate the most current ASME reference or update any other reference, an EA must be prepared. During the past 5 years (2003 through 2007), the Commission prepared at least eight EA/FONSIs in response to a licensee's request to use an updated NRC-approved ASME code. The preparation of EAs for these amendments is costly, and creates unnecessary delays in the completion of regulatory actions.

D. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(3) Which Addresses Amendments to Administrative, Organizational or Procedural Requirements Within Other 10 CFR Parts?

This section currently lists several 10 CFR Parts. The NRC is proposing to revise this section to delete the specific listing of 10 CFR Parts and to add a generic reference to reflect any part of CFR Chapter 10. This proposed revision eliminates the need for changes due to new parts being added or deleted. As a result, efficiencies will be gained in the rulemaking process.

The proposed rule would also add a new paragraph (iv) to § 51.22(c)(3) to expand the categorical exclusion to include amendments concerning education, training, experience, qualification, or other employment suitability requirements established in the regulations.

E. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(9) Which Addresses Amendments to a Permit or License for a Reactor Under Parts 50 or 52?

The proposed rule expands the scope of the current categorical exclusion to include the granting of an exemption from a requirement pertaining to the installation or use of a facility component located within the restricted area, as defined in 10 CFR Part 20, or an inspection or surveillance requirement. Under the current rule, such an exemption would not be covered by this categorical exclusion, and would therefore require the preparation of an EA. The Commission has now determined, however, that there is ample data in the form of EA/FONSIs to justify the categorical exclusion of the granting of such exemptions, provided that the criteria in the current categorical exclusion (*i.e.*, the request involves no significant hazards consideration, there is no significant change in the types of, or increase in the amounts of effluents that may be released offsite, and there is no significant increase in individual or cumulative occupational radiation exposure) are applied to them. During the last five year period, at least 50 EA/FONSIs resulted from licensee requests for such exemptions.

F. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(10) Which Addresses Administrative, Procedural, Organizational or Editorial Changes to a Permit or License?

The proposed rule revises § 51.22(c)(10) by deleting the specific listing of 10 CFR Parts and replacing it with a generic reference to reflect any part of 10 CFR. This proposed revision would eliminate the need for changes due to new parts being added or deleted. As a result, efficiencies are gained in the rulemaking process.

In addition, § 51.22(c)(10) would be revised to add new paragraphs (iii), (iv), and (v) to clarify that changes to a license or permit that are administrative, procedural, organizational, or editorial in nature are not subject to environmental review. The NRC has conducted several EAs, each resulting in a FONSI, for minor administrative changes to licenses and permits because these actions were not specifically identified in § 51.22(c). These types of amendments to a license or permit facilitate the orderly conduct of the licensee's business and ensure that information needed by the Commission to perform its regulatory functions is readily available. These amendments would also include the changing of references on licenses and other licensee documents (*e.g.*, licensee's operational procedures) to reflect amendments to NRC regulations, updated NRC-approved guidance (*e.g.*, NUREG documents), ASME Codes or International Commission on Radiological Protection (ICRP) provisions. Under the current rule, the NRC has been required to prepare EAs for the following administrative actions:

(1) Amendments to reflect changes in ownership;

(2) Amendments to reflect organization name changes;

(3) Amendments to reflect corporate restructuring, including mergers;

(4) Amendments to licenses to reflect changes in references; and

(5) Amendments correcting typographical and editorial errors on licenses, permits, and associated technical specification documents.

The Commission has consistently determined that these types of amendments have no significant impact on the human environment.

G. Why Revise the Categorical Exclusion in 10 CFR 51.22(c)(20) Which Addresses Decommissioning of Sites?

The proposed regulatory action would expand the 10 CFR 51.22(c)(20) categorical exclusion to cover the decommissioning of sites where licensed operations have been limited to the use of radioactive materials in such a manner that a decommissioning plan is not required by §§ 30.36(g)(1), 40.42(g)(1) or 70.38(g)(1), and the NRC has determined that the facility meets the radiological criteria for unrestricted use in § 20.1402, without further remediation or analysis. These types of decommissioning activities are described in NUREG–1757, Vol.1, Rev. 2, ''Consolidated NMSS Decommissioning,'' as Group 2 decommissioning activities, which defines seven decommissioning groups.

Group 2 decommissioning activities cover those:

(1) Facilities where the licensee possessed and used only sealed sources, but the most recent leak tests indicate that the sources leaked or leak tests are not available; or

(2) Facilities where the licensee used unsealed radioactive material, the licensee's survey demonstrated that levels of radiological contamination on building surfaces or surface soils meet the provisions for unrestricted release in 10 CFR 20.1402 by applying NRC-approved decommissioning screening criteria and the licensee is not required to submit a decommissioning plan.

Group 2 decommissioning requests received by the NRC involve licensees who are authorized to possess and use sealed and/or unsealed radioactive materials with half-lives greater than 120 days. For example, the most common unsealed radioactive materials used by Group 2 licensees are tritium (H–3) and Carbon-14.

Normally, Group 2 licensees in the decommissioning process remediate their sites, as necessary, using their operating procedures. These licensees

are required to keep records of material receipt, use, and disposal, enabling them to quantify past radiological material possession and use with a high degree of confidence. These licensees have radiological survey records that characterize the residual radiological contamination levels present within the facilities and at their sites. They are able to demonstrate residual radiological contamination levels without more sophisticated survey procedures or dose modeling. Licensees of Group 2 facilities are not required to have a decommissioning plan, but such a licensee must demonstrate that its site meets the screening criteria of § 20.1402. A decommissioning plan is not required because worker cleanup activities and procedures are consistent with those approved for routine operations and no dose analysis is required.

In many cases, the NRC conducts confirmatory surveys during the licensee's decommissioning activities to verify the accuracy of the licensee's measuring techniques to satisfy the requirements of § 20.1402. The NRC uses a risk-informed process that assigns higher priority for conducting confirmatory surveys at sites that may pose a greater potential threat to the public health and safety. The results of this survey are used by the NRC to support a decision on whether to approve a licensee's request to terminate a license and release the site for unrestricted use.

At present, § 51.22(c)(20) categorically excludes from further NRC environmental review those activities which are defined in NUREG–1757 as Group 1 decommissioning activities, namely, the decommissioning of sites where licensed operations had been limited to the use of small quantities of unsealed short-lived radioactive materials or radioactive materials in sealed sources, provided there is no evidence of leakage of radioactive material from these sealed sources. The current § 51.22(c)(20) decommissioning categorical exclusion was added with the promulgation of the license termination rule, ''Radiological Criteria for License Termination,'' (July 21, 1997; 62 FR 39058). The license termination rule, now codified at 10 CFR Part 20, Subpart E, established a dose-based radiological criterion of 25 mrem/yr in § 20.1402 for the release of a decommissioned site for unrestricted use.

In establishing the decommissioning categorical exclusion, the Commission relied on the ''Generic Environmental Impact Statement in Support of Rulemaking on Radiological Criteria for License Termination on NRC-Licensed Nuclear Facilities'' (GEIS; NUREG–1496, Vol. 1). The GEIS concluded that with the use of ''decay in storage'' for the short-lived nuclides (those with a half-life of less than or equal to 120 days) and the time involved in submitting the information necessary to terminate a license, the activity of licensed material would reach sufficiently low levels such that decontamination of the building or of soils would not be needed.

However, the GEIS did not enable the Commission to determine that there would be no significant effect on the human environment from the use of unsealed radioactive materials with half-lives of more than 120 days. Specifically, the Commission determined that the unique conditions of each licensee facility and the specific uses of unsealed radioactive materials at each site prevented the environmental impacts from being analyzed on a generic basis. Accordingly, the Commission has relied on the GEIS to satisfy its obligations under NEPA regarding decommissioning decisions on sites that meet the 25 mrem/y (0.25 mSv/yr) criterion for unrestricted use, but has continued to require an EA for the decommissioning of any site on which unsealed radioactive materials with half-lives of more than 120 days are located. As such, based upon the 1997 Commission decision, EAs are performed for Group 2 decommissioning activities.

The Commission has now determined, however, that there is ample data in the form of EA/FONSIs to justify the categorical exclusion of Group 2 decommissioning activities. The data show that, over the last five years, every one of the 73 EAs performed for a Group 2 decommissioning action resulted in a FONSI. Thus, the Commission proposes to add a new paragraph (iii) to § 51.22(c)(20) to categorically exclude from the Commission's environmental review the decommissioning of sites where radioactive material has been used in such a manner that a decommissioning plan is not required based on §§ 30.36(g)(1), 40.42(g)(1), or 70.38(g)(1), and the Commission has determined under § 20.1402 that the facility meets the radiological criteria for unrestricted release without further remediation or analysis. If additional cleanup or analysis is needed to meet § 20.1402, the decommissioning activity would be considered a Group 3 or higher decommissioning activity in accordance with NUREG–1757, and would not be covered by this categorical exclusion.

H. Why Add a Categorical Exclusion in 10 CFR 51.22(c)(24) Which Addresses the Awarding of Education Grants?

The proposed rule would add a new 10 CFR 51.22(c)(24) to categorically exclude the issuance of grants, by the NRC, to institutions of higher education in the United States, for scholarships, fellowships, faculty and curricula development in nuclear safety, nuclear security, nuclear environmental protection, and other fields that the Commission determines to be critical to the NRC's regulatory mission. The proposed categorical exclusion covers those actions that are specifically geared toward the development of teaching and educational programs in the nuclear field. The purpose of the grant program is to foster a work force capable of supporting the safe design, construction, operation, and regulation of nuclear facilities, and the safe handling of nuclear materials.

Sections 31.b.(2) and 243 of the Atomic Energy Act of 1954, as amended, constitute the statutory basis of this grants program. Section 243 authorizes the creation of a scholarship and fellowship program to fund scholarships, fellowships, and stipends for the study of science, engineering, or another field of study that the NRC determines is a critical skill area related to its regulatory mission, to support faculty and curricular development in such fields, and to support other domestic educational, technical assistance, or training programs (including those of trade schools) in such fields. Section 31.b.(2) authorizes the NRC to provide grants, loans, cooperative agreements, contracts, and equipment to institutions of higher education to support courses, studies, training, curricula, and disciplines pertaining to nuclear safety, security, or environmental protection, or any other field that the NRC determines to be critical to its regulatory mission.

This new categorical exclusion would cover actions that the NRC has determined to be administrative in nature. As such, these actions (the issuance of grant awards and the concomitant administration of the grants program) will have no significant effect on the quality of the human environment. The actions covered by this proposed categorical exclusion are not expected to result in increased radiation doses to nuclear industry workers or members of the public; degradation of water quality or of the water supply; any adverse effect to federally listed endangered or threatened species or their critical habitat; increased effluents or changes

in effluent pathways; increased noise; damage or reduced access to cultural resources; changes to local or regional socioeconomic conditions; increased traffic or other transportation effects; or increased competition for available resources. Moreover, the NRC will not issue awards to fund programs that include or involve activities directly affecting the environment, such as the construction of facilities; a major disturbance of the local environment brought about by blasting, drilling, excavating, or other means; large-scale acquisitions of computer equipment; field work affecting the local environment (except field work which only involves noninvasive or non-harmful techniques such as taking water or soil samples or collecting non-protected species of flora and fauna); and the testing and release of radioactive material.

I. Why Add a Categorical Exclusion in 10 CFR 51.22(c)(25) Which Addresses the Granting of Exemptions From Regulatory Requirements?

The proposed rule would add a new § 51.22(c)(25) to categorically exclude the NRC action of granting exemptions from certain regulatory requirements. The NRC has found that the majority of the exemptions it grants from various regulatory requirements are administrative or procedural in nature, or are otherwise consistent with the existing criteria for approving amendments to licenses and permits under 10 CFR 51.22(c)(9) and (c)(11). As a result, numerous EAs, each resulting in a FONSI, have been prepared to support the granting of such exemptions. For example, the majority of the EA/FONSIs addressed exemption requests concerning the following administrative issues:

(1) Revising the schedule for the biennial exercise requirements for nuclear reactors in 10 CFR Part 50, Appendix E, Sections IV.F. 2.b and c;

(2) Applying updated NRC-approved ASME Codes; and

(3) Training and experience requirements in 10 CFR Part 35, ''Medical Use of Byproduct Material.''

The proposed categorical exclusion contains prescriptive language that would limit its application to only those exemptions that will not have a significant effect on the human environment.

IV. Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as a Compatibility Category ''NRC.'' The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended (AEA), or the provisions of Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws but does not confer regulatory authority on the State. NEPA applies only to Federal agencies. This rulemaking will not have any impact on Agreement States' regulations. Therefore, Agreement States will not need to make conforming changes to their regulations.

V. Plain Language

The Presidential Memorandum ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885), directed that the Government's documents be written in clear and accessible language. The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the **ADDRESSES** heading of this document.

VI. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. The NRC is proposing to amend 10 CFR 51.22, the NRC's list of categories of actions that the NRC has determined to have no significant effect on the human environment. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

VII. Finding of No Significant Environmental Impact: Availability

Under NEPA and the NRC regulations in Subpart A of 10 CFR Part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an EIS is not required. The NRC has prepared an EA and, on the basis of this EA, has made a FONSI. The proposed amendments are based upon NRC review of environmental assessments conducted over the past 5 years that have consistently resulted in FONSIs. The proposed amendments to the categorical exclusions are minor, administrative, or procedural in nature (*e.g.*, no increases in releases/uses of radioactive or chemical materials).

The NRC has sent a copy of the EA and this proposed rule to every State Liaison Officer and requested their comments on the EA. The EA may be examined at the NRC Public Document Room, 11555 Rockville Pike, Room O–1F23, Rockville, MD 20852.

VIII. Paperwork Reduction Act Statement

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

IX. Public Protection Notification

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

X. Regulatory Analysis

This proposed rule is anticipated to be cost-effective. It would eliminate the need to prepare EAs for actions that have no significant effect on the human environment, and would eliminate the delays associated with the preparation of these documents. A regulatory analysis is not required because this rulemaking does not impose any new requirements on NRC licensees.

XI. Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this rule would not, if promulgated, have a significant economic impact on a substantial number of small entities.

XII. Backfit Analysis

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this proposed rule because this amendment would not involve any provisions that would impose backfits as defined in 10 CFR Chapter I. Therefore, a backfit analysis is not required.

List of Subjects in Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC proposes to adopt the following amendments to 10 CFR part 51:

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

1. The authority citation for part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297f); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335); and Public Law 95–604, Title II, 92 Stat. 3033–3041; and sec. 193, Public Law 101–575, 104 Stat. 2835 (42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 51.80, and 51.97 also issued under secs. 135, 141, Public Law 97–425, 96 Stat. 2232, 2241, and sec. 148, Public Law 100–203, 101 Stat. 1330–223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec.114(f), 96 Stat. 2216, as amended (42 U.S.C. 10134(f)).

2. In § 51.22, paragraphs (a), (c)(1), (c)(2), (c)(3), (c)(9), (c)(10), and (c)(20) are revised, and paragraphs (c)(24) and (c)(25) are added to read as follows:

§ 51.22 Criterion for categorical exclusion; identification of licensing and regulatory actions eligible for categorical exclusion or otherwise not requiring environmental review.

(a) Licensing, regulatory, and administrative actions eligible for categorical exclusion shall meet the following criterion: The proposed action belongs to a category of actions which the Commission, by rule or regulation, has declared to be a categorical exclusion, after first finding that the category of actions does not individually or cumulatively have a significant effect on the human environment.

* * * * *

(c) The following categories of actions are categorical exclusions:

(1) Amendments to parts 1, 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 15, 16, 19, 21, 25, 26, 55, 75, 95, 110, 140, 150, 160, 170, or 171 of this chapter, and actions on petitions for rulemaking relating to parts 1, 2, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 19, 21, 25, 26, 55, 75, 95, 110, 140, 150, 160, 170, or 171 of this chapter.

(2) Amendments to the regulations in this chapter which are corrective, clarifying or of a minor nature or which update references, provided that such amendments do not substantially modify existing regulations, and actions on petitions for rulemaking relating to these amendments.

(3) Amendments to any part in this chapter, and actions on petitions for rulemaking relating to these amendments, which relate to—

(i) Procedures for filing and reviewing applications for licenses or construction permits or early site permits or other forms of permission or for amendments to or renewals of licenses or construction permits or early site permits or other forms of permission;

(ii) Recordkeeping requirements;

(iii) Reporting requirements; or

(iv) Education, training, experience, qualification or other employment suitability requirements.

* * * * *

(9) Issuance of an amendment to a permit or license for a reactor under part 50 or part 52 of this chapter, which changes a requirement, or grants an exemption from any such requirement, with respect to installation or use of a facility component located within the restricted area, as defined in part 20 of this chapter, or which changes an inspection or a surveillance requirement, provided that:

(i) The amendment or exemption involves no significant hazards consideration;

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite; and

(iii) There is no significant increase in individual or cumulative occupational radiation exposure.

(10) Issuance of an amendment to a permit or license issued under this chapter which —

(i) Changes surety, insurance and/or indemnity requirements;

(ii) Changes recordkeeping, reporting, or administrative procedures or requirements;

(iii) Changes the licensee's or permit holder's name, phone number, business or e-mail address;

(iv) Changes the name, position, or title of an officer of the licensee or permit holder, including but not limited to, the radiation safety officer or quality assurance manager; or

(v) Changes the format of the license or permit or otherwise makes editorial, corrective or other minor revisions, including the updating of NRC approved references.

* * * * *

(20) Decommissioning of sites where licensed operations have been limited to the use of—

(i) Small quantities of short-lived radioactive materials;

(ii) Radioactive materials in sealed sources, provided there is no evidence of leakage of radioactive material from these sealed sources; or

(iii) Radioactive materials in such a manner that a decommissioning plan is not required by 10 CFR 30.36(g)(1), 40.42(g)(1), or 70.38(g)(1), and the NRC has determined that the facility meets the radiological criteria for unrestricted release in 10 CFR 20.1402 without further remediation or analysis.

* * * * *

(24) Grants to institutions of higher education in the United States, to fund scholarships, fellowships, and stipends for the study of science, engineering, or another field of study that the NRC determines is in a critical skill area related to its regulatory mission, to support faculty and curricular development in such fields, and to support other domestic educational, technical assistance, or training programs (including those of trade schools) in such fields, except to the extent that such grants or programs include activities directly affecting the environment, such as:

(i) The construction of facilities;

(ii) A major disturbance brought about by blasting, drilling, excavating or other means;

(iii) Field work, except that which only involves noninvasive or non-harmful techniques such as taking water or soil samples or collecting non-protected species of flora and fauna; or

(iv) The release of radioactive material.

(25) Granting of an exemption from the requirements of any regulation of this chapter, provided that—

(i) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

(ii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

(iii) There is no significant construction impact;

(iv) There is no significant increase in the potential for or consequences from radiological accidents; and

(v) The requirements from which an exemption is sought involve:

(A) Recordkeeping requirements;

(B) Reporting requirements;

(C) Inspection or surveillance requirements;

(D) Equipment servicing or maintenance requirements;

(E) Education, training, experience, qualification, requalification or other employment suitability requirements;

(F) Requirements for safeguard plans, including materials control, accounting, or other inventory requirements;

(G) Scheduling requirements;

(H) Surety, insurance or indemnity requirements;

(I) Requirements to update references; *e.g.* NRC approved ASME codes, ICRP standards, or regulatory guidance; or

(J) Other requirements of an administrative, managerial, organizational, or procedural nature.

Dated at Rockville, Maryland, this 3rd day of October 2008.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–24033 Filed 10–8–08; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

RIN: 3150–AI47

[NRC–2008–0404]

Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to revise its generic determination on the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor operating licenses. The proposed revision reflects findings that the Commission has reached in the ''Waste Confidence'' decision update published elsewhere in this issue of the **Federal Register**. The Commission now proposes to find that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations (ISFSIs) until a disposal facility can reasonably be expected to be available.

DATE: Submit comments on the proposed rule by December 8, 2008. Comments received after this date will be considered if it is practical to do so, but NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2008–0404]. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: *Rulemaking.Comments@nrc.gov.* If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays. (Telephone 301–415–1677).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–899–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Neil Jensen, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–8480, e-mail, *neil.jensen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background

In 1990, the Commission concluded a generic rulemaking proceeding to reassess its degree of confidence that radioactive wastes produced by nuclear power plants can be safely disposed of, to determine when such disposal or offsite storage will be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. This proceeding reviewed findings the Commission had made in 1984 on these issues in a generic rulemaking proceeding which became known as the ''Waste Confidence Proceeding.'' The 1990 proceeding resulted in the following five reaffirmed or revised Waste Confidence findings:

(1) The Commission finds reasonable assurance that safe disposal of high-level radioactive waste (HLW) and spent nuclear fuel (SNF) in a mined geologic repository is technically feasible;

(2) The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time;

(3) The Commission finds reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF;

(4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite ISFSIs;

(5) The Commission finds reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage capacity is needed. (55 FR 38474; September 18, 1990).

These five findings form the basis of the Commission's generic determination of no significant environmental impact

from temporary storage of SNF after cessation of reactor operation codified at 10 CFR 51.23(a):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impact for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial [HLW] and [SNF] originating in such reactor and generated up to that time.

Thus, the environmental impacts of spent fuel storage for the period following the term of a reactor operating license or amendment or reactor combined license or amendment or initial independent spent fuel storage installation license or amendment need not be considered in proceedings on applications for such licenses or amendments. See 10 CFR 51.23(b).

In 1999, the Commission reviewed its Waste Confidence findings and concluded that experience and developments after 1990 had confirmed the findings and made a comprehensive reevaluation of the findings unnecessary. See 64 FR 68005; December 6, 1999.

Discussion

Although the Commission concluded in 1999 that a detailed reevaluation of the Waste Confidence findings was unwarranted, it did state that it would consider undertaking a comprehensive reevaluation of the findings when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of those findings. The Commission does not believe that these criteria have been met. However, the Commission is now preparing to conduct a significant number of proceedings on combined operating license (COL) applications for new reactors. This has led NRC to explore ways in which these proceedings may be conducted more efficiently by resolving appropriate issues generically in rulemaking proceedings.

Waste confidence is such an issue. Prior to NRC's original Waste Confidence proceeding, the Commission had stated that, as a matter of policy, it ''would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.'' *Natural Resources Defense Council; Denial of Petition for* Rulemaking, 42 FR 34391, 34393; July 5, 1977. It has been 18 years since the Commission last conducted a formal review of its Waste Confidence findings and there may be concerns that one or more of the findings are now out-of-date or at least not sufficiently supportive of the upcoming COL proceedings. In anticipation of these concerns, the Commission has prepared an update of the 1990 findings and now proposes to revise two of the findings. A detailed examination of its updated findings and proposals is announced separately in this issue of the **Federal Register**.

The update and proposed revisions to the findings have led the Commission to propose a modification of its generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operations codified at 10 CFR 51.23(a). At present, this determination is supported by findings reached in 1990 that: (1) Spent fuel can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation of the reactor that generated the fuel; (2) the Commission has reasonable assurance that a geologic repository will be available by 2025; and (3) all reactors will be able to dispose of their spent fuel within 30 years beyond their licensed life for operation. As modified, this generic determination will be simplified to state that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs until a disposal facility can reasonably be expected to be available. The reasons for this modification are briefly explained below and more fully in the separately published update.

Safe Storage of Spent Fuel

The Commission's update has strengthened its confidence in the safety and security of SNF storage, both in water pools and in ISFSIs. In 1990, the Commission determined that experience with water storage of SNF continued to confirm that pool storage is a benign environment for SNF that does not lead to significant degradation of spent fuel integrity; that the water pools in which the assemblies are stored will remain safe for extended periods; and that degradation mechanisms are well understood and allow time for appropriate remedial action. Similarly, by 1990, the Commission had gained experience with dry storage systems which confirmed the Commission's 1984 conclusions that material degradation processes in dry storage are well-understood, and that dry storage systems are simple, passive, and easily maintained. In fact, one of the bases for the Commission's confidence in the safety of dry storage was its issuance of an amendment in 1988 to 10 CFR part 72 to address spent fuel storage in a monitored retrievable storage installation (MRS) for a license term of 40 years, with the possibility of renewal. Under the environmental assessment for the MRS rule, the Commission found confidence in the safety and environmental insignificance of dry storage for 70 years following a period of 70 years of storage in a storage pool, for a total of 140 years of storage. *See NUREG–1092: Environmental Assessment for 10 CFR Part 72 ''Licensing Requirements for the Independent Storage of Spent Fuel and High-Level Radioactive Waste,''* August 1984. Nothing has occurred in the intervening years which calls into question the Commission's confidence in the safety of both wet and dry storage of SNF over long periods in the normal operation of spent fuel pools and ISFSIs. NRC has approved a 20-year license renewal for a wet ISFSI and 40-year license renewals for two dry ISFSIs.

Since 1990, the Commission's primary focus has been on potential accidents and, since the tragic events of September 11, 2001, on security events which might lead to a radioactive release from stored SNF. Multiple studies have been undertaken by NRC and by other entities, such as the National Academy of Sciences (NAS), of the safety and security of spent fuel storage, including the potential for the draining of a spent fuel pool leading to a zirconium fire and for an airplane crashing into an ISFSI. These studies and the Commission's regulatory actions in enhancing security at nuclear power plants (including the spent fuel pool) and at ISFSIs through issuance of orders to licensees and through new regulations have reinforced NRC's view that spent fuel storage systems are safe and secure and without significant environmental impacts. *See, e.g.*, Letter to Senator Pete V. Domenici from Nils J. Diaz, March 14, 2005, enclosing *NRC Report to Congress on the [NAS] Study on the Safety and Security of Commercial [SNF] Storage,* March 2005; *Denial of Petitions for Rulemaking: The*

Attorney General of the Commonwealth of Massachusetts, The Attorney General of California, PRM–51–10, PRM–51–12, 73 FR 46204; August 8, 2008; *In the Matter of Private Fuel Storage, LLC,* CLI–05–19; 62 NRC 403 (2005).

In sum, the characteristics of spent fuel storage facilities, the studies of the safety and security of spent fuel storage, NRC's extensive experience in regulating spent fuel storage and ISFSIs and in certifying dry cask storage systems, and NRC's actions in approving 40-year license renewals for two ISFSIs (meaning that the safety of dry storage after licensed operation at these ISFSIs has been approved for at least a 60-year period) confirm the Commission's confidence that spent fuel storage is safe and secure over long periods of time. The current generic determination is phrased in terms of confidence that SNF can be stored safely and without significant environmental impacts for *at least* 30 years beyond the licensed life for operation of the reactor. The Commission explained in 1990 that this time period was not intended to represent any technical limitation for safe and environmentally benign storage; rather, this time period only reflected its expectation that sufficient repository capacity would be available for any reactor's spent fuel within 30 years of the end of its licensed operations. *See* 55 FR 38509; September 18, 1990. For the reasons explained briefly below, and more fully in the separately published update, the Commission no longer finds it useful to include this time limitation in its generic determination that SNF can be stored safely and without significant environmental impacts after the end of a reactor's licensed operation.

The Availability of a Repository

The Commission's accumulated experience of the safety of long-term spent fuel storage with no significant environmental impact and its accumulated experience of the safe management of spent fuel storage during and after the expiration of the reactor operating license have motivated it to propose that, instead of predicting a particular date (currently 2025) for the availability of a repository, it would be more appropriate to make a general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available. Dispensing with the 2025 date does not signify a lack of confidence that a repository will be available by that date. DOE submitted its license application for the proposed repository at Yucca Mountain, Nevada on June 3, 2008 and on September 08, 2008, NRC Staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). The NRC has no reason at this point to conclude that the availability of a repository by 2025 is not possible and it would be premature to revise the date for that reason. However, the Commission recognizes that a repository can only be available by that date if the Commission ultimately renders a favorable decision on the application. Those decisions must await the outcome of any NRC licensing proceedings held on the application. The Commission has many times affirmed its commitment to be an impartial adjudicator of the application and does not believe that the existence of the 2025 date poses any threat to its commitment [1], but the Commission now has an opportunity to reconsider the issue of repository availability and believes that deleting this date will have the advantage of removing even an appearance of prejudgment in a licensing proceeding for Yucca Mountain.

The Commission's proposal with respect to the availability of a repository focuses attention on when it may be reasonable to expect that a repository will be available. The Commission proposes to use a ''target date'' approach as described in its proposed revision of Waste Confidence Finding 2. This approach is used by many nations with geologic repository programs and can be a useful vehicle for considering the complex technical and institutional issues involved in predicting repository availability. The NRC believes that it is reasonable to assume that it will be known by 2025 whether a repository is available at the Yucca Mountain site and intends to use this date as the starting-off point for a new repository program on the assumption that, for whatever reason, a repository does not become available at Yucca Mountain. The Commission remains confident that disposal of SNF and HLW in a geologic repository is technically feasible and that DOE should be able to locate a suitable site for repository development in no more time than was needed for the Yucca Mountain repository program (about 20 years). However, both domestic and international developments have made clear that confidence in the technical feasibility of a repository alone is not sufficient to bring about the broader societal and political acceptance for a repository. Achieving this broader support for construction of a repository at a particular site involves many different types of public outreach which, based on international examples described in the update, suggests a range of 25–35 years to obtain. This means that if a new repository program began in 2025, it would be reasonable to expect that a repository would become available by 2050–2060. It must be emphasized that this does not represent a hard and fast date by which a repository must be available for safety reasons. The Commission did not define a period when a repository will be needed for safety or environmental reasons in 1990 and it is not doing so now; it is only explaining its view of when repository capacity may be reasonably expected to be available. For this reason, the Commission proposes to delete reference to the availability date for the repository from its generic determination.

Availability of Repository Capacity for Disposal of Spent Fuel From All Reactors

At present, the Commission's generic determination of no significant environmental impact from the temporary storage of spent fuel after cessation of reactor operation includes a prediction that sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor for disposal of its spent fuel. This prediction was not based on safety or environmental considerations; it was based on finding that 30 years beyond the licensed life for operation of even the earliest reactors would not occur until after 2025. Thus, the Commission's confidence that a repository would be available by 2025 still meant that no reactor would need to store its SNF for more than 30 years beyond its licensed life for operation. If it is assumed that a repository will not be available until 2050–2060, this prediction can no longer be maintained. There are 18 reactor licenses that will expire between 2009 and 2020 and an additional 44 licenses that will expire between 2021 and 2030. *See 2007–2008 USNRC Information Digest,* NUREG–1350, Vol. 19, Table 11, p.48 (Information Digest). For licenses that are not renewed, some spent fuel will need to be stored for more than 30 years beyond the licensed life for operation. There are 22 reactors which were

[1] In 2006, Nevada claimed in court that the Waste Confidence Rule would skew the judgment of the Commissioners during the Yucca Mountain licensing proceeding. But the court dismissed the claim, ruling that the ''petitioner does not have standing to raise this claim because petitioner can point to no injury in fact as legal or practical consequence of the [Waste Confidence] Rule.'' *State of Nevada* v. *Nuclear Regulatory Commission,* 199 Fed. Appx. 1; 2006 U.S. App. LEXIS 24196 (DC Cir., September 22, 2006).

formerly licensed to operate, but which have been permanently shut down. *See Information Digest,* Appendix B. For most of these plants, 30 years beyond the licensed life for operation will fall in the 2030s and 2040s. Thus, for virtually all of these plants, spent fuel will have to be stored beyond 30 years from the expiration of the license if a repository is not available until 2050–2060. For this reason, the Commission is proposing to modify its generic determination to delete the prediction that sufficient repository capacity will be available within 30 years beyond the expiration of the licensed life for operation on all reactors. As stated above, this was not a safety finding and the deletion is made solely to be consistent with an assumption that a repository will not be available until 2050–2060. The Commission is proposing to revise Finding 2 to predict that repository capacity will be available within 50–60 years beyond the licensed life for operation of all reactors (and is requesting public comment on whether a timeframe should be included at all in Finding 2—see below) and, consistent with this, is proposing to revise Finding 4 to find that spent fuel generated in any reactor can be stored safely and without significant environmental impact for at least 60 years beyond the licensed life for operation of the reactor.

Specific Question for Public Comment

The Commission's proposed revision of Finding 2 to include a timeframe for availability of repository capacity within 50–60 years beyond the licensed life for operation of all reactors is based on its assessment not only of its understanding of the technical issues involved, but also predictions of the time needed to bring about the necessary societal and political acceptance for a repository site.

Recognizing the inherent difficulties in making such predictions, the Commission seeks specific comment on whether it should revise its approach to Finding 2 and adopt a more general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available. In other words, in response to the concerns raised by the U.S. Court of Appeals for the District of Columbia Circuit in *State of Minnesota* v. *NRC,* 602 F.2d 412 (1979) that precipitated the original Waste Confidence proceeding, the Commission could now say that there is no need to be concerned about the possibility that spent fuel may need to be stored at onsite or offsite storage facilities at the expiration of the license (including a renewed license) until such time as a repository is available because we have reasonable assurance that spent fuel can be so stored for long periods of time, safely and without significant environmental impact. Such a finding would be made on the basis of the Commission's accumulated experience of the safety of long-term spent fuel storage with no significant environmental impact (see Finding 4) and its accumulated experience of the safe management of spent fuel storage during and after the expiration of the reactor operating license (see Finding 3).

The Commission seeks comment on this alternative revision of Finding 2 and whether additional information is needed for or accompanying changes should be made to its other Findings on the long term storage of spent fuel if such a revision of Finding 2 were to be adopted.

Summary of Proposed Amendments by Section

Section 51.23(a) would be amended to provide the Commission's generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs until a disposal facility can reasonably be expected to be available.

Plain Language

The Presidential memorandum ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31883), directed that the Government's writing be in clear and accessible language. The NRC requests comments on this proposed rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the NRC as explained in the **ADDRESSES** portion of this document.

Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this proposed rule, NRC would modify its generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite ISFSIs. This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Finding of No Significant Environmental Impact: Availability

This proposed rule amends 10 CFR part 51 of the Commission's regulations to modify the generic determination currently codified in Part 51 which was made by the Commission in the 1990 Waste Confidence rulemaking proceeding. That generic determination was that for at least 30 years beyond a reactor's licensed life for operation (which may include the term of a revised or renewed license) no significant environmental impacts will result from the storage of spent fuel generated in that reactor in its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. The proposed modification provides that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations until a disposal facility can reasonably be expected to be available. The environmental analysis on which the revised generic determination is based can be found in the proposed revision and update to the Waste Confidence findings published elsewhere in this issue. This proposed rulemaking formally incorporating the revised generic determination in the Commission's regulations has no separate independent environmental impact. The proposed revisions and update to the Waste Confidence findings are available as specified in the **ADDRESSES** section of this notice.

Paperwork Reduction Act Statement

This proposed rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget approval number 3150–0021.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to a request for information or an information collection requirement unless the requesting document

displays a currently valid OMB control number.

Regulatory Analysis

A draft regulatory analysis has not been prepared for this proposed regulation because this regulation does not establish any requirements that would place a burden on licensees.

Regulatory Flexibility Certification

Under the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rule would describe a revised basis for continuing in effect the current provisions of 10 CFR 51.23(b) which provides that no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or ISFSIs for the period following the term of the reactor operating license or amendment or initial ISFSI license or amendment for which application is made is required in any environmental report, environmental impact statement, environmental assessment, or other analysis prepared in connection with certain actions. This rule affects only the licensing and operation of nuclear power plants or ISFSIs. Entities seeking or holding Commission licenses for these facilities do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the size standards established by the NRC at 10 CFR 2.810.

Backfit Analysis

The NRC has determined that the backfit rule (§§ 50.109, 70.76, 72.62, or 76.76) does not apply to this proposed rule because this amendment would not involve any provisions that would impose backfits as defined in the backfit rule. Therefore, a backfit analysis is not required.

List of Subjects in 10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendment to 10 CFR Part 51.

PART 51—ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

1. The authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 1701, 106 Stat. 2951, 2952, 2953, (42 U.S.C. 2201, 2297(f)); secs. 201, as amended, 202, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note). Subpart A also issued under National Environmental Policy Act of 1969, secs. 102, 104, 105, 83 Stat. 853–854, as amended (42 U.S.C. 4332, 4334, 4335), and Public Law 95–604, Title II, 92 Stat. 3033–3041; and sec. 193, Public Law 101–575, 104 Stat. 2835 (42 U.S.C. 2243). Sections 51.20, 51.30, 51.60, 41.80, and 51.97 also issued under secs. 135, 141, Public Law 97–425, 96 Stat. 2232, 2241, and sec. 148, Public Law 100–203, 101 Stat. 1330–223 (42 U.S.C. 10155, 10161, 10168). Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036–3038 (42 U.S.C. 2021) and under Nuclear Waste Policy Act of 1982, sec. 121, 96 Stat. 2228 (42 U.S.C. 10141). Sections 51.43, 51.67, and 51.109 also under Nuclear Waste Policy Act of 1982, sec 114(f), 96 Stat 2216, as amended (42 U.S.C. 10134 (f)).

2. In § 51.23, paragraph (a) is revised to read as follows:

§ 51.23 Temporary storage of spent fuel after cessation of reactor operation—generic determination of no significant environmental impact.

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations until a disposal facility can reasonably be expected to be available.

* * * * *

Dated at Rockville, Maryland, this 29th day of September 2008.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–23384 Filed 10–8–08; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

[Docket ID–2008–0482]

Waste Confidence Decision Update

AGENCY: Nuclear Regulatory Commission.

ACTION: Update and proposed revision of Waste Confidence Decision.

SUMMARY: On September 18, 1990, the Nuclear Regulatory Commission (NRC or Commission) issued a decision reaffirming and revising, in part, the five Waste Confidence findings reached in its 1984 Waste Confidence Decision. The 1984 decision and the 1990 review were products of rulemaking proceedings designed to assess the degree of assurance that radioactive wastes generated by nuclear power plants can be safely disposed of, to determine when such disposal or offsite storage would be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available. The Commission has decided to again undertake a review of its Waste Confidence findings as part of an effort to enhance the efficiency of combined operating license proceedings for applications for nuclear power plants anticipated in the near future. To assure that its Waste Confidence findings are up-to-date, the Commission has prepared an update of the findings and proposes to revise two of the findings. The purpose of this notice is to seek public comment on the update and the proposed revisions.

The Commission proposes that the second and fourth findings in the Waste Confidence Decision be revised as follows:

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50–60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

The Commission proposes to reaffirm the remaining findings. Each finding, any proposed revisions, and the reasons for revising or reaffirming them are discussed below. In keeping with the proposed revised Findings 2 and 4, the Commission is publishing concurrently

in this issue of the **Federal Register** proposed conforming amendments to its 10 CFR part 51 rule providing its generic determination on the environmental impacts of storage of spent fuel at, or away from, reactor sites after the expiration of reactor operating licenses.

DATES: Submit comments by December 8, 2008. Comments received after this date will be considered if it is practical to do so, but NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID [NRC–2008–0482]. Address questions about NRC dockets to Carol Gallagher 301–415–5905; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to: *Rulemaking.Comments@nrc.gov.* If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 am and 4:15 pm Federal workdays. (Telephone 301–415–1677).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

You can access publicly available documents related to this document using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied for a fee publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

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FOR FURTHER INFORMATION CONTACT: Neil Jensen, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–8480, e-mail, *neil.jensen@nrnc.gov.*

SUPPLEMENTARY INFORMATION:

Background

In October 1979, the NRC initiated a rulemaking proceeding, known as the Waste Confidence proceeding, to assess its degree of assurance that radioactive wastes produced by nuclear power plants can be safely disposed of, to determine when such disposal or offsite storage will be available, and to determine whether radioactive wastes can be safely stored onsite past the expiration of existing facility licenses until offsite disposal or storage is available (44 FR 1372; October 25, 1979). The Commission's action responded to a remand from the U.S. Court of Appeals for the District of Columbia Circuit in *State of Minnesota* v. *NRC,* 602 F.2d 412 (1979). That case raised the question whether an offsite storage or disposal solution would be available for the spent nuclear fuel (SNF) produced at the Vermont Yankee and Prairie Island reactors at the expiration of the licenses for those facilities in the 2007–2009 period or, if not, whether the SNF could be stored at those reactor sites until an offsite solution was available. The Waste Confidence proceeding also stemmed from the Commission's statement, in its denial of a petition for rulemaking filed by the Natural Resources Defense Council (NRDC), that it intended to reassess periodically its finding of reasonable assurance that methods of safe permanent disposal of high-level radioactive waste (HLW) would be available when they were needed. Further, the Commission stated that, as a matter of policy, it ''would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.'' (42 FR 34391, 34393; July 5, 1977, *pet. for rev. dismissed sub nom. NRDC* v. *NRC,* 582 F.2d 166 (2d Cir. 1978)).[1]

The Waste Confidence proceeding resulted in five Waste Confidence findings which the Commission issued August 31, 1984; 49 FR 34658:

(1) The Commission finds reasonable assurance that safe disposal of HLW and SNF in a mined geologic repository is technically feasible;

(2) The Commission finds reasonable assurance that one or more mined geologic repositories for commercial HLW and SNF will be available by the years 2007–2009, and that sufficient repository capacity will be available within 30 years beyond the expiration of any reactor operating license to dispose of existing commercial HLW and SNF originating in such reactor and generated up to that time;

(3) The Commission finds reasonable assurance that HLW and SNF will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all HLW and SNF;

(4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating license at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations (ISFSIs);

(5) The Commission finds reasonable assurance that safe independent onsite or offsite spent fuel storage will be made available if such storage capacity is needed.

Based on these findings, the Commission amended 10 CFR part 51 of its regulations to provide a generic determination, codified in 10 CFR 51.23(a), that for at least 30 years beyond the expiration of reactor operating licenses, no significant environmental impacts will result from the storage of spent fuel in reactor facility storage pools or ISFSIs located at reactor or away-from-reactor sites.

The Commission conducted a review of its findings in 1989–1990 which resulted in the revision of the second and fourth findings to reflect revised expectations for the date of availability of the first repository, and to clarify that the expiration of a reactor's operating license referred to the full 40 year initial license for operation, as well as any additional term of a revised or renewed license. These findings are:

[1] The NRDC petition asserted that the Atomic Energy Act of 1954, as amended (AEA), required NRC to make a finding, before issuing an operating license for a reactor, that permanent disposal of HLW generated by that reactor can be accomplished safely. The Commission found that the AEA did not require this safety finding to be made in the context of reactor licensing, but rather in the context of the licensing of a geologic disposal facility.

(2) The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time;

(4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite ISFSIs.

The Commission amended the generic determination made in 10 CFR 51.23(a) consistent with these revised findings (55 FR 38472; September 18, 1990):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite [ISFSIs]. Further, the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial [HLW and SNF] originating in such reactor and generated up to that time.

This generic determination is applied in licensing proceedings conducted under 10 CFR Parts 50, 52, 54 and 72. *See* 10 CFR 51.23 (2008).

In 1999, the Commission reviewed its Waste Confidence findings and concluded that experience and developments since 1990 had confirmed the findings and made a comprehensive reevaluation of the findings unnecessary. It also stated that it would consider undertaking such a reevaluation when the impending repository development and regulatory activities run their course or if significant and pertinent unexpected events occur, raising substantial doubt about the continuing validity of the Waste Confidence findings (64 FR 68005; December 6, 1999).

The Commission does not believe that the criteria set in 1999 for reopening the Waste Confidence findings have been met. However, the Commission is now preparing to conduct a significant number of proceedings on combined construction permit and operating license (COL) applications for new reactors. The Commission anticipates that the issue of waste confidence may be raised in those proceedings and desires to take a fresh look at its Waste Confidence findings to take into account developments since 1990. For this purpose, the Commission has prepared this update of the Waste Confidence findings and now proposes the following revisions of Findings 2 and 4:

(2) The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50–60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time.

(4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite ISFSIs.

The update restates and supplements the bases for the earlier findings. The Commission seeks public comment on the update and on its proposed revisions of Findings 2 and 4.

The Commission is also publishing concurrently in this issue of the **Federal Register** a proposed rule revising 10 CFR 51.23(a) to conform with the proposed revisions of Findings 2 and 4.

I. Finding 1: The Commission Finds Reasonable Assurance That Safe Disposal of High-Level Radioactive Waste and Spent Fuel in a Mined Geologic Repository Is Technically Feasible

A. Bases for Finding 1

The Commission reached this finding in 1984 and reaffirmed it in 1990. The focus of this finding is on whether safe disposal of HLW and SNF is technically possible using existing technology and without a need for any fundamental breakthroughs in science and technology. To reach this finding, the Commission considered the basic features of a repository designed for a multi-barrier system for waste isolation and examined the problems the Department of Energy (DOE) would need to resolve in developing a final design for such a repository. The Commission identified three major technical problems: (1) The selection of a suitable geologic setting as host for a technically acceptable repository site; (2) the development of waste packages that will contain the waste until the fission products are greatly reduced; and (3) the development of engineered barriers, such as backfilling and sealing of the drifts and shafts of the repository, that can effectively retard migration of radionuclides out of the repository (49 FR 34667; August 31, 1984).

DOE's selection of a suitable geologic setting has been governed by Congress' passage of the Nuclear Waste Policy Act of 1982, Public Law 97–425, 42 U.S.C. 10101 *et seq.* (NWPA) and by the 1987 amendments to NWPA in the Nuclear Waste Policy Amendments Act, Pub. L. 100–202 (NWPAA). DOE had begun to explore potential repository sites before the NWPA, but that Act set in place a formal process and schedule for the development of two geologic repositories. The following brief summary of key provisions of these Acts may assist readers in understanding the process followed by DOE in locating a suitable geologic setting.

As initially enacted, NWPA directed DOE to issue guidelines for the recommendation of sites and then to nominate at least 5 sites as being suitable for site characterization for selection as the first repository site and, not later than January 1, 1985, to recommend 3 of those sites to the President for characterization as candidate sites. Section 112 of NWPA, 42 U.S.C. 10132. Not later than July 1, 1989, DOE was to again nominate 5 sites and recommend 3 of them to the President for characterization for selection of the second repository. *Id.* DOE was then to carry out site characterization activities for approved sites. Section 113 of NWPA, 42 U.S.C. 10133. Following site characterization, DOE was then to recommend sites to the President as suitable for development as repositories and the President was to recommend one site to the Congress by March 31, 1987, and another site by March 31, 1989, for development as the first two repositories. Section 114 of NWPA, 42 U.S.C. 10134. States and affected Indian tribes were given the opportunity to object, but if the recommendations were approved by Congress, DOE was then to submit applications for a construction authorization to NRC. *Id.* NRC was given until January 1, 1989, to reach a decision on the first application and until January 1, 1992, on the second. The Commission was directed to prohibit the emplacement in the first repository of more than 70,000 metric tons of heavy metal (MTHM) until a

second repository was in operation. *Id.* The 1987 NWPAA, *inter alia,* restricted site characterization solely to a site at Yucca Mountain, NV (YM) and terminated the program for a second repository. The NWPAA provided that if DOE at any time determines YM to be unsuitable for development as a repository, DOE must report to Congress its recommendations for further action to assure the safe, permanent disposal of SNF and HLW, including the need for new legislation. Section 113 of NWPA, as amended, 42 U.S.C. 10133.

In 1984, the Commission reviewed DOE's site exploration program and concluded that it was providing information on site characteristics at a sufficiently large number and variety of sites and geologic media to support the expectation that one or more technically acceptable sites would be identified (49 FR 34668; August 31, 1984). In 1990, the Commission noted that the 1987 amendment of NWPA that focused solely on the YM site carried the potential for considerable delay in opening a repository if that site were found to be unlicenseable. However, the possibility of that delay did not undermine the Commission's confidence that a technically acceptable site would be located, either at YM or elsewhere. The Commission observed that the NRC staff had provided extensive comments on DOE's draft environmental assessments of the 9 sites it had identified as being potentially acceptable and on the final environmental assessments for the 5 sites nominated.[2] NRC had not identified any fundamental technical flaw or disqualifying factor which would render any of the sites unsuitable for characterization or potentially unlicenseable, although NRC noted that many issues would need to be resolved during site characterization for YM or any other site (55 FR 38486; September 18, 1990).

With respect to the development of effective waste packages, the Commission, in 1984, reviewed DOE's scientific and engineering program on this subject. The Commission also considered whether the possibility of renewed reprocessing of SNF might alter the technical feasibility of achieving a suitable waste package because of the need to accommodate a waste form other than spent fuel. The Commission concluded that the studies of DOE and others demonstrated that the chemical and physical properties of SNF and HLW can be sufficiently understood to permit the design of a suitable waste package and that the possibility of commercial reprocessing would not substantially affect this conclusion (49 FR 34671; August 31, 1984). In 1990, the Commission reviewed continued research and experimentation on waste packages that were undertaken by DOE in other countries, particularly Sweden and Canada. NRC noted that DOE had narrowed the range of waste package designs to a design tailored for unsaturated tuff at the YM site due to the 1987 redirection of the HLW program. NRC also noted that some reprocessing wastes from the defense program and the West Valley Demonstration Project were now anticipated to be disposed in the repository. However, NRC remained confident that, given a range of waste forms and conservative test conditions, the technology is available to design acceptable waste packages (55 FR 38489; September 18, 1990).

With respect to the development of effective engineered barriers, the Commission's confidence in 1984 rested upon its consideration of DOE's ongoing research and development activities regarding backfill materials and borehole and shaft sealants which led it to the conclusion that these activities provided a basis for reasonable assurance that engineered barriers can be developed to isolate or retard radioactive material released by the waste package (49 FR 34671; August 31, 1984). In 1990, although DOE's research had narrowed to focus on YM, the Commission continued to have confidence that backfill or packing materials can be developed as needed for the underground facility and waste package, and that an acceptable seal can be developed for candidate sites in different geologic media (55 FR 38489–38490; September 18, 1990).

B. Evaluation of Finding 1

There remains high confidence among the scientific and technical community engaged in waste management that safe geologic disposal is achievable with currently available technology. *See, e.g.,* National Research Council, *''Technical Bases for Yucca Mountain Standards,''* 1995. No insurmountable technical or scientific problem has emerged to disturb this confidence that safe disposal of SNF and HLW can be achieved in a mined geologic repository. To the contrary, there has been significant progress in the enhancement of scientific understanding and technological development needed for geologic disposal over the past 18 years. There is now a much deeper understanding of processes that affect the ability of repositories to isolate waste over long periods. *Id.* at 71–72; International Atomic Energy Agency (IAEA), ''Scientific and Technical Basis for the Geologic Disposal of Radioactive Wastes, Technical Reports Series No. 413,'' 2003. The ability to characterize and quantitatively assess the capabilities of geologic and engineered barriers has been repeatedly demonstrated. NRC, ''Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada; Proposed Rule,'' (64 FR 8640, 8649; February 22, 1999); Organization for Economic Cooperation and Development, Nuclear Energy Agency, ''Lessons Learned from Ten Performance Assessment Studies,'' 1997. Specific sites have been investigated and extensive experience has been gained in underground engineering. IAEA, ''Radioactive Waste Management Studies and Trends, IAEA/WMDB/ST/4,'' 2005; IAEA, ''The Use of Scientific and Technical Results from Underground Research Laboratory Investigations for the Geologic Disposal of Radioactive Waste, IAEA–TECDOC–1243,'' 2001. These advances and others throughout the world, in underground research laboratories, continue to confirm the soundness of the basic concept of deep geologic disposal. IAEA, ''Joint Convention on Safety of Spent Fuel Management and on Safety of Radioactive Waste Management, INFCIRC/546,'' 1997.

In the United States, the technical approach for safe HLW disposal has remained unchanged for several decades: Use a deep geologic repository containing natural barriers to hold canisters of HLW with additional engineered barriers to further retard radionuclide release. Although some specifics in this technical approach have changed in response to new knowledge (*e.g.*, engineered backfill was removed as a design concept for YM in the late 1990s in response to enhanced understandings of heat and water transfer processes in the near-field drift environment), safe disposal continues to appear to be a feasible goal with current technology. Assessments for long-term performance of a potential repository at YM were conducted by DOE in 1998 (DOE/RW–0508, Viability Assessment) and 2002 (DOE/RW–0539, Site Recommendation). These assessments used existing technology and available scientific information, and did not identify areas where fundamental

[2] Under the program established by the initial NWPA, DOE had nominated sites at Hanford WA, Yucca Mountain NV, Deaf Smith County TX, Davis Canyon UT, and Richton Dome MS, and had recommended the first 3 sites for site characterization.

breakthroughs in science or technology were needed to support the assessments.

With respect to the issue of identifying a suitable geologic setting as host for a technically acceptable site, DOE made its suitability determination for the YM site in 2002. On June 3, 2008, DOE submitted the application to NRC and on September 08, 2008, NRC Staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). Whether this particular site will be found to be technically acceptable must await the outcome of an NRC licensing proceeding. The 1987 amendments to NWPA barred DOE from continuing site investigations elsewhere within the U.S. However, Congress' decision to focus solely on YM was not based on any finding that information DOE had obtained on other sites ruled them out for technical reasons; rather, the decision was aimed at controlling the costs of the HLW program (55 FR 38486; September 18, 1990). Repository programs in other countries are actively considering crystalline rock, clay formations, and salt formations as repository host media. IAEA, ''Radioactive Waste Management Status and Trends, IAEA/WMDB/ST/4,'' 2005; IAEA, ''The Use of Scientific and Technical Results from Underground Research Laboratory Investigations for the Geologic Disposal of Radioactive Waste, IAEA–TECDOC–1243,'' 2001. Many of these programs have been conducting research on these geologic media for several decades. Although there are relative strengths to the capabilities of each of these potential host media, no geologic media previously identified as a candidate host has been ruled out based on technical or scientific information. Salt formations currently are being considered as hosts only for reprocessed nuclear materials because heat-generating waste, like spent nuclear fuel, exacerbates a process by which salt can rapidly deform. This process could potentially cause problems for keeping drifts stable and open during the operating period of a repository.

In 2001, NRC amended its regulations to include a new 10 CFR Part 63, ''Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada,'' (66 FR 55732; November 2, 2001), which requires use of both natural and engineered barriers to meet overall total system performance objectives without pre-determined subsystem performance requirements, such as substantially complete containment for a waste package, as is required in 10 CFR Part 60.[3] Accordingly, U.S. research and development activities have focused on understanding the long-term capability of natural and engineered barriers which can prevent or substantially reduce the release rate of radionuclides from a potential repository system. Although the performance of individual barriers may change through time, the overall performance of the total system is required to be acceptable throughout the performance period for the repository. In this context of total system performance, research and development has supported the view that it appears technically possible to design and construct a waste package and an engineered barrier system that, in conjunction with natural barriers, could prevent or substantially reduce the release rate of radionuclides from a potential repository system during the performance period. NRC, ''Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada; Proposed Rule,'' (64 FR 8649; February 22, 1999); IAEA, ''Joint Convention on Safety of Spent Fuel Management and on Safety of Radioactive Waste Management, INFCIRC/546,'' 1997.

Since the Commission last considered Waste Confidence issues, NRC has issued design certifications under its regulations at 10 CFR Part 52, ''Early Site Permits; Standard Design Certifications; and Combined Licenses for Nuclear Power Plants,'' and is currently reviewing several plant designs in response to applications for design certifications and for COL applications that reference designs under review or designs previously certified. These facilities would use the same or similar fuel assembly designs as the nuclear power plants currently operating in the United States. A need for possible design changes for repository disposal may be affected by the extent of a licensee's reliance on cladding or fuel type as a barrier to waste isolation. If limited reliance is placed on the barrier capabilities of cladding or fuel type in a demonstration of compliance with repository safety requirements, then minimal design changes may be needed to accommodate new types of SNF or cladding. As such, the new reactor designs and specific license applications currently under review would not raise issues as to the technical feasibility of repository disposal.

NRC is also engaged in preliminary interactions with DOE and possible reactor vendors proposing advanced reactor designs that are different from the currently operating light-water reactors. Some of these advanced reactors use gas-cooled or liquid metal cooled technologies and have fuel and reactor components that might require different transportation and storage containers. Geometric, thermal, and criticality constraints could conceivably require a design modification to disposal containers from that currently proposed for YM. Nevertheless, the technical requirements for disposal of advanced reactor components appear similar to the requirements for disposal of components for current light water reactors. For example, DOE currently plans to dispose of spent fuel at YM from both gas-cooled (Peach Bottom 1) and liquid-metal cooled (Fermi 1) reactors, using the same basic technological approach as for other SNF. Although radionuclide inventory, fuel matrix, and cladding characteristics for advanced fuels might be distinct from current light-water reactors, the safe disposal of advanced fuel appears to involve the same scientific and engineering knowledge as used for fuel from current light-water reactors.

There is currently a high uncertainty regarding the growth of advanced reactors in the U.S. The licensing strategy developed by NRC and DOE for the next generation nuclear plant (NGNP) program found that an aggressive licensing approach may lead to operation of a prototype facility in 2021. Based on comparison with current disposal strategies for fuel from existing gas cooled or liquid-metal cooled reactors, NRC is confident that current technology appears to be adequate to support the safe disposal of spent fuel from a potential prototype facility. In addition to the NGNP activities related to the prototype reactor, various activities, such as DOE's Advanced Fuel Cycle Initiative, are underway to evaluate fuel cycle alternatives that could affect the volume and form of waste from the prototype reactor or other advanced nuclear reactor designs. The need to consider waste disposal as part of the overall research and development activities for advanced reactors is recognized and included in the activities of designers, DOE and NRC. *See, e.g.*, DOE Nuclear Energy Research Advisory Committee and the Generation IV International Forum, ''A Technology Roadmap for Generation IV

[3] NRC's regulations at 10 CFR Part 63 apply only to the proposed repository at YM. NRC's regulations at 10 CFR Part 60, ''Disposal of High-Level Radioactive Wastes in Geologic Repositories,'' govern the licensing of any repository other than one located at YM. However, at the time Part 63 was proposed, the Commission indicated it would consider revising Part 60 if it seemed likely to be used in the future. 64 FR 8640, 8643; February 22, 1999.

Nuclear Energy Systems,'' December 2002.

Based on the information described previously, the Commission proposes to reaffirm Finding 1.

II. Finding 2 (1990): The Commission Finds Reasonable Assurance That at Least One Mined Geologic Repository Will Be Available Within the First Quarter of the Twenty-First Century, and That Sufficient Repository Capacity Will Be Available Within 30 Years Beyond the Licensed Life for Operation (Which May Include the Term of a Revised or Renewed License) of Any Reactor To Dispose of the Commercial High-Level Radioactive Waste and Spent Fuel Originating in Such Reactor and Generated Up to That Time

A. Bases for Finding 2

The dual objectives of this finding are to predict when a repository will be available for use and to predict how long spent fuel may need to be stored at a reactor site until repository space is available for the spent fuel generated at that reactor. With respect to the first prediction, the Commission's focus in 1984 was on the years 2007–2009, the years during which the operating licenses for the Vermont Yankee and Prairie Island nuclear power plants would expire.[4] In 1984, DOE anticipated that the first repository would begin operation in 1998 and the second in 2004. However, NRC concluded that technical and institutional uncertainties made it preferable to focus on the 2007–2009 time period. The technical uncertainties involved the questions of how long it would take DOE to locate a suitable geologic setting for a potentially technically acceptable repository and how long it would take to develop an appropriate waste package and engineered barriers. The Commission expressed the view that despite early delays DOE's program was on track and, under the impetus given by the recently-enacted NWPA, would timely resolve the technical problems (49 FR 34674–34675; August 31, 1984).

The Commission also identified institutional uncertainties that needed to be resolved: (1) Measures for dealing with Federal-state disputes; (2) An assured funding mechanism that would be sufficient over time to cover the period for developing a repository; (3) An organizational capability for managing the HLW program; and (4) A firm schedule and establishment of responsibilities. The Commission expressed its confidence in the ability of the provisions of the then recently-passed NWPA to timely resolve these uncertainties (49 FR 34675–34679; August 31, 1984).

With respect to the second prediction, NRC reviewed DOE's estimates of the amount of installed generating capacity of commercial nuclear power plants in the year 2000 and concluded that the total amount of spent fuel that would be produced during the operating lifetimes of these reactors would likely be about 160,000 MTHM. To accommodate this amount, NRC assumed that two repositories would be needed. NRC calculated that if the first repository began to receive SNF in 2005, and the second in 2008, then all the SNF would be emplaced by about 2026. This would mean that sufficient repository capacity would be available within 30 years beyond the expiration of any reactor license for disposal of its SNF (49 FR 34679; August 31, 1984).

In reviewing these predictions in 1990, the Commission faced a considerably changed landscape. First, DOE's schedule for the availability of a repository had slipped several times so that its then-current projection was 2010. Second, Congress' 1987 amendment of NWPA had confined site characterization to the YM site, meaning that there were no ''back-up'' sites being characterized in case the YM site should be found unsuitable or unlicenseable. Finally, site characterization activities at YM had not proceeded without problems, notably in DOE's schedule for sub-surface exploration and in development of its quality assurance program. Given these considerations, the Commission found it would not be prudent to reaffirm its confidence in the availability of a repository in the 2007–2009 period (55 FR 38495; September 18, 1990).

Instead, the Commission found that it would be reasonable to assume that DOE could make its finding whether YM was suitable for development of a repository by the year 2000. The Commission was unwilling to assume that DOE would make a finding of suitability (which would be necessary for a repository to be available by 2010). To establish a new time-frame for repository availability, the Commission made the assumption that DOE would find the YM site unsuitable by the year 2000 and that (as DOE had estimated) it would take 25 years for a repository to become available at a different site.

The Commission then considered whether it had sufficient bases for confidence that a repository would be available by 2025 using the same technical and institutional criteria it had used in 1984. The Commission found no reason to believe that another potentially technically acceptable site could not be located if the YM site were found unsuitable. The development of a waste package and engineered barriers was tied up with the question of the suitability of the YM site but NRC found no reason to believe that a waste package and engineered barriers could not be developed for a different site by 2025, if necessary (55 FR 38495; September 18, 1990). The institutional uncertainties were perhaps more difficult to calculate. The Commission acknowledged that DOE's efforts to address the concerns of States, local governments and Indian tribes had met with mixed results. Nevertheless, the Commission retained its confidence that NWPA, as amended, had achieved the proper balance between providing for participation by affected parties and providing for the exercise of Congressional authority to carry out the national program for waste disposal (55 FR 38497; September 18, 1990). Similarly, the Commission believed that management and funding issues had been adequately resolved by NWPA, as amended, and would not call into question the availability of a repository by 2025 (55 FR 38497–38498; September 18, 1990). Thus, except for the schedule, the Commission was confident that the HLW program set forth in the amended NWPA would ultimately be successful.

The Commission also considered whether the termination of activities for a second repository, combined with the 70,000 MTHM limit for the first repository, together with its new projection of 2025 as the time for the availability for a repository, undermined its prediction that sufficient repository capacity would be available within 30 years beyond expiration of any reactor operating license to dispose of the SNF originating in such reactor and generated up to that time (55 FR 38501–38504; September 18, 1990). The Commission noted that almost all reactor licenses would not expire until some time in the first three decades of the twenty-first century and license renewal was expected to extend the terms of some of these licenses. Thus, a repository was not needed by 2007–2009 to provide disposal capacity within 30 years beyond expiration of

[4] Under the court remand which precipitated the initial waste confidence review, NRC was required to consider whether there was reasonable assurance that an offsite storage solution would be available by the years 2007–2009 and, if not, whether there was reasonable assurance that the spent fuel could be stored safely at those sites beyond those dates. *See State of Minnesota v. NRC,* 602 F.2d 412, 418 (DCDC Cir. 1979).

most operating licenses.[5] The Commission acknowledged, however, that it appeared likely that two repositories would be needed to dispose of all the SNF and HLW from the current generation of reactors unless Congress provided statutory relief from the 70,000 MTHM limit for the first repository and unless the first repository had adequate capacity to hold all the SNF and HLW generated. This was because DOE's spent fuel projections, in 1990, called for 87,000 MTHM to have been generated by the year 2036. In addition, DOE's projections were based on the assumption of no new reactor orders. The Commission believed that that assumption probably underestimated the total spent fuel discharges to be expected due to the likelihood of reactor license renewals. The Commission expressed the belief that if the need for a second repository was established, Congress would provide the needed institutional support and funding, as it had for the first repository.[6] The Commission reasoned that if work began on the second repository program in 2010, that repository could be available by 2035. Two repositories available in approximately 2025 and 2035, each with acceptance rates of 3400 MTHM/year within several years after commencement of operations, would provide assurance that sufficient repository capacity will be available within 30 years of operating license expiration for reactors to dispose of the spent fuel generated at their sites up to that time. The Commission concluded that a second repository, or additional capacity at the first repository, would be needed only to accommodate the additional quantity of spent fuel generated during the later years of reactors operating under a renewed license. The Commission stated that the availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of these reactors' operating licenses and that the same would be true of the spent fuel discharged from any new generation of reactor designs (55 FR 38503–38504; September 18, 1990).

The Commission acknowledged that there were several licenses that had been prematurely terminated where it was possible that SNF would be stored more than 30 years beyond the effective expiration of the license and that there could be more of these premature terminations. However, the Commission remained confident that in these cases, the overall safety and environmental impacts of extended spent fuel storage would be insignificant. The Commission had found that spent fuel could be safely stored for at least 100 years (Finding 4),[7] and that spent fuel in at-reactor storage would be safely maintained until disposal capacity at a repository was available (Finding 3). The Commission emphasized that it had not identified a date by which a repository must be available for health and safety reasons. The Commission found that in effect, under the second part of Finding 2, safe management and safe storage would not need to continue for more than 30 years beyond expiration of any reactor's operating license because sufficient repository capacity was expected to become available within those 30 years (55 FR 38504; September 18, 1990).

B. Evaluation of Finding 2

As explained previously, the Commission based its estimate in 1990 on the premise that at least one geologic repository would be available within the first quarter of the twenty-first century on an assumption that DOE would make its suitability determination under section 114 of NWPA around the year 2000. To avoid being put in the position of assuming the suitability of the YM site, the Commission then assumed that DOE would find that site unsuitable and, as DOE had estimated, that it would take 25 years before a repository could become available at an alternate site.

DOE made its suitability determination in early 2002 and found the YM site suitable for development as a repository.[8] Although DOE's application for a construction authorization for a repository was considerably delayed from the schedule set out in NWPA,[9] on June 3, 2008, DOE submitted the application to NRC and on September 08, 2008, NRC Staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). DOE's current estimate of the best achievable date for opening of the YM repository, assuming it is licensed, is 2020. At the hearing before the Subcommittee on Energy and Air Quality of the House Committee on Energy and Commerce held on July 15, 2008, Edward F. Sproat III, Director of DOE's Office of Civilian Radioactive Waste Management (OCRWM), informed the Congress that DOE could be ready to begin accepting SNF by 2020, but only if adequate funding is provided.

The NWPA process thus remains on track for making available a geologic repository for the disposal of SNF and HLW. DOE's projection of a date for repository availability has moved from 2010 in 1990 to 2020 today and could slip further. Even with some slippage in DOE's schedule, it remains possible that a repository will be available by 2025. Of course, now the only repository that could become available by 2025 is the proposed repository at YM and it will only become available if the Commission issues a construction authorization and a subsequent authorization to receive and possess HLW. In 2005, the State of Nevada filed a petition for rulemaking with NRC (PRM–51–8) which raised the question whether continued use of the 2025 date, in effect, indicated prejudgment of the outcome of any licensing proceeding that might be held. The Commission rejected this notion in its denial of the petition:

> Even if DOE's estimate as to when it will tender a license application should slip further, the 2025 date would still allow for unforeseen delays in characterization and licensing. It also must be recognized that the Commission remains committed to a fair and comprehensive adjudication and, as a result, there is the potential for the Commission to deny a license for the Yucca Mountain site based on the record established in the adjudicatory proceeding. That commitment is not jeopardized by the 2025 date for repository availability. The Commission did not see any threat to its ability to be an

[5] NRC identified Dresden 1, licensed in 1959, as the earliest licensed power reactor and noted that 30 years beyond its licensed life for operation would be 2029 and that it was possible, if a repository were to become available by 2025, for all the Dresden 1 SNF to be removed from that facility by 2029 (55 FR 38502; September 18, 1991).

[6] DOE is statutorily required to report to the President and to Congress on the need for a second repository between January 1, 2007 and January 1, 2010. Section 161 of NWPA, as amended, 42 U.S.C. 10172a. DOE intends to submit the report in 2008.

[7] The Commission conservatively assumed that licenses would be renewed for 30 year terms (55 FR 38503; September 18, 1990). Thus, the initial 40 year term of the operating license, plus 30 years for the renewed operating license term and 30 years beyond the expiration of the renewed license amounts to storage for at least 100 years.

[8] On February 14, 2002, the Secretary of Energy recommended the YM site for the development of a repository to the President thereby setting in motion the approval process set forth in sections 114 and 115 of the NWPA. *See* 42 U.S.C. 10134(a)(1); 10134(a)(2); 10135(b), 10136(b)(2). On February 15, 2002, the President recommended the site to Congress. On April 8, 2002, the State of Nevada submitted a notice of disapproval of the site recommendation to which Congress responded, on July 9, 2002, by passing a joint resolution approving the development of a repository at YM which the President signed on July 23, 2002. See Pub. L. No. 107–200, 116 Stat. 735 (2002) (codified at 42 U.S.C. 10135 note (Supp. IV 2004)).

[9] Section 114(b) of NWPA directs the Secretary of Energy to submit a construction authorization application to NRC within 90 days of the date the site designation becomes effective. 42 U.S.C. 10134(b).

impartial adjudicator in 1990 when it selected the 2025 date even though then, as now, a repository could only become available if the Commission's decision is favorable. Should the Commission's decision be unfavorable and should DOE abandon the site, the Commission would need to reevaluate the 2025 availability date, as well as other findings made in 1990. *State of Nevada; Denial of a Petition for Rulemaking* (70 FR 48329, 48333; August 17, 2005).

In the absence of an unfavorable NRC decision and DOE's abandonment of the site, the Commission found no reason to reopen its Waste Confidence findings.

However, the Commission has now considered the recommendations of the Combined License Review Task Force Report and, in its June 22, 2007, Staff Requirements Memorandum (SRM) on that report, has approved rulemaking to resolve generic issues associated with combined license applications. SRM—COMDEK–07–0001/COMJSM–07–0001—Report of the Combined License Review Task Force (ML071760109). In a subsequent SRM of September 7, 2007, the Commission expressed the view that a near-term update to the Waste Confidence findings was appropriate. SRM—Periodic Briefing on New Reactor Issues (ML072530192). The staff, in its response to these SRMs, recognized that there would likely be long-term inefficiencies in combined license application proceedings, due to the need to respond to potential questions and petitions directed to the existing Waste Confidence Decision, and committed to evaluate possible updates to the decision.[10] See memorandum from Luis A. Reyes to the Commissioners, ''Rulemakings that Will Provide the Greatest Efficiencies to Complete the Combined License Application Reviews in a Timely Manner,'' December 17, 2007, at 3 (ML073390094). Undertaking a public rulemaking proceeding now to consider revisions to the Waste Confidence findings and rule—rather than waiting until some point closer to the 2025 date—will allow sufficient time to conduct a studied and orderly reassessment and, as appropriate, to revise and update the findings and rule. In particular, it will allow the Commission to consider alternative time-frames which would provide reasonable assurance for the availability of a repository.

One possibility might be to make an assumption that the Commission would ultimately find the YM site unacceptable by a certain date and then set the expected availability of a different repository at a time around 25 years later in accordance with DOE's 1990 estimate of the time it would take to make a repository available at a different site. However, the Commission rejected this route in the denial of the Nevada petition:

> [T]he use of a Commission acceptability finding as the basis for repository availability is impossible to implement because it would require the Commission to prejudge the acceptability of any alternative to Yucca Mountain in order to establish a reasonably supported outer date for the Waste Confidence finding. That is, if the Commission were to assume that a license for the Yucca Mountain site might be denied in 2015 and establish a date 25 years hence for the 'availability' of an alternative repository (*i.e.*, 2040), it would still need to presume the 'acceptability' of the alternate site to meet that date (70 FR 48333; August 17, 2005).

Another approach would be to revise the finding to include a target date or timeframe for which it now seems reasonable to assume that a repository would be available. A target date for when a disposal facility can reasonably be expected to be available would result from an examination of the technical and institutional issues that would need to be resolved before a repository could be available. The target date approach would be consistent with the HLW disposal programs in other countries, as explained further in this document. The target date could be placed in the finding itself, or described in the explanation for the finding. A target date is admittedly not very different from ''the first quarter of the twenty-first century'' as stated in the current finding, but this approach would make it more clear that specification of a particular time for when a repository could be built does not imply that radioactive waste would pose unsafe conditions if a repository were not available at that time. The capability to safely store radioactive waste over long periods is a viable interim alternative not dependent on any one specific year for availability of a repository. The Commission has adopted this approach in updating its finding.

Most countries possessing HLW and SNF eventually plan to confine these wastes using deep geologic disposal. Currently, there are 24 other countries that consider disposal of spent or reprocessed nuclear fuel in deep geologic repositories. From the vantage point of near-term safety, there has been little urgency in these countries for implementing disposal facilities because of the perceived high degree of safety provided by interim storage, either at reactors or at independent storage facilities. Of these 24 countries,10 have established target dates for the availability of a repository. Most of the 14 countries which have not established target dates rely on centralized interim storage, which may include a protracted period of onsite storage before shipment to a centralized facility.[11]

The ''target date'' approach would need to assume a beginning date for a new repository program. NRC believes that it is reasonable to select 2025 as the starting point, the current outer date of the Commission's prediction of repository availability. It is reasonable to assume that it will be known by 2025 whether a repository is available at the YM site. If it is not available, it seems reasonable to assume that a new repository program would get underway around that time. The need for a new repository program would not necessarily be the result of an NRC denial of the license application; it could result from a change in national policy for HLW disposal, a court reversal of a Commission licensing action, or other factors. The assumption of a need for a new repository program would be based on an assumption that the proposed YM repository does not become available, and not on an assumption that NRC determines that facility to be technically unacceptable. In sum, the Commission would be saying that it will remove its expectation that a repository will be available by 2025 but, even in the event that the YM repository does not become available, it retains confidence that spent fuel can be safely stored with no significant environmental impact until a repository can reasonably be expected to be available and that the Commission has a target date for the availability of the repository in that circumstance.

If it is assumed that a new repository program begins around the year 2025, then setting a target date for the

[10] Challenges to 10 CFR 51.23 in individual COL proceedings would likely be addressed through application of 10 CFR 2.335, ''Consideration of Commission rules and regulations in adjudicatory proceedings.'' This rule generally prohibits attacks on NRC rules during adjudicatory proceedings but does allow a party to an adjudicatory proceeding to petition that application of a specified rule be waived or an exception made for the particular proceeding. 10 CFR 2.335(b). The sole ground for such a waiver or exception is that ''special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation * * * would not serve the purposes for which the rule or regulation was adopted.'' *Id.* Thus, a review of the Waste Confidence findings and rule now might be expected to obviate such challenges in individual COL proceedings.

[11] The three countries with target dates that plan direct disposal of SNF are: Czech Republic (2050), Finland (2020), and Sweden (2020). The seven countries with target dates that plan disposal of reprocessed SNF/HLW are: Belgium (2035), China (2050), France (2025), Germany (2025), Japan (2030s), Netherlands (2013), Switzerland (2042).

availability of a repository becomes a matter of examining the technical and institutional problems DOE would need to resolve to achieve the target date. The technical problems should be the same as the ones NRC examined in the earlier Waste Confidence reviews, namely, how long it would take DOE to locate a suitable site and how long it would take to develop a waste package and engineered barriers for that site. For the reasons explained in our evaluation of Finding 1, the Commission continues to have reasonable assurance that disposal in a geologic repository is technically feasible. That is the approach being taken in all the countries identified previously which have set target dates for the availability of a repository. It is also the approach of 14 other countries which have HLW disposal programs, but which have not set target dates.[12] In addition when Congress amended NWPA in 1987 to focus exclusively on the YM site, it did so for budgetary reasons and not because the sites DOE was considering at the time were discovered to be technically unacceptable. The research being done nationally and internationally strongly suggests that potentially acceptable sites exist and can be identified.

The amount of time DOE might need to develop an alternative repository site would depend upon the context of any enabling legislation, budgetary constraints, and the degree of similarity between a candidate site and other well-characterized sites with similar HLW disposal concepts. DOE began characterization of the YM site in 1982, made its suitability determination in 2002, and submitted a license application in 2008. However, the history of potential repository development at YM may be a poor indicator of the amount of time needed to develop a new repository. Many problems extraneous to site characterization activities adversely impacted DOE's repository program, such as changes in enabling legislation, public confidence issues, funding in Congressional appropriations, and significant delay in issuing environmental standards. In terms of the technical work alone, a lot would depend on whether Congress established a program involving characterization of many sites preliminary to the recommendation of a single site (similar to the 1982 NWPA) or a program focused on a single site (similar to the amended NWPA). The former would likely take longer but might have a better chance of success if problems developed with the single site. Much would also depend on whether the site(s) chosen for characterization is similar to sites in this or other countries for which much information is available or whether the site(s) would present novel challenges for which much fundamental knowledge would have to be developed. An alternative site with a disposal approach that is similar to that used in other international repository programs could make use of the extensive knowledge from those international programs to gain efficiencies in the alternative repository development program.

In addition, there should be a certain amount of ''lessons learned'' from the YM repository program that could help to shorten the length of a new program. For example, performance assessment techniques have improved significantly over the past 20 years (*e.g.*, the Goldsim software package of DOE's Total System Performance Assessment was not available 20 years ago and represents a significant improvement over the FORTRAN language of years past) such that performance assessment models are easier to develop and more reliable from what was available 20 years ago. Similarly, operational and manufacturing aspects developed during the YM program (*e.g.*, manufacturing of waste packages, excavation of drifts, waste handling), would be applicable to another program. Also, regulatory issues considered during the YM program (*e.g.*, burn-up credit for nuclear fuel and seismic performance analysis) should provide information useful for setting new standards or revising current standards.[13]

Whether waste package and engineered barrier information developed during the YM repository program would be transferable to a new program depends heavily on the degree of similarity between an alternative site and YM. The fundamental physical characteristics of the potential YM repository are significantly different from other potential repository sites that were considered in the U.S. repository program before 1987. If YM does not become available, DOE could select an alternative candidate site that was similar to YM in important physical characteristics (such as oxidizing conditions, drifts above the water table with low amounts of water infiltration, water chemistry buffered by volcanic tuff rocks). In this instance, much of the existing knowledge for engineered barrier performance at YM might be transferable to a different site. Nevertheless, much of DOE's current research on engineered barriers for YM could be inapplicable if an alternative site had significantly different characteristics than the YM site, such as an emplacement horizon in reducing conditions below the water table. In this instance, research from additional programs by DOE, industry, and other countries might provide important information on engineered barriers, provided DOE's alternative was analogous to sites and engineered barriers being considered elsewhere.

It is important to note, however, that broader institutional issues have emerged since 1990 that bear on the time it takes to implement geologic disposal. International developments have made clear that technical experience and confidence in geologic disposal, on their own, have not sufficed to bring about the broader societal and political acceptance needed to realize the authorization of a single national repository.

In the United Kingdom (UK), in 1997, an application for the construction of a rock characterization facility at Sellafield was rejected, leaving the country without a path forward for long-term management or disposal of HLW or SNF. In 1998, an inquiry by the UK House of Lords subsequently endorsed geologic disposal, but specified that public acceptance was required. As a result, the UK Government embraced a repository plan based on the principles of voluntarism and partnership between communities and implementers. This led to the initiation of a national public consultation, and major structural reorganization within the UK program. In 2007, the Scottish Government officially rejected any further consultation with the UK Government on deep geologic disposal of HLW and SNF. Discussions may continue on issues of interim storage only. This action by the Scottish Government effectively ends more than 7 years of consultations with stakeholders from communities near Scottish nuclear installations and represents another major setback for the UK program.

In Germany, a large salt dome at Gorleben has been under study since 1977 as a potential repository for SNF. After decades of intense discussions and protests, an agreement was reached in 2000 between the utilities and the government to suspend exploration of Gorleben for at least three, and at most,

[12] These countries are: Brazil, Canada, Hungary, Lithuania, Romania, South Korea, Slovak Republic, Spain (direct disposal of SNF); Bulgaria, India, Italy, Russia, United Kingdom, Ukraine (disposal of reprocessed SNF/HLW).

[13] Both NRC's Part 63 and EPA's Part 197 are applicable only for a repository at YM. NRC and EPA have in place standards for a repository at a different site, but these standards would likely be revised in a new repository program.

ten years. In 2003, the Federal Ministry for the Environment set up an interdisciplinary expert group to identify, with public participation, criteria for selecting new candidate sites.

After detailed site investigations in several locations in Switzerland, in 1993, the Swiss national cooperative for radioactive waste disposal proposed a deep geologic repository for low- and intermediate-level waste at Wellenberg. Despite a finding by Swiss authorities, in 1998, that technical feasibility of the disposal concept was successfully demonstrated, a public cantonal referendum rejected the proposed repository in 2002. Even after more than 25 years of high quality field and laboratory research, Swiss authorities do not expect a deep geologic repository will be available in their country before 2040.

In 1998, an independent panel reported to the Governments of Canada and Ontario on its review of Atomic Energy of Canada Ltd.'s concept of geologic disposal. Canadian Nuclear Fuel Waste Disposal Concept Environmental Assessment Panel, *Report of the Nuclear Fuel Waste Management and Disposal Concept Environmental Assessment* Panel, February 1998. The panel found that from a technical perspective, safety of the concept had been adequately demonstrated, but from a social perspective, it had not. The panel concluded that broad public support is necessary in Canada to ensure the acceptability of a concept for managing nuclear fuel wastes. The panel also found that technical safety is a key part, but only one part of acceptability. To be considered acceptable in Canada, the panel found that a concept for managing nuclear fuel wastes must: (1) Have broad public support; (2) be safe from both a technical and social perspective; (3) have been developed within a sound ethical and social assessment framework; (4) have the support of Aboriginal people; (5) be selected after comparison with the risks, costs and benefits of other options; and (6) be advanced by a stable and trustworthy proponent and overseen by a trustworthy regulator. Resulting legislation mandated a nationwide consultation process and widespread organizational reform. Eight years later, in 2005, a newly-created Nuclear Waste Management Organization (NWMO), recommended an Adaptive Phased Management approach for long-term care of Canada's SNF, based on the outcomes of the public consultation. This approach includes both a technical method and a new management system. According to NWMO, it ''* * * provides for centralized containment and isolation of used nuclear fuel deep underground in suitable rock formations, with continuous monitoring and opportunity for retrievability; and it allows sequential and collaborative decision-making, providing the flexibility to adapt to experience and societal and technological change.'' NWMO, *Choosing a Way Forward: The Future Management of Canada's Used Nuclear Fuel, Final Study Report,* November 2005.

In 2007, the Government of Canada announced its selection of the Adaptive Phased Management approach, and directed NWMO to take at least two years to develop a ''collaborative community-driven site-selection process.'' NWMO must then use this process to open consultations with citizens, communities, Aboriginals, and other interested parties to find a suitable site in a willing host community. The Canadian Government explicitly acknowledges that this approach will ''take time to develop a process that is open, transparent, inclusive, and that is built on a solid foundation of trust, integrity and respect for Canadians and the environment.'' The Honorable Gary Lunn, P.C., M.P., Minister of Natural Resources, Canada, to President of NWMO, July 12, 2007. For financial planning and cost estimation purposes only, NWMO assumes the availability of a deep geological repository in 2035, 27 years after initiating development of new site selection criteria, 30 years after embarking on a national public consultation, and 37 years after rejection of the original geologic disposal concept. NWMO, *Annual Report 2007: Moving Forward Together,* March 2008.

Repository development programs in Finland and Sweden are much further advanced, but have nonetheless taken the time to build support from potential host communities. Preliminary site investigations in Finland began in 1986, and detailed characterizations of four locations were performed between 1993 and 2000. In 2001, the Finnish Parliament ratified the Government's decision to proceed with a repository project at a chosen site only after the municipal council of the host community had approved the siting of the disposal facility in 1999. Finland expects this facility to begin receipt of SNF for disposal in 2020, 34 years after the start of preliminary site investigations.

Between 1993 and 2000, Sweden conducted feasibility studies in eight municipalities. Based on technical considerations, one site was found unsuitable for further study, and two, based on municipal referenda, decided against allowing further investigations. Three of the remaining five sites were selected for detailed site investigations. Municipalities adjacent to two of these sites agreed to be potential hosts and one refused. One of the two volunteer sites will be selected for development as a repository and an application to the Swedish safety authorities is expected in 2009. If construction is authorized, Sweden expects the repository to be available for disposal in 2018, 25 years after starting feasibility studies in 1993.

If YM is not licensed, Congress will need to provide direction to DOE for development of a new site or, potentially, a new management concept, for the long-term management and disposal of SNF and HLW. Whatever approach Congress mandates, international experience since 1990 would appear to suggest that greater attention may need to be paid to developing societal and political acceptance in concert with essential technical, safety and security assurances. While there is no technical basis for making precise estimates of the minimum time needed to accomplish these objectives, examination of the international examples cited previously would support a range of between 25 and 35 years.

Another important institutional issue is whether funding for a new repository program is likely to be available. The provisions of NWPA for funding the repository have proved to be adequate for assuring the timely development of a repository in the sense that there have always been more than sufficient funds available for meeting the level of funding Congress appropriates for the repository program. Section 302(e)(2) of NWPA provides that the Secretary of Energy may make expenditures from the Nuclear Waste Fund (NWF), subject to appropriations by the Congress. At the FY 2009 Appropriations Hearing (April 10, 2008), Edward F. Sproat III, Director of OCRWM, DOE, stated that the NWF has a balance of approximately $21.0 billion. Thus, the NWF has the capacity to ensure timely development of a repository consistent with Congressional funding constraints. Moreover, DOE is in the process of preparing contracts to be signed by utilities planning to build new reactors. Therefore, there will be a source of funding for disposal of the fuel to be generated by these reactors.

Arriving at a target date involves balancing the technical and institutional factors discussed previously. It appears that the technical work needed to make a repository available could probably be done in less time than it took DOE to

submit a license application for the YM site (26 years measured from the beginning of site characterization). However, as discussed previously, the time needed to develop societal and political acceptance of a repository might range between 25 and 35 years. Therefore, if the starting point for a new program were 2025, a reasonable target date would be 2050–2060 for the availability of a repository.

Finding 2 also includes the prediction that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of HLW and SNF originating in such reactor and generated up to that time. As explained previously, in 1990 DOE projected that 87,000 MTHM would be generated by the year 2036. Given the statutory limit of 70,000 MTHM for the first repository, either statutory relief from that limit or a second repository would be needed. The Commission's continued assurance that sufficient repository capacity would be available within 30 years of license expiration of all reactors rested on an assumption that two repositories would be available in approximately 2025 and 2035, each with acceptance rates of 3400 MTHM/year within several years after commencement of operations. *See* 55 FR 38502; September 18, 1990.

If an assumption is made, for purposes of establishing a target date, that a repository will not become available until approximately 2050–2060, it appears that a finding that sufficient repository space will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) is not supportable.[14] According to the 2007–2008 USNRC Information Digest, NUREG–1350, Vol. 19, Table 11, p.48 (Information Digest), there are 18 reactor operating licenses that will expire between 2009 and 2020. There are an additional 44 licenses that will expire between 2021 and 2030. Many of these licenses may be renewed which would extend their operating lifetimes, but this cannot be assumed.[15] For licenses that are not renewed, some spent fuel will need to be stored for more than 30 years beyond the expiration of the license if a repository is not available until 2050–2060. According to the Information Digest, Appendix B, there are 22 reactors which were formerly licensed to operate, but which have been permanently shut down. Thirty years beyond their licensed life of operation will come as early as 2029 for Dresden 1 and as late as 2056 for Millstone 1, but for most of these plants, 30 years beyond the licensed life for operation will fall in the 2030s and 2040s. Thus, for virtually all of these plants, spent fuel will have to be stored beyond 30 years from the expiration of the license if a repository is not available until 2050–2060.

In 1990, the Commission emphasized that this 30 year period was not a safety finding. It was only an estimate of how long it was likely that SNF would need to be stored, given its confidence that repository disposal would be available by 2025. In fact, the Commission said it was not concerned about the fact that it was already clear in 1990 that a few reactors would need to store spent fuel on-site beyond 30 years after the effective expiration date of their licenses (*i.e.*, the date the license prematurely terminated) due to its confidence in the safety of spent fuel storage (55 FR 38503; September 18, 1990). For the reasons presented in the evaluation of Finding 4, the Commission is now able to say that there is no public health and safety or environmental concern if its target date of 2050–2060 for the availability of a disposal facility results in the need to store fuel at some reactors for a 50–60 year period after expiration of the license or even longer.

Based on the information described previously, the Commission is proposing to revise Finding 2 to eliminate a specific date for the availability of a repository and to state that a repository may reasonably be expected to be available within 50–60 years beyond the licensed life for operation of any reactor.

C. Proposed Finding 2

The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50–60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and spent fuel originating in such reactor and generated up to that time.

D. Specific Question for Public Comment

An alternative approach would be for the Commission to revise Finding 2 without reference to a timeframe for the availability of a repository. (The proposed revision to simplify 10 CFR § 51.23(a) removes the reference to a repository date although it is based on an expectation of repository availability by 2050–2060 as set forth in the proposed revision to Finding 2). In 2005, in response to PRM–51–8, the Commission had declined to consider such an approach to define ''availability'' based on a presumption that some acceptable disposal site would become available at some undefined time in the future. The Commission concluded then that such an approach would be a departure from the framework it had established in its original 1984 decision to use a specific timeframe as a basis for assessing the degree of assurance that radioactive waste can be disposed of safely and for determining when such disposal will be available (70 FR. 48333; August 17, 2005).

The Commission's proposed revision of Finding 2 is based on its assessment not only of our understanding of the technical issues involved, but also predictions of the time needed to bring about the necessary societal and political acceptance for a repository site. Recognizing the inherent difficulties in making such predictions, the Commission seeks specific comment on whether it should revise its approach to Finding 2 and adopt a more general finding of reasonable assurance that SNF generated in any reactor can be stored safely and without significant environmental impacts until a disposal facility can reasonably be expected to be available. In other words, in response to the court's concerns that precipitated the original Waste Confidence proceeding, the Commission could now say that there is no need to be concerned about the possibility that spent fuel may need to be stored at onsite or offsite storage facilities at the expiration of the license (including a renewed license) until such time as a repository is available because we have reasonable assurance that spent fuel can be so stored for long periods of time, safely and without significant environmental impact. Such a finding would be made on the basis of the Commission's accumulated experience of the safety of long-term spent fuel storage with no significant environmental impact (see Finding 4)

[14] Based on the inventory of SNF in nuclear power plant pools and interim storage facilities, the amount of spent fuel is anticipated to exceed the 70,000 MTHM disposal limit in the NWPA by 2010. *See* Institute of Nuclear Material Management Seminar XXV, January 16, 2008, paper by Bob Quinn of Energy Solutions, *Industry Perspective on the GNEP—Yucca Mountain Relationship.* Therefore, a new repository program would need to remove this limit or provide for more than one repository.

[15] Six of these reactor operating licenses have already been renewed (Dresden 2, Ginna, Nine Mile Point 1, Robinson 2, Point Beach 1, and Monticello). Forty-two other reactor operating licenses have been renewed and the renewed licenses will expire after 2030.

and its accumulated experience of the safe management of spent fuel storage during and after the expiration of the reactor operating license (see Finding 3).

The Commission seeks comment on this alternative revision of Finding 2 and whether additional information is needed for or accompanying changes should be made to its other Findings on the long term storage of spent fuel if such a revision of Finding 2 were to be adopted.

III. Finding 3: The Commission Finds Reasonable Assurance That HLW and Spent Fuel Will Be Managed in a Safe Manner Until Sufficient Repository Capacity Is Available To Assure the Safe Disposal of All HLW and Spent Fuel

A. Bases for Finding 3

The Commission reached this finding in 1984, and reaffirmed it in 1990. The focus of this finding is on whether reactor licensees can be expected to safely store their spent fuel in the period between the cessation of reactor operations and the availability of repository capacity for their fuel. The Commission placed its main reliance that the spent fuel would be managed safely on the fact that, under either a possession-only Part 50 license or a Part 72 license, the utility would remain under NRC's regulatory control and inspections and oversight of storage facilities would continue (49 FR 34679–34680; August 31, 1984; 55 FR 38508; September 18, 1990). In 1990, when extended storage at the reactor site seemed more probable, the Commission pointed out that NRC's regulations provided for license renewals of Part 72 licenses and that NRC was considering issuance of a general Part 72 license under which spent fuel could be stored in NRC-certified casks,[16] (55 FR 38508; September 18, 1990). The Commission reasoned that these regulations would provide further mechanisms for NRC supervision of spent fuel management by licensees. The Commission was not concerned about then-looming contractual disputes between DOE and the utilities regarding DOE's obligation to begin removing spent fuel from reactor sites in 1998 because NRC licensees cannot abandon spent fuel in their possession and would remain responsible for it (55 FR 38508; September 18, 1990).

The Commission also considered the unusual case where a utility was unable to manage its spent fuel. The NWPA had provided an Interim Storage Program (Subtitle B) which enabled a utility to enter into a contract with DOE for temporary storage of its fuel but, by 1990 (the expiration of the program), no utility had sought to take advantage of it (55 FR 38508; September 18, 1990). In a case where a utility became insolvent, NRC believed that the cognizant state public utility commission would be likely to require an orderly transfer to another entity which could be accomplished if the new entity met NRC's regulations (49 FR 34680; August 31, 1984). Further, the Commission expressed the view that, while the possibility of a need for Federal action to take over stored spent fuel from a defunct utility or from a utility that lacked technical competence to assure safe storage was remote, the authority for this type of action exists in sections 186c and 188 of the Atomic Energy Act. *Id.*

B. Evaluation of Finding 3

As explained previously, the focus of Finding 3 is on whether reactor licensees can be expected to safely store their spent fuel in the period between the cessation of reactor operations and the availability of repository capacity for their fuel. In this regard, the NRC is successfully regulating four decommissioned reactor sites that continue to hold Part 50 licenses and consist only of an ISFSI under the Part 72 general license provisions.[17] In addition, the NRC staff has discussed plans to build and operate ISFSIs under the Part 72 general license provisions with the licensees at the La Crosse and Zion plants, which are currently undergoing decommissioning. The NRC is also successfully regulating ISFSIs at two fully decommissioned reactor sites (Trojan and Ft. St. Vrain) under specific Part 72 licenses.[18]

The NRC monitors the performance of ISFSIs at decommissioned reactor sites by conducting periodic inspections that are the same as the inspections performed for ISFSIs at operating reactor sites. When conducting inspections at these ISFSIs, NRC inspectors follow the guidance in NRC Inspection Manual Chapter 2690, ''Inspection Program for Dry Storage of Spent Reactor Fuel at Independent Spent Fuel Storage Installations and for Part 71 Transportation Packages.'' At all six decommissioned reactor sites mentioned previously, all spent fuel on site has been successfully loaded into the ISFSI, so only those inspection procedures applicable to the existing storage configurations are conducted. Also, any generally licensed ISFSI where decommissioning and final survey activities related to reactor operations have been completed is treated as an ''away from reactor'' (AFR) ISFSI for inspection purposes. Therefore, those programs relied upon under the 10 CFR Part 50 license for operation of the generally licensed ISFSI are also subject to inspection.

The NRC has not encountered any management problems associated with the ISFSIs at these six decommissioned reactor sites. Further, NRC's inspection findings do not indicate unique management problems at any currently operating ISFSI. Generally, the types of issues identified through NRC inspections of ISFSIs are similar to issues identified for Part 50 licensees. Most issues are identified early in the operational phase of the dry cask storage process, during loading preparations and actual spent fuel loading activities. Once a loaded storage cask is placed on the storage pad, relatively few inspection issues are identified due to the passive nature of these facilities.

Further, NRC's regulations require that every nuclear power reactor operating license issued under 10 CFR part 50, and every COL issued under 10 CFR part 52 must contain a condition requiring licensees to submit written notification to the Commission of the licensees' plan for managing irradiated fuel between cessation of reactor operation and the time the DOE takes title to and possession of the irradiated fuel for ultimate disposal in a repository. The submittal, required by 10 CFR 50.54(bb), must include information on how the licensee intends to provide funding for the management of its irradiated fuel. Specifically, 10 CFR 50.54(bb) requires the licensee to:

> [W]ithin 2 years following permanent cessation of operation of the reactor or 5 years before expiration of the reactor operating license, whichever occurs first, submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal * * * Final Commission review will be undertaken as part of any proceeding for continued licensing under part 50 or 72 of this chapter. The licensee must demonstrate to NRC that the elected actions will be consistent with NRC requirements for licensed possession of

[16] Part 72 was, in fact, amended to provide for storage of spent fuel in NRC-certified casks pursuant to a general license (55 FR 29191; July 18, 1990).

[17] These reactor sites include Maine Yankee, Yankee Rowe, Connecticut Yankee (also known as Haddam Neck), and Big Rock Point.

[18] There are several additional sites with specific Part 72 ISFSI licenses that are in the process of decommissioning (*e.g.*, Humbolt Bay, Rancho Seco).

irradiated nuclear fuel and that the actions will be implemented on a timely basis. Where implementation of such actions requires NRC authorizations, the licensee shall verify in the notification that submittals for such actions have been or will be made to NRC and shall identify them. A copy of the notification shall be retained by the licensee as a record until expiration of the reactor operating license. The licensee shall notify the NRC of any significant changes in the proposed waste management program as described in the initial notification.

While the interim storage program under Subtitle B of the NWPA expired in 1990, in the past arrangements have been made with DOE to take possession of spent fuel in urgent or unusual circumstances, as was done for the Three Mile Island Unit 2 fuel debris. 10 CFR 50.54(bb) (2008).

To date, the NRC has also renewed three specific Part 72 ISFSI licenses. These renewals include the Part 72 specific licenses for the General Electric Morris Operation (the only wet, or pool-type ISFSI), as well as the Surry and H.B. Robinson ISFSIs. The NRC staff is also currently reviewing an application for renewal of the specific ISFSI license for the Oconee plant (ML081280084) and anticipates a renewal application for the Fort St. Vrain ISFSI sometime in 2009. Specific licenses for six additional ISFSIs will expire between 2012 and 2020. It is expected that license renewal will be requested by these licensees, unless a permanent repository or some other interim storage option is made available. Although the NRC staff's experience with renewal of ISFSI licenses is limited to these three cases, it is noteworthy that both the Surry and H.B. Robinson ISFSI licenses were renewed for a period of 40-years, instead of the 20-year renewal period currently provided for under Part 72. The Commission authorized the staff to grant exemptions to allow the 40-year renewal period after the staff reviewed the applicants' evaluations of aging effects on the structures, systems, and components important to safety. The Commission determined that the evaluations, supplemented by the licensees' aging management programs, provided reasonable assurance of continued safe storage of spent fuel in these ISFSIs. *See* SECY–04–0175, ''Options for Addressing the Surry Independent Spent Fuel Storage Installation License-Renewal Period Exemption Request,'' September 28, 2004 (ML041830697).

With regard to generally licensed ISFSIs, the NRC staff is currently working on a proposed rulemaking to clarify the processes for the renewal of ISFSIs operated under the general license provisions of 10 CFR part 72, and for renewal of the Certificates of Compliance for dry cask storage systems. *See License and Certificate of Compliance Terms* (73 FR 45173; August 4, 2008). There are currently nine sites operating generally licensed ISFSIs that will reach the prescribed 20 year limit on storage between 2013 and 2020.

The Commission concludes that the events that have occurred since the last formal review of the Waste Confidence Decision in 1990 provide support for a continued finding of reasonable assurance that HLW and spent fuel will be managed in a safe manner until sufficient repository capacity is available. Specifically, the NRC has continued its regulatory control and oversight of spent fuel storage at both operating and decommissioned reactor sites, through both specific and general Part 72 licenses. With regard to general Part 72 licenses, the NRC has successfully implemented a general licensing and cask-certification program, as envisioned by the Commission in 1990. There are currently 15 certified spent fuel storage cask designs. 10 CFR 72.214 (2008). In addition, the Commission's reliance on the license renewal process in its 1990 review has proven well placed, with two specific Part 72 ISFSI licenses having been successfully renewed for an extended 40-year renewal period, and a third having been renewed for a period of 20 years. Further, while DOE did not meet its contractual obligation to begin removing spent fuel from reactor sites in 1998, NRC licensees have continued to meet their obligation to safely store spent fuel in accordance with the requirements of 10 CFR Parts 50 and 72.[19]

On the basis of the information described previously, the Commission proposes to reaffirm Finding 3.

IV. Finding 4 (1990): The Commission Finds Reasonable Assurance That, if Necessary, Spent Fuel Generated in Any Reactor Can Be Stored Safely and Without Significant Environmental Impacts for at Least 30 Years Beyond the Licensed Life for Operation (Which May Include The Term of a Revised or Renewed License) of That Reactor at Its Spent Fuel Storage Basin, or at Either Onsite or Offsite Independent Spent Fuel Storage Installations

A. Bases for Finding 4

The focus of this finding is on the safety and environmental effects of long-term storage of spent fuel. In 1984, the Commission found that spent fuel can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of reactor operating licenses (49 FR 34660; August 31, 1984). In 1990, the Commission determined that if the reactor operating license were renewed for 30 years,[20] storage would be safe and without environmental significance for at least 30 years beyond the term of licensed operation for a total of at least 100 years (55 FR 38513; September 18, 1990). The Commission looked at four broad issues in making this finding: (1) The long-term integrity of spent fuel under water pool storage conditions; (2) the structure and component safety for extended facility operation for storage of spent fuel in water pools; (3) the safety of dry storage; and (d) the potential risks of accidents and acts of sabotage at spent fuel storage facilities (49 FR 34681; August 31, 1984; 55 FR 38509; September 18, 1990).

With respect to the safety of water pool storage, the Commission found in 1984 that research and experience in the United States and Canada and other countries confirmed that long-term storage could be safely undertaken, *e.g.*, that the cladding which encases spent fuel is highly resistant to failure (49 FR 34681–34682; August 31, 1984). In 1990, the Commission determined that experience with water storage of

[19] Section 302 of NWPA authorizes the Secretary of Energy to enter into contracts with utilities generating HLW and SNF under which the utilities are to pay statutorily imposed fees into the NWF in return for which the Secretary, ''beginning not later than January 31, 1998, will dispose of the [HLW] or [SNF] involved * * *'' 42 U.S.C. 10222(a)(5)(B). The NWPA also prohibits NRC from issuing or renewing a reactor operating license unless the prospective licensee has entered into a contract with DOE or is engaged in good-faith negotiations for such a contract. 42 U.S.C. 10222(b)(1). When it became evident that a repository would not be available in 1998, DOE took the position that it did not have an unconditional obligation to accept the HLW or SNF in the absence of a repository. *See Final Interpretation of Nuclear Waste Acceptance Issues*, (60 FR 21793; April 28, 1995). The U.S. Court of Appeals for the District of Columbia Circuit, however, held that DOE's statutory and contractual obligation to accept the waste no later than January 31, 1998 was unconditional. *Indiana Michigan Power Co.* v. *DOE*, 88 F.3d 1272 (DCDC Cir. 1996). Subsequently, the utilities have continued to safely manage the storage of SNF in reactor storage pools and in ISFSIs and have received damage awards as determined in lawsuits brought before the U.S. Federal Claims Court, *See, e.g., System Fuels Inc.* v. *U.S.*, 78 Fed. Cl. 769 (October 11, 2007).

NRC has recently become aware that DOE is in the process of developing an amendment to the standard spent fuel contract for new nuclear power plants. This amendment would include a revised commitment for removal of spent fuel from new reactor sites by DOE. *See* discussion of Finding 5, *infra.*

[20] Subsequently, the Commission limited the renewal period for power reactor licenses to 20 years beyond expiration of the operating license or combined license. 10 CFR 54.31 (56 FR 64943, 64964; December, 13, 1991).

spent fuel continued to confirm that pool storage is a benign environment for spent fuel that does not lead to significant degradation of spent fuel integrity and that the water pools in which the assemblies are stored will remain safe for extended periods. Further, degradation mechanisms are well understood and allow time for appropriate remedial action, (55 FR 38510, 38511; September 18, 1990). In sum, wet storage was affirmed as a fully-developed technology with no associated major technical problems, based on both experience and scientific studies.

In 1984, the Commission based its confidence in the safety of dry storage on an understanding of the material degradation processes, derived largely from technical studies, together with the recognition that dry storage systems are simpler and more readily maintained, (49 FR 34683–34684; August 31, 1984). By 1990, NRC and ISFSI operators had gained considerable experience with dry storage. NRC staff safety reviews of topical reports on storage system designs, the licensing and inspection of dry storage at two reactor sites under Part 72, and NRC's promulgation of an amendment to Part 72, incorporating a monitored retrievable storage installation (MRS) (a dry storage facility) into the regulations had confirmed the 1984 conclusions on the safety of dry storage. In fact, under the environmental assessment for the amendment (NUREG–1092), the Commission found confidence in the safety and environmental insignificance of dry storage at an MRS for 70 years following a period of 70 years of storage in spent fuel storage pools (55 FR 38509–38513; September 18, 1990).

The Commission also found that the risks of major accidents at spent fuel storage pools resulting in offsite consequences were remote because of the secure and stable character of the spent fuel in the storage pool environment, and the absence of reactive phenomena—''driving forces''—which might result in dispersal of radioactive material. The Commission noted that storage pools and ISFSIs are designed to safely withstand accidents caused either by natural or man-made phenomena and that human error does not have the capability to create a major radiological hazard to the public due to the absence of high temperature and pressure conditions (49 FR 34684–34685; August 31, 1984). By 1990, the NRC staff had spent several years studying in detail catastrophic loss of reactor spent fuel pool water, possibly resulting in a fuel fire in a dry pool, but concluded that because of the large inherent safety margins in the design and construction of a spent fuel pool no action was justified to further reduce the risk (55 FR 38511; September 18, 1990).

In 1984, the Commission recognized that the intentional sabotage of a storage pool was theoretically possible but found that the consequences would be limited by the realities that, except for some gaseous fission products, the radioactive content of spent fuel is in the form of solid ceramic material encapsulated in high-integrity metal cladding and stored underwater in a reinforced concrete structure (49 FR 34685; August 31, 1984). Under these conditions, the Commission noted that the radioactive content of spent fuel is relatively resistant to dispersal to the environment. Similarly, because of the weight and size of the sealed protective enclosures, dry storage of spent fuel in dry wells, vaults, silos and metal casks is also relatively resistant to sabotage and natural disruptive forces. *Id.* Although the 1990 decision examined several studies of accident risk, no considerations had arisen to affect the Commission's confidence that the possibility of a major accident or sabotage with offsite radiological impacts at a spent fuel storage facility is extremely remote (55 FR 38512; September 18, 1990).

Finally, the Commission noted that the generation and onsite storage of a greater amount of spent fuel as a result of reactor license renewals would not affect the Commission's findings on environmental impact. Finding 4 is not based on a determination of a specific number of reactors and amount of spent fuel generated. Finding 4 evaluates the safety of spent fuel storage and lack of environmental impacts overall, noting that individual license renewal actions would be subject to safety and environmental reviews (55 FR 38512; September 18, 1990).

B. Evaluation of Finding 4

As explained previously, the focus of Finding 4 is on the safety and environmental significance of long-term storage of spent fuel. Specifically, the Commission examined four broad issues in making this finding: (1) The long-term integrity of spent fuel under water pool storage conditions; (2) the structure and component safety for extended facility operation for storage of spent fuel in water pools; (3) the safety of dry storage; and (4) the potential risks of accidents and acts of sabotage at spent fuel storage facilities.

1. Storage in Spent Fuel Pools

Since 1990, the NRC has continued its periodic examination of spent fuel pool storage to assure adequate safety is maintained and that there are no adverse environmental effects of storage of spent fuel in pools. The Office of Nuclear Reactor Regulation (NRR) and the former Office for Analysis and Evaluation of Operational Data (AEOD) independently evaluated the safety of spent fuel pool storage, and the results of these evaluations were documented in a memo to the Commission dated July 26, 1996, entitled ''Resolution of Spent Fuel Storage Pool Action Plan Issues,'' (ML003706364) and a separate memo to the Commission dated October 3, 1996), entitled, ''Assessment of Spent Fuel Pool Cooling,'' (ML003706381) (later published as NUREG–1275, Vol. 12, ''Operating Experience Feedback Report: Assessment of Spent Fuel Cooling,'' February 1997), respectively. As a result of these studies, potential follow-up activities were identified. The NRR staff described NRC follow-up activities and associated industry actions in a memo to the Commission dated September 30, 1997, entitled ''Followup Activities on the Spent Fuel Pool Action Plan,'' (ML003706412). These evaluations became part of the investigation of Generic Safety Issue 173, ''Spent Fuel Pool Storage Safety,'' which found that the relative risk posed by loss of spent fuel cooling is low when compared with the risk of events not involving the SFP.

The safety and environmental effects of spent fuel pool storage were also addressed in conjunction with regulatory assessments on permanently shutdown nuclear plants and decommissioning nuclear power plants. NUREG/CR–6451, ''A Safety and Regulatory Assessment of Generic BWR and PWR Permanently Shutdown Nuclear Power Plants,'' (August 1997) addressed the appropriateness of regulations (*e.g.*, requirements for emergency planning and insurance) associated with spent fuel pool storage. The study identified a number of regulations that were pertinent only to an operating reactor and not to spent fuel storage. Those regulations were not needed to ensure the safe maintenance of a permanently shutdown plant. This study also provided what are now known to be conservative bounding estimates of fuel coolability, and provided a number of conservative bounding estimates of offsite consequences for the most severe accidents that involve draining of the spent fuel pool.

More recently, the NRC issued NUREG–1738, ''Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants,'' (February 2001). This study

provided the results of the NRC staff's latest evaluation of the potential accident risk in a spent fuel pool at decommissioning plants. The report contained a discussion of fuel coolability for various types of accidents and included potential offsite consequences based on assumed radiation releases. The study demonstrated that using conservative and bounding assumptions regarding the postulated accidents, the predicted risk estimates were below that associated with reactor accidents and well below the Commission's safety goal. There was even some concern within the NRC that the level of conservatism in the analysis accompanying NUREG–1738 overstated the likelihood and severity of the more extreme spent fuel pool accidents. These concerns have proven valid, as subsequent studies (described in the following paragraph) have conclusively and consistently shown that the safety margins are much larger than indicated by previous studies, such as NUREG–1738. *See The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking* (73 FR 46204; August 8, 2008).

Following the terrorist attacks of September 11, 2001, the NRC undertook a complete reexamination of spent fuel pool safety and security issues. This reexamination included a significantly improved methodology, based on detailed state-of-the-art analytical modeling, for assessing the response of spent fuel assemblies during security events including those which might result in draining of the spent fuel pool. This more detailed and realistic analytical modeling was also supported by extensive testing of zirconium oxidation kinetics in an air environment and full scale coolability and ''zirc fire'' testing of spent fuel assemblies. This extensive effort resulted in both the confirmation of the conservatism of past analyses and improved, more realistic analyses of fuel coolability and potential responses during accident or security event conditions. Importantly, the new more detailed and realistic modeling led to the development of improvements in spent fuel safety, which were required to be implemented at spent fuel pools by the Commission for all operating reactor sites. *See id.*

In 2003, the U.S. Congress asked the National Academies to provide independent scientific and technical advice on the safety and security of commercial SNF storage including the potential safety and security risks of SNF presently stored in cooling pools and dry casks at commercial nuclear reactor sites. A classified report was issued by the National Academy of Sciences (NAS) in July 2004, and an unclassified summary for public distribution was issued in 2005. As part of the information gathering for the study, the NRC and Sandia National Laboratories briefed the NAS authoring committee on the ongoing work to reassess spent fuel pool safety and security issues. The NAS report contains findings and recommendations for reducing the risk of events involving spent fuel pools as well as dry casks. The NRC provided its response to the NAS in a letter to Senator Pete V. Domenici from NRC Chairman Nils J. Diaz, dated March 14, 2005 (ML050280428). In essence, the NRC concluded, as a result of its own study and subsequent regulatory actions, that it had adopted the important recommendations of the NAS report relevant to spent fuel pools. As a result of the improvements to spent fuel pool safety and security, together with the inherent safety and robustness of spent fuel pool designs, the NRC concluded that the risk associated with security events at spent fuel pools is acceptably low. Because those safety improvements to spent fuel pool storage are applicable to non-security events (randomly initiated accidents), accident risk will also have been further reduced.

While the Commission continues to have reasonable assurance that storage in spent fuel pools provides adequate protection of public health and safety and the common defense and security, and will not result in significant impacts on the environment, NRC acknowledges several incidents of groundwater contamination originating from leakage in reactor spent fuel pools and associated structures. In 1990, the Commission specifically acknowledged two incidents where radioactive water leaked from spent fuel pools, one case resulting in contamination outside of the owner controlled area. (*See* 55 FR. 38511; September 18, 1990). The Commission addressed these events stating, ''[t]he occurrence of operational events like these have been addressed by NRC staff at the plants listed. The staff has taken inspection and enforcement actions to reduce the potential for such operational occurrences in the future.'' *Id.*

On March 10, 2006, the Liquid Radioactive Release Lessons Learned Task Force was established by the NRC Executive Director for Operations in response to incidents at several plants involving unplanned, unmonitored releases of radioactive liquids into the environment. Liquid Radioactive Release Lessons Learned Task Force Final Report, September 1, 2006 (Task Force Report) (ML062650312). One of the incidents that prompted formation of the Task Force involved leakage from the Unit 1 and 2 spent fuel pools at Indian Point.[21] Task Force Report, at 1, 5–6, 11. The Task Force reviewed historical data on inadvertent releases of radioactive liquids, including four additional incidents involving leakage from spent fuel pools (Seabrook, Salem, Watts Bar, and Palo Verde). As a result of its review, the Task Force concluded that ''[b]ased on bounding dose calculations and/or actual measurements, the near-term public health impacts have been negligible for the events at NRC-licensed operating power facilities discussed in this report.'' Task Force Report, at 15. While concluding that near-term public health impacts were negligible, the Task Force made 26 specific recommendations for improvements to NRC's regulatory programs with regard to unplanned or unmonitored releases of radioactive liquids from nuclear power reactors.

The NRC staff has addressed, or is in the process of addressing, the Task Force recommendations. *See* ''Liquid Release Task Force Recommendations Implementation Status as of February 26, 2008'' (ML073230982) (Implementation Status). Actions taken in response to Task Force recommendations have included revisions to several guidance documents, development of draft regulatory guidance on implementation of the requirements of 10 CFR 20.1406 (*i.e.* DG–4012),[22] revisions to Inspection Procedure 71122.01, and an evaluation of whether further action was required to enhance the performance of SFP tell-tale drains.[23] For example, Regulatory

[21] The NRC staff recently completed an inspection at Indian Point Units 1 and 2. NRC Inspection Report Nos. 05000003/2007010 and 05000247/2007010, May 13, 2008 (ML0813404250). The purpose of the inspection was to assess Entergy's site groundwater characterization conclusions and the radiological significance of Entergy's discovery of a spent fuel pool leakage at Units 1 and 2. The NRC staff concluded that Entergy's response to the spent fuel pool leakage was reasonable and technically sound. The NRC staff stated that ''[t]he existence of on-site groundwater contamination, as well as the circumstances surrounding the causes of leakage and previous opportunities for identification and intervention, have been reviewed in detail. Our inspection determined that public health and safety has not been, nor is likely to be, adversely affected, and the dose consequence to the public that can be attributed to current on-site conditions associated with groundwater contamination is negligible.'' *Id.*

[22] DG–4012 was formally issued as Regulatory Guide 4.21, ''Minimization of Contamination and Radioactive Waste Generation: Life-Cycle Planning'' in June 2008.

[23] In addition to the NRC's efforts, the nuclear industry collectively responded to these incidents

Continued

Guide 4.1 is being revised to provide guidance to industry for detecting, evaluating, and monitoring releases from operating facilities via unmonitored pathways; to ensure consistency with current industry standards and commercially available radiation detection methodology; to clarify when a licensee's radiological effluent and environmental monitoring programs should be expanded based on data or environmental conditions; and to ensure that leaks and spills will be detected before radionuclides migrate offsite via an unmonitored pathway. Also, Regulatory Guide 1.21 is being revised to provide a definition of ''significant contamination'' that should be documented in a licensee's decommissioning records under to 10 CFR 50.75(g); to clarify how to report summaries of spills and leaks in a licensee's Annual Radioactive Effluent Release Report; to provide guidance on remediation of onsite contamination; and to upgrade the capability and scope of the in-plant radiation monitoring system to include additional monitoring locations and the capability to detect lower risk radionuclides. Further, Inspection Procedure 71122.01 has been revised to provide for review of onsite contamination events, including events involving groundwater; evaluation of effluent pathways so that new pathways are identified and placed in the licensee's Offsite Dose Calculation Manual, as applicable; and inclusion of limited, defined documentation of significant radioactive releases to the environment in inspection reports for those cases where such events would not normally be documented under current inspection guidance. *See* Implementation Status (ML073230982).

In addition, on January 22, 2008; 73 FR 3812, the NRC published a proposed rule that would, in part, amend 10 CFR part 20 to clarify existing requirements by explicitly requiring licensees to conduct their operations to minimize the introduction of residual radioactivity into the site, including subsurface soil and groundwater. This proposed rule also would include a requirement that licensees perform surveys to evaluate the concentrations and quantities of residual radioactivity and the potential radiological hazards of residual radioactivity detected. *Id.* While unmonitored, unplanned releases continue to require the NRC's and licensees' attention, the NRC staff is confident that this issue will be adequately addressed through continued regulatory oversight of operating and new nuclear reactors and enhanced through the NRC's continued implementation of the Task Force recommendations. Therefore, the NRC staff continues to have assurance that no significant environmental impacts or safety concerns will result from extended storage in spent fuel pools.

2. Storage in Dry Casks

With regard to dry cask storage, studies of the accident risk of dry storage since 1990 have focused on specific dry cask storage systems located at either a generic Pressurized Water Reactor (PWR) site or a specific Boiling Water Reactor (BWR) site. In 2004, the Electric Power Research Institute (EPRI) performed a Probabilistic Risk Assessment (PRA) of a bolted dry spent fuel storage cask at a generic PWR site. K. Canavan, ''Probabilistic Risk Assessment (PRA) of Bolted Storage Casks Updated Quantification and Analysis Report,'' Electric Power Research Institute, Palo Alto, California; EPRI Doc. No. 1009691, December 2004. In 2007, the NRC published a pilot PRA methodology that assessed the risk to the public and identified the dominant contributors to risk associated with a welded canister dry spent fuel storage system at a specific BWR site. NUREG–1864, ''A Pilot Probabilistic Risk Assessment of a Dry Cask Storage System at a Nuclear Power Plant,'' March 2007. Both studies calculated the annual individual radiological risk and consequences associated with a single cask lifecycle where the lifecycle is divided into three phases: loading, onsite transfer, and onsite storage. The results of the EPRI study showed that risk is extremely low with no calculated early fatalities, a first year risk of latent cancer fatality of 5.6E–13 per cask, and subsequent year cancer risk of 1.7E–13 per cask. The NRC study also showed that risk is extremely low with no prompt fatalities expected, a first year risk of latent cancer fatality of 1.8E–12 per cask and subsequent year cancer risk of 3.2E–14 per cask. The major contributors to the low risk associated with dry cask storage are that they are passive systems, relying on natural air circulation for cooling, and are inherently robust massive structures that are highly damage resistant.

NRC and licensee experience to date with ISFSIs and with certification of casks has indicated that interim storage of spent fuel at reactor sites can be safely and effectively conducted using passive dry storage technology. There have not been any safety problems during dry storage. The problems that have been encountered primarily occur during cask preparation activities, after initial loading of spent fuel, but before placement on the storage pad. One issue involved the unanticipated collection and ignition of combustible gas during cask welding activities. The NRC issued generic communications in 1996 addressing the problem and providing direction for preventing its recurrence. NRC Bulletin 96–04, ''Chemical, Galvanic, or Other Reactions in Spent Fuel Storage and Transportation Casks,'' and NRC Information Notice 96–34: ''Hydrogen Gas Ignition During Closure Welding of a VSC–24 Multi-Assembly Sealed Basket.'' NRC inspection and review guidance was also revised to ensure that appropriate measures are in place to preclude these events. *See* NRC Inspection Manual, Inspection Procedure 60854 Item 60854–02 and 02.03.a.6 and SFPO Interim Staff Guidance No. 15, dated January 10, 2001.

In addition, issuance of Materials License No. SNM–2513 for the Private Fuel Storage, LLC (PFS) facility has confirmed the feasibility of licensing an AFR ISFSI under 10 CFR Part 72. While there are several issues that would have to be resolved before the PFS AFR ISFSI could be built and operated,[24] the extensive review of safety and environmental issues associated with licensing the PFS facility provides additional confidence that spent fuel may be safely stored at an AFR ISFSI for long periods, after storage at a reactor site. The PFS facility was licensed for a

of unplanned, unmonitored releases of radioactive liquids through the Industry Initiative on Groundwater Protection (Industry Initiative). The Industry Initiative has resulted in publication of voluntary industry guidance on the implementation of groundwater protection programs at nuclear power plants. *See* ''Industry Ground Water Protection Initiative-Final Guidance Document,'' NEI–07–07, August 2007 (ML072610036); ''Groundwater Protection Guidelines for Nuclear Power Plants: Public Edition, EPRI, Palo Alto, CA: EPRI Doc. No. 1016099, 2008.

[24] For example, on September 7, 2006, two separate Interior Department agencies refused PFS a lease to use tribal lands to store spent fuel and refused to grant a right-of-way to access the land. On July 17, 2007, PFS filed a complaint against the Interior Department challenging its decisions. The case has not yet been resolved. Another issue is associated with the February 2006 (NAS) Report on the transport of SNF in the United States, which concluded that while safe transport is technically viable, ''the societal risks and related institutional challenges may impinge on the successful implementation of large-quantity shipping programs.'' National Research Council 2006, ''Going the Distance? The Safe Transport of Spent Nuclear Fuel and High-Level Radioactive Waste in the United States,'' Washington, DC: National Academy Press, TIC: 217588, at pp. 214. The NAS committee found that ''malevolent acts against spent fuel and high-level waste shipment are a major technical and societal concern,'' and recommended that ''an independent examination of security of spent fuel and high-level waste transportation be carried out prior to the commencement of large-quantity shipments to a federal repository or to interim storage.'' *Id.*

period of 20 years with the potential for license renewal.

In addition, as noted in its 1990 Waste Confidence Decision, the Commission has confidence in the safety and environmental insignificance of dry storage at an MRS for 70 years following a period of 70 years of storage in spent fuel storage pools (55 FR 38509–38513; September 18, 1990). Specifically, the Commission stated:

> Under the environmental assessment for the MRS rule [NUREG–1092], the Commission has found confidence in the safety and environmental insignificance of dry storage of spent fuel for 70 years following a period of 70 years of storage in spent fuel storage pools. Thus, this environmental assessment supports the proposition that spent fuel may be stored safely and without significant environmental impact for a period of up to 140 years if storage in spent fuel pools occurs first and the period of dry storage does not exceed 70 years.

Further, a commenter on the 1990 Waste Confidence Decision asserted that there was reasonable assurance that spent fuel could be stored safely and without significant environmental risk in dry casks at reactor sites for up to 100 years. The Commission responded (55 FR 38482; September 18, 1990):

> The Commission does not dispute a conclusion that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years. Evidence supports safe storage for this period. A European study published in 1988 states, ''in conclusion, present-day technology allows wet or dry storage over very long periods, and up to 100 years without undue danger to workers and population (See Fettel, W., Kaspar, G., and Guntehr, H., ''Long-Term Storage of Spent Fuel from Light-Water Reactors'' (EUR 11866 EN), Executive Summary, p.v., 1988).
>
> Although spent fuel can probably be safely stored without significant environmental impact for longer periods, the Commission does not find it necessary to make a specific conclusion regarding dry cask storage in this proceeding, as suggested by the commenter, in part because the Commission's Proposed Fourth Finding states that the period of safe storage is ''at least'' 30 years after expiration of a reactor's operating license. The Commission supports timely disposal of spent fuel and high-level waste in a geologic repository, and by this decision does not intend to support storage of spent fuel for an indefinitely long period.

The Commission also explained the nature of its finding that spent fuel could be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation, stating (55 FR 38509; September 18, 1990):

> [I]n using the words ''at least'' in its revised Finding Four, the Commission is not suggesting 30 years beyond the licensed life for operation * * * represents any technical limitation for safe and environmentally benign storage. Degradation rates of spent fuel in storage, for example, are slow enough that it is hard to distinguish by degradation alone between spent fuel in storage for less than a decade and spent fuel stored for several decades.

As explained previously in this document under the discussion of Finding 3, the NRC has renewed two specific ISFSI licenses for an extended 40-year period under exemptions granted from 10 CFR part 72, which provides for 20-year renewals. In addition, NRC is considering a rulemaking which would provide a 40-year license term for an ISFSI with the possibility of renewal. *See License and Certificate of Compliance Terms,* 73 FR 45173; August 4, 2008. Continued suitability of materials is a prime consideration for ISFSI license renewals. As discussed under Finding 3 in this document, the applicants' evaluation of aging effects on the structures, systems and components important to safety, supplemented by the licensees' aging management programs, provided reasonable assurance of continued safe storage of spent fuel in these ISFSIs. Thus, these cases reaffirm the Commission's confidence in the safety of interim dry storage for an extended period. While these license renewal cases only address storage for a period of up to 60 years (20-year initial license, plus 40-year renewal), studies performed to date indicate no major issues with dry storage for up to 100 years. *See, e.g.*, NUREG/CR–6831, ''Examination of Spent PWR Fuel rods after 15 Years in Dry Storage,'' (September 2003); J. Kessler, ''Technical Bases for Extended Dry Storage of Spent Nuclear Fuel,'' Electric Power Research Institute, Palo Alto, California; EPRI Doc. No. 1003416, December 2002. (55 FR 38509; September 18, 1990).

3. Terrorism and Spent Fuel Management

The NRC has, since the 1970s, regarded spent fuel in storage as a potential terrorist target and provided for appropriate security measures. Before the tragic events of September 11, 2001, spent fuel was well protected by physical barriers, armed guards, intrusion detection systems, area surveillance systems, access controls, and access authorization requirements for persons working inside nuclear power plants and spent fuel storage facilities. Since September 11, 2001, the NRC has significantly modified its requirements, and licensees have significantly increased their resources to further enhance and improve security at spent fuel storage facilities and nuclear power plants. *See* Letter to Senator Pete V. Domenici from NRC Chairman Nils J. Diaz, dated March 14, 2005 (ML050280428) (Diaz Letter), at 20.

Consistent with the approach taken at other categories of nuclear facilities, the NRC responded to the terrorist attacks of September 11, 2001 by promptly developing and requiring security enhancements for spent fuel storage both in spent fuel pools and dry casks. In February 2002, the NRC required power reactor licensees to enhance security and improve their capabilities to respond to terrorist attack. The NRC's orders included requirements for spent fuel pool cooling to deal with the consequences of potential terrorist attacks. These enhancements to security included increased security patrols, augmented security forces, additional security posts, increased vehicle standoff distances, and improved coordination with law enforcement and intelligence communities, as well as strengthened safety-related mitigation procedures and strategies. The February 2002 orders required licensees to develop specific guidance and strategies to maintain or restore spent fuel pool cooling capabilities using existing or readily available resources (equipment and personnel) that can be effectively implemented under the circumstances associated with the loss of large areas of the plant due to large fires and explosions. The NRC issued additional orders on security, including security for spent fuel storage in January and April of 2003. The NRC subsequently inspected each facility to verify the licensee's implementation, evaluated inspection findings and, as necessary, required actions to address any noted deficiencies. The NRC's inspection activities in this area are ongoing. In 2004, the NRC reviewed and approved revised security plans submitted by licensees to reflect the implementation of new security requirements. The enhanced security at licensee facilities is routinely inspected using a revised baseline inspection program, and power reactor licensees' capabilities (including spent fuel pools) are tested in periodic (every 3 years) force-on-force exercises. Diaz Letter, at iii, 7, 9.

In 2002, the NRC required power reactors in decommissioning, wet ISFSIs and dry storage ISFSIs to enhance security and improve their capabilities to respond to, and mitigate the consequences of, a terrorist attack. In the same year, the NRC required licensees transporting more than a specified amount of spent fuel to

enhance security during transport. Diaz Letter, at 7, 8.

In 2002, the NRC also initiated a classified program on the capability of nuclear facilities to withstand a terrorist attack. The early focus of the program was on power reactors, including spent fuel pools, and on dry cask storage and transportation. As the results of that classified program became available, NRC provided licensees additional guidance on the Commission's expectations regarding the implementation of the orders on the spent fuel mitigation measures. Diaz Letter, at iv.

More recently, on October 26, 2006; 71 FR 62664, the NRC issued a proposed rule to improve security measures at nuclear power reactors. The Commission is currently considering a draft final rule. In addition, in 2007 the NRC issued a final rule revising the Design Basis Threat, which also increased the security requirements for power reactors and their spent fuel pools (72 FR 12705; March 19, 2007).

i. Spent Fuel Pools

SFPs are extremely robust structures that are designed to safely contain spent fuel under a variety of normal, off-normal, and hypothetical accident conditions (*e.g.*, loss of electrical power, floods, earthquakes, tornadoes). SFPs are massive structures made of reinforced concrete with walls typically over six feet thick, lined with welded stainless steel plates to form a generally leak-tight barrier, fitted with racks to store the fuel assemblies in a controlled configuration and provided with redundant monitoring, cooling and make-up water systems. Spent fuel stored in SFPs is typically covered by about 25 feet of water that serves as both shielding and an effective protective cover against impacts directly on the stored fuel. Diaz Letter, at 2; *The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking,* 73 FR 46206; August 8, 2008 (*Denial of PRMs*).

The post September 11, 2001 studies noted previously confirm the effectiveness of additional mitigation strategies to maintain spent fuel cooling in the event the pool is drained and its initial water inventory is reduced or lost entirely. Based on this recent information and the implementation of additional strategies following September 11, 2001, the probability, and, accordingly, the risk of an SFP zirconium fire initiation will be less than reported in NUREG–1738 and previous studies. Given the physical robustness of SFPs, the physical security measures, and the SFP mitigation measures, and based upon NRC site evaluations of every SFP in the United States, the NRC has determined that the risk of an SFP zirconium fire, whether caused by an accident or a terrorist attack, is very low. In addition, the NRC has approved license amendments and issued safety evaluations to incorporate mitigation measures into the plant licensing bases of all operating nuclear power plants in the United States. (*See Denial of PRMs,* 73 FR 46207–08; August 8, 2008).

ii. Dry Storage Casks

Dry storage casks are massive canisters, either all metal or a combination of concrete and metal, and are inherently robust (*e.g.*, some casks weigh over 100 tons). Storage casks contain spent fuel in a sealed and chemically-inert environment. Diaz Letter, at 3.

The NRC has evaluated the results of security assessments involving large commercial aircraft attacks, which were performed on four prototypical spent fuel cask designs, and concluded that the likelihood is very low that a radioactive release from a spent fuel storage cask would be significant enough to cause adverse health consequences to nearby members of the public. While differences exist with storage cask designs, the results of the security assessments indicate that any potential radioactive releases were consistently very low.

The NRC also evaluated the results of security assessments involving vehicle bomb and ground assault attacks against these same four cask designs. The NRC concluded that while a potential radiological release was possible, the size and nature of the release did not require the Commission to immediately implement additional security compensatory measures. Accordingly, the NRC staff has recommended, and the Commission has approved, development of risk-informed, performance-based security requirements and associated guidance applicable to all ISFSI licensees (general and specific), which would enhance existing security requirements. This proposed ISFSI security rulemaking would apply to all existing and future licensees. *See* SECY–07–0148, ''Independent Spent Fuel Storage Installation Security Requirements for Radiological Sabotage,'' (August 28, 2007) (ML080250294); Staff Requirements—SECY–07–0148–Independent Spent Fuel Storage Installation Security Requirements for Radiological Sabotage, (December 18, 2007) (ML073530119). In addition, the NRC has noted that distributing spent fuel over many discrete storage casks (*e.g.*, in an ISFSI) limits the total quantity of spent fuel that could potentially be attacked at any one time, due to limits on the number of adversaries and the amount of equipment they can reasonably bring with them. Diaz Letter, at 17, 18, 22.

iii. Conclusion-Security

Today, spent fuel is better protected than ever. The results of security assessments, existing security regulations, and the additional protective and mitigative measures imposed since September 11, 2001, provide high assurance that the spent fuel in both spent fuel pools and in dry storage casks will be adequately protected. The ongoing efforts to update the ISFSI security requirements to address the current threat environment will integrate the additional protective measures imposed since September 11, 2001, into a formalized regulatory framework in a transparent manner that balances public participation against protection of exploitable information.

4. Conclusion

The Commission concludes that the events that have occurred since the last formal review of its Waste Confidence Decision in 1990 provide support for a continued finding of reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation of that reactor at its spent fuel storage basin. Specifically, NRC finds continued support for this finding in the extensive study of spent fuel pool storage that has occurred since 1990, and the continued regulatory oversight of operating plants, which has been enhanced by the recommendations of the Liquid Release Task Force.

Further, the Commission is proposing to revise Finding 2 to reflect its expectation that repository capacity will be available within 50–60 years of the licensed life for operation of any reactor. Consistent with this, the Commission is proposing to revise Finding 4 to reflect that spent fuel can be safely stored in dry casks for a period of at least 60 years without significant environmental impacts. Specifically, the inherent robustness and passive nature of dry cask storage—coupled with the operating experience and research accumulated to date, the 70 year finding in the Environmental Assessment for the MRS rule, and the renewal of two specific Part 72 licenses for an extended 40 year period (for a total ISFSI

operating life of at least 60 years)—support this finding. Further, this finding is consistent with the Commission's statements in 1990 that it did not dispute that dry spent fuel storage is safe and environmentally acceptable for a period of 100 years (55 FR 38482; September 18, 1990); that spent fuel could probably be safely stored without significant environmental impact for periods longer than 30 years (55 FR 38482; September 18, 1990); and that the 30 year finding did not represent a technical limitation for safe and environmentally benign storage (55 FR 38509; September 18, 1990).

C. Finding 4

The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite independent spent fuel storage installations.

V. Finding 5: The Commission Finds Reasonable Assurance That Safe Independent Onsite Spent Fuel Storage or Offsite Spent Fuel Storage Will Be Made Available if Such Storage Capacity Is Needed

A. Bases for Finding 5

The focus of this finding is on the timeliness of the availability of facilities for storage of spent fuel when the fuel can no longer be stored in the reactor's spent fuel storage pool. At the outset of the Waste Confidence proceeding there was uncertainty as to who had the responsibility for providing this storage, with the expectation that the Federal government would provide away-from-reactor facilities for this purpose. However, in 1981 DOE announced its decision to discontinue the AFR program. The Commission found that the industry's response to this change was a general commitment to do whatever was necessary to avoid shutting down reactors. The NWPA provided Federal policy on this issue by defining public and private responsibilities for spent fuel storage and by providing for an MRS program, an interim storage program at a Federal facility for utilities for whom there was no other solution, and a research, development, and demonstration program for dry storage designed to assist utilities in using dry storage methods. These NWPA provisions, together with the availability of ISFSI technology and the fact that the Part 72 regulations and licensing procedures were in place gave the Commission assurance that safe independent onsite or offsite spent fuel storage would be available when needed (49 FR 34686–34687; August 31, 1984).

In 1990, the Commission saw no need to revise this finding. It recognized that the NWPAA had undermined the ability of an MRS to provide for timely storage by linking the MRS to the siting and schedule for a repository (*e.g.*, DOE was not permitted to select an MRS site until it had recommended a site for development as a repository). However, it found that whatever the uncertainty introduced by these NWPAA provisions, it was more than compensated for by operational and planned spent fuel pool expansions and dry storage investments by the utilities themselves. The Commission also considered the fact that it seemed probable that DOE would not meet the 1998 deadline for beginning to remove spent fuel from the utilities. This did not undermine the Commission's confidence that storage capacity would be made available as needed because NRC licensees cannot abrogate their safety responsibilities and would remain responsible for the stored fuel despite any possible contractual disputes with DOE. The Commission noted that DOE's research program had successfully demonstrated the viability of dry storage technology and that the utilities had continued to add dry storage capacity at their sites. Further, the Commission believed that there would be sufficient time for construction and licensing of any additional storage capacity that might be needed due to operating license renewals (55 FR 38513–38514; September 18, 1990).

B. Evaluation of Finding 5

In 1990 the Commission reaffirmed Finding 5 despite significant uncertainties regarding DOE's MRS and repository programs, and the potential for the renewal of reactor operating licenses. Specifically, in reaffirming Finding 5 the Commission stated:

> In summary, the Commission finds no basis to change the Fifth Finding in its Waste Confidence Decision. Changes by the NWPAA, which may lessen the likelihood of an MRS facility, and the potential for some slippage in repository availability to the first quarter of the twenty-first century * * * are more than offset by the continued success of utilities in providing safe at-reactor-site storage capacity in reactor pools and their progress in providing independent onsite storage. Therefore, the Commission continues to find ''* * * reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage is needed.'' (55 FR 38514; September 18, 1990).

In reaching this conclusion, the Commission stressed that—regardless of the outcome of possible contractual disputes between DOE and utilities—the utilities possessing spent fuel could not abrogate their safety responsibilities. In addition, the Commission cited to three situations where dry storage had been licensed at specific reactor sites (Surry, H.B. Robinson, and Oconee), and to several additional applications for licenses permitting dry cask storage at reactor sites. *Id.*

1. Operating and Decommissioned Reactors

As in 1990, the NRC staff is not aware of any current operating reactor that has an insurmountable problem with safe storage of SNF. The options successfully being used to increase onsite storage capacity are spent fuel pool re-racking and fuel-pin consolidation, as well as onsite dry cask storage. While there are cases where a licensee's ability to use an onsite dry cask storage option may be limited by State or Public Utility Commission authorities, the NRC is successfully regulating six fully decommissioned reactor sites that contain ISFSIs licensed under either the general or specific license provisions of Part 72. The NRC has not encountered any management problems associated with the ISFSIs at these six decommissioned reactor sites and has discussed plans to build generally licensed ISFSI's with two additional licensees that are in the process of decommissioning.

In addition, since 1990, the NRC has renewed the specific Part 72 ISFSI licenses for both the Surry and H.B. Robinson plants for an extended 40-year period, instead of the 20-year renewal period currently provided for under Part 72. As discussed previously under Finding 3, the Commission authorized the staff to grant exemptions to allow the 40-year renewal period after the staff reviewed the applicants' evaluations of aging effects on the structures, systems, and components important to safety, and determined that the evaluations, supplemented by the licensees' aging management programs, provided reasonable assurance of continued safe storage of spent fuel in these ISFSIs. *See* SECY–04–0175, ''Options for Addressing the Surry Independent Spent Fuel Storage Installation License-Renewal Period Exemption Request,'' September 28, 2004 (ML041830697).

With regard to the uncertainty surrounding the contractual disputes

between DOE and the utilities referenced by the Commission in 1990, the U.S. Court of Appeals for the District of Columbia Circuit has since held that DOE's statutory and contractual obligation to accept the waste no later than January 31, 1998, was unconditional. *Indiana Michigan Power Co.* v. *DOE*, 88 F.3d 1272 (DC Cir. 1996). Subsequently, the utilities have continued to manage spent fuel safely in spent fuel pools and ISFSIs and have received damage awards as determined in lawsuits brought before the U.S. Federal Claims Court, *see, e.g., System Fuels Inc.* v. *U.S.*, 78 Fed. Cl. 769 (October 11, 2007).

In total, there are currently 51 licensed ISFSIs being managed at 47 sites across the country, under either specific or general Part 72 NRC licenses. As explained in the discussion of Finding 3, NRC's inspection findings do not indicate unique management problems at any currently operating ISFSI regulated by the NRC. Generally, the types of issues identified through NRC inspections of ISFSIs are similar to issues identified for Part 50 licensees. Most issues are identified early in the operational phase of the dry cask storage process, during loading preparations and actual spent fuel loading activities. Once an ISFSI is fully loaded with spent fuel, relatively few inspection issues are identified due to the passive nature of these facilities.

Finally, on June 3, 2008, the DOE submitted its license application for the proposed Yucca Mountain HLW repository, and on September 8, 2008, NRC Staff notified DOE that it found the application acceptable for docketing (73 FR 53284; September 15, 2008). While the Commission can express no view on the quality or acceptability of the application in this evaluation of waste confidence, its submittal is evidence of a continued Federal commitment to providing for ultimate disposal of spent fuel.

2. New Reactors

With regard to the status of contracts requiring DOE to take title to and possession of the irradiated fuel generated by utilities, the NRC staff understands that DOE has drafted language for a new amendment to the standard DOE-utility contracts. According to reports in the trade press, the revised contract will require DOE to accept spent fuel from any new nuclear power plants ten years after expiration of the operating license or any extension of the operating license. The utilities have not publicly expressed an opinion on the revised contracts to date. *See* Energy Daily, ED Vol. 36 No. 107, Thursday, June 5, 2008. In addition, before licensing a new reactor the NRC must find that the applicant has entered into a contract with DOE for removal of spent fuel from the reactor site, or receive written affirmation from DOE that the applicant is actively and in good faith negotiating with the DOE for such a contract. NWPA, Sec.302(b). This finding will be documented in the Safety Evaluation Report produced by the NRC staff in response to specific license applications for new reactors.

The near-term design certifications and existing or planned combined license applications do not undermine the Commission's confidence that spent fuel storage will become available when such storage is needed. These facilities will use the same or similar fuel assembly designs as the nuclear power plants currently operating in the United States and the spent fuel will be accommodated using existing or similar transportation and storage containers. As discussed under Finding 1, the NRC is also engaged in preliminary interactions with DOE on ''advanced reactors'' (*e.g.*, gas-cooled or liquid-metal cooled technologies). The fuel and reactor components associated with some of these advanced reactor designs would likely require different storage, transportation and disposal packages than those currently used for spent fuel from light-water reactors. The possible need for further assessment of performance and storage capability for new and different fuels would depend on the number and types of reactors actually licensed and operated. There is currently a high uncertainty regarding the growth of advanced reactors in the U.S. In addition, the need to consider waste disposal as part of the overall research and development activities for advanced reactors is recognized and included in the activities of DOE, designers, and the NRC (see, for example, ''A Technology Roadmap for Generation IV Nuclear Energy Systems,'' issued by the U.S. DOE Nuclear Energy Research Advisory Committee and the Generation IV International Forum, December 2002).

Nonetheless, the addition of new plants will undoubtedly add to the amount of spent fuel requiring disposal. This fact does not affect the Commission's confidence that safe storage options will be available when needed because, as the Commission stated in 1990—utilities have sought to meet storage capacity needs at their respective reactor sites (55 FR 38514; September 18, 1990). Specifically, as discussed under Finding 3, NRC licensees have successfully and safely used onsite storage capacity in spent fuel pools and, more recently, in onsite ISFSIs licensed under 10 CFR part 72. In addition, while construction and operation of an MRS facility by DOE is uncertain, the NRC has promulgated regulations that provide a framework for licensing such a facility. *See* 10 CFR part 72 (53 FR 31651; August 19, 1988). Further, while there are unresolved issues that prevent construction and operation of the PFS facility, the extensive safety and environmental reviews that supported issuance of an NRC license for PFS provide added confidence that licensing of a private AFR facility is technically feasible.

The Commission concludes that the events that have occurred since the last formal review of the Waste Confidence Decision in 1990, provide support for a continued finding of reasonable assurance that safe independent onsite spent fuel storage or offsite spent fuel storage will be made available if such storage capacity is needed. Specifically, since 1990, NRC licensees have continued to develop and successfully use onsite storage capacity in the form of pool and dry cask storage in a safe and environmentally sound fashion. With regard to offsite storage, the Commission licensed the PFS facility after an extensive safety and environmental review process, and a protracted adjudicatory hearing that resulted in over 70 ASLB and Commission decisions. The Commission also has a regulatory framework in place for licensing an MRS facility, should the need arise. In addition, based on discussions with the DOE and recent reports in the trade press, the NRC understands that a new standard contract providing for disposal of spent fuel by DOE is currently being prepared. This, coupled with the recent submission of a license application for the proposed Yucca Mountain repository, provides the NRC with continued confidence in the Federal commitment to providing for the ultimate disposal of spent fuel.

For all the above reasons, the Commission proposes to reaffirm Finding 5.

Dated at Rockville, Maryland, this 29th day of September 2008.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. E8–23381 Filed 10–8–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1078; Directorate Identifier 2008–CE–051–AD]

RIN 2120–AA64

Airworthiness Directives; BURKHART GROB LUFT—UND RAUMFAHRT GmbH & CO KG G103 Series Gliders

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

ACTION: Notice of proposed rulemaking (NPRM).

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

The Luftfahrt-Bundesamt received a report from the Grob Company that a bolt in the airbrake control was found failed during a pre-flight inspection on a G 103C TWIN III ACRO. During an extensive investigation (metallurgical investigation) a double sided fatigue crack was found as root cause. As the bolt is insignificantly stressed by cyclic bending the crack was probably caused by mean stress supported by a bolt torque exceeding the limit.

The actions specified by this airworthiness directive are intended to prevent further bolt cracking which can result in airbrake as well as elevator failure (elevator control is on the same pedestal) and reduced controllability of the power glider.

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 November 10, 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.

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: Greg Davison, Glider Program Manager, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090.

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–2008–1078; Directorate Identifier 2008–CE–051–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

The Luftfahrt-Bundesamt (LBA), which is the aviation authority for the Federal Republic of Germany, has issued AD D–2008–231, dated July 11, 2008; and AD D–2008–232, dated July 11, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

The Luftfahrt-Bundesamt received a report from the Grob Company that a bolt in the airbrake control was found failed during a pre-flight inspection on a G 103C TWIN III ACRO. During an extensive investigation (metallurgical investigation) a double sided fatigue crack was found as root cause. As the bolt is insignificantly stressed by cyclic bending the crack was probably caused by mean stress supported by a bolt torque exceeding the limit.

The actions specified by this airworthiness directive are intended to prevent further bolt cracking which can result in airbrake as well as elevator failure (elevator control is on the same pedestal) and reduced controllability of the power glider.

The MCAI requires:

- Replacement of bolt LN9037–M6x60 from the airbrake bell crank 103B–4437 with a new bolt and a new locking nut and tightening the bolt to a specific torque;
- Check of all parts of the airbrake bell crank and the attachment parts for any damage and replacement of any damaged parts;
- Check of the airbrake locking force of the left-hand and right-hand wing for a specific force value range and that the locking is clearly noticeable; and
- Check of the airbrake locking force at the operating lever in the front cockpit with the wings rigged for a specific force value range.

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

Relevant Service Information

Grob Aerospace has issued Service Bulletin No. MSB 315–76/1 and 869–27/1 (same document), dated June 23, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the 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 this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed 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

We estimate that this proposed AD will affect 129 products of U.S. registry. We also estimate that it would take about 1 work-hour per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $15 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $12,255, or $95 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:

Burkhart Grob Luft—Und Raumfahrt GmbH & CO KG: Docket No. FAA–2008–1078; Directorate Identifier 2008–CE–051–AD.

Comments Due Date

(a) We must receive comments by November 10, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the following models and serial numbers (SNs) gliders, certificated in any category:

(1) G103 TWIN II, SNs 3730 through 3878;

(2) G103A TWIN II ACRO, SNs 3730 through 34078 (K);

(3) G103C TWIN III ACRO, SNs 34101 through 34203; and

(4) G 103 C TWIN III SL, SNs 35001 through 35051

Subject

(d) Air Transport Association of America (ATA) Code 27: Flight Controls.

Reason

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

The Luftfahrt-Bundesamt received a report from the Grob Company that a bolt in the airbrake control was found failed during a pre-flight inspection on a G 103C TWIN III ACRO. During an extensive investigation (metallurgical investigation) a double sided fatigue crack was found as root cause. As the bolt is insignificantly stressed by cyclic bending the crack was probably caused by mean stress supported by a bolt torque exceeding the limit. The actions specified by this airworthiness directive are intended to prevent further bolt cracking which can result in airbrake as well as elevator failure (elevator control is on the same pedestal) and reduced controllability of the power glider.

The MCAI requires replacement of bolt LN9037–M6x60 from the airbrake bell crank 103B–4437 with a new bolt with a new locking nut and tightening the bolt to a specific torque; check of all parts of the airbrake bell crank and the attachment parts for any damage and replacement of any damaged parts; check of the airbrake locking force of the left-hand and right-hand wing for a specific force value range and that the locking is clearly noticeable; and check of the airbrake locking force at the operating lever in the front cockpit with the wings rigged for a specific force value range.

Actions and Compliance

(f) Unless already done, within 60 days after the effective date of this AD, do the following actions following Grob Aerospace Service Bulletin No. MSB 315–76/1 and No. 869–27/1 (same document), dated June 23, 2008:

(1) Remove bolt LN9037–M6x60 from the airbrake bell crank 103B–4437 and install a new bolt LN9037–M6x60 with the new locking nut LN9348–M6 and torque the bolt to 6.4 Nm (4.7 lbs.ft).

(2) Inspect all parts of the airbrake bell crank including the attachment parts for any damage and, before further flight, replace any damaged parts.

(3) Inspect the airbrake locking force of the left-hand (LH) and right-hand (RH) wing using a spring balance. The force must be equal for the LH and RH wing (guidance value: 10±2 daN, (22.5±4.5 lbs)) and the locking must be clearly noticeable.

(4) Inspect the airbrake locking force at the operating lever in the front cockpit with the wings rigged. The guidance value is 10±2 daN, (22.5±4.5 lbs). It must not exceed 15–20 daN (33.7–45.0 lbs).

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, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Greg Davison, Glider Program Manager, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4130; fax: (816) 329–4090. 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 (44 U.S.C. 3501 *et seq.*), 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 Federal Republic of Germany Luftfahrt-Bundesamt AD D–2008–231, dated July 11, 2008; and AD D–2008–232, dated July 11, 2008; and Grob Aerospace Service Bulletin No. MSB 315–76/1 and No. 869–27/1 (same document), dated June 23, 2008, for related information.

Issued in Kansas City, Missouri, on October 2, 2008.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23973 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1081; Directorate Identifier 2008–NM–143–AD]

RIN 2120–AA64

Airworthiness Directives; ATR Model ATR72 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

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

Incomplete accomplishment instructions in SB [service bulletin] ATR72–27–1059 original issue and Revision 1, failed to mention installation of cotter pins to secure the self locking nuts after re-installation of the modified Pitch Uncoupling Mechanism (PUM), when connecting the elevator control linkage rods to the PUM input levers and the PUM output rods to the elevator bellcranks (on both sides).

Because of the non-installation of these four cotter pins, the fail-safe criteria of the design requirements on the pitch control are no longer met. Such a failure could cause the loss of one self locking nut and would result in the loss of pitch control on one side—Captain or First Officer—or the loss of control of one elevator surface. The symmetrical loss of two concerned self-locking nuts could lead to a complete loss of the pitch control.

* * * * *

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 November 10, 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

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–2008–1081; Directorate Identifier 2008–NM–143–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

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Emergency Airworthiness Directive 2008–0137–E, dated July 23, 2008 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

Incomplete accomplishment instructions in SB [service bulletin] ATR72–27–1059 original issue and Revision 1, failed to mention installation of cotter pins to secure the self locking nuts after re-installation of the modified Pitch Uncoupling Mechanism (PUM), when connecting the elevator control linkage rods to the PUM input levers and the PUM output rods to the elevator bellcranks (on both sides).

Because of the non-installation of these four cotter pins, the fail-safe criteria of the design requirements on the pitch control are no longer met. Such a failure could cause the loss of one self locking nut and would result in the loss of pitch control on one side—Captain or First Officer—or the loss of control of one elevator surface. The symmetrical loss of two concerned self-locking nuts could lead to a complete loss of the pitch control.

For the reasons stated above, this AD requires you to check [for] the presence of the four cotter pins and [perform] their installation if they are found to be missing.

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

Relevant Service Information

ATR has issued Avions de Transport Regional Service Bulletin ATR72–27–1059, Revision 02, dated May 19, 2008. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But

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

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a **Note** within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 20 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,200, or $160 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:

ATR–GIE Avions De Transport Régional (Formerly Aerospatiale): Docket No. FAA–2008–1081; Directorate Identifier 2008–NM–143–AD.

Comments Due Date

(a) We must receive comments by November 10, 2008.

Affected ADs

(b) None.

Applicability

(c) This AD applies to ATR Model ATR72–101, –102, –201, –202, –211, –212, and –212A airplanes, all serial numbers, certificated in any category; as identified in paragraphs (c)(1) and (c)(2) of this AD, as applicable.

(1) This AD applies to airplanes on which ATR Service Bulletin ATR72–27–1059 was done in service at original issue, dated October 3, 2006, or Revision 01, dated March 14, 2007, except as provided by paragraph (c)(2) of this AD.

(2) This AD does not apply to airplanes on which Revision 02 of ATR Service Bulletin ATR72–27–1059 was done in service, or ATR Modification 05572 was done in production. Modification 05572 is factory-incorporated on ATR72–212A airplanes from manufacturer's serial number (MSN) 730.

Subject

(d) Air Transport Association (ATA) of America Code 27: Flight controls.

Reason

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

Incomplete accomplishment instructions in SB [service bulletin] ATR72–27–1059 original issue and Revision 1, failed to mention installation of cotter pins to secure the self locking nuts after re-installation of the modified Pitch Uncoupling Mechanism (PUM), when connecting the elevator control linkage rods to the PUM input levers and the PUM output rods to the elevator bellcranks (on both sides).

Because of the non-installation of these four cotter pins, the fail-safe criteria of the design requirements on the pitch control are no longer met. Such a failure could cause the loss of one self locking nut and would result in the loss of pitch control on one side—Captain or First Officer—or the loss of control of one elevator surface. The symmetrical loss of two concerned self-locking nuts could lead to a complete loss of the pitch control.

For the reasons stated above, this AD requires you to check [for] the presence of the four cotter pins and [perform] their installation if they are found to be missing.

Actions and Compliance

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

(1) *Within 10 days after the effective date of this AD:* Verify installation of the four cotter pins securing the nuts of the fastener assemblies connecting the elevator control rods to the elevator bellcranks as shown in Figure 1 of the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–27–1059, Revision 02, dated May 19, 2008.

(2) If any cotter pin is found missing, before further flight, install a new cotter pin with part number MS24665–164 by doing all the applicable actions in accordance with the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–27–1059, Revision 02, dated May 19, 2008.

Note 1: For accessing the zone to be inspected, panels 325BL, 325BR, 327HL, 327KL, 327KR, 327JR, 327JL, 333BB, and 334BB may need to be removed. AMM (airplane maintenance manual) 06–41–30 contains removal procedures.

(3) Before further flight after accomplishment of paragraph (f)(2) of this AD, perform an operational test of the elevator control as specified in paragraph 3.D., ''Tests,'' of the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–27–1059, Revision 02, dated May 19, 2008. If any elevator control rod fails the operational test, before further flight, repair using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows:

The MCAI does not specify corrective action for failure of the operational test (binding or friction) specified in paragraph (f)(3) of this AD. This AD requires using a method approved by the Manager, International Branch, ANM–116 or the EASA

(or its delegated agent) and performing corrective action before further flight.

Other FAA AD Provisions

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

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

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Emergency Airworthiness Directive 2008–0137–E, dated July 23, 2008, and Avions de Transport Regional Service Bulletin ATR72–27–1059, Revision 02, dated May 19, 2008, for related information.

Issued in Renton, Washington, on October 3, 2008.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E8–23982 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–143544–04]

RIN 1545–BD84

Regulations Enabling Elections for Certain Transactions Under Section 336(e)

Correction

In proposed rule document E8–19603 beginning on page 49965 in theissue of Monday, August 25, 2008, make the following correction:

§1.336–3 [Corrected]

1. On page 49979, in the first column, in §1.336–3(d)(1), in thetwenty-second line, ''into account in an amount'' should read''into account in amount''.

2. On the same pages, in the same column, in §1.336–3(d)(2), in thelast line, ''into account in an amount'' should read ''into accountin amount''.

[FR Doc. Z8–19603 Filed 10–8–08; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–107318–08]

RIN 1545–BH75

Notice to Participants of Consequences of Failing To Defer Receipt of Qualified Retirement Plan Distributions; Expansion of Applicable Election Period and Period for Notices

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under sections 402(f), 411(a)(11), and 417 of the Internal Revenue Code (Code). The proposed regulations would provide that the notice required under section 411(a)(11) to be provided to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit must also describe the consequences of failing to defer receipt of the distribution. The proposed regulations would also provide that the applicable election period for waiving the qualified joint and survivor annuity form of benefit under section 417 is the 180-day period ending on the annuity starting date, and that a notice required to be provided under section 402(f), section 411(a)(11), or section 417 may be provided to a participant as much as 180 days before the annuity starting date (or, for a notice under section 402(f), the distribution date). These regulations would affect administrators of, employers maintaining, participants in, and beneficiaries of tax-favored retirement plans.

DATES: Written or electronic comments and requests to speak at the public hearing must be received by January 7, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–107318–08), 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–107318–08), 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–107318–08).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael P. Brewer at (202) 622–6090; concerning submission of comments or to request to speak at the public hearing, Funmi Taylor at (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 for review 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 *December 8, 2008.* Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, 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 collections 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 service to provide information.

The collection of information in these proposed regulations is in § 1.411(a)–11(c)(2) of the Income Tax Regulations. This collection of information is required to comply with the statutory

notice requirements of section 411(a), and is expected to be included in the notices currently provided to employees that inform them of their rights and benefits under the plan. The likely recordkeepers are businesses or other for-profit institutions and nonprofit institutions and organizations.

Estimated total annual recordkeeping burden: 100,000 hours.

Estimated average annual burden hours per recordkeeper: 1 hour.

Estimated number of recordkeepers: 100,000.

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.

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.

Background

A. Notice of Consequences of Failing To Defer

Section 411(a)(11)(A) provides that, if the present value of any nonforfeitable accrued benefit exceeds $5,000, a qualified plan must provide that such benefit may not be immediately distributed without the consent of the participant. Similarly, section 203(e) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), provides that if the present value of any nonforfeitable accrued benefit with respect to a participant in a plan exceeds $5,000, the benefit may not be immediately distributed without the consent of the participant.

Section 1102(b)(1) of the Pension Protection Act of 2006 (PPA '06), 109 Public Law 280, 120 Stat. 780, instructs the Secretary of the Treasury to modify the regulations under section 411(a)(11) of the Code ''to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt.'' Section 1102(b)(2)(A) of PPA '06 provides that the modifications required by section 1102(b)(1) of PPA '06 shall apply to years beginning after December 31, 2006. Section 1102(b)(2)(B) of PPA '06, however, states that a plan shall not be treated as failing to meet the requirements of section 411(a)(11) with respect to any description of the consequences of failing to defer provided ''within 90 days after the Secretary of the Treasury issues the modifications required by [section 1102(b)(1) of PPA '06] if the plan administrator makes a reasonable attempt to comply with such requirements.''

Section 1.411(a)–11(c)(2)(i) states that, in order for a plan to obtain valid consent under section 411(a)(11), ''so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution.'' Section 1.411(a)–11(c)(4) states that a distribution is immediately distributable prior to the later of the time a participant has attained normal retirement age or age 62.

Q&A–32 of Notice 2007–7, 2007–5 I.R.B. 395, provides that a plan administrator is required to revise the notice required under section 411 to reflect the modifications made by section 1102(b) of PPA '06 for notices provided in plan years beginning after December 31, 2006. Notice 2007–7 further provides that, pursuant to section 1102(b)(2)(B) of PPA '06, a plan will not be treated as failing to meet the new requirements of section 1102(b) of PPA '06 if the plan administrator makes a reasonable attempt to comply with the new requirements with respect to a notice that is provided prior to the 90th day after the issuance of regulations reflecting the modifications required by such section 1102(b) of PPA '06. See § 601.601(b)(2)(ii)(*b*).

Q&A–33 of Notice 2007–7 includes a safe harbor that would be considered a reasonable attempt to comply with the requirement in section 1102(b)(1) of PPA '06 that a description of a participant's right to defer receipt of a distribution include a description of the consequences of failing to defer. In particular, Q&A–33 provides that a description that is written in a manner reasonably calculated to be understood by the average participant and that includes the following information is a reasonable attempt to comply with the requirements of section 1102(b)(2)(B) of PPA '06: (a) In the case of a defined benefit plan, a description of how much larger benefits will be if the commencement of distributions is deferred; (b) in the case of a defined contribution plan, a description indicating the investment options available under the plan (including fees) that will be available if distributions are deferred; and (c) the portion of the summary plan description that contains any special rules that might materially affect a participant's decision to defer. For purposes of clause (a), a plan administrator can use a description that includes the financial effect of deferring distributions, as described in § 1.417(a)(3)–1(d)(2)(i), based solely on the normal form of benefit.

Q&A–31 of Notice 2007–7 provides that the provisions of section 1102 apply to plan years that begin after December 31, 2006. Q&A–31 explains that this means that the new rules relating to the content of the notices apply only to notices issued in those plan years, without regard to the annuity starting date for the distributions.

B. Expansion of Applicable Election Period

Section 401(a)(11)(A)(i) provides that, except as provided in section 417, a plan that is qualified under section 401(a) must provide the accrued benefit payable to a vested participant who does not die before the annuity starting date in the form of a qualified joint and survivor annuity.

Section 417(a)(1)(A) provides that, in general, a plan satisfies section 401(a)(11) only if each participant may elect at any time during the ''applicable election period'' to waive the qualified joint and survivor annuity form of benefit (and to revoke the waiver), and certain other requirements are satisfied. Before PPA '06, section 417(a)(6)(A) provided that the ''applicable election period'' for a participant to waive the qualified joint and survivor annuity form of distribution was the 90-day period ending on the annuity starting date.

Section 1102(a)(1)(A) of PPA '06 amended section 417(a)(6)(A) by changing the 90-day ''applicable election period'' for electing a distribution subject to the qualified joint and survivor annuity (QJSA) rules of sections 401(a)(11) and 417 in a form other than a QJSA to a 180-day applicable election period. Section 1102(a)(2)(A) of PPA '06 made a parallel amendment to section 205(c)(7)(A) of ERISA by striking ''90-day'' and inserting ''180-day''.

Sections 1102(a)(1)(B) and 1102(a)(2)(B) of PPA '06 provide that the Secretary of the Treasury shall modify the regulations relating to section 417 of the Code and section 205 of ERISA by substituting ''180 days'' for ''90 days'' each place it appears.

Section 1102(a)(3) of PPA '06 provides that the amendments to the applicable election period apply to years beginning after December 31, 2006.

C. Expansion of Period for Notices

Section 417(a)(3)(A) of the Code and section 205(c)(3)(A) of ERISA provide that a plan must provide to each

participant, ''within a reasonable period of time before the annuity starting date'' and consistent with such regulations as the Secretary of the Treasury may prescribe, a written explanation that describes the terms and conditions of the qualified joint and survivor annuity and certain other information. Similarly, section 402(f)(1) provides that a plan administrator must, ''within a reasonable period of time'' before making an eligible rollover distribution, provide to recipients an explanation of certain tax consequences of the distribution.

Section 1102(a)(1)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations under sections 402(f), 411(a)(11), and 417 by substituting ''180 days'' for ''90 days'' each place it appears in §§ 1.402(f)–1, 1.411(a)–11(c), and 1.417(e)–1(b). Similarly, section 1102(a)(2)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations relating to sections 203(e) and 205 of ERISA by substituting ''180 days'' for ''90 days'' each place it appears.

Section 1102(a)(3) provides that the amendments to the notice periods apply to years beginning after December 31, 2006. Q&A–31 of Notice 2007–7 explains that the 180-day period for distributing notices applies to notices distributed in a plan year that begins after December 31, 2006.

D. Requirements under ERISA

ERISA section 203(e) is the parallel provision to section 411(a)(11) of the Code and ERISA section 205 is the ERISA parallel to section 417 of the Code. Pursuant to section 101 of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt (the Reorganization Plan), the Secretary of the Treasury generally has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including sections 203(e) and 205 of ERISA. Thus, the changes required by section 1102 of PPA '06 would apply as well for purposes of ERISA sections 203(e) and 205.

Explanation of Provisions

A. Notice of Consequences of Failing To Defer

These proposed regulations would provide that the notice required by section 411(a)(11) advising a participant of the right, if any, to defer receipt of a distribution must also inform the participant of the consequences of failing to defer such receipt. The proposed regulations would also provide guidance on the relevant information that must be provided to a participant in order to satisfy the requirement that the participant be notified of the consequences of failing to defer.

Specifically, these proposed regulations would require that the participant be provided a description of specified federal tax implications of failing to defer and, in the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and when the benefit is no longer immediately distributable (that is, the later of age 62 or attainment of normal retirement age). Section 1.417(a)(3)–1(c)(2)(ii) permits a plan to provide participants with a QJSA explanation, which does not vary based on the participant's marital status, of the relative value of optional forms of benefit compared to the value of a QJSA. These proposed regulations would permit the statement of the amount payable to not be based on the participant's marital status, to the extent the plan is permitted under § 1.417(a)(3)–1(c)(2)(ii) to use a QJSA explanation that does not vary based on whether the participant is married or unmarried.

The proposed regulations would also require the information in the notice to include, in the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan. In addition, the proposed regulations would require the notice to include, in the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining information on such fees.

The proposed regulations also include an additional category of information that must be provided relating to any provisions of the plan (and provisions of any accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Thus, for example, the proposed regulations would require a description of the eligibility requirements for retiree health benefits if such benefits are limited to participants who have an undistributed benefit under the employer's retirement plan.

In general, the proposed regulations would also provide that the required information regarding the consequences of a participant's failing to defer receipt of a distribution must appear together. However, the proposed regulations would permit a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

B. Expansion of Applicable Election Period and Period for Notices

Consistent with sections 1102(a)(1)(A) and (1)(B) and 1102(a)(2)(A) and (2)(B) of PPA '06, the proposed regulations would both (1) expand the definition of applicable election period to up to 180 days, and (2) expand the time period for notices issued under sections 402(f), 411(a)(11), and 417 to allow the notices to be issued up to 180 days prior to the annuity starting date (or, in the case of a notice under section 402(f), the date of distribution). Specifically, the proposed regulations would substitute ''180 days'' for ''90 days'' and ''180-day'' for ''90-day'' each place those terms appear in § 1.401(a)–13(g)(4)(ii), § 1.401(a)–20, A–3(b)(1), A–4, A–10(a), A–16, and A–24(a)(1), § 1.402(f)–1, § 1.411(a)–11(c), and § 1.417(e)–1(b).

Pursuant to section 101 of the Reorganization Plan, the Secretary of Treasury has the authority to issue regulations under ERISA sections 203(e) and 205. Thus, these proposed regulations that apply to sections 402(f), 411(a)(11), and 417 of the Code would apply as well for purposes of sections 203(e) and 205 of ERISA.

Proposed Effective/Applicability Date

These regulations are proposed to become effective for notices provided (and election periods beginning) on or after the first day of the first plan year beginning on or after January 1, 2010. However, in no event will the regulations become effective for notices provided (and election periods beginning) earlier than the first day of the first plan year beginning 90 days after publication of final regulations in the **Federal Register**.

With respect to the regulations relating to the notice of consequences of failing to defer the receipt of distributions, until these regulations become effective, a plan will be treated as complying if: (1) The plan complies either with these proposed regulations or with Q&A–32 and Q&A–33 in Notice

2007–7; or (2) if the plan administrator makes a reasonable attempt to comply with the requirement that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt.

With respect to the proposed regulations relating to the expanded applicable election period and the expanded period for notices, plans may rely on these proposed regulations for notices provided (and election periods beginning) during the period beginning on the first day of the first plan year beginning on or after January 1, 2007 and ending on the effective date of final 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 the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on several factors, including that the regulation merely provides guidance to implement a statutorily-required notice, and that the incremental burden in the regulation would be minimal because it only requires including additional information in notices already provided by all of the affected entities. 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 Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Friday, February 20, 2009, 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.

Persons who wish to present oral comments at the hearing must submit written or electronic comments by January 7, 2009 and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by January 16, 2009. 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 Michael P. Brewer, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Office of Chief Counsel, IRS, and the Department of the Treasury participated in the development of these regulations.

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 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *.

§ 1.401(a)–13; § 1.401(a)–20; § 1.402(f)–1; § 1.411(a)–11; § 1.417(e)–1 [Amended]

Par. 2. For each entry listed in the ''Location'' column, remove the language in the ''Remove'' column and add the language in the ''Add'' column in its place.

Location	Remove	Add
1.401(a)–13(g)(4)(ii), first sentence	90 days	180 days.
1.401(a)–20, A–4, third sentence	90 days	180 days.
1.401(a)–20, A–10(a), fifth and sixth sentences	90 days	180 days.
1.401(a)–20, A–16, sixth sentence	90 days	180 days.
1.401(a)–20, A–24(a)(1), fifth sentence	90 days	180 days.
1.402(f)–1, A–2(a), first sentence	90 days	180 days.
1.411(a)–11(c)(2)(ii)	90 days	180 days.
1.411(a)–11(c)(2)(iii)(A), first sentence	90 days	180 days.
1.417(e)–1(b)(3)(i)	90 days	180 days.
1.417(e)–1(b)(3)(ii), first sentence	90 days	180 days.
1.417(e)–1(b)(3)(iii)	90 days	180 days.
1.417(e)–1(b)(3)(vi), second sentence	90 days	180 days.
1.417(e)–1(b)(3)(vii)	90 days	180 days.
1.417(e)–1(b)(3)(vii)	90-day	180-day.

§ 1.411(a)–11 [Amended]

Par. 3. Section 1.411(a)–11 is amended as follows:

1. The second sentence of paragraph (c)(2)(i) is revised.

2. The second sentence of paragraph (c)(2)(iii)(B)(*3*) is revised.

3. Paragraphs (c)(2)(vi) and (h) are added.

The additions and revisions read as follows:

§ 1.411(a)–11 Restriction and valuation of distributions.

* * * * *

(c) * * *

(2) *Consent*—(i) * * * In addition, so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt. * * *

* * * * *

(iii) * * *

(B) * * *

(*3*) * * * The summary described in paragraph (c)(2)(iii)(B)(*2*) of this section must advise the participant of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt, must set forth a summary of the distribution options under the plan, must refer the participant to the most recent version of the notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the participant that, upon request, a copy of the notice will be provided without charge.

* * * * *

(vi) *Consequences of failing to defer*—(A) A notice under this paragraph (c)(2) that is required to describe the consequences of failing to defer receipt of a distribution until it is no longer immediately distributable must, to the extent applicable under the plan and in a manner designed to be easily understood, provide the participant with the information set out in paragraphs (c)(2)(vi)(A)(*1*) through (*5*) of this section and explain why it is relevant to a decision whether to defer.

(*1*) A description of the following federal tax implications of failing to defer: differences in the timing of inclusion in taxable income of an immediately commencing distribution that is not rolled over (or not eligible to be rolled over) and a distribution that is deferred until it is no longer immediately distributable (including, as applicable, differences in the taxation of distributions of designated Roth contributions within the meaning of section 402A); application of the 10% additional tax on certain distributions before age 59½ under section 72(t); and, in the case of a defined contribution plan, loss of the opportunity upon immediate commencement for future tax-favored treatment of earnings if the distribution is not rolled over (or not eligible to be rolled over) to an eligible retirement plan described in section 402(c)(8)(B).

(*2*) In the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and upon commencement when the benefit is no longer immediately distributable (assuming no future benefit accruals). The statement need not vary based on the participant's marital status if the plan is permitted, pursuant to § 1.417(a)(3)–1(c)(2)(ii), to provide a QJSA explanation that does not vary based on the participant's marital status.

(*3*) In the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan.

(*4*) In the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining additional information on the fees and expenses that apply to the participant's account.

(*5*) An explanation of any provisions of the plan (and provisions of an accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Such provisions would include, for example: plan terms under which a participant who fails to defer may lose eligibility for retiree health coverage or eligibility for early retirement subsidies or social security supplements; plan terms under which the benefit of a rehired participant who failed to defer may be adversely affected by the decision not to defer; and, in the case of a defined contribution plan, plan terms under which undistributed benefits that otherwise are nonforfeitable become forfeitable upon the participant's death.

(B) *Location of information; incorporation by reference.* In general, the information required to be provided in a notice under this paragraph (c)(2)(vi) must appear together (for example, in a list of consequences of failing to defer). However, the notice will not be treated as failing to satisfy the requirements of this paragraph (c)(2)(vi) merely because the notice includes a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

* * * * *

(h) *Consequences of Failing to Defer Effective/Applicability Date.* The provisions in paragraph (c) of this section that describe the requirement to notify participants of the consequences of failing to defer are effective for notices provided on or after the first day of the first plan year beginning on or after January 1, 2010.

Linda E. Stiff,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E8–23918 Filed 10–8–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 288

[DoD–2008–OS–0059; RIN 0790–AI29]

Office of the Secretary of Defense and Joint Staff Freedom of Information Act Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This part establishes Office of the Secretary of Defense (OSD) policy, assigns responsibilities, and prescribes procedures for the effective administration of the Freedom of Information Act (FOIA) Program in OSD and the Joint Staff. This part supplements and implements part 286 of 32 CFR, the DoD Freedom of Information Act Regulation.

DATES: Comments must be received by December 8, 2008.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Dave Henshall, 703–696–3243.

SUPPLEMENTARY INFORMATION:

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

It has been certified that 32 CFR part 288 does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribunal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order 12866, as amended by Executive Order 13422.

Sec. 202, Pub. L. 104–4, ''Unfunded Mandates Reform Act''

It has been certified that 32 CFR part 288 does not contain a Federal mandate that may result in the expenditure by State, local and tribunal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

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

It has been certified that 32 CFR part 288 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule implements the procedures for processing FOIA requests within the OSD and JS components.

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

It has been certified that 32 CFR part 288 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been certified that 32 CFR part 288 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

1. The States;

2. The relationship between the National Government and the States; or

3. The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 288

Freedom of information.

Accordingly, title 32 of the Code of Federal Regulations, Chapter I, Subchapter N is proposed to be amended by adding part 288 as follows:

PART 285—OFFICE OF THE SECRETARY OF DEFENSE AND JOINT STAFF FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

Sec

288.1 Purpose.
288.2 Applicability.
288.3 Definitions.
288.4 Policy.
288.5 Responsibilities.
288.6 Procedures.
288.7 Information requirements.

Appendix to Part 288—DoD Agencies and Field Activities, And Other Defense Organizations Served by the Freedom of Information Division

Authority: 5 U.S.C. 552.

§ 288.1 Purpose.

This part establishes Office of the Secretary of Defense (OSD) policy, assigns responsibilities, and prescribes procedures for the effective administration of the Freedom of Information Act (FOIA) Program in OSD and the Joint Staff (JS). This part supplements and implements part 286 of 32 CFR, the DoD Freedom of Information Act Regulation.

§ 288.2 Applicability.

This part applies to OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and the Defense Agencies and DoD Field Activities listed in the appendix to this part. They will hereafter be referred to collectively as the ''OSD and JS Components.''

§ 288.3 Definitions.

Appeal. A request by a member of the general public, made under the FOIA, asking the appellate authority to reverse an initial denial authority (IDA) decision to withhold all or part of a requester record or to deny a request for a fee waiver, reduction of fees, or expedited processing, or any other adverse determination.

Consultation. The process whereby a DoD Component transfers a FOIA responsive document to another Component, Federal agency, or non-U.S. government entity to obtain recommendations on the releasability of the document. After review, the document is returned to the original Component for response to the requester or further review.

FOIA request. A written request for records, made by a person, including a member of the public (U.S. or foreign citizen), an organization, or a business, but not including a Federal agency or a fugitive from the law, that either explicitly or implicitly invokes the FOIA. A request must reasonably describe the records sought and be submitted in compliance with this part 286 of 32 CFR.

IDA. An individual granted the authority to make initial determinations as to the releasability of records to the public.

Privacy Act request. A written request from a U.S. citizen or alien lawfully admitted for permanent residence seeking records on himself or herself that are contained within a Privacy Act system of records.

Referral. The process whereby a DoD Component transfers a request to another DoD Component or Federal agency for one of two reasons. 1. The DoD Component that receives the request determines that responsive records are with another DoD Component or Federal agency, and therefore transfers that request to the other DoD Component or agency for processing and direct response to the requester. 2. The DoD Component that receives the request locates documents that originated with another DoD Component or Federal agency. In this case, the request and documents are transferred to the originating DoD Component or Federal agency for response directly to the requester. This also applies to the situation where a responsive document is transferred to a higher-level authority for response to the requester.

§ 288.4 Policy.

It is OSD policy that OSD and JS Components shall promote the public trust by making the maximum amount of information available to the public on the operation and activities of the Department of Defense, consistent with the Department's responsibility to protect national security and other sensitive DoD information.

§ 288.5 Responsibilities.

(a) The Chief, Freedom of Information Division (FOID), Executive Services Directorate, Washington Headquarters Services (WHS), shall organize, direct, and manage the Office of Freedom of Information (OFOI), the Defense Freedom of Information Policy Office (DFOIPO), and the OSD/JS Privacy Office, and ensure their mutually supported functions are integrated to promote maximum efficiency.

(b) Additionally, the Chief, FOID, shall:

(1) Direct and administer the DoD FOIA Program within the OSD and JS Components.

(2) Execute policies and establish procedures to ensure compliance with 32 CFR parts 285 and 286.

(3) Maintain the OSD/JS FOIA Requester Service Center (RSC).

(4) Serve as the central point of contact (POC) within the OSD and JS Components for the receipt of all FOIA initial requests for records of the OSD Components.

(5) Forward FOIA and Privacy Act requests for records from the public to the OSD Components having possession, control, and/or equities in the requested record.

(6) Respond to FOIA and Privacy Act requesters concerning OSD/JS records.

(7) Maintain a document management system of FOIA and Privacy Act requests.

(8) Conduct educational training for the OSD Components on the requirements and implementation of the FOIA, 5 U.S.C. 552, in accordance with 32 CFR part 286.

(9) Administer the OSD/JS FOIA RSC Web Site. This includes OSD and JS compliance with 5 U.S.C. 552(a)(2).

(10) Receive processing fees for deposit in the U.S. Treasury FOIA.

(11) Serve concurrently as Chief, DFOIPO, and shall:

(i) Receive, process, and review all FOIA appeals for the OSD and JS Components and the Combatant Commands and make recommendations to the appellate authority for final adjudication of these FOIA appeals.

(ii) Provide FOIA litigation support to the Office of the General Counsel, Department of Defense.

(c) The General Counsel, WHS, shall provide assistance and advice to the Pentagon Force Protection Agency (PFPA) and WHS components in the processing of initial denials of requested PFPA and WHS records.

(d) The General Counsel, Department of Defense, shall:

(1) Provide assistance and advice to the OSD Components in the processing of initial denials of requested records.

(2) Coordinate with the Department of Justice on all final appeals for requested records when litigation is likely.

(3) Through the Office of Legislative Counsel, provide assistance and advice to OFOI in the processing and final review of Secretary and Deputy Secretary-level records.

(e) The Heads of OSD and JS Components shall:

(1) Process FOIA requests received from the OFOI in accordance with this part and 32 CFR part 286.

(2) Serve as the IDA, who is authorized to make initial determinations on initial requests for records under 5 U.S.C. 552. This responsibility may be delegated to a representative authorized to deny information on their behalf.

(3) Designate an office and an individual(s) as the POC for FOIA matters. Provide written notice to OFOI of delegated IDAs and POCs, including notice of changes.

(4) Coordinate with legal counsel as necessary on proposed denials of records.

(5) Provide OFOI with a brief statement of the reasons for the denial, including the identification of any exemptions applied.

(6) Alert OFOI when the issues raised by a FOIA request are of unusual significance, precedent setting, or otherwise require special guidance from OFOI.

(7) Forward all FOIA requests that are received directly from the requester (known as ''out-of-channels requests'') to OFOI for entry into the FOIA case tracking system.

(8) Establish procedures to mark record copies and to notify holders of classified records that have been downgraded, declassified, or reclassified as a result of a review under 5 U.S.C. 552.

(9) Provide instructions to employees who administer FOIA matters under this part and 32 CFR parts 285 and 286.

(10) Include a ''FOIA'' link on Component Web sites to the OSD/JS FOIA RSC (*http://www.dod.mil/pubs/foi/*) to assist requesters in properly directing their FOIA requests to the correct office for processing.

§ 288.6 Procedures.

(a) *General.* A request to the OSD/JS RSC for access to information under the provisions of 32 CFR part 286 may be denied upon the determination that:

(1) The requested information is exempt under 5 U.S.C. 552.

(2) The requester has failed to comply with the procedural requirements imposed by 32 CFR parts 285 and 286.

(b) *Processing FOIA Requests Within The OSD and JS Components.* (1) The OFOI receives two types of FOIA requests: Direct requests from a member of the public asking for access to DoD, OSD, or JS information; and referrals or consultations from other DoD and non-DoD agencies that contain OSD or JS documents or other agency documents with OSD or JS equities. In each case, OFOI shall forward the FOIA request (and responsive documents if a referral or consultation) to the OSD or JS Component having responsibility for the requested information. Any FOIA request received by an OSD or JS Component out of channels from a source other than OFOI shall be directed to OFOI without delay for formal entry into the case tracking system. The OSD or JS Component should commence work on the request, pending its return from the OFOI.

(2) FOIA requests shall be sent by OFOI to the OSD or JS Component having responsibility for the information, along with SD Form 466, ''Freedom of Information Action (Cover Sheet);'' SD Form 472, ''Request Information Sheet;'' and DD Form 2086, ''Record of Freedom of Information (FOI) Processing Cost.'' The SD Form 472 and the DD Form 2086 shall be completed and returned to OFOI when processing is complete along with the documents located as a result of the search. OSD or JS Components shall forward information denied in total or in part to OFOI at the initial request stage. The OSD and JS Components shall conduct document searches at the Federal Records Center, Suitland, Maryland, if the documents have been retired to that center. Documents that have been transferred to the National Archives and Records Administration (NARA) are considered the property of NARA and are not subject to OSD and JS Component searches.

(3) If an OSD or JS Component believes that a FOIA request is forwarded to them by OFOI for processing in error the OSD or JS Component's IDA will explain on the SD Form 472 why the OSD or JS Component is not the appropriate office and identify the specific component or other agency of the Government that is likely to have responsibility for the information.

(4) OFOI shall assign a suspense date to each request tasked to the OSD and JS Components by which the receiving component must respond to OFOI. Requests for extensions shall be made to OFOI at least 3 working days before the suspense date. Extensions of time shall be made by OFOI and granted on a case-by-case basis depending on whether the reasons provided qualify as ''unusual circumstances'' as defined by the FOIA.

(5) When a request requires a search by an OSD or JS Component and the requested record is released in full or denied in its entirety, one copy of the requested record, a completed SD Form 472, and DD Form 2086 shall be delivered to OFOI. If the located record is denied in part, two copies of the requested record shall be delivered to OFOI. One copy will indicate the denied information with red pencil brackets, and the other copy will be ''clean,'' with no brackets. Those Components using electronic redaction software may indicate denied information by electronic brackets or

highlights. OFOI will redact the document electronically and prepare it for release to the requester.

(6) If OFOI provides the OSD or JS Component with a document for review that was located by another agency, the Component will return the document tasked for review back to OFOI with its release recommendations. The OSD or JS Component will indicate any exempt information with red pencil brackets or electronically.

(7) The FOIA, 5 U.S.C. 552(b) requires the release of segregable information not otherwise exempt. At a minimum, review for segregability shall be at the paragraph level. If OFOI determines that the information is not properly segregated, it will be returned to the OSD or JS Component for further review.

(8) Completed copies of the SD Form 472 and DD Form 2086 shall be returned with the packet. When a denial is based on a security classification according to the criteria outlined in DoD 5200.1–R,[1] the component's decision rationale shall indicate that a current review of the record supports continued classification. The explanation shall also contain the specific rationale from Executive Order 12958 that supports the decision for continued classification of the requested record. All denials of information require the signature of the IDA on the SD Form 472.

(9) A classified document containing unclassified information may not be denied in total under Exemption 1, 5 U.S.C. 552(b)(1), unless the unclassified information, when taken in aggregate, would reveal classified information. This determination must be made in accordance with section 1.7 of Executive Order 12958. Denial of unclassified information not meeting that standard may only be accomplished by exerting one or more of Exemptions 2 through 9 of 5 U.S.C. 552.

(10) All documents, regardless of classification, that are responsive to a FOIA request must be provided to OFOI for processing. This includes Confidential, Secret, Top Secret, and Sensitive Compartmented Information records. OSD and JS Components may contact the OFOI Security Manager to verify OFOI's clearance level for access to classified information.

(11) When an OSD and JS Component cannot locate a requested record and a ''no record'' determination is made, the explanation on the SD Form 472 shall so state and be signed by the IDA. Complete copies of the SD Form 472 and DD Form 2086 shall be returned with the packet.

(c) *Processing FOIA Appeals Within the OSD and JS Components.* (1) When an appeal involves documents denied by an OSD or JS Component IDA, DFOIPO shall review the entire case file of the initial action to determine if the information was properly denied in accordance with 32 CFR part 286 and 5 U.S.C. 552. If the initial action is deemed proper, then DFOIPO will recommend to the appellate authority that the initial action be upheld. When DFOIPO determines that the initial denial should not be upheld on appeal, it shall make a new release recommendation to the OSD or JS Component and return the denied information to OSD or JS Component for its reconsideration. Documents will be processed and returned to OFOI in accordance with the processing procedures outlined in paragraph (b) of this section.

(2) When an appeal involves an initial ''no record'' response, DFOIPO shall review the entire case file to determine if the initial search was adequate. If DFOIPO determines that the administrative record cannot support the adequacy of the initial search, the OSD or JS Component shall be tasked to provide more detailed accounting of the initial search, conduct a new search, or both. If it is determined that the initial administrative record shows that the initial search was adequate, DFOIPO will advise the appellate authority to uphold the original determination.

(3) If the appeal concerns an administrative decision made by DFOIPO such as denial of expedited processing, fee waiver, or a fee category determination, DFOIPO shall review the original case file, along with additional documentary evidence presented by the requester, and make a recommendation to the appellate authority for final adjudication.

(4) When the final determination by DFOIPO involves a full grant, the Chief, FOID or designee shall notify the requester of that determination.

§ 288.7 Information requirements.

The DoD Annual FOIA Report is assigned Report Control Symbol DD–DA&M(A) 1365 in accordance with the requirements of DoD 8910.1–M.[2]

Appendix to Part 288—DoD Agencies and Field Activities, and Other Defense Organizations Served by the Freedom of Information Division

American Forces Information Service
Armed Forces Radiology Research Institute
Defense Acquisition University
Defense Advanced Research Projects Agency
Defense Business Transformation Agency
Defense Equal Opportunity Management Institute
Defense Legal Services Agency
Defense Media Activity
Defense Microelectronics Activity
Defense Modeling and Simulation Office
Defense Prisoner of War/Missing Persons Office
Defense Security Cooperation Agency
Defense Systems Management College
Defense Technology Security Administration
DoD Counterintelligence Field Activity
DoD Human Resources Activity
Joint Professional Military Education Colleges
Missile Defense Agency
National Defense University
Pentagon Force Protection Agency (PFPA)
Uniformed Services University of the Health Sciences
Washington Headquarters Services (WHS)
White House Military Office

September 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–23998 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–06–P

[1] Available at *http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf.*

[2] Available at *http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf.*

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 325

[DOD–2008–OS–0067]

RIN 0790–AI30

Defense Contract Management Agency (DCMA) Privacy Program

AGENCY: Department of Defense.

ACTION: Proposed rule.

SUMMARY: This part provides policies and procedures for the Defense Contract Management Agency's (DCMA) implementation of a Privacy Program under the Privacy Act of 1974, as amended.

DATES: Comments must be received by December 8, 2008.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Mail: Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this

Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Debbie Gendreau, (703) 428–1487.

SUPPLEMENTARY INFORMATION:

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

It has been determined that Privacy Act rules for the Department of Defense are not significant rules. This rule does not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. Chapter 6)

It has been determined that this Privacy Act rule for the Department of Defense does not have significant economic impact on a substantial number of small entities because it is concerned only with the administration of the Privacy Act within the Department of Defense.

Public Law 95–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that this Privacy Act rule for the Department of Defense imposes no information requirements beyond the Department of Defense and that the information collected within the Department of Defense is necessary and consistent with 5 U.S.C. 552a, known as the Privacy Act of 1974.

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

It has been determined that this Privacy Act rulemaking for the Department of Defense does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that the Privacy Act rules for the Department of Defense do not have federalism implications. The rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 325

Privacy.

Accordingly 32 CFR Part 325 is added to read as follows:

Sec.

325.1 Purpose and Scope.
325.2 Definitions.
325.3 Policy.
325.4 Responsibilities.
325.5 Procedures.
Appendix A to Part 325—DCMA Non Disclosure Statement
Appendix B to Part 325—DCMA PII Breach Notification Responsibility Statement

Authority: Privacy Act of 1974, Pub. L. 93–579, Stat. 1896 (5 U.S.C. 552a).

§ 325.1 Purpose and scope.

This part provides policies and procedures for the Defense Contract Management Agency's (DCMA) implementation of a Privacy Program under the Privacy Act of 1974, as amended (5 U.S.C. 552a), OMB Circular A–130,[1] 32 CFR part 310, OMB Memorandum M–07–16,[2] and DoD Policy Memo, subject: Safeguarding Against and Responding to the Breach of Personally Identifiable Information (PII). [3]

(a) This part applies to all DCMA organizational elements which includes the Headquarters, Divisions, and any Field Activities, and supersedes previously issued guidance on the DCMA Privacy Program.

(b) This part shall be made applicable to DCMA contractors who are operating or maintaining a system of records or portion of a system of records, to include collecting and disseminating records associated with accomplishing the Agency's mission.

[1] Available at *http://www.whitehouse.gov/omb/circulars/a130/a130trans4.pdf.*

[2] Available at *http://www.whitehouse.gov/omb/memoranda/fy2007/m-16.pdf.*

[3] Available at *http://www.defenselink.mil/privacy/pdfdocs/Safeguarding%20Against%20and%20Responding%20to%20the%20Breach%20of%20PII%20%20-%20OSD%2015041-07.pdf.*

§ 325.2 Definitions.

Agency. For the purpose of disclosing records subject to the Privacy Act among DoD Components, the Department of Defense is considered a single agency. For all other purposes including applications for access and amendment, denial of access or amendment, appeals from denials, and record keeping as regards release to non-DoD agencies, DCMA is considered an agency within the meaning of the Privacy Act.

Government Contractor. The company and its employees who administer or work under a government contract awarded by DCMA. The Contractor and its employees are not considered employees for purposes of FAR 37.104 unless otherwise authorized by statute. However, the Contractor and its employees are considered employees of DCMA for purposes of the criminal provisions of 5 U.S.C. 552a(i) during the performance of the contract whenever a DCMA contract requires the performance of any activities associated with maintaining a system of records subject to the Privacy Act, including the collection, use, and dissemination of records on behalf of the Agency.

Personal Information. Information about an individual that identifies, links, relates, or is unique to, or describes him or her (e.g., a social security number; age; military rank; civilian grade; marital status; race; salary; home or office phone numbers; other demographic, biometric, personnel, medical, and financial information, etc). Such information also is known as personally identifiable information (e.g., information which can be used to distinguish or trace an individual's identity, such as his or her name; social security number; date and place of birth; mother's maiden name; and biometric records, including any other personal information which is linked or linkable to a specified individual).

§ 325.3 Policy.

It is DCMA policy that:

(a) Individuals have a fundamental right to privacy and the expectation that this Agency, including contractors, will safeguard PII it maintains to the maximum extent practicable.

(1) DCMA shall balance the right of the individual to be protected against unwarranted invasions of personal privacy against agency need when setting any requirement to collect, maintain, use, and disseminate PII, ensuring that such activities are relevant and necessary to achieve a purpose required by statute, Executive Order or regulation.

(2) DCMA personnel, including contractors, have an affirmative responsibility to protect an individual's privacy when collecting, maintaining, using, or disseminating PII.

(3) DCMA shall ensure that policy proposals with potential impact to privacy rights of individuals are evaluated for those impacts and, when required and consistent with the Privacy Provisions of the E-Government Act of 2002 (44 U.S.C. 3501, Note), shall prepare a Privacy Impact Assessment (PIA).

(b) DCMA shall adhere to the rules, regulations, policies, and definitions set forth for implementing a Privacy Act Program by DoD in 32 CFR part 310. DCMA shall create and maintain Privacy Act policy only where it is not already addressed in the authorities listed.

§ 325.4 Responsibilities.

(a) The Director, DCMA, or his/her designee, shall:

(1) Provide adequate funding and personnel to establish and support an effective Privacy Program.

(2) Serve as the Agency Appellate Authority as required under 32 CFR 310.18 and 310.19.

(b) The DCMA Privacy Act Officer, or his/her designee, shall:

(1) Formulate policies, procedures, and standards necessary for uniform compliance with the Privacy Act and 32 CFR part 310 by DCMA activities.

(2) Prepare any Privacy Act Reports as may be mandated by OMB Circular A–130, 32 CFR part 310, and subsequent DoD policy.

(3) Establish and conduct training consistent with the requirements of 32 CFR part 310 for DCMA personnel.

(4) Serve as an Access Denial Authority (ADA) for Headquarters as required under 32 CFR 310.18 and 310.19.

(5) Direct the day-to-day activities of the DCMA Privacy Program.

(6) Coordinate with the DCMA Chief Information Officer (CIO) to formulate procedures and standards for safeguarding against, assessing risk of, handling, reporting, and making proper notification of DCMA PII breaches.

(7) Prepare any required new, amended, or altered system notices for systems of records subject to the Privacy Act and submit them to the Defense Privacy Office for subsequent publication in the **Federal Register**.

(8) Coordinate with DCMA CIO to review PII holdings in accordance with DoD policy.

(9) Develop and maintain a Rules and Consequences policy applicable to all DCMA employees (including managers) and its contractors, licensees, certificate holders and grantees in accordance with DoD policy.

(c) The General Counsel, DCMA, or his/her designee, shall:

(1) Advise and assist the Privacy Act Officer and other DCMA organization Privacy Act Managers as required in the discharge of their responsibilities.

(2) Advise the Defense Privacy Office on the status of DCMA Privacy Act-related litigation.

(3) Consult with DOD General Counsel on final denials, involving issues not able to be resolved within DCMA, or that raise new or significant legal issues of potential significance to other Government agencies.

(4) Coordinate Privacy Act litigation with the Department of Justice.

(5) Coordinate on denials of initial requests and appeals.

(d) The Chief Information Officer, Information Technology, DCMA, or his/her designee, shall:

(1) Formulate and implement protective standards for DCMA PII maintained in automated data processing systems and facilities.

(2) Coordinate with the DCMA Privacy Officer to formulate procedures and standards for safeguarding against, assessing risk of, handling, reporting, and making proper notification of DCMA PII breaches.

(3) Prepare PIAs when required by other authority.

(e) DCMA Division Directors, or their designees, shall:

(1) Assume responsibility for the overall management of the Privacy Act Program within their respective Divisions.

(2) Ensure the Division's internal operating procedures provide for effective compliance with the Privacy Act.

(3) Designate a Privacy Act Manager to serve as the principal point-of-contact on privacy matters.

(4) Serve as an Access Denial Authority for their respective Division. This authority shall not be delegated.

(f) The Division Privacy Act Manager, or his/her designee, shall:

(1) Manage the DCMA Privacy Act Program in accordance with this part and applicable DCMA, DoD, and Federal policies and regulations.

(2) Provide guidelines for managing, administering, and implementing the DCMA Privacy Act Program.

(3) Ensure that the collection, maintenance, use, or dissemination of PII records is in a manner that assures such actions are relevant and necessary for a lawful purpose; that the information is timely, accurate, relevant, and complete for its intended use; and that appropriate safeguards are provided to prevent misuse of such information.

(g) DCMA Procurement Center Officials shall:

(1) Ensure that all contracts awarded by DCMA whose services would subject Government Contractors to the requirements of this part include contractual provisions required by FAR Subpart 24.1 or FAR 39.105.

(2) Ensure that all contracts awarded by DCMA shall require Government Contractor employees to participate in Privacy Act training mandated by DCMA, DoD, or other authority.

(3) Ensure that each contractor covered by this part is contractually required to have its employees sign Certificates of Non-Disclosure prior to being given individual access to DCMA PII (Appendix A to Part 325).

(h) DCMA Military Members and Civilian Employees shall:

(1) Not disclose any PII, except as authorized by this part, DoD or other Federal regulations.

(2) Not maintain any official files which are retrieved by name or other personal identifier without first ensuring a system of records notice has been published in the **Federal Register**.

(3) Participate in Privacy Act training mandated by DCMA, DoD, or other authority.

(4) Report any disclosures of personal information from a system of records or the maintenance of any system of records that are not authorized by this part to the appropriate Privacy Act officials for action.

(5) Forward to the Division Privacy Act Manager any Privacy Act requests received directly from a member of the public, so that the request may be administratively controlled and processed in accordance with this part.

(6) Adhere to the Standards of Conduct addressed in 32 CFR part 310.

(i) DCMA Contractors shall:

(1) Sign a DCMA Certificate of Non-Disclosure prior to gaining initial access to DCMA PII. (Appendix A to Part 325)

(2) Not disclose any PII, except as authorized by this part.

(3) Not maintain any official files which are retrieved by name or other personal identifier without first ensuring a system of records notice has been published in the **Federal Register**.

(4) Participate in Privacy Act training mandated by DCMA, DoD, or other authority in accordance with their contract.

(5) Report any disclosures of personal information from a system of records or the maintenance of any system of records that are not authorized by this part to the appropriate Privacy Act officials for action.

(6) Forward to the Division Privacy Act Manager any Privacy Act requests received directly from a member of the public, so that the request may be administratively controlled and processed.

§ 325.5 Procedures.

(a) *Access to records.* (1) Requests for information contained in a DCMA system of records should be addressed to the DCMA Privacy Officer, 6350 Walker Lane, Alexandria, VA 22310. Requests will be processed in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), 32 CFR part 310, the Freedom of Information Act (5 U.S.C. 552), and this part.

(2) *Denial of access.* Access to information contained in a DCMA system of records may be formally denied in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), and 32 CFR part 310.

(b) *Notification when information is lost, stolen, or compromised.* (1) DCMA will respond to breaches in accordance with 32 CFR part 310 as augmented by OMB Memorandum M–07–16, and DoD Policy Memo, subject: Safeguarding Against and Responding to the Breach of Personally Identifiable Information (PII).

(2) DCMA will establish appropriate administrative, technical, and physical safeguards to protect information against unauthorized disclosure, access or misuse.

(c) *Clauses in DCMA agreements with other government entities.* DCMA will include a DCMA PII Breach Notification Responsibility Statement in all agreements with other government entities that maintain or otherwise have access to DCMA generated personal information. (See Appendix B to Part 325)

Appendix A to Part 325—DCMA Certificate of Non Disclosure

(See section 325.4(h))

NON-DISCLOSURE AGREEMENT

CONTRACT NO. _____

DELIVERY/TASK ORDER NO. _____

I, _____, (hereinafter RECIPIENT), an employee and authorized representative of _____, a Contractor providing support services to the Defense Contract Management Agency (DCMA) with likely access to nonpublic, information, understand and agree to the following:

RECIPIENT is engaged in delivering support services to DCMA under contract; and

It is the intention of DCMA to protect and prevent access to and disclosure of nonpublic sensitive information to anyone other than employees or authorized contractor personnel of the United States Government who have a need to know unless so authorized by the Contracting Officer and/or the Contracting Officer's representative; and

DCMA acknowledges that RECIPIENT will have or require access to such nonpublic information in the course of delivering the contract services; and, finally,

''Nonpublic information'' includes such information as proprietary information (e.g., information submitted by a contractor marked as proprietary), advanced procurement information (e.g., future requirements, statements of work, and acquisition strategies), source selection information (e.g., bids before being made public, source selection plans, and rankings of proposals), trade secrets and other confidential business information (e.g., confidential business information submitted by a contractor), attorney work product, information protected by the Privacy Act (e.g., social security numbers, home addresses and telephone numbers), and other sensitive information that would not be released by DCMA under the Freedom of Information Act (e.g., program, planning and budgeting system information);

RECIPIENT further agrees to and promises as follows:

RECIPIENT shall not seek access to nonpublic information beyond what is required for the performance of the support services contract;

RECIPIENT will ensure that his or her status as a contractor employee is known when seeking access to and receiving such nonpublic information from Government employees;

As to any nonpublic information to which RECIPIENT has or is given access, RECIPIENT shall not use or disclose such information for any purpose other than providing the contract support services, and will not use or disclose the information for any personal or other commercial purpose; and

If RECIPIENT becomes aware of any improper release or disclosure of such nonpublic information, RECIPIENT will advise the contracting officer or a duly authorized representative in writing as soon as possible.

The RECIPIENT agrees to return any nonpublic information given to him or her pursuant to this agreement, including any transcriptions by RECIPIENT of nonpublic information to which RECIPIENT was given access, if not already destroyed, upon RECIPIENT leaving the employ of the contractor providing services to DCMA.

RECIPIENT understands that any unauthorized use, release or disclosure of nonpublic information in violation of this CERTIFICATE, whether during or after leaving the contractor's employ, will subject the RECIPIENT to administrative, civil or criminal remedies as may be authorized by law.

RECIPIENT: _____

(Signature)

DATE: _____

PRINTED NAME: _____

TITLE: _____

Appendix B to Part 325—DCMA PII Breach Notification Responsibility Statement

(See section 325.5(c))

Personally Identifiable Information (PII). In the event *(name of signatory to MOU)* is collecting and maintaining PII on behalf of DCMA and the information is lost, stolen, or otherwise compromised, *(name of signatory to MOU)* shall notify the DCMA Privacy Officer, 6350 Walker Lane, Alexandria, VA 22310, (703) 428–1453, within 24 hours and provide all necessary information regarding the breach. A determination will be made at that time whether DCMA or *(name of signatory to the MOU)* will notify the affected individuals impacted by the breach. *(name of signatory to MOU)* is responsible for filing the Breach notification with US–CERT.

Dated: September 30, 2008.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E8–23999 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 7

Negotiated Rulemaking Advisory Committee for Off-Road Vehicle Management for Cape Hatteras National Seashore

AGENCY: National Park Service (NPS), Interior.

ACTION: Notice of Meeting Location Change and Additional Public Comment Time for Eighth and Ninth Meetings.

SUMMARY: Notice is hereby given, in accordance with the Federal Advisory Committee Act (Pub. L. 92463, 86 Stat. 770, 5 U.S.C. App 1, section 10), that the meeting location has been changed and an additional public comment time added for the eighth and ninth meeting of the Negotiated Rulemaking Advisory Committee for Off-Road Vehicle (ORV) Management at Cape Hatteras National Seashore. These meetings were noticed on July 8, 2008 at 73 FR 38954. (*See* **DATES** section.)

DATES: The Committee will hold its eighth meeting on November 14–15, 2008, from 8:30 a.m. to 5:30 p.m. on November 14, and from 8:30 a.m. to 4 p.m. on November 15. The meeting on both days will be held at the Wright Brothers National Memorial Pavilion, 1000 Croatan Highway (Milepost 7.6), Kill Devil Hills, North Carolina 25948. The Committee will hold its ninth meeting on December 11–12, 2008, from 8:30 a.m. to 5:30 p.m. on December 11,

and from 8:30 a.m. to 4 p.m. on December 12. The meeting on both days will be held at the Wright Brothers National Memorial Pavilion, 1000 Croatan Highway (Milepost 7.6), Kill Devil Hills, North Carolina 25948.

These, and any subsequent meetings, will be held for the following reason: To work with the National Park Service to assist in potentially developing special regulations for ORV management at Cape Hatteras National Seashore.

The proposed agenda for these meetings of the Committee may contain the following items: Approval of Meeting Summary from Last Meeting, Subcommittee and Members' Updates since Last Meeting, Alternatives Discussions, National Environmental Policy Act Update, and Public Comment. However, the Committee may modify its agenda during the course of its work. The meetings are open to the public. Interested persons may provide brief oral/written comments to the Committee during the public comment period of the meetings each day before the lunch break and at 5 p.m. on the first day of each meeting or file written comments with the Park Superintendent.

FOR FURTHER INFORMATION CONTACT: Mike Murray, Superintendent, Cape Hatteras National Seashore, 1401 National Park Drive, Manteo, North Carolina 27954, (252) 473–2111, extension 148.

SUPPLEMENTARY INFORMATION: The Committee's function is to assist directly in the development of special regulations for management of ORVs at Cape Hatteras National Seashore (Seashore). Executive Order 11644, as amended by Executive Order 11989, requires certain Federal agencies to publish regulations that provide for administrative designation of the specific areas and trails on which ORV use may be permitted. In response, the NPS published a general regulation at 36 CFR 4.10, which provides that each park that designates routes and areas for ORV use must do so by promulgating a special regulation specific to that park. It also provides that the designation of routes and areas shall comply with Executive Order 11644, and 36 CFR 1.5 regarding closures. Members of the Committee will negotiate to reach consensus on concepts and language to be used as the basis for a proposed special regulation, to be published by the NPS in the **Federal Register**, governing ORV use at the Seashore. The duties of the Committee are solely advisory.

Dated: September 26, 2008.

Michael B. Murray,

Superintendent, Cape Hatteras National Seashore.

[FR Doc. E8–23779 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–46–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2007–0659; FRL–8727–1]

Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Approval of Section 110(a)(1) Maintenance Plans for the 1997 8-Hour Ozone Standard for the Parishes of Calcasieu and St. James

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Louisiana State Implementation Plan (SIP) concerning maintenance plans addressing the 1997 8-hour ozone standard for the parishes of Calcasieu and St. James. On July 20, 2007 and August 24, 2007, the State of Louisiana submitted separate SIP revisions containing maintenance plans for the 1997 ozone standard for Calcasieu and St. James Parishes, respectively. These plans ensure the continued attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS) through the year 2014. These maintenance plans meet the statutory and regulatory requirements, and are consistent with EPA's guidance. EPA is approving the revisions pursuant to section 110 of the Federal Clean Air Act (CAA). On March 12, 2008, EPA issued a revised ozone standard. Today's action, however, is being taken to address requirements under the 1997 ozone standard. Requirements for the areas under the 2008 standard will be addressed in future actions.

DATES: Written comments must be received on or before November 10, 2008.

ADDRESSES: Comments may be mailed to Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ellen Belk, Air Planning Section (6PD–L), Multimedia Planning and Permitting Division, U.S. EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–2164; fax number (214) 665–7263; e-mail address *belk.ellen@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule, which is located in the rules section of this **Federal Register**.

Dated: September 29, 2008.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. E8–23866 Filed 10–8–08; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Chapter III

Low-Power Television and Translator Upgrade Program; Public Meeting

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Advanced notice of proposed rulemaking, notice of public meetings.

SUMMARY: Section 3009 of the Deficit Reduction Act (Act) requires the National Telecommunications and Information Administration (NTIA) to implement and administer a program through which each eligible low-power television broadcast station, Class A television station, television translator

station, or television booster station may receive reimbursement for equipment to upgrade from analog to digital in eligible rural communities. NTIA will hold public meetings regarding the implementation of this Low-power Television Upgrade Program (Upgrade Program) [1] in Washington, DC and Las Vegas, Nevada.

DATES: The meeting will be held in Washington DC on October 24, 2008, at 10 a.m. Eastern Time, and in Las Vegas, Nevada on October 28, 2008, at 3:30 p.m. Mountain Time.

ADDRESSES: The Washington, DC meeting will be held at the U.S. Department of Commerce, 1401 Constitution Ave., NW. The Las Vegas, Nevada meeting will be held at the Golden Nugget Hotel and Casino, 129 Fremont Street. The locations of both meetings will also be announced on the NTIA Web site *www.ntia.doc.gov/lptv.*

FOR FURTHER INFORMATION: For further information regarding the meetings, contact William Cooperman, Broadcast Division Director, at (202) 482–5802.

SUPPLEMENTARY INFORMATION: NTIA will host two public meetings related to its implementation of the Upgrade Program authorized under Section 3009 of the Deficit Reduction Act of 2005, as amended by the DTV Transition Assistance Act (Pub. L. 110–295). As amended, section 3009 of the Act contains, in its entirety, the following language:

Sec. 3009. Low-Power Television and Translator Upgrade Program

(a) Establishment.—The Assistant Secretary shall make payments of not to exceed $65,000,000, in the aggregate, during fiscal years 2009 through 2012, from the Digital Television Transition and Public Safety Fund established under section 309(j)(8)(E) of the Communications Act of 1934 (47 U.S.C. 309(j)(8)(E)) to implement and administer a program through which each licensee of an eligible low-power television station may receive reimbursement for equipment to upgrade low-power television stations from analog to digital in eligible rural communities, as that term is defined in section 610(b)(2) of the Rural Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)). Such reimbursements shall be issued to eligible stations on or after February 18, 2009. Priority reimbursements shall be given to eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.

(b) Eligible Stations.—For purposes of this section, the term ''eligible low-power television station'' means a low-power television broadcast station, Class A television station, television translator station, or television booster station—

(1) that is itself broadcasting exclusively in analog format; and

(2) that has not converted from analog to digital operations prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.

Section 610(b)(2) of the Rural Electrification Act of 1937 (7 U.S.C. 950bb(b)(2)), which is referenced in Section 3009(a), contains, in its entirety, the following language: *''the term 'eligible rural community' means any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants.''*

Matters To Be Considered: NTIA will discuss the following topics at the public meetings and will also provide an opportunity for public comment on these matters.

1. *Station Eligibility:* How to define an eligible station. Issues that will be discussed include the following:

(1) Whether a facility must hold an FCC license to be considered ''broadcasting'' or be permitted to hold an FCC construction permit or program test authority.

(2) Whether a facility meets the statutory requirement ''broadcasting exclusively in analog format'' if it has a construction permit, program test authority, or license for a digital companion channel or has flash cut to digital.

(3) Whether NTIA should establish a uniform deadline of eligibility (DOE) applicable to all applicants that NTIA will use when determining a station's eligibility regarding the two previous items. If so, should the DOE be (1) the date of enactment of the Act (*i.e.*, February 8, 2006), (2) the closing date for receipt of Upgrade Program applications for the applicable grant round, (3) the same date as the Expenditure Start Date discussed in the section titled Reimbursement, below, or (4) some other date.

(4) Whether a governmental subsidiary can be considered a nonprofit corporation and therefore may qualify for ''priority reimbursement.''

(5) Whether NTIA should adopt the same requirements regarding station eligibility for the Upgrade Program as NTIA adopted for the Digital-to-Analog Conversion Program (Conversion Program) and published in the October 29, 2007, **Federal Register** (72 FR 61109–61114). The Conversion Program was established under Section 3008 of the Act and contains language identical to Section 3009 establishing the Upgrade Program regarding the definition of an eligible station.[2]

2. *Eligible Communities:* How NTIA could implement the statutory requirement that an eligible station must be ''in eligible rural communities'' (*i.e.*, ''any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants.'') Issues to be discussed will include the most appropriate method of designating an eligible rural community, including the following:

(1) Whether NTIA should determine an eligible rural community based on the population within the station's

(a) Community of license, or

(b) FCC 50/50 contour,[3] or

(c) Grade A coverage,[4] or

(d) Grade B coverage,[5] or

(e) P coverage contour per Section 74.707 of the FCC Rules.

(2) Whether NTIA should determine an eligible rural community based on some other definition or formula (*e.g.*, the number, or percentage, of people served by the station living in rural areas outside Urban Areas or Urban Clusters of more than 20,000).[6]

3. *Reimbursement:* The statute provides for reimbursement to an otherwise eligible station that has not converted from analog to digital operations prior to the *''date of enactment of the Digital Television Transition and Public Safety Act of 2005''* (*i.e.*, February 8, 2006). Issues that will be discussed include whether NTIA should accept all expenditures for eligible costs after February 8, 2006, for reimbursement, or, in order to provide fair and equitable notice to all potential applicants to the Upgrade Program,

[1] *See* Title III of the Deficit Reduction Act of 2005, Public Law No. 109–171, 120 Stat. 4, 21 (Feb. 8, 2006).

[2] The October 29, 2007, **Federal Register** notice announcing the Conversion Program stated that an eligible station ''must be broadcasting as authorized by the FCC, not merely possess a Construction Permit,'' that ''stations that broadcast in digital, either on the main channel or on a companion channel, will not be eligible,'' and that ''a governmental unit would not qualify for priority compensation unless the unit has a separate corporate charter and has received a determination of non-profit status.'' The notice also required that an applicant to the Conversion Program ''either hold an FCC broadcast license or have filed an application for a broadcast license prior to November 29, 2007.''

[3] *See* 47 CFR 73.684, 73.699.

[4] *See* 47 CFR 73.684.

[5] *See id.*

[6] Urban Areas and Urban Clusters are areas defined by the U.S. Census Bureau, see *http://www.census.gov/geo/www/ua/ua_2k.html.*

establish another date (''Expenditure Start Date'') after which applicant expenses would be eligible for reimbursement. If NTIA were to establish the Expenditure Start Date after February 8, 2006, should it be any of the following?

(1) The date of this notice, or

(2) The date that NTIA announces the availability of funds to start the Upgrade Program, or

(3) The closing date for receipt of Upgrade Program applications for the applicable grant round, or

(4) The date that NTIA awards Upgrade Program funds to an applicant, or

(5) The Deadline of Eligibility date discussed earlier in the section on Eligibility.

4. *Priority Reimbursement:* How NTIA can implement the requirement that priority reimbursement shall be given to ''*eligible low-power television stations in which the license is held by a non-profit corporation and eligible low-power television stations that serve rural areas of fewer than 10,000 viewers.*'' Issues to be discussed include whether NTIA should

(1) Have an exclusive period during which only applicants who qualify for the priority can apply?

(2) Establish a priority reimbursement category within a larger grant round?

(3) Provide additional points, if the grants are competitive, to those applicants which meet the criteria for priority reimbursement?

(4) Require that stations meet both criteria (licensee held by a non-profit corporation and that serve rural areas of fewer than 10,000 viewers) in order to receive the priority?

(5) Use the same benchmark in determining the priority reimbursement population requirement (''rural areas of fewer than 10,000 viewers'') as used in determining population eligibility requirement (''any area of the United States that is not contained in an incorporated city or town with a population in excess of 20,000 inhabitants'')?

(6) Adopt the same requirements regarding priority reimbursement for the Upgrade Program as it adopted for the Conversion Program and published in the October 29, 2007, **Federal Register** (72 FR 61109–61114). The Conversion Program was established under Section 3008 of the Act and contains language identical to Section 3009 establishing the Upgrade Program regarding priority consideration (reimbursement).[7]

5. *Eligible Equipment and Costs:* The Act states that reimbursement shall be given for *''equipment to upgrade low-power television stations from analog to digital,''* but does not provide further guidance regarding which equipment or costs should be supported by the program.

Issues that will be discussed include what costs or equipment should be eligible for reimbursement under the program and whether there should be a formula or limit on the amount of funds awarded to a single station. If so, what should they be or how should they be determined?

6. *Application Selection:* Issues to be discussed include how applications should be selected for funding and whether NTIA should consider any of the following alternatives:

(1) Uniform grants. If all 7,000 low-power facilities were eligible for the program, each facility could receive a grant of approximately $9,000; if only half the facilities were eligible for the program, the uniform grant would be approximately $18,000, etc.

(2) First-come, first served. NTIA could fund complete applications from otherwise eligible stations on a first-come, first-served basis, until all funds are awarded. A provision would have to be devised to provide for the facilities that meet the statutory requirements for priority reimbursement.

(3) Competitive grant cycle. If NTIA were to awards funds on a competitive basis, what selection factors and criteria should it establish to evaluate applications?

(4) Single or multiple grant cycles. How many grant cycles should NTIA plan to award the funds during the authorized period FY 09–FY 12?

7. *Administrative Procedures to Award Grants:* Issues to be discussed include the administrative matters related to the efficient implementation of the Upgrade Program, including preparation and submission of applications, payment of funds, and grantee post-award obligations.

Time and Date: The Washington meeting will held on October 23, 2008 from 10 a.m. to 11:30 a.m., and the Las Vegas meeting on October 28, 2008, from 3:30 p.m. to 5 p.m. These times and the agenda topics are subject to change. Please refer to NTIA's Web site, *www.ntia.doc.gov/lptv,* for the most up-to-date meeting agenda.

Place: The meetings will be held in Washington, DC at the U.S. Department of Commerce and in Las Vegas, Nevada at the Golden Nugget Hotel and Casino.

Status: Interested parties are invited to attend and to submit written comments. Interested parties are permitted to file comments electronically via e-mail to *lptv@ntia.doc.gov.* Comments provided via email may be submitted in one or more of the formats specified below. Comments may be filed with NTIA at any time before the meeting, and through November 14, 2008. If interested parties wish to submit comments for consideration by NTIA in advance of the meeting, they should be sent to the above listed address and received by close of business one week prior to the meeting to provide sufficient time for review. Comments received after such time may not be reviewed prior to the meeting. Alternatively, interested parties may also submit paper submissions.

Paper comments should be sent to: LPTV Program, U.S. Department of Commerce, Room 4812, 1401 Constitution Ave., NW., Washington, DC 20230. Please note that all material sent via the U.S. Postal Service (including ''Overnight'' or ''Express Mail'') is subject to delivery delays of up to two weeks due to mail security procedures at the Department of Commerce. All written comments received will be posted on the NTIA Web site at *www.ntia.doc.gov/lptv.*

It would be helpful if paper submissions also include a CD or DVD in HTML, ASCII, Word or WordPerfect format (please specify version). CDs or DVDs should be labeled with the name and organizational affiliation of the filer, and the name of the word processing program used to create the document.

Because of space limitation, attendance at the meeting will be determined on a first-come, first-served basis. The meeting will be physically accessible to people with disabilities. Individuals requiring special services, such as sign language interpretation or other ancillary aids, are asked to indicate this to [name] at least two (2) days prior to the meeting. Members of the public will have an opportunity to ask questions at the meeting. Individuals who would like to submit questions in writing should e-mail their questions to Lynn Chadwick at *lchadwick@ntia.doc.gov.*

Dated: October 2, 2008.

Meredith Attwell Baker,

Acting Assistant Secretary for Communications and Information.

[FR Doc. E8–23841 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–60–P

[7] The October 29, 2007, **Federal Register** notice regarding the Conversion Program, stated that ''in sum, an applicant requesting priority compensation must (i) be a non-profit corporation; or (ii) serve fewer than 10,000 people within the low-power station's 50/50 service contour.''

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 504 and 552

[GSAR Case 2006–G510; Docket 2008–0007; Sequence 19]

RIN 3090–AI72

General Services Acquisition Regulation; GSAR Case 2006–G510; Rewrite of GSAR Part 504, Administrative Matters

AGENCY: Office of the Chief Acquisition Officer, General Services Administration (GSA).

ACTION: Proposed rule.

SUMMARY: The GSA is proposing to amend the General Services Acquisition Regulation (GSAR) to revise the language regarding requirements for administrative matters.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before December 8, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2006–G510 by any of the following methods:

- Regulations.gov: *http://www.regulations.gov*. Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2006–G510'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with GSAR Case 2006–G510. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and ''GSAR Case 2006–G510'' on your attached document.
- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2006–G510 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 Mr. Ernest Woodson at (202) 501–3775, or by e-mail at e*rnest.woodson@gsa.gov*. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G510.

SUPPLEMENTARY INFORMATION:

A. Background

The GSA is amending the GSAR to update the text addressing GSAR Part 504, Administrative Matters; Subpart 504.4, Safeguarding Classified Information Within Industry; Subpart 504.5, Electronic Commerce in Contracting; Subpart 504.6, Contract Reporting; Subpart 504.11, Central Contractor Registration; and Subpart 504.13, Personal Identify Verification of Contractor Personnel. This rule is a result of the GSA Acquisition Manual (GSAM) Rewrite initiative undertaken by the GSA to revise the GSAM to maintain consistency with the Federal Acquisition Regulation (FAR) and implement streamlined and innovative acquisition procedures that contractors, offerors, and GSA acquisition personnel can utilize when entering into and administering contractual relationships. The GSAM incorporates the GSAR as well as internal agency acquisition policy.

The GSA will rewrite each part of the GSAR and GSAM, and as each GSAR part is rewritten, GSA will publish it in the **Federal Register**.

This rule covers the rewrite of GSAR Parts 504 and 552. The rule revises GSAR Subpart 504.4, Safeguarding Classified Information Within Industry; revises Section 504.402, General; deletes duplicative information already addressed in FAR 4.402; deletes the definition for ''U.S. Industry'' as the term is not referred in the subpart; revises Section 504.475, Return of classified information, to ensure grammatical and structural consistency; deletes Subpart 504.5, Electronic Commerce in Contracting, in its entirety because it duplicates information already addressed in FAR 4.5; in Subpart 504.6, Contract Reporting, redesignates Section 504.602–71, Federal Procurement Data System-Public Access, as Section 504.605–70, Federal Procurement Data System-Public Access, to establish a one-time fee for direct public access to Federal Procurement Data System Database; adds a new Subpart 504.11, Central Contractor Registration (CCR) and a new Section 504.1103, Procedures, to ensure that prospective contractors register in CCR in accordance with the FAR 4.1103; adds a new Subpart 504.13, Personal Identity Verification of Contractor Personnel and new Sections 504.1301, Policy, and 504.1303, Contract Clause, to establish agency policy for ensuring compliance with Homeland Security Presidential Directive, HSPD–12, and prescribe the requirements for inserting a new clause FAR 552.204–9, Personal Identify Verification Requirements, in solicitations and contracts when contractor employees will require access to Federal facilities or information.

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 GSA 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 the revisions are not considered substantive. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The GSA will consider comments from small entities concerning the affected GSAR Parts 504 and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2006–G510), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the GSAR 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 Parts 504 and 552

Government procurement.

Dated: September 18, 2008

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 504 and 552 as set forth below:

1. The authority citation for 48 CFR parts 504 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 504—ADMINISTRATIVE MATTERS

2. Revise section 504.402 to read as follows:

504.402 General.

(a) This subpart prescribes procedures for safeguarding classified information required to be disclosed to contractors

in connection with the solicitation of offers, and the award, performance, and termination of contracts.

(b) As used in this subpart, the term ''Contractor(s)'' means prospective contractors, subcontractors, vendors, and suppliers.

3. Amend section 504.475 by revising paragraph (a), paragraph (b) introductory text, and paragraphs (b)(1) thru (b)(5)(i) to read as follows:

504.475 Return of classified information.

(a) Contracting officers must recover classified information, unless it has been destroyed as provided in Section 7 of Chapter 5 of the National Industrial Security Program Operating Manual (NISPOM). The Government agency that provided classified information to a GSA contractor is responsible for the return of the information.

(b) Contracting officers must ensure that classified information provided by the government is returned immediately after any of the following events:

(1) Bid opening or closing date for receipt of proposals by non-responding offerors.

(2) Contract award by unsuccessful offerors.

(3) Termination or completion of the contract.

(4) Notification that authorization to release classified information has been withdrawn.

(5) After Notification that a facility—

(i) Does not have adequate means to safeguard classified information; or

* * * * *

Subpart 504.5 [Removed]

4. Remove Subpart 504.5.

504.602–71 [Redesignated as 504.605–70]

5. Redesignate section 504.602–71 as 504.605–70.

6. Add Subpart 504.11 to read as follows:

Subpart 504.11—Central Contractor Registration

Sec.
504.1103 Procedures.

Subpart 504.11—Central Contractor Registration

504.1103 Procedures.

In addition to the requirements found in FAR 4.1103, prior to awarding a contractual instrument the contracting officer must—

(1) Verify that the prospective contractor's exact legal business name, Doing-Business-As (DBA) name (if any), physical street address, and Data Universal Number System (DUNS) number or DUNS+4 number, as found in the CCR, matches the information that will be placed on the contract, order, or agreement from the vendor's quote or proposal. Correct mismatches by having the vendor amend the information in the CCR or the quote or proposal. The CCR information can be accessed through GSA's CCR repository. (Contact the GSA Systems Programming Branch for instructions, a user ID, and password.)

(2) Ensure that the contractor's address code exists in Pegasys and that it is CCR enabled with the contractor's DUNS or DUNS+4 number. This can be done by searching Pegasys records using the contractor's Taxpayer Identification Number (TIN). If no code exists, request that a new address code be established by the Finance Center for CCR compliance.

(3) Ensure that the contractor's identifying information is correctly placed on the contractual instrument, using special care to ensure that the legal name and ''remit to'' name match exactly. (Note: Lockbox names or numbers should not be used to replace the contractor's name in the remittance block on the contractual instrument.)

7. Add Subpart 504.13 to read as follows:

Subpart 504.13—Personal Identity Verification of Contractor Personnel

Sec.
504.1301 Policy.
504.1303 Contract clause.

Subpart 504.13—Personal Identity Verification of Contractor Personnel

504.1301 Policy.

Contracting officers must follow the procedures contained in the GSA HSPD–12 Personal Identify Verification and Credentialing Standard Operating Procedures, found at *http://insite.gsa.gov/hspd12implementation*, to ensure compliance with Homeland Security Presidential Directive–12 (HSPD–12) ''Policy for a Common Identification Standard for Federal Employees and Contractors,'' Office of Management and Budget Memorandum M–05–24, and Department of Commerce FIPS PUB 201.

504.1303 Contract clause.

Insert the clause at 552.204–9, Personal Identity Verification Requirements, in solicitations and contracts when it is determined that contractor employees will require routine physical access to federally controlled facilities or information systems to perform contract requirements.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

8. Add section 552.204–9 to read as follows:

552.204–9 Personal Identity Verification Requirements.

As prescribed in 504.1303, insert the following clause:

PERSONAL IDENTITY VERIFICATION REQUIREMENTS (DATE)

The Contractor shall comply with GSA personal identity verification requirements, identified by the Contracting Officer, if Contractor employees require routine physical access to GSA controlled facilities or information systems to perform contract requirements.

(End of clause)

[FR Doc. E8–22794 Filed 10–8–08; 8:45 am]

BILLING CODE 6820–61–S

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 511 and 552

[GSAR Case 2007–G507; Docket 2008–0007; Sequence 21]

RIN 3090–AI74

General Services Acquisition Regulation; GSAR Case 2007–G507; Describing Agency Needs

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 revise language regarding the requirements for describing the agency needs.

DATES: Interested parties should submit written comments to the Regulatory Secretariat on or before December 8, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by GSAR Case 2007–G507 by any of the following methods:

• Regulations.gov: *http://www.regulations.gov*.

Submit comments via the Federal eRulemaking portal by inputting ''GSAR Case 2007–G507'' under the heading ''Comment or Submission''. Select the link ''Send a Comment or Submission'' that corresponds with GSAR Case 2007–G507. Follow the instructions provided to complete the ''Public Comment and Submission Form''. Please include your name, company name (if any), and

''GSAR Case 2007–G507'' on your attached document.

• Fax: 202–501–4067.

• Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2007–G507 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. Cecelia Davis at (202) 219–0202, or by e-mail at *cecelia.davis@gsa.gov*. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2007–G507.

SUPPLEMENTARY INFORMATION:

A. Background

The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to update the text addressing GSAR Part 511, Describing Agency Needs, Subpart 511.1, Selecting and Developing Requirements Documents, Subpart 511.2, Using and Maintaining Requirements Documents, Subpart 511.4, Delivery or Performance Schedules, Subpart 511.5, Liquidated Damages, and Subpart 511.6, Priorities and Allocations.

This rule is a result of the General Services Administration Acquisition Manual (GSAM) Rewrite initiative. The initiative was undertaken by GSA to revise the GSAM to maintain consistency with the FAR and 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 General Services Administration Acquisition Regulation (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 511. The rule revises GSAR Subpart 511.1, Selecting and Developing Requirements Documents; to renumber 511.104–70, Solicitation provisions, to 511.107 and revise its content for grammatical and structural clarity and consistency with FAR 52.211–6, GSAR Subpart 511.2, Using and Maintaining Requirements Documents; to revise 511.204, Solicitation provisions and contract clauses; to delete paragraphs (a), (b)(2), and (b)(4) and insert new paragraphs (a),(b)(4) through (b)(13), and change paragraph (d) to paragraph (c) accordingly, and update the section and insert prescriptions for the use of new GSAR clauses in solicitations and contracts that cite Federal specifications, or in supply contracts that exceed the simplified acquisition threshold to include a format at paragraph (b)(11), Subpart 511.4, Delivery or Performance Schedules, to revise 511.404, Contract clauses; to delete paragraphs (a)(1), (2), and (5) and renumber paragraphs (3), (4), and (6) as paragraphs (1), (2) and (3) respectively, and revise paragraph (b) to change the title of the GSAR clause referenced in the paragraph to ''Phased Completion of Work,'' and revise the prescription for the use of the clause for consistency with FAR 52.211–10, to add a new Subpart 511.5, Liquidated Damages, and 511.503, Contract Clause; to require liquidated damages for phased completion of construction for consistency with FAR 52.211–12, Subpart 511.6, Priorities and Allocations, to revise 511.600, Scope of Part; to delete obsolete text and update the section to note its non-applicability to non-rated orders; to delete 511.601, Definitions, in its entirety because the definitions are adequately addressed in FAR 11.601; revise 511.602, General, to update paragraphs (d) and (e); to remove obsolete text and add new language to make the paragraphs consistent with GSA's current operating structure; to maintain section 511.603, Procedures, as written without change; and to delete 511.604, Solicitation provision and contract clause in its entirety as the clause is obsolete and is no longer required.

Discussion of Comments

One public comment was received in response to the ''Advanced Notice of Proposed Rulemaking'' at 71 FR 7910, February 15, 2006, pertaining to this GSAR Part 511. The commenter suggested that GSA consider whether the various delivery and packaging requirements identified in the ''Risk of Loss'' clause to be simplified to clearly require delivery and packaging that comports with the contractor's standard commercial practices. The agency determined that this comment is outside the scope of this Part, and has referred it for consideration under GSAM Part 538.

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 the revisions are not considered substantive. The revisions only update and reorganize existing coverage. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. GSA will consider comments from small entities concerning the affected GSAR Parts 511 and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq*. (GSAR case 2007–G507), in correspondence.

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 Parts 511 and 552

Government procurement.

Dated: September 26, 2008

Al Matera,

Director, Office of Acquisition Policy.

Therefore, GSA proposes to amend 48 CFR parts 511 and 552 as set forth below:

1. The authority citation for 48 CFR parts 511 and 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 511—DESCRIBING AGENCY NEEDS

511.104-70 [Removed]

2. Remove section 511.104-70.

3. Add section 511.107 to read as follows:

511.107 Solicitation provisions.

In addition to FAR clause 52.211–6, the contracting officer shall insert the provision at 552.211–X2 in solicitations when permitting brand name or equal item description(s), with instructions for the offeror to complete the information.

4. Amend section 511.204 by—

a. Removing paragraph (a), and redesignating paragraphs (b), (c), and (d) as (a), (b), and (c) respectively;

b. Removing the newly redesignated paragraphs (b)(2) and (b)(4), and redesignating the newly redesignated paragraph (b)(3) as (b)(2) and adding new paragraphs (b)(3) through (b)(13); and

c. Removing from the second sentence of the newly redesignated paragraph (b)(2) ''You'' and adding ''The Contracting Officer'' in its place.

The added text reads as follows:

511.204 Solicitation provisions and contract clauses.

* * * * *

(b)* * *

(3) Insert a clause substantially the same as the clause at 552.211–76, Charges for Packaging, Packing and Marking, in solicitations and contracts for supplies to be delivered to GSA distribution centers.

(4) Include the clause at 552.211–X8, Non-Manufactured Wood Packaging Material for Export, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities overseas and the contract amount is expected to exceed the simplified acquisition threshold.

(5) Include the clause 552.211–X4, Consistent Pack and Package Requirements, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(6) Include the clause 552.211–X5, Maximum Weight Per Shipping Container, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(7) Include the clause 552.211–X6, Export Packing, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(8) Include the clause 552.211–X7, Vehicle Export Preparation, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(9) Include the clause 552.211–X9, Small Parts, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(10) Include the clause 552.211–X10, Decals, Stickers, and Data Plates, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(11) Include the clause 552.211–X11, Purchased Vehicle Format, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(12) Include the clause 552.211–X12, Radio Frequency Identification (RFID) Using Passive Tags, in solicitations and contracts for supplies when deliveries may be made to military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(13) Include the clause 552.211–X13, Unique Item Identification (UID), in solicitations and contracts for supplies when deliveries may be made to military activities and a single item exceeds $5,000 in cost.

* * * * *

5. Revise section 511.404 to read as follows:

511.404 Contract clauses.

(a) *Supply contracts.*—(1) *Shelf-life items.* Use the following clauses in solicitations and contracts that require delivery of shelf-life items within a specified number of months from the date of manufacture or production:

(i) Insert 552.211–79, Acceptable Age of Supplies, if the required shelf-life period is 12 months or less, and lengthy acceptance testing may be involved. For items having a limited shelf-life, substitute Alternate I when required by the director of the portfolio concerned.

(ii) Insert 552.211–80, Age on Delivery, if the required shelf-life period is more than 12 months, or when source inspection can be performed within a short time period.

(2) *Stock replenishment contracts.* Insert 552.211–81, Time of Shipment, in solicitations and stock replenishment contracts that do not include the Availability for Inspection, Testing and Shipment/Delivery clause at 552.211–83 and require shipment within 45 calendar days after receipt of the order. If shipment is required in more than 45 days, use Alternate I.

(3) *Indeterminate testing time.* Insert 552.211–83, Availability for Inspection, Testing and Shipment/Delivery, in solicitations and contracts that provide for source inspection by Government personnel and that require lengthy testing for which time frames cannot be determined in advance. If the contract is for stock items, use Alternate I.

(b) *Construction contracts.* Insert the clause at 552.211–84, Phased Completion of Work, in solicitations and contracts for construction when different completion dates are anticipated and FAR 52.211–10 is applicable.

6. Add Subpart 511.5 to read as follows:

Subpart 511.5—Liquidated Damages

511.503 Contract clauses.

Insert the clause at 552.211–X3, Liquidated Damages for Phased Completion—Construction, in solicitations and contracts for construction when supplementing FAR 52.211–12, Liquidated Damages—Construction.

7. Revise section 511.600 to read as follows:

511.600 Scope of subpart.

Pursuant to the Defense Priorities and Allocations System (DPAS) Delegation 3, the Department of Commerce delegated to the GSA Global Supply (Southwest Supply Center) the authority to use the DPAS system. This subpart implements the DPAS within GSA. This subpart does not apply to non-rated orders placed by GSA on behalf of other agencies, for emergency preparedness, response, and recovery support.

511.601 [Removed and reserved]

8. Remove and reserve section 511.601.

9. Amend section 511.602 by revising paragraphs (d) and (e) to read as follows:

511.602 General.

* * * * *

(d) Only the GSA Global Supply (Southwest Supply Center) may place an order containing a DPAS priority rating.

(e) The Commissioner, FAS, shall issue additional guidance, as may be necessary, to ensure effective implementation of its delegated DPAS authority.

* * * * *

511.604 [Removed and reserved]

10. Remove and reserve section 511.604.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.211–8 [Removed and reserved]

11. Remove and reserve section 552.211–8.

12. Add sections 552.211-X1, 552.211–X2, and 552.211–X3, after section 552.211–8 to read as follows:

552.211–X1 Time of Delivery.

As prescribed at 511.404(a), insert the following clause:

	TIME OF DELIVERY (DATE)
	The Contractor will ship contract item(s) to the Federal Supply Acquisition Service (FAS) stocking points identified in the delivery order at its discretion in order to maintain the required stock levels within the minimum and maximum requirements provided in the weekly status report.
	Delivery is required to be made at destination within *_____* calendar days after receipt of order for deliveries to a GSA facility.
	Orders under this contract may require direct delivery to other agencies. Orders for direct delivery must be shipped and delivered within the time specified in blocks below.
	Shipment must be made with *_____* days after receipt of order.
	In addition to block above the Contractor must also ensure that delivery will be made within *_____* days after receipt of order.

Note: A ''X'' mark in the left hand block shall be considered a mandatory requirement to be fulfilled by the contractor.

552.211–X2 Brand Name or Equal.

As prescribed at 511.107, insert the following provision:

BRAND NAME OR EQUAL (DATE)

The offeror shall include the following information for any brand name or equal item it is offering as required by Federal Acquisition Regulation 52.211–6:

MANUFACTURER'S NAME _____

BRAND _____

MODEL OR PART NO. _____

552.211–X3 Liquidated Damages for Phased Completion—Construction

As prescribed in 511.503, insert the following clause:

LIQUIDATED DAMAGES FOR PHASED COMPLETION—CONSTRUCTION (DATE)

(a) Where the contract specifies different completion dates for different phases or portions of the work, the Contractor shall be liable for liquidated damages at the specified rate for each calendar day following the completion date that the phase or portion of work is not completed. If a single rate is specified, the specified rate shall be apportioned between the different phases or portions of the work.

(b) If the Government elects to accept any portion of the work not specifically designated as a phase or portion of work with its own completion date, the liquidated damage rate shall be apportioned between accepted work and uncompleted work, and the Contractor's liability for liquidated damages shall be computed accordingly. The Contractor may receive a rated order under this contract from a Delegate Agency. The Contractor must give preferential treatment to rated orders as required by the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700). The existence of previously accepted unrated or lower rated orders is not sufficient reason to reject a rated order. Rated orders take preference over all unrated orders as necessary to meet required delivery dates. There are two levels of ratings designated by the symbol of either ''DO'' or ''DX.'' All ''DO'' rated orders have equal priority with each other and take preference over unrated orders. All ''DX'' rated orders have equal priority with each other and take preference over ''DO'' rated orders and unrated orders. The rating designation is followed by a program identification symbol. Program identification symbols indicate which approved program is supported by the rated order (see Schedule 1 of 15 CFR part 700 for a list of Delegate Agencies, approved programs, and program identification symbols).

552.211–15 [Removed and reserved]

13. Remove and reserve section 552.211–15.

552.211–71 [Removed and reserved]

14. Remove and reserve section 552.211–71.

552.211–74 [Removed and reserved]

15. Remove and reserve section 552.211–74.

16. Revise section 552.211–76 to read as follows:

552.211–76 Charges for Packaging, Packing and Marking.

As prescribed in 511.204(c)(4), insert a clause substantially as follows:

CHARGES FOR PACKAGING, PACKING AND MARKING (DATE)

If supplies shipped to a GSA wholesale distribution center are not packaged, packed and marked in accordance with contract requirements, the Government has the right, without prior notice to the Contractor, to perform the required repackaging/ repacking/ remarking, by contract or otherwise, and charge the Contractor therefore at the rate of $____ *____ per man-hour or fraction thereof. The Contractor will also be charged for material costs, if incurred. This right is not exclusive, and is in addition to other rights or remedies provided for in this contract.

(End of clause)

* The rate to be inserted in the above clause shall be determined by the Commissioner, Federal Supply Service, or a designee.

552.211–78 [Removed and reserved]

17. Remove and reserve section 552.211–78.

552.211–82 [Removed and reserved]

18. Remove and reserve section 552.211–82.

19. Amend section 552.211–84 by revising the section heading; and revising the date of the clause to read as follows:

552.211–84 Phased Completion of Work.

* * * * *

PHASED COMPLETION OF WORK (DATE)

* * * * *

20. Add sections 552.211–X4 through 552.211–X13 to read as follows:

552.211–X4 (D-FSS–457) Consistent Pack and Package Requirements.

As prescribed in 511.204, insert the following clause:

CONSISTENT PACK AND PACKAGE REQUIREMENTS (DATE)

The Contractor is advised that the Government will, where possible, order in full shipping containers and/or unitized loads. If volume warrants, the Government may also order in truckload or carload quantities provided such quantities do not exceed the maximum order limitation of this contract.

When the number of items per unit container, intermediate container and/or shipping container is not specified for an item, the offeror will state, in the spaces provided in the schedule of items, the number of items to be provided in each container. The quantities which are accepted at the time of award shall remain in effect throughout the term of the contract unless the Contracting Officer approves in writing a request by the Contractor to change the package quantities. Requests for changes shall be directed to the Contracting Officer or Administrative Contracting Officer, whichever is applicable.

552.211–X5 (D-FSS–462) Maximum Weight Per Shipping Container.

As prescribed in 511.204, insert the following clause:

MAXIMUM WEIGHT PER SHIPPING CONTAINER (DATE)

In no instance shall the weight of a shipping container and its contents exceed 23 kilograms (51 pounds), except when caused by—

(1) The weight of a single item within the shipping container;

(2) A prescribed quantity per pack for an item per shipping container; or

(3) A definite weight limitation set forth in the purchase description.

(End of clause)

552.211–X6 (D-FSS–465) Export Packing.

As prescribed in 511.204, insert the following clause:

EXPORT PACKING (DATE)

(a) Offerors are requested to quote, in the pricelist accompanying their offer (or by separate attachment), additional charges or net prices covering delivery of the items furnished with commercial or military export packing. Military export packing, if offered, shall be in accordance with Mil-Std–2073–1 Level A or B as specified. If commercial export packing is offered, the offer or pricelist shall include detailed specifications describing the packing to be furnished at the price quoted.

(b) Ordering activities will not be obligated to utilize the Contractor's services for export packing accepted under this solicitation, and they may obtain such services elsewhere if desired. However, the Contractor shall furnish items export packed when such packing is specified on the purchase order.

(End of clause)

552.211–X7 (D-FSS–466) Export Preparation.

As prescribed in 511.204, insert the following clause:

EXPORT PREPARATION (DATE)

Vehicles shall be prepared for export on wheels, unboxed, unless otherwise specified in the Schedule of Items. All parts and equipment easily removable (subject to pilferage) shall be enclosed in a box substantially secured to the vehicle (inside body if feasible) in such a manner as to minimize the possibility of loss or damage while in transit to ultimate destination.

(End of clause)

552.211–X8 (D-FAS–468) Non-Manufactured Wood Packaging Material for Export.

As prescribed in 511.204, insert the following clause:

NON-MANUFACTURED WOOD PACKAGING MATERIAL FOR EXPORT (DATE)

(a) *Definitions.*

Packaged material, and solid wood packing material (SWPM), for purposes of this clause, is defined as each separate and distinct material that by itself or in combination with other materials forms the container providing a means of protecting and handling a product. This includes, but is not limited to, pallets, dunnage, crating, packing blocks, drums, load boards, pallet collars, and skids.

Non-manufactured wood, is also called solid wood and defined as wood packing other than that comprised wholly of wood-based products such as plywood, particle board, oriented strand board, veneer, wood wool, and similar materials, which has been created using glue, heat and pressure or a combination thereof.

IPPC Country: Countries of the European Union (EU) or any other country endorsing the International Plant Protection Convention (IPPC) ''Guidelines for Regulating Wood Packaging Material in International Trade,'' approved March 15, 2002. A listing of countries participating in the IPPC is found at *http://www.aphis.usda.gov/import__export/plants/plant__exports/wpm/country/index.shtml.*

(b) Non-manufactured wood pallets and other non-manufactured wood packaging material used to pack items for delivery to or through IPPC countries must be marked and properly treated in accordance with IPPC guidelines.

(c) This requirement applies whether the shipment is direct to the end user or through a Government designated consolidation point. Packaging that does not conform to IPPC guidelines will be refused entry, destroyed or treated prior to entry.

(d) For Department of Defense distribution facilities or freight consolidation points, all non-manufactured wood pallets or packaging material with a probability of entering countries endorsing the IPPC Guidelines must be treated and marked in accordance with DLAD 47.305–1 (available at *http://www.dla.mil/j–3/j–3311/DLAD/rev5.htm*), and MIL-STD–2073–1, Standard Practice for Military Packaging (and any future revision).

(e) Pallets and packing material shipped to FAS distribution facilities designated for possible delivery to the countries endorsing the IPPC Guidelines will comply with DLAD 47.305–1, and MIL-STD–2073–1.

(f) Delays in delivery caused by non-complying pallets or wood package material will not be considered as beyond the control of the Contractor. Any applicable Government expense incurred as a result of the Contractor's failure to provide appropriate pallets or package material shall be reimbursed by the Contractor. Expenses may include the applicable cost for repackaging, handling and return shipping, or the destruction of solid wood packaging material.

(End of clause)

552.211–X9 (D-FSS–469) Small Parts.

As prescribed in 511.204, insert the following clause:

SMALL PARTS (DATE)

All small parts required must be furnished in connection with machines covered by contracts resulting from this solicitation shall be packed in envelopes, sealed, identified with part numbers and quantity on outside of envelopes: larger parts must be individually tagged and identified with part number on face of tag.

(End of clause)

552.211–X10 (D-FSS–478) Decals, Stickers, and Data Plates.

As prescribed in 511.204, insert the following clause:

DECALS, STICKERS, AND DATA PLATES (DATE)

Unless otherwise specified, caution plates/decals shall be conspicuously installed for all equipment requiring such notices. Vehicles for civil agencies

shall be provided with the manufacturer's current warranty legend imprinted on decalcomania, and applied in a visible area of the engine compartment. In addition, a decal or sticker shall provide at least the following information: contract number; purchase order number; date of delivery, month and year; and the warranty time, in month and miles.

552.211–X11 (D-FSS–479) Purchase Vehicle.

As prescribed in 511.204, insert the following clause:

PURCHASE VEHICLE (DATE)

The Contractor shall affix one copy of GSA Form 1398, GSA Purchased Vehicle, fully completed, to the right or left front door lock face or door post after final inspection is made. All marks on windows and other labels (except labels cautioning against drained transmission, crankcase, and rear axle) shall be removed. Copies of GSA Form 1398 are available from the Contracting Officer.

NOTE TO OFFEROR: Data shown in the solicitation schedule of items may be utilized to satisfy the requirements for the following to be shown on GSA Form 1398:

(1) Receiving Agency—Examples are: State, USIA, Forest Service, GSA.

(2) Purchase Order Number—Use the five-digit ''case'' or ''file'' number.

(End of clause)

552.211–X12 Radio Frequency Identification (RFID) Using Passive Tags.

As prescribed in 511.204, insert the following clause:

RADIO FREQUENCY IDENTIFICATION (RFID) USING PASSIVE TAGS (DATE)

Radio Frequency Identification shall be required on all non-bulk shipments to the Defense Logistics Agency (DLA) or Department of Defense (DoD) destinations. Shipments shall be tagged in accordance with 48 CFR clause 252.211–006. Shipments to GSA Distribution Centers with final destinations to DLA and DoD shall be in compliance to 48 CFR 252.211–7006. Copies may be obtained from *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html*.

(End of clause)

552.211-X13 Unique Item Identification (UID).

As prescribed in 511.204, insert the following clause:

UNIQUE ITEM IDENTIFICATION (UID) (DATE)

Unique Item Identification shall be required on tangible personal property in accordance with DFARS 211.274–4 as requested by the Defense Logistics Agency (DLA) or Department of Defense (DOD). Item Property that falls within this criterion shall be valuated and identified in accordance with DFARS 252.211–7003. Details shall be found in DFARS 252.211–7007. Copies can be obtained from *http://www.access.gpo.gov* (48 CFR Chapter 2).

(End of clause)

[FR Doc. E8–23703 Filed 10–8–08; 8:45 am]

BILLING CODE 6820–61–S

Notices

Federal Register
Vol. 73, No. 197
Thursday, October 9, 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

October 6, 2008.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, D.C. 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.

National Agricultural Statistics Service

Title: Farm and Ranch Irrigation Survey.

OMB Control Number: 0535–0234.

Summary of Collection: The Farm and Ranch Irrigation Survey (FRIS) is an integral part of the 2007 Census of Agriculture and is conducted under the authority of the Census of Agriculture Act of 1997 (Pub. L. 105–113). This law requires the Secretary of Agriculture to conduct a census of agriculture beginning in 2002 and every fifth year thereafter (prior to that the census was conducted by the Department of Commerce). The 2008 FRIS will be obtaining data describing the irrigation activities of U.S. farm operations. Some of these activities are of national concern, such as the use of chemigation, fertigation and water-conserving practices of irrigators. The 2008 FRIS will also incorporate a second version of the questionnaire that will be directed at horticultural producers.

Need and Use of the Information: NASS will collect information from the FRIS on acres irrigated by land use category, acres and yields of irrigated and non-irrigated crops, quantity of water applied and method of application to selected crops, acres irrigated and quantity of water used by source, acres irrigated by type of water distribution systems, and number of irrigation wells and pumps. The primary purpose of FRIS is to provide detailed data on water management practices and water uses in American agriculture, and to on-farm irrigation activities for use in preparing a wide variety of water-related local programs, economic models, legislative initiatives, market analyses, and feasibility studies. The absence of FRIS data would certainly affect irrigation policy decision.

Description of Respondents: Farms.

Number of Respondents: 35,000.

Frequency of Responses: Reporting: Other (one-time).

Total Burden Hours: 23,933.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E8–24070 Filed 10–8–08; 8:45 am]

BILLING CODE 3410–20–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Notice

AGENCY: United States Commission on Civil Rights.

ACTION: Notice of meeting.

DATE AND TIME: Friday, October 17, 2008; 9:30 a.m.

PLACE: U.S. Commission on Civil Rights, 624 Ninth Street, NW., Rm. 540, Washington, DC 20425.

Meeting Agenda

I. Approval of Agenda
II. Approval of Minutes
- September 12, 2008 Meeting
- September 30, 2008 Meeting

III. Announcements
IV. Staff Director's Report
V. Program Planning
- FY 2009 Statutory Report Concept Paper
- Proposed Letter to the State Bar of California

VI. State Advisory Committee Issues
- Arkansas SAC
- Minnesota SAC
- North Carolina SAC

VII. Future Agenda Items
VIII. Adjourn

CONTACT PERSON FOR FURTHER INFORMATION: Lenore Ostrowsky, Acting Chief, Public Affairs Unit (202) 376–8582.

Date: October 7, 2008.

David Blackwood,

General Counsel.

[FR Doc. E8–24198 Filed 10–7–08; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau.

Title: Field Representative/Decennial Field Staff/Coverage Measurement Exit Questionnaire.

Form Number(s): BC–1294, BC–1294(D), BC–1294(CM).

OMB Control Number: 0607–0404.

Type of Request: Revision of a currently approved collection.

Burden Hours: 393.

Number of Respondents: 2,500.

Average Hours Per Response: BC–1294—7 minutes; BC–1294(D) and BC–1294(CM)—10 minutes.

Needs and Uses: Retention of trained field interviewing staff is a major concern for the Census Bureau because of both the monetary costs associated with employee turnover, as well as the potential impact on data quality. Therefore, in a continuous effort to devise policies and practices aimed at reducing turnover among interviewers, the Census Bureau collects data on the reasons interviewers leave their Census Bureau jobs.

The exit questionnaires are the instruments used to collect turnover data from a sample of former current survey interviewers (field representatives) and decennial census interviewers (enumerators and listers). The goal or purpose of the exit questionnaires is to determine the reasons for interviewer turnover and what the Census Bureau might have done, or can do, to influence interviewers not to leave. Thus the exit questionnaires seek reasons interviewers quit, inquires about motivational factors that would have kept interviewers from leaving, attempts to identify training program strengths and weaknesses and their impacts on turnover, and explores the impact of pay, working conditions and supervisory styles on employees' reasons for quitting.

As the environment in which surveys take place, the demographics of our labor force, and the way surveys are conducted continues to change, it is important that we continue to examine the interviewers' concerns about their job. Information provided by respondents to the exit questionnaire provides insight on the measures the Census Bureau might take to decrease turnover, and is useful in helping us determine if the reasons for interviewer turnover appear to be systemic or localized. The exit questionnaires have been shown to be useful and, therefore, we believe it is important to continue to use them to effect program planning and management.

Forms BC–1294 and BC–1294(D) are the instruments we currently use to collect turnover data from a sample of former current survey interviewers and decennial census interviewers, respectively. We are adding the BC–1294(CM) to this clearance to collect turnover data from Census Coverage Measurement (CCM) listers and interviewers. CCM operations are conducted to determine the number of people and housing units missed or counted more than once in the Census of the United States and Puerto Rico.

In addition to the new form BC–1294(CM), we plan to implement changes to the BC–1294 and BC–1294(D) which reflect Census Bureau policy and procedural changes to current survey and decennial operations since the last request for clearance. For example, on the current survey side, field staff have reported an increased concern for safeguarding Personally Identifiable Information (PII) and Census Bureau confidential data on laptops, which has resulted in the use of multiple passwords and data encryption software. Thus, changes have been made to the BC–1294 to determine if the Census Bureau's increased security concerns, for the accountable property (laptops) and the increased security requirements pertaining to the restricted data contained on the laptops, are impacting FR turnover.

Recent changes in 2010 decennial operations have also made it necessary to revise the BC–1294(D). For example, the 2010 Nonresponse Followup (NRFU) operation that was originally going to involve computer-assisted data collection will revert to being a paper-based operation. That is, a paper instrument or questionnaire will be used to collect respondent data instead of a hand-held computer. Thus we are making changes to the BC–1294(D) to remove questions about the use and impact of automation on the retention of NRFU enumerators. In addition, the proposed revisions to the BC–1294(D) reflect the redesign of the 2010 Address Canvassing operation from what was done in the 2006 Census Test and the lessons learned during the 2008 Dress Rehearsal.

The information collected via the three Exit Questionnaires will help the Census Bureau develop plans to reduce turnover in its current survey, decennial and coverage measurement interviewing staff. This, in turn, will allow for better informed decisions regarding the field workforce and implementation of more effective pay plans, selection procedures, interviewer training, and retention strategies for all interviewers.

Affected Public: Individuals or households.

Frequency: One-time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 5 U.S.C. Section 3101 and Title 13 U.S.C. Section 23.

OMB Desk Officer: Brian Harris-Kojetin, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Brian Harris-Kojetin, OMB Desk Officer, either by fax (202–395–7245) or e-mail (*bharrisk@omb.eop.gov*).

Dated: October 3, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–23890 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 53–2008]

Foreign–Trade Zone 242 Boundary County, Idaho, Application for Subzone, Hoku Materials, Inc. (Polysilicon Manufacturing), Pocatello, Idaho

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by Boundary County, Idaho, grantee of FTZ 242, requesting special–purpose subzone status with manufacturing authority at the polysilicon manufacturing facility of Hoku Materials, Inc., located in Pocatello, Idaho. The application was submitted pursuant to the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on October 3, 2008.

The Hoku facility (approximately 200 employees, 67 acres, 200,000 sq. ft.), currently under construction, is located at One Hoku Way, Pocatello, Idaho. Hoku is proposing to manufacture under zone procedures polysilicon (3,500 metric tons with possible expansion up to 8,000 metric tons) for the solar module market. The applicant is requesting to use two foreign–origin inputs (some 11% of finished product value): silicon (HTSUS 2804.69 duty rate 5.5%) and trichlorosilane (HTSUS 2853.00 duty rate 2.8%) in the manufacturing process.

FTZ procedures would exempt Hoku from customs duty payments on foreign materials used in export production (some 95% of plant shipments). On its domestic shipments, Hoku could defer duty until the product is entered for

consumption, and choose the duty–free rate that applies to the finished polysilicon for the foreign inputs used in production. The company may also realize certain logistical/procedural savings related to weekly entry and direct delivery procedures, as well as savings on materials that become scrap/waste during manufacturing. The application indicates that FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, Diane Finver of the FTZ staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is December 8, 2008. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to December 23, 2008).

A copy of the application will be available for public inspection at each of the following locations: U.S. Department of Commerce Export Assistance Center, 700 W. State Street, 2nd floor, Boise, Idaho 83720; and, Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, D.C. 20230–0002.

For further information, contact Diane Finver at Diane__Finver@ita.doc.gov or (202) 482–1367.

Dated: October 3, 2008.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24024 Filed 10–8–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1577]

Grant of Authority for Subzone Status; Noramco, Inc. (Pharmaceutical Intermediates), Athens, GA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Foreign-Trade Zones Act provides for ''* * * the establishment * * * of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,'' and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

Whereas, the Board's regulations (15 CFR part 400) provide for the establishment of special-purpose subzones when existing zone facilities cannot serve the specific use involved, and when the activity results in a significant public benefit and is in the public interest;

Whereas, the Georgia Foreign Trade Zone, Inc., grantee of FTZ 26, has made application to the Board for authority to establish special-purpose subzone status at the pharmaceutical intermediate manufacturing plant of Noramco, Inc., located in Athens, Georgia (FTZ Docket 23–2008, filed 4/3/08);

Whereas, notice inviting public comment has been given in the **Federal Register** (73 FR 20247, 4/15/08); and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that approval of the application is in the public interest;

Now, therefore, the Board hereby grants authority for subzone status for activity related to a prescription pharmaceutical intermediate product at the Noramco, Inc., facility located in Athens, Georgia (Subzone 26K), as described in the application and **Federal Register** notice, and subject to the FTZ Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 1st day of October 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–23888 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

Order No. 1575

Termination of Foreign–Trade Subzone 61G, Carolina, Puerto Rico

Pursuant to the authority granted in the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), and the Foreign–Trade Zones Board Regulations (15 CFR Part 400), the Foreign–Trade Zones Board has adopted the following order:

Whereas, on November 28, 1995, the Foreign–Trade Zones Board issued a grant of authority to the Puerto Rico Trade and Export Company (PRTEC) authorizing the establishment of Foreign–Trade Subzone 61G at the IPR Pharmaceuticals, Inc. facility, Carolina, Puerto Rico (Board Order 787, 60 FR 63499, 12/11/95);

Whereas, PRTEC has advised the Board that zone procedures are no longer needed at the facility and requested voluntary termination of Subzone 61G (FTZ Docket 18–2008);

Whereas, the request has been reviewed by the FTZ Staff and U.S. Customs and Border Protection officials, and approval has been recommended;

Now, therefore, the Foreign–Trade Zones Board terminates the subzone status of Subzone 61G, effective this date.

Signed at Washington, DC, this 18th day of September 2008.

David M. Spooner,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign–Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. E8–24026 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Philip Cheng

In the Matter of: Philip Cheng, currently incarcerated at: Registration Number 10105–111 FCI, Terminal Island, Federal Correctional Institution, P.O. Box 3007, San Pedro, CA 90731; and with an address at: 7654 Peach Blossom Drive, Cupertino, CA 95014.

Order Denying Export Privileges

On December 3, 2007, in the U.S. District Court for Northern District of California, Philip Cheng (''Cheng'') pled guilty to and was convicted of violating Section 38 of the Arms Export Control Act (22 U.S.C. 2778 (2000)). Cheng pled guilty to willfully engaging in brokering activities in facilitating the export and transfer of defense articles and defense services, specifically the brokering of the export of thermal imaging and infrared technology controlled under 22 CFR 121.1, Category XII(c), without having registered with and obtained the required authorization from the Department of State. Cheng was sentenced to 24 months imprisonment, followed by three years of supervised release, and ordered to pay a $50,000

fine and a $100.00 special assessment fee.

Section 766.25 of the Export Administration Regulations (''EAR'' or ''Regulations'')[1] provides, in pertinent part, that ''[t]he Director of the Office of Exporter Services, in consultation with the Director of the Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of the [Export Administration Act (''EAA'')], the EAR, of any order, license or authorization issued thereunder; any regulation, license, or order issued under the International Emergency Economic Powers Act (50 U.S.C. 170 1–1706); 18 U.S.C. 793, 794 or 798; section 4(b) of the Internal Security Act of 1950 (50 U.S.C. 783(b)), or section 38 of the Arms Export Control Act (22 U.S.C. 2778).'' 15 CFR 766.25(a); see also Section 11(h) of the EAA, 50 U.S.C. app. § 2410(h). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d); see also 50 U.S.C. app. § 24 10(h). In addition, Section 750.8 of the Regulations states that the Bureau of Industry and Security's Office of Exporter Services may revoke any Bureau of Industry and Security (''BIS'') licenses previously issued in which the person had an interest in at the time of his conviction.

I have received notice of Cheng's conviction for violating the AECA, and have provided notice and an opportunity for Cheng to make a written submission to BIS, as provided in Section 766.25 of the Regulations. I have received a submission from Cheng. Based upon my review and consideration of that submission, my consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Cheng's export privileges under the Regulations for a period of eight years from the date of Cheng's conviction.

Accordingly, it is hereby *ordered:*

I. Until December 3, 2015, Philip Cheng, currently incarcerated at Registration Number 10105–111, FCI Terminal Island, Federal Correctional Institution, P.O. Box 3007, San Pedro, CA 90731, and with an address at: 7654 Peach Blossom Drive, Cupertino, CA 95014, and when acting for or on behalf of Cheng, his representatives, assigns, agents, or employees, (collectively referred to hereinafter as the ''Denied Person'') 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 Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Philip Cheng 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 if necessary to prevent evasion of the Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until December 3, 2015.

VI. In accordance with Part 756 of the Regulations, Cheng may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

VII. A copy of this Order shall be delivered to Cheng. This Order shall be published in the **Federal Register**.

Dated: September 29, 2008.

Bernard Kritzer,

Director, Office of Exporter Services.

[FR Doc. E8–23795 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DT–M

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2008). The Regulations issued pursuant to the EAA, which is currently codified at 50 U.S.C. app. § 2401–2420 (2000). Since August 21, 2001, the EAA 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 July 23, 2008 (73 FR 43603, July 25, 2008), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Galaxy Aviation Trade Co. Ltd., et al.; Final Decision and Order

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 Shaken Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran.

Hossein Jahan Peyma, 2/1 Makran Cross, Heravi Square, Moghan Aye, Pasdaran Cross, Tehran, Iran.

Appellants; Final Decision and Order.

This matter is before me upon a Recommended Decision and Order of the Administrative Law Judge (''AU'') issued on September 16, 2008.

On August 27, 2008, the Appellants, Galaxy Aviation Trade Company Ltd, Hooshang Seddigh, Hamid Shakeri Hendi and Hossein Jahan Peyma (''Galaxy''), filed with the U.S. Coast Guard's Administrative Law Judge Docketing Center an appeal of a temporary denial order (''TDO'') issued by the Assistant Secretary for Export Enforcement on June 6, 2008, pursuant to section 766.24 of the Export Administration Regulations (''Regulations'').[1] The relevant facts are as follows. The Bureau of Industry and Security's (BIS) Office of Export Enforcement had obtained information that a Boeing 747 aircraft was about to be re-exported to Iran without the proper U.S. Government authorization. Based on the information before him, the Assistant Secretary issued an exparte Order on June 6, 2008, temporarily denying for 180 days the export privileges of Galaxy, as well as Iran Air (of Tehran, Iran), and Ankair (of Istanbul, Turkey), in accordance with Section 766.24 of the Regulations. The Order was published in the **Federal Register** on June 17, 2008 (73 FR 34249). On July 10, 2008, the Assistant Secretary issued a modified Order that expanded the scope of the denial as to Ankair, but did not modify the TDO as to Galaxy or Iran Air. The modified Order was likewise published in the **Federal Register** on July 22, 2008 (73 FR 42544).

On August 27, 2008, the U.S. Coast Guard's Administrative Law Judge Docketing Center received a one-page letter from Galaxy appealing the TDO and requesting that it be withdrawn as to Galaxy. Galaxy filed no other materials or information to substantiate its request (section 766.24(e)(2)–(3) of the Regulations). The appeal did not indicate that it had been served on the BIS as required by section 766.24(e)(3) of the Regulations. After the Docketing Center confirmed that the appeal had not been served, a copy was sent to BIS by facsimile on September 2, 2008. On September 11, 2008, BIS filed a written response seeking a continuation of the TDO, along with multiple exhibits supporting its request. Ankair and Iran Air have not appealed the TDO.

On September 16, 2008, following a review of the entire record before him, the ALJ found in his Recommended Decision and Order that ''BIS has met the standard contained in Section 766.24 of the Regulations and has introduced evidence that the potential violations under investigation are significant, deliberate and covert, and not merely technical or negligent.'' He further found that it is ''reasonable to believe that the temporary denial order is required in the public interest to prevent an imminent violation'' of the export control laws and regulations. The AU recommended that the TDO issued on June 6, 2008, and modified on July 10, 2008, be affirmed and Galaxy's appeal be denied.

Based on my review of the entire record, I affirm the findings of fact and conclusions of law made by the AU in his Recommended Decision and Order.

Accordingly, it is ordered,

First, the Temporary Denial Order issued by the Assistant Secretary for Export Enforcement on June 6, 2008, and modified on July 10, 2008, is affirmed, and this appeal is denied.

Second, the Appellants are advised that they may appeal to the United States Court of Appeals for the District of Columbia in accordance with Section 766.24(g) of the Regulations and 50 U.S.C. app. 2412(d)(3).

Third, this Final Decision and Order shall be served on Appellants and on BIS and shall be published in the **Federal Register**. In addition, the AU's Recommended Decision and Order, except for Section IV relating to the Recommended Order, shall also be published in the **Federal Register**.

This order, which constitutes the final agency action with regard to this appeal, is effective upon publication in the **Federal Register**.

Dated: September 19, 2008.

Mario Mancuso,

Under Secretary of Commerce for Industry and Security.

UNITED STATES DEPARTMENT OF COMMERCE

Bureau of Industry and Security

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 Shaken Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran,

Hossein Jahan Peyma, 2/1 Makran Cross, Heravi Square, Moghan Aye, Pasdaran Cross, Tehran, Iran.

Respondents/Appellants; AJL Recommended Decision and Order.

I. Preliminary Statement

This Recommended Decision and Order is made in regard to a recent Temporary Denial Order (''TDO'') wherein the Assistant Secretary of Export Enforcement (''Assistant Secretary'') of the Bureau of Industry and Security, United States Department of Commerce (''BIS'') denied export privileges to Respondents Galaxy Aviation Trade Company Ltd., Hooshang Seddigh, Hamid Shaken Hendi and Hossein Jahan Peyma (collectively, ''Galaxy'' or the ''Galaxy Respondents''). Specifically, the Assistant Secretary issued the TDO on June 6, 2008 pursuant to Section 766.24 of the Export Administration Regulations (''EAR'' or the ''Regulations''),[1] and modified said TDO as to Respondent Ankair on July 10, 2008. The case involves allegations that Respondents were likely to effectuate a re-export of a Boeing 747 to Iran.

In June 2008, BIS's Office of Export Enforcement (''OEE'') presented evidence to the Assistant Secretary seeking a TDO in accordance with Section 766.24 of the Regulations, in order to prevent the imminent re-export, in violation of Section 746.7 of the Regulations, of a Boeing 747 (or any other U.S.-origin aircraft) to Iran without U.S. Government authorization.

Based on the evidence presented by OEE, the Assistant Secretary issued an exparte Order on June 6, 2008, temporarily denying for 180 days the export privileges of the Galaxy Respondents, as well as of Iran Air (of Tehran, Iran), and Ankair (of Istanbul, Turkey). The Order was published in the **Federal Register** on June 17, 2008 (73 FR 34249). On July 10, 2008, the Assistant Secretary issued a modified Order that expanded the scope of the denial as to Respondent Ankair, but did not modify the TDO as to the Galaxy Respondents or Respondent Iran Air.[2] The modified Order was published in

[1] The Regulations issued pursuant to the Export Administration Act of 1979, as amended. 50 U.S.C. app. § 24012420 (2000). 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)), as extended by the Notice of July 23, 2008 (73 FR 43,603 (July 25, 2008)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)).

[1] The Regulations issued pursuant to the Export Administration Act of 1979, as amended. 50 U.S.C. app. 24012420 (2000). 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)), as extended by the Notice of July 23, 2008 (73 FR 43,603 (July 25, 2008)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701–1706 (2000)).

[2] The modified Order was served on the 110 respondents and was also published in the **Federal Register** on July 22, 2008 (73 FR 42544). Respondents Ankair and Iran Air have not appealed the 110 and are not parties to this appeal proceeding.

the **Federal Register** on July 22, 2008 (73 FR 42544).

On August 27, 2008, the U.S. Coast Guard's Administrative Law Judge Docketing Center (''ALJ Docketing Center'') received a one-page letter from Galaxy Respondents appealing the TDO and requesting that the TDO be withdrawn as to the Galaxy Respondents. This letter did not include a certificate of service or other indication that the Galaxy Respondents had served it on BIS as required by section 766.24(e)(3) of the Regulations. On September 2, 2008, the AU Docketing Center contacted the Office of Chief Counsel for Industry and Security at the Department of Commerce, which represents BIS in administrative matters pending before the ALJs. After the Office of Chief Counsel confirmed that it had not been thus served with the appeal, the ALl Docketing Center forwarded a copy thereof on September 2, 2008. Exhibit 12. On September 11, 2008, BIS filed a written response with sixteen (16) exhibits to Galaxy's appeal seeking a continuation of the TDO. On September 15, 2008, BIS filed a proposed Recommended Decision and Order. ALl Exhibit 1. This Recommended Decision and Order will not address the TDO or modified TDO with respect to Ankair and Iran Air as neither has appealed.

II. Recommended Findings of Fact

Based upon the record before me, I make the following findings of fact:

1. The TDO was issued by the Assistant Secretary of Commerce for Export Enforcement on June 6, 2008. It was published in the **Federal Register** on June 17, 2008 (73 FR 34249). A modified Order expanding the scope of the denial as to Respondent Ankair was issued on July 10, 2008, and was also served and published in the **Federal Register** on July 22, 2008 (73 FR 42544). Exhibits 1 and 2.

2. Respondents Galaxy Aviation Trade Company Ltd., Hooshang Seddigh, Hamid Shaken Hendi and Hossein Jahan Peyma filed with the AU Docketing Center a one-page letter appealing the TDO and denying any involvement in the purchase of a Boeing 747 from Ankair. Exhibit 12.

3. On June 6, 2008, prior to the issuance of the TDO, Yavuz Cizmeci, the Chairman/Chief Executive Officer of ACT Airlines and Chief Executive Officer of Respondent Ankair, reported to a BIS special agent that Ankair owned a Boeing 747, tail number CALK, manufacturer serial number 24134, and that that aircraft was going to be sold to Galaxy Aviation of the United Kingdom. Exhibit 7.

4. Galaxy Aviation Trade Company Ltd. corporate records listed Hooshang Seddigh, Hamid Shaken Hendi, and Hossein Jahan Peyma as its shareholders on June 6, 2008, which was the date the TDO was imposed. Exhibit 9.

5. Hamid Shaken Hendi has an address in the same building as Iran Air's Headquarters in Tehran, Iran. Hossein Jahan Peyma also has an address in Tehran, Iran. Exhibits 8 and 9.

6. Galaxy Aviation Trade Company Ltd. corporate records listed Sam David Mahjoobi of the U.K. as a corporate officer of Galaxy on June 6, 2008, which was the date the TDO was imposed. Exhibit 9.

7. BIS is in possession of a document titled ''Aircraft Sale and Purchase Agreement'' involving the sale of the Boeing 747, tail number TC–AKZ, manufacturer serial number 24134. Ankair is listed as the Seller and Sam David Mahjoobi is listed as the Buyer. Paragraph 1.1 of the agreement states ''Delivery or Delivery Date means the dates beginning 20 June 2008 and ending 27 June 2008 on which the Aircraft, Engines, and Documents are delivered to Buyer in Istanbul and the Bill of Sale for the Aircraft is executed and submitted to the Buyer by Seller.'' The document is signed and initialled on each page by the respective parties to the transaction. Exhibit 15.

8. Photographs dated June 27,2008, from the Web site iraviation.com show the Boeing 747, tail number TC–AKZ in Tehran, Iran on that date. Exhibit 11.

9. The Aero Transport Data Bank shows the operational history of a Boeing 747, Manufacturer's serial number 24134 as now being operated by Iran Air on June 27, 2008 and lists a new Iranian tail number TC–AKZ. Exhibit 10.

10. The Boeing 747 aircraft at issue is of U.S.-origin and is subject to the Export Administration Regulations. It is classified under Export Control Classification Number 9A991.b on the Commerce Control List and is controlled for anti-terrorism reasons, and at the time of the alleged violations required U.S. Government authorization for export or re-export to Iran. Exhibit 4; 15 CFR part 774, Supp. 1; 15 CFR 746.7.

11. A United States Department of Treasury records search revealed that Galaxy Respondents did not obtain U.S. Government authorization for the re-export to Iran of this U.S.-origin aircraft. Exhibit 5.

12. A record from the Republic of Turkey Ministry of Transport shows that this Boeing 747 aircraft was deregistered in Turkey effective June 27, 2008. Exhibit 13.

13. BIS Assistant Director of the Office of Export Enforcement declared that Respondents informed Turkish civil aviation authorities on or about June 27, 2008 that the aircraft's registration was being switched to Pakistan. See Exhibit 13; Exhibit 14, at ¶ 4.

14. BIS Assistant Director of the Office of Export Enforcement declared that Pakistan Civil Aviation Authorities have informed the U.S. Government that this Boeing 747 aircraft was never registered (or de-registered) in Pakistan. Exhibit 14, at ¶ 5.

III. Discussion

A. Standard for BIS's Issuance of Temporary Denial Order

The Assistant Secretary for Export Enforcement (''Assistant Secretary'') may issue a TDO on an ex parte basis ''upon a showing by BIS that the order is necessary in the public interest to prevent an imminent violation of the EAA, the EAR, or any order, license or authorization issued thereunder.'' [3]

With regard to whether a violation may be ''imminent,'' the Regulations provide that:

A violation may be ''imminent'' either in time or in degree of likelihood. To establish grounds for the temporary denial order, BIS may show either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations. To indicate the likelihood of future violations, BIS may show that the violation under investigation or charges is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent, and that it is appropriate to give notice to companies in the United States and abroad to cease dealing with the person in U.S.-origin items in order to reduce the likelihood that a person under investigation or charges continues to export or acquire abroad such items, risking subsequent disposition contrary to export control requirements. Lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.[4]

BIS may therefore show that a violation is about to occur or that the facts and circumstances of the matter under investigation demonstrate a reasonable belief in the likelihood of a future violation or violations.[5] Consequently, a TDO may be issued and

[3] 15 CFR 766.24(b)(l).

[4] 15 CFR 766.24(b)(3).

[5] *Id.*

maintained in force, when, as in this case, matter is still under investigation by BIS.

B. Appeal Procedure for Temporary Denial Order

Once a TDO has been issued or renewed, any respondent may appeal the issuance or renewal of the TDO at any time to an administrative law judge (''AU'').[6] The filing of the appeal shall stay neither the effectiveness of the TDO nor any application for renewal.[7] Section 766.24(e)(3) states that a ''full written statement in support of the appeal must be filed in support of the appeal together with appropriate evidence, and be simultaneously served on BIS, which shall have seven [working] days from receipt to file a reply.'' [8] Section 766.24(e)(4) provides, in turn, that within 10 working days after the appeal is filed, the AU is to submit a Recommended Decision to the Under Secretary for Industry and Security (''Under Secretary'') addressing whether the issuance of the TDO should be affirmed, modified, or vacated.[9]

As discussed above, an appellant must simultaneously serve a copy of any appeal on BIS and the AU docketing center and thus, no appeal is perfected unless or until BIS is served with a copy thereof. That is to say that no timeline can begin to run until BIS has been served with the appeal. In the instant case, Galaxy served the AL Docketing Center with its appeal on August 27, 2008, but there was no evidence it ever served a copy thereof on BIS. On September 2, 2008, the AU Docketing Center served a copy of Galaxy's appeal on BIS after confirming that BIS in fact had not yet been served. Exhibit 12.

For the purpose of this case, the appeal will be treated as being perfected on September 2, 2008 when BIS was served a copy thereof. Therefore, BIS's reply brief filed on September 11, 2008 was filed within seven (7) working days of the appeal and was thus timely.

C. Temporary Denial Order Necessary in the Public Interest To Prevent Imminent Violation

After careful consideration of the entire record. I find that the TDO was necessary in the public interest to prevent an imminent violation of the EAA, the EAR, or an order, license, or authorization thereunder. There was and is sufficient reason to believe in the likelihood of a violation and the Assistant Secretary's TDO should be affirmed.

1. BIS's Showing

In June 2008, as part of an on-going investigation, BIS obtained evidence that Iran Air, an Iranian government owned airline, was seeking to acquire aircraft, including a Boeing 747 cargo plane from Turkey, through a third party in the United Kingdom (''U.K.''). Exhibit 7, at ¶ 6. Iran, a state-sponsor of terrorism, is the subject of a broad U.S. trade embargo.[10] On June 6, 2008, prior to the issuance of the TDO, BIS special agents interviewed HBK Investments (''HBK''), which in turn contacted ACT Airlines (''ACT'') of Istanbul, Turkey concerning ACT's potential sale of a Boeing 747 to Iran. Exhibit 7, at ¶ 6. HBK owns 17.5% of ACT. Exhibit 7, at ¶ 5. ACT's Chairman and/or Chief Executive Officer (''CEO'') Yavuz Cizmeci—who also is CEO of Respondent Ankair—denied that ACT owned the plane and stated that it actually was owned by Ankair and that Ankair was going to sell the aircraft to Galaxy Aviation of the U.K. Exhibit 7, at ¶ 1 The Regulations issued pursuant to the Export Administration Act of 1979, as amended. 50 U.S.C. app. 24012420 (2000). 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)), as extended by the Notice of July 23, 2008 (73 FR 43,603 (July 25, 2008)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.1701—1706 (2000)). 4–6; Exhibit 14, at ¶ 3. Notably also, BIS did not raise the name Galaxy Aviation with HBK during the initial discussion; rather, HBK first raised Galaxy Aviation's name with BIS based on the information provided by Ankair and ACT. Exhibit 7, at ¶ 6.

Further examination of Galaxy's corporate records revealed to BIS that Respondent Hamid Shaken Hendi, one of Galaxy's three listed shareholders, has an address in the same building as Respondent Iran Air's headquarters in Tehran, Iran. Exhibit 8 & 9. Moreover, another of Galaxy's principal shareholders, Respondent Hossein Jahan Peyma, also has a Tehran, Iran address. See Exhibits 8 and 9.

BIS's investigation has developed additional evidence indicating that the transaction which the TDO was originally issued to prevent between Ankair and Galaxy has actually occurred. Specifically, BIS has presented evidence that the Boeing 747 in question was reexported to Iran after issuance, service, and publication of the TDO in question in this case. BIS has obtained a copy of contractual documents indicating that Ankair was to deliver the 747 between June 20 and June 27, 2008. Exhibit 15.

Moreover, the Aero Transport Data Bank,[11] a worldwide fleet list of all airlines operating transport aircraft, indicates that the Boeing 747 referenced in the TDO left Turkey and has not only been re-exported to Iran, but also has been issued a new Iranian tail number. Exhibit 10; Exhibit 14, at ¶ 6. BIS has submitted evidence that this occurred subsequent to the issuance and publication of the TDO at issue in this case. *Id.* In addition, consistent with the delivery period set forth in the contract, a plane-spotter photo was posted to the aviation Web site iraviation.com that shows the aircraft on the ground in Tehran, Iran on June 27, 2008, at precisely the end of delivery period set forth in the contract. Exhibit 11. There is further evidence that this same day, June 27, 2008, the Turkish Ministry of Transport sent a letter to its counterparts at the Pakistan General Civil Aviation Authority, informing them that the aircraft was de-registered in Turkey effective that date. Exhibit 13; Exhibit 14, at ¶ 4. This letter was apparently sent to the Pakistan for or received by Iran Air or Ankair or Ankair's parent, Dunyaya Bakis Hava Tasimaciligi A.S., also known as (''a/k/a'') Dunyaya Bakis Air Transportation, Inc. (''DBHT''). Exhibit 5. A similar U.S. Department of Treasury records search reveals that no such license was obtained with respect to these individuals. Exhibit 5.

Nevertheless and as discussed above, the unauthorized re-export of a Boeing 747 to Iran will likely occur or occur again in violation of the requirements of Section 746.7 of the Regulations. It is clear that this would constitute a significant violation of the Regulations something more than a technical or negligent infraction. Furthermore, there is sufficient reason to believe that Respondents took deliberate actions here which further support the possibility of imminent future violations. This, together with BIS's specific concern that two additional U.S.-origin aircraft under the control of Ankair will be or have recently been re-exported to Iran, and with Respondent's

[6] 15 CFR 766.24 (e)(1)(i).

[7] 15 CFR 766.24 (e)(1)(ii).

[8] The word ''working'' was inserted because intermediate Saturdays, Sundays, and legal holidays are excluded from the computation of time when the period of time prescribed or allowed is seven days or less. 15 CFR 766.5(e).

[9] 15 CFR 766.24(e)(4); 50 U.S.C. app. 2412(d)(2).

[10] See Executive Orders 12957 (March 16, 1995), 12959 (May 6, 1995), and 13059 (August 19, 1997).

[11] References in BIS's opposition brief to the ''Aero Transport Database'' should instead read ''Aero Transport Data Bank.''

lack of appropriate evidence to support its written appeal further substantiates the public need to affirm the Assistant Secretary's TDO. Exhibit 16.

IV. Conclusion

I hereby find that BIS has met the standard required by section 766.24 of the Regulations and has introduced evidence that the potential violations under investigation are significant, deliberate and covert, and not merely technical or negligent, It was and is reasonable to believe that the temporary denial order is required in the public interest to prevent an imminent violation of the Act, the Regulations, or any order, license or other authorization issued under the Act.

Therefore, I recommend that TDO issued by the Assistant Secretary on June 6, 2008, and modified on July 10, 2008 be affirmed and Respondents' corresponding appeal be denied.

Accordingly, I am referring this Recommended Decision and Order to the Under Secretary of Commerce for Industry and Security for review and final action for the agency, without further notice to the respondent, as provided in section 766.24 of the Regulations.[14]

[REDACTED SECTION]

Done and Dated, September 16, 2008, New York, NY.

The Honorable Walter J. Brudzinski, Administrative Law Judge.

ATTACHMENT A, Exhibit Lists

A. BIS Exhibits 1–16:

1. June 6, 2008 Order Temporarily Denying Export Privileges.
2. July 10, 2008 Order Modifying Temporary Denial of Export Privileges.
3. June 25, 2008 Article Entitled ''Iran Air Drops Plans to Buy Russian Aircraft Over Cost Fears.''
4. September 10,2008 Letter to Mr. Thomas Madigan, Director Office of Export Enforcement.
5. August 5th and August 25th Letters Regarding U.S. Department of Treasury Records Search.
6. August 7, 2008 Letter to Mr. Hamit Kahveci, World Focus Airlines.
7. September 10, 2008 Declaration of Tracy E. Martin.
8. Excerpt of IranAir Web site.
9. Current Appointments Report for: GALAXY AVIATION TRADE COMPANY LTD.
10. Airframe History of B.747 msn 24134.
11. Photographs of airplane.
12. July 25, 2008 Letter to Office of the Administrative Law Judge from Galaxy Aviation Trade Company Ltd.
13. June 27, 2008 Letter to Director of General Civil Aviation Authority Pakistan from the Republic of Turkey Ministry of Transport.
14. September 11, 2008 Declaration of John Sonderman.
15. May 20,2008 Aircraft Sale and Purchase Agreement.
16. Aero Transport Data Bank (world wide fleet list) publicly available at *http://www.aerotransport.org/.*

B. Respondents did not file any exhibits.

C. ALJ Exhibit 1:

1. BIS's Recommended Decision and Order Received September 16, 2008.

Certificate of Service

I hereby certify that I have served the foregoing RECOMMENDED DECISION AND ORDER as indicated below to the following person(s):

Mario Mancuso, Under Secretary of Commerce for Industry and Security, U.S. Department of Commerce, Room H–3892, 14th Street & Constitution Avenue, NW., Washington, DC 20230, Fax: 202–482–2387. (By Facsimile and Federal Express.)

Gregory Michelsen, Attorney-Advisor, Attorney for Bureau of Industry and Security, Office of Chief Counsel for Industry and Security, U.S. Department of Commerce, Room H–3839, 14th Street & Constitution Avenue, NW., Washington, DC 20230, Fax: 202–482–0085. (By Facsimile and Federal Express.)

Galaxy Aviation Trade Company Ltd. and Hooshang Seddigh, 15 Moreland Court, Lyndale Avenue, Finchley Road, London, UK NW2 2PJ. (By First Class Mail, Postage Prepaid.)

Hamid Shakeri Hendi, 5th Floor, 23 Nafisi Avenue, Shahrak Ekbatan, Karaj Special Road, Tehran, Iran. (By First Class Mail, Postage Prepaid.)

Hossein Jahan Peyma, 2/1 Makran Cross, Heravi Square, Moghan Ave., Pasdaran Cross, Tehran, Iran. (By First Class Mail, Postage Prepaid.)

ALJ Docketing Center, Attention: Hearing Docket Clerk, 40 S. Gay Street, Room 412, Baltimore, Maryland 21202–4022, Fax: (410) 962–1746. (By Facsimile and Federal Express.)

Done and dated this 16th day of September, 2008 at New York, New York.

Regina V. Maye,

Paralegal Specialist to the Hon. Walter J. Brudzinskj, Administrative Law Judge.

[FR Doc. E8–23726 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DT–M

[14] See 15 CFR 766.24(e) (indicating that within five working days after receipt of a recommended decision concerning a TDO appeal, the Under Secretary is to issue a written order affirming, modifying, or vacating the recommended decision.

DEPARTMENT OF COMMERCE

International Trade Administration

(A–351–840)

Certain Orange Juice from Brazil; Notice of Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Elizabeth Eastwood, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3874.

SUPPLEMENTARY INFORMATION:

Background

On April 25, 2008, the Department of Commerce (the Department) published a notice of initiation of administrative review of the antidumping duty order on certain orange juice fromBrazil. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 FR 22337 (April 25, 2008). The period of review is March 1, 2007, through February 29, 2008, and the preliminary results are currently due no later than December 1, 2008. The review covers two producers/exporters of the subject merchandise to the United States.

Extension of Time Limit for Preliminary Results

Pursuant to section 751(a)(3)(A) of Tariff Act of 1930, as amended (the Act), the Department shall make a preliminary determination in an administrative review of an antidumping order within 245 days after the last day of the anniversary month of the date of publication of the order. Section 751(a)(3)(A) of the Act further provides, however, that the Department may extend the 245–day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period. We determine that it is not practicable to complete this administrative review within the time limits mandated by section 751(a)(3)(A) of the Act because of certain technical issues contained in supplemental questionnaire responses. Analysis of these issues requires additional time. Therefore, we have fully extended the deadline for completing the preliminary results until March 31, 2009. The deadline for the final results of the review continues to be 120 days after the publication of the preliminary results.

This extension notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: October 3, 2008.

Stephen J. Claeys,

Deputy Assistant Secretary for Import Administration.

[FR Doc. E8–24022 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–878

Saccharin from the People's Republic of China: Notice of Final Results of Expedited Sunset Review of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Andrea Staebler Berton, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4037.

SUMMARY: On June 5, 2008, the Department of Commerce (''the Department'') initiated a sunset review of the antidumping duty order on saccharin from the People's Republic of China (''PRC''). On the basis of a notice of intent to participate, and an adequate substantive response filed on behalf of domestic interested parties, as well as a lack of response from respondent interested parties, the Department conducted an expedited (120–day) sunset review. As a result of the sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping. The dumping margins are identified in the Final Results of Review section of this notice.

SUPPLEMENTARY INFORMATION:

Background

On June 5, 2008, the Department published the notice of initiation of the sunset review of the antidumping duty order on saccharin from the PRC pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five–Year (''Sunset'') Reviews*, 73 FR 31974 (June 5, 2008) (''*Initiation Notice*''). On June 20, 2008, the Department received a notice of intent to participate from a domestic interested party, PMC Specialties Group, Inc. (''PMCSG''), within the deadline specified in section 351.218(d)(1)(i) of the Department's regulations. PMCSG claimed interested party status under section 771(9)(C) of the Act as the sole domestic producer of saccharin in the United States and the petitioner in the original investigation. On July 7, 2008, the Department received a substantive response from PMCSG within the deadline specified in section 351.218(d)(3)(i) of the Department's regulations. We did not receive responses from any respondent interested parties to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and section 351.218(e)(1)(ii)(C)(2) of the Department's regulations, the Department determined to conduct an expedited review of the order.

Scope of the Order

The product covered by this antidumping duty order is saccharin. Saccharin is defined as a non–nutritive sweetener used in beverages and foods, personal care products such as toothpaste, table top sweeteners, and animal feeds. It is also used in metalworking fluids. There are four primary chemical compositions of saccharin: (1) Sodium saccharin (American Chemical Society Chemical Abstract Service (''CAS'') Registry 128–44–9); (2) calcium saccharin (CAS Registry 6485–34–3); (3) acid (or insoluble) saccharin (CAS Registry 81–07–2); and (4) research grade saccharin. Most of the U.S.-produced and imported grades of saccharin from the PRC are sodium and calcium saccharin, which are available in granular, powder, spray–dried powder, and liquid forms. The merchandise subject to this order is currently classifiable under subheading 2925.11.00 of the *Harmonized Tariff Schedule of the United States* (''HTSUS'') and includes all types of saccharin imported under this HTSUS subheading, including research and specialized grades. Although the HTSUS subheading is provided for convenience and customs purposes, the Department's written description of the scope of this order remains dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the ''Issues and Decision Memorandum'' (''Decision Memorandum'') from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, dated concurrently with this notice, and is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margins likely to prevail if the order were revoked. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit in room 1117 of the main Commerce building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

Pursuant to section 752(c)(3) of the Act, we determine that revocation of the antidumping duty order on saccharin from the PRC would be likely to lead to continuation or recurrence of dumping at the following weighted–average percentage margins:

Manufacturers/Exporters/Producers	Weighted–Average Margin (percent)
Suzhou Fine Chemical Group Co., Ltd.	291.57
Shanghai Fortune Chemical Co., Ltd.	249.39
Kaifeng Xinhua Fine Chemical Factory	281.97
PRC–Wide	329.94

This notice also serves as the only 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 section 351.305 of the Department's regulations. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: October 2, 2008.

David M. Spooner,

Assistant Secretary for Import Administration.

[FR Doc. E8–24030 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Applications and Reports for Registration as a Tanner or Agent

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing

effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 8, 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 Les Cockreham, (907) 271–3021 or *les.cockreham@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Marine Mammal Protection Act exempts Alaskan natives from the prohibitions on taking, killing, or injuring marine mammals if the taking is done for subsistence or for creating and selling authentic native articles of handicraft or clothing. The natives need no permit, but non-natives who wish to act as a tanner or agent for such native products must register with NOAA and maintain and submit certain records. The information is necessary for law enforcement purposes.

II. Method of Collection

Paper documentation is submitted.

III. Data

OMB Number: 0648–0179.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 54.
Estimated Time Per Response: Applications and reports, 2 hours.
Estimated Total Annual Burden Hours: 108.
Estimated Total Annual Cost to Public: $54.

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: October 6, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–23943 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Gear-Marking Requirement for Atlantic Large Whale Take Reduction Plan

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 8, 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 Kristy Long, (301) 713–1401 or *Kristy.Long@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The purpose of this proposed collection of information is to enable National Oceanic and Atmospheric Administration (NOAA) to reduce the serious injury and mortality of large whales, especially right whales, due to incidental entanglement in United States (U.S.) commercial fishing gear. Any persons setting trap/pot or gillnet gear in some areas of the Atlantic Ocean would be required to paint or otherwise mark their gear with one or two color codes, designating the type of gear and area where the gear is set. The surface buoys of this gear would also need to be marked to identify the vessel or fishery. These marking requirements would apply in the various management areas under the Atlantic Large Whale Take Reduction Plan (ALWTRP). Additionally, fishermen in the Southeast U.S. Restricted Area South would need to call-in before departing on a fishing trip to arrange for an observer.

The goals of this collection of information are to obtain more information on where large whales are being entangled and on what type gear responsible for the entanglement. This information will allow NMFS to focus further risk reduction measures in certain areas or fisheries, where needed, to meet the goals of the ALWTRP. Also, fisheries observers can provide information to managers on whether regulations need to be modified to address compliance or safety issues.

II. Method of Collection

Information collected is in the form of gear marking and telephone calls.

III. Data

OMB Number: 0648–0364.
Form Number: None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations and individuals or households.
Estimated Number of Respondents: 4,270.
Estimated Time Per Response: Gear marking per vessel, 5 minutes * 50 marks = 4 hours and 10 minutes; trip notification to observers, 2 minutes.
Estimated Total Annual Burden Hours: 18,399.
Estimated Total Annual Cost to Public: $11,203.

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: October 6, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–23960 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Documentation of Fish Harvest

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 8, 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 Otha Easley, (727) 824–5306 or *Otha.Easley@noaa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

The seafood dealers who process red porgy, gag, black grouper, or greater amberjack during seasonal fishery closures must maintain documentation, as specified in 50 CFR part 300, subpart K, that such fish were harvested from areas other than the South Atlantic. The documentation includes information on the vessel that harvested the fish and on where and when the fish were offloaded. The information is required for the enforcement of fishery regulations.

II. Method of Collection

The information is in the form of a paper affidavit which remains with the respondent.

III. Data

OMB Number: 0648–0365.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations, individuals or households.

Estimated Number of Respondents: 25.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 50.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 6, 2008.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E8–23961 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XK92

Marine Mammals; Issuance of Permits

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

ACTION: Notice; issuance of permits.

SUMMARY: Notice is hereby given that individuals and institutions have been issued Letters of Confirmation for activities conducted under the General Authorization for Scientific Research on marine mammals. See **SUPPLEMENTARY INFORMATION** for a list of names and address of recipients.

ADDRESSES: The Letters of Confirmation and related documents are available for review upon written request or by appointment in the following office:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)427–2521.

FOR FURTHER INFORMATION CONTACT: Office of Protected Resources, Permits Division, (301)713–2289.

SUPPLEMENTARY INFORMATION: The requested Letters of Confirmation have been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216). The General Authorization allows for bona fide scientific research that may result only in taking by level B harassment of marine mammals. The following Letters of Confirmation were issued in Fiscal Year 2008.

File No. 10047: Issued to Robert B. Griffin, Ph.D., Mote Marine Laboratory, 1600 Ken Thompson Parkway, Sarasota, FL 34236 on October 22, 2007, for photo-identification, behavioral observations, and underwater videography of Atlantic spotted dolphins (Stenella frontalis), bottlenose dolphins (Tursiops truncatus), and rough-toothed dolphins (Steno bredanensis) in the Gulf of Mexico and waters off the Florida Keys through October 31, 2012.

File No. 10038: Issued to David Mann, Ph.D., University of South Florida, College of Marine Science, 140 7th Avenue South, St. Petersburg, FL 33701, on October 22, 2007, for vessel surveys of distribution and abundance of 22 species of cetaceans on the West Florida Shelf. Activities include photo-

identification, behavioral observations, and passive acoustics and may be conducted until January 31, 2010.

File No. 10081: Issued to Natalija Lace, University of Southern Mississippi, 118 College Drive, Hattiesburg, MS 39406, on November 13, 2007, to investigate how natural features and the noise levels of habitats affect the acoustic characteristics of the signals produced by bottlenose dolphins. Activities include the use of passive acoustics in Tampa Bay, Florida through November 15, 2010.

File No. 1064–1748: Issued to National Ocean Service's Center for Coastal Environmental Health and Biomolecular Researach, 219 Fort Johnson Road, Charleston, SC [Principal Investigator: Eric Zolman] on February 8, 2008, for photo-identification and vessel surveys of bottlenose dolphins off South Carolina through March 31, 2009. The study was modified to expand the geographic location to include east-central Georgia and to add focal follows as a research tool to examine interactions between dolphins and crab pots. The amended Letter of Confirmation No. 1064–1748–01 supercedes version 1064–1748–00 issued on March 30, 2004.

File No. 13386: Issued to The Taras Oceanographic Foundation, 905 Stonewood Court, Jupiter, FL [Principal Investigator: Barbara Brunnick] on May 12, 2008, to document the abundance and distribution of bottlenose dolphins off the coast of Palm Beach County, Florida. Activities include the use of photo-identification and vessel surveys and are authorized through June 1, 2013.

File No. 13427: Issued to the Pacific Whale Foundation, 300 Ma'alaea Rd., Ste. 211, Wailuku, HI 96793 [Principal Investigator: Quincy A. Gibson, Ph.D.] on June 4, 2008, for line transect surveys and photo-identification of several non-listed cetacean species found in the deeper waters offshore of Maui County, Hawaii. The purpose of the proposed research is to gather information on the distribution, habitat use, abundance and behavior of several lesser studied, non-listed odontocetes. The activities may be conducted through June 15, 2013.

File No. 13416: Issued to Jessica Weiss, 310 West Eden St., Kill Devil Hills, NC 27948, on June 4, 2008, for the close approach, photo-identification, behavioral observations, and focal follows of bottlenose dolphins within North Carolina waters and the adjacent Atlantic Ocean. The purpose of this research is to investigate the seasonal and year-round residency of Western North Atlantic coastal or offshore bottlenose dolphins in the northern Outer Banks of North Carolina, in addition to identifying any biological and/or ecological stressors on the dolphins in the area. The activities may be conducted through May 31, 2013.

File No. 1099–1846: Issued to Jamie McKee, SAIC, 1140 Eglin Parkway, Shalimar, FL 32578 on May 12, 2006, for line transect surveys for the inshore and estuarine stocks of Atlantic bottlenose dolphins in south Georgia estuaries near the Naval Submarine Base Kings Bay. These activities may be conducted until May 31, 2011. This study was modified to authorize photo-identification of animals during surveys. The amended Letter of Confirmation No. 1099–1846–01 supercedes version 1099–1846–00, issued on June 6, 2008.

File No. 572–1869: Issued to Daniel K. Odell, Ph.D., Hubbs-SeaWorld Research Institute, 6295 Sea Harbor Drive, Orlando, FL 32821 on June 17, 2008, to conduct vessel surveys, photo-identification, behavioral observations, passive acoustic recordings, and videography of bottlenose dolphins in the Indian River Lagoon on the east-central coast of Florida; in the Key West, FL area; and in the coastal waters of Georgia. In addition, aerial surveys of bottlenose dolphins may be conducted over the Indian River Lagoon. These activities may be conducted through November 14, 2011. The study was modified to include photo-identification work in waters from Ponce Inlet to the northern border of Flagler County in Florida. The amended Letter of Confirmation No. 572–1869–01 supercedes version 572–1869–00, issued on November 14, 2006.

File No. 13525: Issued to Richard Connor, Ph.D., University of Massachusetts at Dartmouth, North Dartmouth, MA 02740 on July 25, 2008, for behavioral observations, video documentation, and photo-identification of bottlenose dolphins in Beaufort County, SC. The activities may be conducted through October 31, 2010.

File No. 13549: Issued to Moby A. Solangi, Ph.D., Institute for Marine Mammal Studies, P.O. Box 207, Gulfport, MS 39502 on August 20, 2008, for transect surveys, photo-identification, and behavioral observations of bottlenose dolphins in the estuaries of the Gulf of Mexico. Occasional aerial surveys are also authorized. The activities may be conducted through August 31, 2012.

File No. 572–1869: Issued to Daniel K. Odell, Ph.D., Hubbs-SeaWorld Research Institute, 6295 Sea Harbor Drive, Orlando, FL 32821 on August 20, 2008. The study was modified to allow aerial surveys at a minimum altitude of 152 meters (500 feet). The amended Letter of Confirmation No. 572–1869–02 supercedes version 572–1869–01, issued on June 17, 2008 (see above paragraph for File No. 572–1869 for details).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination was made that the activities are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: October 3, 2008.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E8–24015 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XK84

New England Fishery Management Council; Public Meeting; Revision

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

ACTION: Notice of rescheduling of a public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Research Steering Committee (Committee), in October, 2008, to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting scheduled for Thursday, October 16, 2008 has been cancelled and rescheduled for Thursday, October 30, 2008 at 9:30 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 339–1040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: This meeting was originally scheduled for Thursday, October 16, 2008. The original notice published in the **Federal**

Register on Thursday, October 2, 2008 (73 FR 57336).

The Council's Research Steering Committee (Committee) will address a range of issues including a briefing on the status of NMFS' Cooperative Research Program activities and funding. The Committee also will review preliminary work of the NEFMC's 5-year research priorities. The Committee will re-examine, and possibly revise, the evaluation criteria for cooperative research priorities subject to review by the Committee as well as review a small number of cooperative research project final reports. The Committee will also discuss the use of a workshop format to conduct future Committee management reviews. Finally, the Committee will discuss outstanding issues related to the Council's research set-aside programs if time allows. The Committee may consider other topics at their discretion.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: October 6, 2008.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E8–23941 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Docket Number: 0810021307–81308–01

Enhancing the Security and Stability of the Internet's Domain Name and Addressing System

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce

ACTION: Notice of Inquiry

SUMMARY: The Department of Commerce (Department) notes the increase in interest among government, technology experts and industry representatives regarding the deployment of Domain Name and Addressing System Security Extensions (DNSSEC) at the root zone level. The Department remains committed to preserving the security and stability of the DNS and is exploring the implementation of DNSSEC in the DNS hierarchy, including at the authoritative root zone level. Accordingly, the Department is issuing this notice to invite comments regarding DNSSEC implementation at the root zone.

DATES: Comments are due on November 24, 2008.

ADDRESSES: Written comments may be submitted by mail to Fiona Alexander, Associate Administrator, Office of International Affairs, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Room 4701, Washington, DC 20230. Written comments may also be sent by facsimile to (202) 482–1865 or electronically via electronic mail to DNSSEC@ntia.doc.gov. Comments will be posted on NTIA's website at http://www.ntia.doc.gov/DNS/DNSSEC.html.

FOR FURTHER INFORMATION CONTACT: For further information about this Notice, please contact Ashley Heineman at (202) 482–0298 or aheineman@ntia.doc.gov.

SUPPLEMENTARY INFORMATION:

Background. The Domain Name and Addressing System (DNS) is a critical component of the Internet infrastructure and is used by almost every Internet protocol-based application to associate human readable computer hostnames with the numerical addresses required to deliver information on the Internet. It is a hierarchical and globally distributed system in which distinct servers maintain the detailed information for their local domains and pointers for how to navigate the hierarchy to retrieve information from other domains. The accuracy, integrity, and availability of the information supplied by the DNS are essential to the operation of any system, service or application that uses the Internet.

The DNS was not originally designed with strong security mechanisms to ensure the integrity and authenticity of the DNS data. Over the years, a number of vulnerabilities have been identified in the DNS protocol that threaten the accuracy and integrity of the DNS data and undermine the trustworthiness of the system. Technological advances in computing power and network transmission speeds have made it possible to exploit these vulnerabilities more rapidly and effectively.[1]

Development of the DNSSEC Protocol. To mitigate the long-recognized vulnerabilities in the DNS, the Internet Engineering Task Force (IETF), using the same open standards process employed to develop the core DNS protocols, has developed a set of protocol extensions to protect the Internet from certain DNS related attacks: DNSSEC.[2] DNSSEC is designed to support authentication of the source and integrity of information stored in the DNS using public key cryptography and a hierarchy of digital signatures. It is designed to offer protection against forged (''spoofed'') DNS data, such as that created by DNS cache poisoning, by providing: (1) validation that DNS data is authentic; (2) assurance of data integrity; and (3) authenticated denial of existence.[3] DNSSEC does not provide any confidentiality for, or encryption of, the DNS data itself. The DNSSEC protocol also does not protect against denial of service (DoS) attacks or other attacks against the name server itself.[4]

The DNSSEC protocol is designed to allow for deployment in discrete zones within the DNS infrastructure without requiring deployment elsewhere, as DNSSEC is an opt-in technology. Signing of any individual zone or domain within the hierarchy does not

[1] *See*, National Research Council, The National Academies, *Signposts in Cyberspace: The Domain Name System and Internet Navigation* 154 (2005)(*Signposts*), http://books.nap.edu/catalog.php?record__id=11258#toc (last checked September 29, 2008); Department of Homeland Security, National Security Division, and National Institute of Standards and Technology, National Vulnerability Database, Vulnerability Summary for CVE-2008–1447 (Original release date July 08, 2008; last revised September 17, 2008) available at http://web.nvd.nist.gov/view/vuln/detail?vuln Id=CVE-2008–1447 (last checked September 23, 2008) (This site provides a list of most recent advisories regarding DNS vulnerabilities including DNS spoofing, cache poisoning, etc., and includes links to tools and solutions).

[2] The DNSSEC protocol has been under development since the 1990s with the latest revision approved by the IETF in 2005. RFC 4033 and its companion documents RFCs 4034 and 4035 update, clarify and refine the security extensions previously defined orginally in RFC 2535 and its predecessors. *Id.*, *Signposts*, at 154; *see also*, S. Rose and R. Chandramouli, ''Challenges in Securing the Domain Name System,'' Institute of Electrical and Electronics Engineers (IEEE) Security and Privacy Journal, Vol. 4, No. 1, 84 (Tom Karygiannis, Rick Kuhn, and Susan Landau eds., Jan./Feb. 2006)(Challenges), http://www.antd.nist.gov/pubs/Rose-Challenges%20in%20Securing%20DNS.pdf.

[3] R. Arends *et al.*, DNS Security Introduction and Requirements, Internet Engineering Task Force (IETF) Request for Comment (RFC) 4033 (March 2005)(RFC 4033), http://www.ietf.org/rfc/rfc4033.txt (last checked September 24, 2008).

[4] *Id.*

obligate or force any entity operating a zone elsewhere in the DNS hierarchy to deploy. In addition, end users systems only receive DNSSEC signed information if they request it.

Proponents of DNSSEC assert that widespread deployment of the protocol would mitigate many of the vulnerabilities currently associated with the DNS, increasing the security and integrity of the Internet DNS in a scalable fashion.[5] Ubiquitous deployment of DNSSEC would also enable authentication of the hierarchical relationship between domains to provide the highest levels of assurance. Thus, to realize the greatest benefits from DNSSEC, there needs to be an uninterrupted chain of trust from the zones that choose to deploy DNSSEC back to the root zone.[6]

Ubiquitous deployment of DNSSEC throughout the Internet landscape would require action by a broad range of entities supporting the operation of the DNS infrastructure including, for example, domain name registrars, top level domain (TLD) registry operators and the operators or managers for sub-domains or enterprise networks, Internet service providers (ISPs), software vendors, and others.[7] Additionally, software will need to be developed, servers will need to be configured to support DNSSEC, and users' systems will need to be configured to look for the authenticating signatures.

Current DNSSEC Deployment Status. To date, deployment of DNSSEC has been somewhat piecemeal. At present, only a small number of country code top level domain (ccTLD) operators (*e.g.*, .se [Sweden], .pr [Puerto Rico], .bg [Bulgaria], and .br [Brazil]) have deployed DNSSEC.[8] In addition, the operators of several generic TLDs (including .org and .gov) have publicly announced their intention to do so.[9] A number of second-level domain operators have also signed their zones, such as nist.gov.[10]

Some argue that DNSSEC deployment has been delayed because without a signed root, early deployments operate as ''islands of trust'' with no established chain of trust above them in the DNS hierarchy connecting them to other signed zones.[11] Without a common, shared ''trust anchor,''[12] these early deployers and others that wish to deploy DNSSEC must be able to manage not only their own trust anchors or ''keys,'' but also the trust anchors for other signed domains within the DNS hierarchy.[13] The technical and procedural challenges presented by this ''key management'' dilemma need to be overcome to facilitate DNSSEC deployment.[14]

Due to the complexities involved in managing trust anchors in the absence of a signed root, alternative mechanisms such as ''trust anchor repositories'' (TARs) are also being developed.[15] TARs are just one type of alternative available today. It is not clear what other alternatives for key management may be currently under development or could be developed in the future.[16]

Implementing DNSSEC at the Root. The hierarchical nature of the DNS structure (*e.g.*, root zone, top level domains, sub-domains) and the trust anchor framework required for security-aware resolvers to validate a signed response arguably make DNSSEC deployment at the root level (*i.e.*, ''signing'' of the root) an important step to achieve optimal benefits from the protocol. Signing the root would provide a single trust anchor at the top of the hierarchy upon which the DNS infrastructure could depend. Proponents contend this would simplify the validation process for those who have already deployed DNSSEC, while providing an incentive for possible broader deployment by others across the DNS domain space by removing one of the primary deterrents (the lack of a single trust anchor) to adoption.[17]

Support among the DNS community for implementation of DNSSEC at the root level has progressively grown over the years, as threats to the DNS have emerged. Several organizations have publicly indicated their support for signing the root zone.[18] Various Internet entities have undertaken a number of test-bed and pilot project initiatives to assess the technical feasibility and issues associated with signing of the root zone. Some notable examples include:

Internet Corporation for Assigned Names and Numbers (ICANN) DNSSEC testing demo (https://ns.iana.org/dnssec/status.html)

VeriSign DNSSEC Root testbed (https://webroot.verisignlabs.com/)

[5] *Id.*, at 6.

[6] *See Signposts*, *supra* note 1 at 158.

[7] *See e.g.*, Challenges, *supra* note 2, at 86-87. The Department recognizes that the ultimate success of DNSSEC would also require a widespread education campaign among end-users and DNSSEC awareness would have to be integrated into application and operating system software and development.

[8] To check which TLDs that have deployed DNSSEC, *see* University of Southern California Los Angeles, ''SecSpider: the DNSSEC Monitoring Project'' (UCLA SecSpider), http://secspider.cs.ucla.edu (last checked September 19, 2008) (each TLD zone can be looked up separately using this tool); Carolyn Duffy Marsan, Network World, ''Feds Tighten Security on .GOV'' (September 22, 2008), http://www.networkworld.com/news/2008/092208-government-web-security.html?page=1 (last checked September 25, 2008).

[9] Public Interest Registry, '' .ORG Becomes First Generic Top Level Domain to Start DNSSEC Implementation'' (July 21, 2008), http://pir.org/index.php?db=content/News&tbl=Press&id=9 (last checked September 24, 2008); Executive Office of the President, Office of Management and Budget, Memorandum for Chief Information Officers, Securing the Federal Government's Domain Name System Infrastructure (August 22, 2008), http://www.whitehouse.gov/omb/memoranda/fy2008/m08-23.pdf (last checked September 24, 2008).

[10] *See* UCLA SecSpider, *supra* note 8, (second level zones may also be looked up using this tool).

[11] R. Arends, *et al.*, Protocol Modifications for the DNS Security Extensions, Internet Engineering Task Force (IETF) Request for Comment (RFC) 4035 (March 2005)(RFC 4035), http://www.ietf.org/rfc/rfc4035.txt (last checked September 25, 2008) (This document defines the concept of a signed zone and lists requirements for a zone signature).

[12] As defined in RFC 4033, a ''Trust Anchor'' is ''a configured DNSKEY RR or RR hash of a DNSKEY RR. A validating security-aware resolver uses this public key or hash as a starting point for building the authentication chain to a signed DNS response.'' Further, ''presence of a trust anchor also implies that the resolver should expect the zone to which the trust anchor points to be signed.'' *See* RFC 4033, *supra* note 3.

[13] *See* RFC 4035, *supra* note 11.

[14] *See* Challenges, *supra* note 2 at 85-86.

[15] TARs allow a trusted third party to collect, authenticate, and manage the required keys on behalf of a group of DNSSEC users. For additional information on TARs, *see*, Sparta Inc., Shinkuro Inc., and National Institute of Science and Technology, ''Statement of Needed Internet Capability: Trust Anchor Repositories'' (June 9, 2008), http://www.dnssec-deployment.org/tar/tarpaper.pdf (last checked September 24, 2008). In April 2008, the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) authorized the creation and maintenance of an Interim TAR to act as a registry of DNSSEC trust anchors for top level domains. *See*, Minutes of the Special Meeting of the ICANN Board of Directors (April 30, 2008), http://www.icann.org/en/minutes/minutes-30apr08.htm (last checked September 24, 2008).

[16] The potential risks and benefits associated with TARs and other alternatives to signing of the root are not the primary focus of this NOI and, accordingly, are addressed only briefly here. However, depending on the comments received in response to this NOI, the Department may consider these issues more fully at a later date.

[17] *See*, Samuel Weiler, Carnegie Mellon University, Information Networking Institute, ''Deploying DNSSEC Without a Signed Root'' (April 2004), http://www.watson.org/~weiler/INI 1999–19.pdf (last checked September 25, 2008) (This document discusses the importance of a signed root from a technical perspective and discusses alternatives if the root is not signed).

[18] The National Academies, *see Signposts*, *supra* note 1, at 158; The European Internet Regional Internet Registry (RIPE), *see* Letter from Axel Pawlik, Managing Director, RIPE Network Coordination Centre to Dr. Vinton Cerf and Paul Twomey, ICANN (June 12, 2007), http://www.ripe.net/ripe/wg/dns/icann-root-signing.pdf (last checked September 24, 2008); Nominet (the .uk registry), *see* Nominet, ''Signing the Root'' (October 2007), http://www.nominet.org.uk/digitalAssets/27762__Signing__the__Root.pdf (last checked September 24, 2008); Public Interest Registry (PIR), *see* Letter from Alexa A.S. Raad, President and CEO, Public Internet Registry to the Honorable Carlos M. Gutierrez, Secretary of Commerce, U.S. Department of Commerce (September 5, 2008).

EP.NET, LLC Root Server Testbed Network (http://www.rs.net/)

These test-beds were established to demonstrate the technical feasibility for signing the root zone on a day-to-day routine basis. However, as they have largely been developed to evaluate technical aspects of signing the root, these test-bed efforts have not addressed or considered certain policy and procedural issues regarding the management of a signed root zone. These policy and procedural issues, especially regarding key management for the root zone, must be resolved before deployment in the root zone to ensure transparency and trustworthiness to the Internet community.

While deployment of DNSSEC at the root has many benefits, it introduces new security requirements. In particular, the cryptographic keys used to protect the root zone must be protected from disclosure. If an unauthorized entity gains access to the keys, it could publish incorrect information in the DNS with DNSSEC extensions falsely indicating the DNS data's integrity and authenticity. This risk can be mitigated through a variety of procedural and technical mechanisms, many of which can be applied in concert. The Department welcomes comments regarding procedural and technical mechanisms available to address such security requirements.

DNSSEC Implementation Models. A DNSSEC signed root zone would represent one of most significant changes to the DNS infrastructure since it was created. Consistent with the *U.S. Principles on the Internet's Domain Name and Addressing System*, the Department is now undertaking a review of the various implementation models to enhance the security and stability of the Internet DNS.[19] The Department recognizes the potential benefits of a DNSSEC signed root and is actively examining various implementation models in coordination with the National Institute of Standards and Technology (NIST) as well as other U.S. Government stakeholders and experts. NIST has been at the forefront of DNSSEC research and deployment domestically.[20] The U.S. Government also recently announced the deployment of DNSSEC throughout the .gov domain.[21] The Department has also been consulting with other relevant stakeholders, including ICANN and VeriSign, Inc., with respect to DNSSEC deployment.[22]

As a fundamental consideration, it is essential that implementation of DNSSEC at the root further ensures the stability and reliability of the root zone management system. All of the DNSSEC root zone deployment models of which the Department is aware would incorporate the elements required for ''signing'' the root into the process flow for management of the authoritative root zone file. At present, the process flow (see diagram at http://www.ntia.doc.gov/DNS/CurrentProcessFlow.pdf) includes the following steps: (1) TLD operator submits change request to the Internet Assigned Numbers Authority (IANA) Functions Operator; (2) the IANA Functions Operator processes the request; (3) the IANA Functions Operator sends a request to the Administrator for verification/authorization; (4) the Administrator sends verification/authorization to the Root Zone Maintainer to make the change; (5) the Root Zone Maintainer edits and generates the new root zone file; and (6) the Root Zone Maintainer distributes the new root zone file to the 13 root server operators. Deployment of DNSSEC in the root zone would introduce new steps into this process flow, but would not necessarily require a change in the existing roles of the various participants in the process.

As a cryptographic key-based system, DNSSEC employs two types of public-private key pairs created for the zone; one is referred to as the Zone Signing Key (ZSK) and the other is referred to as the Key Signing Key (KSK).[23] The private components of these keys are kept secret and are used for signing purposes. The collection of KSK and ZSK public keys published for the root zone is referred to as the root keyset.

Specifically, signing of the root zone would involve three steps:

(1) The signing of the root zone file itself and the creation of the Zone Signing Key (ZSK), which would be performed by the *Root Zone Signer (RZS)*;

(2) The signing of the zone signing keyset and the creation of the Key Signing Key (KSK), which would be performed by the *Root Key Operator (RKO)*; and

(3) Publication of the public key information for propagation throughout the rest of the Internet.[24]

As with other changes to the root zone, the Administrator would be responsible for verifying/authorizing updates to the root keyset.

A number of possible models exist to implement these steps into the existing root zone file management system. Six possible process flow models are presented in Appendix A for consideration and comment; commenters are encouraged to also review the graphic representations of these process flows posted on NTIA's website at http://www.ntia.doc.gov/DNS/DNSSEC.html. The Department recognizes that the six process flow models discussed in the appendix may not represent all of the possibilities available and invites comments below on alternate models, as appropriate.

REQUEST FOR COMMENT:

The Department seeks comments on DNSSEC deployment and a signed root generally, as well as specific details, comments, and evaluations of the various process flow models proposed or other process flow models that may otherwise be technically feasible to implement DNSSEC at the root zone level. Please include an analysis of the risks, benefits, and impacts of each process flow on the DNS security and stability generally. This analysis should include whether there are security weaknesses or strengths with each process flow model, whether there are methods or suggestions that will increase security and efficiency, and/or whether any alternative process flow models exist that may be preferable to those described in the appendix.

Questions on DNSSEC Deployment Generally

- In terms of addressing cache poisoning and similar attacks on the DNS, are there alternatives to DNSSEC

[19] *See U.S. Principles on the Internet's Domain Name and Addressing System*, http://www.ntia.doc.gov/ntiahome/domainname/usdnsprinciples__06302005.htm (last checked September 24, 2008).

[20] National Institute of Standards and Technology (NIST), U.S. Department of Commerce, DNSSEC Project, http://www-x.antd.nist.gov/dnssec/ (last checked September 24, 2008).

[21] Executive Office of the President, Office of Management and Budget, Memorandum for Chief Information Officers, Securing the Federal Government's Domain Name System Infrastructure (August 22, 2008), http://www.whitehouse.gov/omb/memoranda/fy2008/m08-23.pdf (last checked September 24, 2008)(The U.S. Government is requiring deployment of DNSSEC at the TLD level in .gov by January 2009 and in all .gov sub-domains used by Federal agencies by December 2009).

[22] The Department's agreements with ICANN and VeriSign, Inc. provide the process through which changes are currently made to the authoritative root zone file.

[23] *See*, Ramaswamy Chandramouli and Scott Rose, NIST, ''Secure Domain Name System (DNS) Deployment Guide,'' NIST SP 800-81, at 9-3 - 9-5 (May 2006), http://csrc.nist.gov/publications/nistpubs/800–81/SP800–81.pdf (last checked September 24, 2008) (This document provides deployment guidelines for securing DNS at the enterprise level including use of keys and provides a general discussion of the structure of the DNS).

[24] *See generally*, *id.*, at Sections 8 and 9 (These document sections provide a general discussion of zone signing guidelines).

that should be considered prior to or in conjunction with consideration of signing the root?

- What are the advantages and/or disadvantages of DNSSEC relative to other possible security measures that may be available?
- What factors impede widespread deployment of DNSSEC?
- What additional steps are required to facilitate broader DNSSEC deployment and use? What end user education may be required to ensure that end users possess the ability to utilize and benefit from DNSSEC?

General Questions Concerning Signing of the Root Zone

- Should DNSSEC be implemented at the root zone level? Why or why not? What is a viable time frame for implementation at the root zone level?
- What are the risks and/or benefits of implementing DNSSEC at the root zone level?
- Is additional testing necessary to assure that deployment of DNSSEC at the root will not adversely impact the security and stability of the DNS? If so, what type of operational testing should be required, and under what conditions and parameters should such testing occur? What entities (*e.g.*, root server operators, registrars, registries, TLD operators, ISPs, end users) should be involved in such testing?
- How would implementation of DNSSEC at the root zone impact DNSSEC deployment throughout the DNS hierarchy?
- How would the different entities (*e.g.*, root operators, registrars, registries, registrants, ISPs, software vendors, end users) be affected by deployment of DNSSEC at the root level? Are these different entities prepared for DNSSEC at the root zone level and /or are each considering deployment in their respective zones?
- What are the estimated costs that various entities may incur to implement DNSSEC? In particular, what are the estimated costs for those entities that would be involved in deployment of DNSSEC at the root zone level?

Operational Questions Concerning Signing of the Root Zone

- The Department recognizes that the six process flow models discussed in the appendix may not represent all of the possibilities available. The Department invites comment on these process flow models as well as whether other process flow model(s) may exist that would implement deployment of DNSSEC at the root zone more efficiently or effectively.
- Of the six process flow models or others not presented, which provides the greatest benefits with the fewest risks for signing the root and why? Specifically, how should key management (public and private key sets) be distributed and why? What other factors related to key management (*e.g.*, key roll over, security, key signing) need to be considered and how best should they be approached?
- We invite comment with respect to what technical capabilities and facilities or other attributes are necessary to be a Root Key Operator.
- What specific security considerations for key handling need to be taken into account? What are the best practices, if any, for secure key handling?
- Should a multi-signature technique, as represented in the M of N approach discussed in the appendix, be utilized in implementation of DNSSEC at the root zone level? Why or why not? If so, would additional testing of the technique be required in advance of implementation?

Dated: October 3, 2008.

Meredith Attwell Baker,

Acting Assistant Secretary for Communications and Information Administration.

Appendix A: Six Possible Process Flow Models

The first three of the process flows described below assign the responsibilities of Root Zone Signer, Root Key Operator, and key publishing among the existing parties to the root zone file management process or to a new, as yet unspecified, third party without materially changing the other pre- existing roles and responsibilities. The fourth model represents a variation of previous models, while changing the current root zone management process flow. The fifth model is also a variation of previous models, while maintaining the current root zone management process flow. The sixth model describes a process flow in which more than one third party, as yet unspecified, are introduced as Root Key Operators, which can be applied to all the previous process flows.

Proposed Process Flow 1 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal1.pdf). In Proposed Process Flow 1, the current root zone file management process outlined previously would remain unchanged except that after the Root Zone Maintainer edits and generates the new root zone file, it would then generate the ZSK and send it to the Root Key Operator. The Root Key Operator would then generate the KSK, sign the root keyset, and transmit the keyset update request to the Administrator. After the Administrator verifies/authorizes the key update request, it would notify the Root Zone Maintainer (in this model serving as the Root Zone Signer), which would sign the root zone file and publish it to the root server operators. Concurrently, the Administrator would also notify the Root Key Operator that the key update request has been verified/authorized and the RKO would then publish the public key information.

In this process flow, the role of Root Zone Signer is assigned to the Root Zone Maintainer. The Root Key Operator responsibilities are assigned to none of the current participants in the root zone file management process. Rather, these duties are assigned to an unspecified third party. This approach involves little change to the current root zone file management process and its existing assignments of roles and responsibilities.

Proposed Process Flow 2 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal2.pdf). Proposed Process Flow 2 is similar to Proposed Process Flow 1 except that in this model, the Root Key Operator is responsible for generating both the Zone Signing Key as well as the Key Signing Key. After creating the ZSK, the Root Key Operator transmits it to the Root Zone Maintainer/Signer, which maintains the ZSK.

Proposed Process Flow 3 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal3.pdf). This model also corresponds closely to Proposed Process Flow 1. However, in this model, the Root Key Operator, both generates the ZSK and signs the root zone file. Thus, after the Root Zone Maintainer generates the root zone file, it would then transmit the file to the Root Key Operator. In turn, the Root Key Operator, after generating the ZSK and the KSK, signing the root keyset, and obtaining verification/authorization from the Administrator, would sign the root zone file and return it to the Root Zone Maintainer for delivery. In this scenario, the Administrator would communicate only with the Root Key Operator with respect to the verification/authorization of the key update request.

Proposed Process Flow 4 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal4.pdf). This model describes a process flow in which the existing roles and responsibilities with respect to the management of the authoritative root zone file are significantly altered.[25] Specifically, under this proposed process flow, existing responsibilities for editing and generating the root zone file that now reside with the Root Zone Maintainer would be transferred to the IANA Functions Operator. In addition, the IANA Functions Operator would also be assigned the responsibilities of Root Zone Signer. The Root Zone Maintainer would continue to be responsible for distributing the now-signed root zone file to the 13 root server operators.

Thus, under this model the process would operate as follows: After receiving a change request from a TLD operator, the IANA Functions Operator would process the request and send a request to the

[25] Under the IANA functions contract with the Department, ICANN submitted a proposal substantially similar to Process Flow 4 for the Department of Commerce's consideration on September 2, 2008. That proposal is pending before the Department. This proposal is available at http://www.ntia.doc.gov/DNS/ICANNDNSSECProposal.pdf.

Administrator for verification/authorization to make the change. Upon receiving verification/authorization, the IANA Functions Operator would then edit and generate a new root zone file. The Root Key Operator function would be physically collocated with the IANA Functions Operator, responsible for generation of the KSK, signing the root keyset, and publishing the public key information. The IANA Functions Operator would also generate the ZSK and sign the root zone file. After signing the root zone file, the IANA Functions Operator would send the signed root zone file to the Root Zone Distributor (formally Root Zone Maintainer), which, in turn, would distribute it to the 13 root server operators. Under this process flow, the Administrator would perform the verification/authorization functions as in the other models.

Proposed Process Flow 5 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal5.pdf). This model maintains the existing roles and responsibilities with respect to the management of the authoritative root zone file.[26] That is, the existing responsibilities for editing and generating the root zone file that now reside with the Root Zone Maintainer would remain the same with the additional/new responsibility of Root Zone Signer and collocating the Root Key Operator function. The Root Zone Maintainer would continue to be responsible for distributing the now-signed root zone file to the 13 root server operators.

Thus, under this model the process would operate as follows: After receiving a change request from a TLD operator, the IANA Functions Operator would process and send a request to the Administrator for verification/authorization to make the change. Upon receiving verification/authorization, the Root Zone Maintainer would then edit and generate a new root zone file. The Root Key Operator responsibility would be physically collocated with the Root Zone Maintainer, responsible for generation of the KSK, signing the root keyset, and publishing the public key information. The Root Zone Maintainer would also generate the ZSK and sign the root zone file. After signing the root zone file, the Root Zone Maintainer would distribute it to the 13 root server operators. Under this process flow, the Administrator would perform the verification/authorization functions as in the other models.

Proposed Process Flow 6 (see diagram at http://www.ntia.doc.gov/DNS/DNSSECproposal6.pdf). The proposed process flow models one through three illustrate the important role played by the Root Key Operator. As presented, they depict the RKO responsibilities as being discharged by a single entity. In process flows four and five, the RKO responsibilities are collocated with either the IANA Functions Operator or the Root Zone Maintainer. However, cryptographic mechanisms exist that theoretically would permit two or more entities to participate in the RKO procedures, known as multi-signature technique, no matter where the RKO responsibilities are located.[27] Such a shared key framework is commonly referred to as an ''M of N'' approach, in which ''M'' is the minimum number of those entities that must participate in order to generate and use the key in question, and ''N'' represents the number of entities that share control of the key. In an M of N approach, only a predetermined subset of the key shares is required to generate a signature. For example, a three (3) of five (5) scheme would include five parties (N) with distinct key shares, but any three (M) of the five parties are required to generate a valid signature.[28]

The M of N approach could theoretically be applied to the KSK, the ZSK, or both. However, increasing the number of participants under this approach increases the complexities of the key management process. Because the ZSK would be used much more frequently than the KSK, Process Flow 6 applies the M of N approach only to management of the KSK. It should be noted that this cryptographic approach could be applied to any of the previous process flow models.

Process Flow 6 depicts the multi-signature technique as applied to Process Flow 1. The N entities would participate in the generation of the KSK key pair, and each would retain a share of the private key. Generating a signature with the KSK, such as signing a new ZSK, would require participation of M key shares.

Process Flow 6 does not propose specific values for either M or N; however, these parameters would need to be resolved prior to implementation of such a framework. This would entail deciding, among other things, (a) how many total RKOs (N) would be technically feasible; (b) what subset of these (M) would be reasonable or appropriate to enable reconstitution of the key; and (c) what other attributes would be necessary from a technical and policy standpoint to carry out this responsibility. The Department invites comments regarding this technique and its application at the root zone level.

[FR Doc. E8–23974 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–60–S

[26] Under the Cooperative Agreement with the Department, VeriSign submitted a proposal substantially similar to Process Flow 5 for the Department of Commerce's consideration on September 23, 2008. That proposal is pending before the Department. This proposal is available at http://www.ntia.doc.gov/DNS/VeriSignDNSSECProposal.pdf.

[27] *See* Tal Rabin, IBM T. J. Watson Research Center, ''A Simplified Approach to Threshold and Proactive RSA'' (1998)(Rabin), http://www.research.ibm.com/security/prsa.ps (last checked September 24, 2008); Adi Shamir, ''How to Share a Secret,'' Communications of the ACM, Volume 22, Issue 11, 612-13 (R. Rivest, eds., Nov. 1979)(discussion of a mathematical model that facilitates dividing a set of data in a certain number pieces that allows the data set to be easily reconstructed); T. Keisler and L. Harn, ''RSA Blocking and Multisignature Schemes with No Bit Expansion,'' Electronic Letters, Volume 26, Issue 18, 1490-91 (Aug. 1990)(describes one example of a multi-signature technique).

[28] *See* Rabin, *supra* note 27; for further information on this technique *see generally*, Elaine Barker, William Barker, William Burr, William Polk, and Miles Smid, NIST, ''Recommendation for Key Management - Part 1: General (revised)'' NIST Special Publication 800–57 Part 1 (May 2006), http:/ /csrc.nist.gov/publications/nistpubs/ 800–57/SP800–57-Part1.pdf (last checked September 24, 2008) (this refers to this class of techniques as ''split knowledge procedures'').

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

[Docket No. PTO–C–2008–0040]

Performance Review Board (PRB)

AGENCY: United States Patent and Trademark Office.

ACTION: Notice

SUMMARY: In conformance with the Civil Service Reform Act of 1978, 5 U.S.C. 4314(c)(4), the United States Patent and Trademark Office announces the appointment of persons to serve as members of its Performance Review Board.

ADDRESSES: Director, Human Capital Management, Office of Human Resources, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

FOR FURTHER INFORMATION CONTACT: Karen Karlinchak at (571) 272–6200.

SUPPLEMENTARY INFORMATION: The membership of the United States Patent and Trademark Office Performance Review Board is as follows:

Margaret J. A. Peterlin, Chair, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office.

Stephen S. Smith, Vice Chair, Chief Administrative Officer, United States Patent and Trademark Office.

John J. Doll, Commissioner for Patents, United States Patent and Trademark Office.

Lynne G. Beresford, Commissioner for Trademarks, United States Patent and Trademark Office.

Wendy R. Garber, Acting Chief Information Officer, United States Patent and Trademark Office.

James A. Toupin, General Counsel, United States Patent and Trademark Office.

Lois E. Boland, Director, Office of Intellectual Property Policy and Enforcement, United States Patent and Trademark Office.

Barry K. Hudson, Chief Financial Officer, United States Patent and Trademark Office.

Jefferson D. Taylor, Director, Office of Governmental Affairs, United States Patent and Trademark Office.

Deborah S. Cohn, Deputy Commissioner for Trademark

Operations, United States Patent and Trademark Office.

Margaret A. Focarino, Deputy Commissioner for Patent Operations, United States Patent and Trademark Office.

Kenneth Berman, Director of Information Technology, International Broadcasting Bureau.

Dated: October 1, 2008.

Jon W. Dudas,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. E8–24065 Filed 10–8–08; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Active Duty Service Determinations for Civilian or Contratual Groups

SUMMARY: On September 24, 2008, the Secretary of the Air Force, acting as Executive Agent of the Secretary of Defense, determined that the service of the group known as the ''Vietnamese Citizens Who Served in Vietnam Under Contract With the U.S. Armed Forces and Were Assigned to Reconnaissance Teams and Exploitation Forces Within the Military Assistance Command, Studies and Observations Group (MACVSOG), Ground Operations OP–35, Command and Control (C&C), From January 1964 to April 1972.''

Shall not be considered ''active duty'' for purposes of all laws administered by the Department of Veterans Affairs (VA).

FOR FURTHER INFORMATION CONTACT: Contact Mr. James D. Johnston at the Secretary of the Air Force Personnel Council (SAFPC); 1535 Command Drive, EE Wing, 3d Fl.; Andrews AFB, MD 20762–7002.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. E8–23966 Filed 10–8–08; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Partially Closed Meeting of the Secretary of the Navy Advisory Panel; Correction

AGENCY: Department of the Navy, DoD.

ACTION: Notice; correction.

SUMMARY: The Department of the Navy originally published a document in the **Federal Register** on September 05, 2008, announcing a partially closed meeting of the Secretary of the Navy Advisory Panel (SNAP). The Department of the Navy published a correction notice in the **Federal Register** on October 1, 2008, announcing a change in the date and location of the meeting. The time of the meeting contained in the correction notice of October 1, 2008 has now changed.

FOR FURTHER INFORMATION CONTACT: Colonel Caroline Simkins-Mullins, SECNAV Advisory Panel, Office of Program and Process Assessment, 1000 Navy Pentagon, Washington, DC 20350, telephone: 703–697–9154.

Correction

In the **Federal Register** of October 01, 2008, in FR Doc. E8–23037, make the following changes:

1. In the first column, on page 57086, correct the **DATES** caption to read as follows:

''**DATES:** The meeting will be held on October 16, 2008 from 9:45 a.m. to 4:30 p.m. The morning sessions on Acquisition Structure from 9:45 a.m.–11:30 a.m. will be opened. The afternoon sessions will be closed.''

2. In the first column, on page 57086, correct the **ADDRESSES** caption to read as follows:

''**ADDRESSES**: The meeting will be held in Room 1E868, in the Pentagon, 1000 Navy Pentagon, Washington, DC 20350. Public access is limited due to the Pentagon Security requirements. Any individual wishing to attend the meeting must contact LCDR Cary Knox, USN at 703–693–0463 or Colonel Simkins-Mullins at 703–697–9154 no later than October 9, 2008. Members of the public who do not have Pentagon access will be required to provide the following information by October 9, 2008 in order to obtain a visitor badge: Name, Date of Birth and Social Security Number. Public transportation is recommended as public parking is not available. Members of the public wishing to attend this meeting must enter through the Pentagon Metro Entrance between 9:10 a.m. and 9:30 a.m. Members of the public will need two forms of identification in order to receive a visitors badge and meet their escort. Members of the public will be escorted to Room 1E868 to attend the open sessions of the Advisory Panel and shall remain with designated escorts at all times while on the Pentagon Reservation. Members of the public will be escorted back to the Pentagon Metro Entrance at 11:30 a.m.''

Dated: October 3, 2008.

T. M. Cruz,

Lieutenant Commander, Judge Advocate Generals Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. E8–23946 Filed 10–8–08; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before November 10, 2008.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, Washington, DC 20503. Commenters are encouraged to submit responses electronically by e-mail to *oira_submission@omb.eop.gov* or via fax to (202) 395–6974. Commenters should include the following subject line in their response ''Comment: [insert OMB number], [insert abbreviated collection name, e.g., ''Upward Bound Evaluation'']. Persons submitting comments electronically should not submit paper copies.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or

reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: October 3, 2008.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management.

Institute of Education Sciences

Type of Review: Reinstatement.

Title: Impact Evaluation of the DC Opportunity Scholarship Program.

Frequency: Annually.

Affected Public: Individuals or household (primary).

Reporting and Recordkeeping Hour Burden:

Responses: 5,946.

Burden Hours: 5,075.

Abstract: The DC Opportunity Scholarship Program is a five year school choice program that provides scholarships for children in low-income families in Washington DC. This evaluation uses a randomized control trial to compare the outcomes of eligible applicants who received scholarships to eligible applicants who did not receive a scholarship.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3767. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E8–23904 Filed 10–8–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice Announcing OMB Approval of Information Collection

AGENCY: Office of Elementary and Secondary Education, U.S. Department of Education.

ACTION: Notice announcing OMB Approval of Information Collection

SUMMARY: The Department of Education (Department) announces that the Office of Management and Budget (OMB) has approved the collection of information, listed in the **SUPPLEMENTARY INFORMATION** below, following the Department's submission of a request for approval under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). This notice describes the information collection that has been approved, the OMB control number, and the current expiration date.

FOR FURTHER INFORMATION CONTACT: James J. English, U.S. Department of Education, 400 Maryland Avenue, SW., room 3E315, Washington, DC 20202–6135. Telephone (202) 260–1394 or via Internet: *james.english@ed.gov.*

If you use a telecommunications device for the deaf (TDD), you may call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternate format (*e.g.*, Braille, large print, audiotape, or computer diskette) on request to any of the contact people listed in this section.

SUPPLEMENTARY INFORMATION: The PRA and its implementing regulations require Federal agencies to display OMB control numbers and inform respondents of their legal significance after OMB has approved an agency's information collections. In accordance with those requirements, the Department notifies the public that the following information collections have been approved (or re-approved) by OMB following the Department's submission of an information collection request (ICR):

- OMB Control No. 1810–0662, Migrant Education Program (MEP) Final Regulations and Certificate of Eligibility (COE) §§ 200.83, 200.84, 200.88, and 200.89. The expiration date for this information collection is September 30, 2011.

Electronic Access to This Document

You may 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: *www.gpoaccess.gov/nara/index.html.*

Dated: October 3, 2008.

Kerri L. Briggs,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. E8–24045 Filed 10–8–08; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Fusion Energy Sciences Advisory Committee

AGENCY: Department of Energy, Office of Science.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Fusion Energy Sciences Advisory Committee. The Federal Advisory Committee Act (Pub. L. 92–463, 86Stat.770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Thursday, November 6, 2008, 9 a.m. to 6:30 p.m. and Friday, November 7, 2008, 9 a.m. to noon.

ADDRESSES: The Gaithersburg Hilton, 620 Perry Parkway, Gaithersburg, Maryland, 20877, USA.

FOR FURTHER INFORMATION CONTACT: Albert L. Opdenaker, Office of Fusion Energy Sciences; U.S. Department of Energy; 1000 Independence Avenue, SW.; Washington, DC 20585–1290; Telephone: 301–903–4927.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: The Office of Fusion Energy Sciences (OFES) is developing a new strategic plan for the Fusion Energy Sciences (FES) program. The Fusion Energy Sciences Advisory Committee (FESAC) recently completed its report on scientific themes and issues facing the magnetic fusion portion of the FES program. At this meeting, FESAC will hear a final report from its panel that is identifying the scientific themes and issues facing the four major alternate confinement concepts. The output from this panel along with the previous FESAC report

on the themes and issues facing the magnetic fusion program will provide a major portion of the information that OFES will use to produce a Strategic Overview Plan. The Committee will also hear a status report from its panel that is identifying the scientific themes and issues facing the high energy density laboratory plasma (HEDLP) program, and other reports as listed in the agenda shown below.

Tentative Agenda

Thursday, November 6, 2008

- Presentation on DOE Perspectives by the Deputy Director for Science Programs.
- Presentation on OFES Perspectives and Plans for Development of Long-Range Strategic Plans including Research Needs Workshops.
- Presentation on the Final Report of the Toroidal Magnetic Alternates Panel.
- Presentation on the status of the HEDLP Panel activities.
- Presentation on ITER Status.
- Presentation by OFES on the Draft Strategic Overview Plan.
- Public Comments.

Friday, November 7, 2008

- Report on Fusion Diagnostics Development Needs.
- Status on the Research on Plasma-Materials Interactions in Fusion.
- Adjourn

Public Participation: The meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Albert L. Opdenaker at 301–903–8584 (fax) or *albert.opdenaker@science.doe.gov* (e-mail). Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of the meeting will be available on the U.S. Department of Energy's *Office of Fusion Energy Sciences* Web site (*http://www.science.doe.gov/ofes/*).

Issued at Washington, DC, on October 3, 2008.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E8–24072 Filed 10–8–08; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–480–000]

Northern Natural Gas Company; Elk City Oklahoma Pipeline, L.P.; Notice of Application

October 2, 2008.

Take notice that on September 29, 2008, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, and Elk City Oklahoma Pipeline, L.P. (ECOP), c/o Atlas Pipeline Mid-Continent LLC, 110 West 7th Street, Suite 2300, Tulsa, Oklahoma 74119, filed a joint application in Docket No. CP08–480–000. Northern, pursuant to section 7(b) of the Natural Gas Act (NGA), requests permission and approval to abandon by sale to Saleco, a new yet to be named Delaware limited liability company, 16 miles of 16-inch pipeline in Northern's Field Area and receipt point facilities (Beckham System), with appurtenances facilities located in Roger Mills and Beckham counties, Oklahoma. Northern also requests Commission approval to abandon the primary firm service it provides with respect to a receipt point located on the facilities proposed for abandonment. Once Saleco is transferred to ECOP, the Beckham System will be operated by ECOP as part of its non-jurisdictional gathering system. Northern and ECOP also request in the filing a determination that, upon transfer to ECOP, the facilities in question will be classified as ''gathering'' under Section 1(b) of the NGA, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to Michael T. Loeffler, Senior Director of Certificates and External Affairs for Northern, 1111 South 103rd Street, Omaha, Nebraska 68124, at (402) 398–7103.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission.

Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, 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: October 24, 2008.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–23935 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP08–477–000]

Northwest Pipeline GP; Notice of Application

October 2, 2008.

Take notice that on September 24, 2008, Northwest Pipeline GP (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84108, filed with the Commission an application pursuant to section 157 of the Commission's regulations under the Natural Gas Act (NGA) seeking authorizing construction and operation of its Colorado Hub Connection Project. The facilities to be constructed are approximately 27.4 miles of 24-inch pipeline; and interconnecting facilities the Enterprise Meeker Gas Processing Plant and with White River Hub, all in Rio Blanco County, Colorado, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Copies of this filing are available for review at the Commission's Washington, DC offices, or may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (801) 584–6851.

Any questions regarding this application should be directed to Lynn Dahlberg, Manager Certificates, Northwest Pipeline GP, 295 Chipeta Way, Salt Lake City, Utah 84108, phone (213) 225–5900, e-mail *gbrown@breitburn.com.*

There are two ways to become involved in the Commission's review of this application. First, any person wishing to obtain legal status by becoming a party to this proceeding should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10) by the comment date, below. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to the project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions via the internet in lieu of paper. 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. 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.

Comment Date: October 24, 2008.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–23938 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

October 3, 2008.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP91–203–075, RP92–132–063.

Applicants: Tennessee Gas Pipeline Company.

Description: Tennessee Gas Pipeline Company submits a report re the status of Tennessee's discussions with their customers concerning the development of a mutually agreeable solution to address the over-collections.

Filed Date: 10/01/2008.

Accession Number: 20081003–0033.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP99–301–225.

Applicants: ANR Pipeline Company.

Description: ANR Pipeline Company submits an amendment to Rate Schedule FTS–1 negotiated rate agreement with Nexen Marketing USA Inc (Contract 113035), to be effective 11/1/08.

Filed Date: 09/26/2008.

Accession Number: 20081001–0058.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 8, 2008.

Docket Numbers: RP00–70–020.

Applicants: Algonquin Gas Transmission Company.

Description: Algonquin Gas Transmission, LLC submits Original Sheet No. 89 *et al.* to FERC Gas Tariff, Fifth Revised Volume No. 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0118.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP96–200–197.

Applicants: CenterPoint Energy Gas Transmission Co.

Description: CenterPoint Energy Gas Transmission Company submits a negotiated rate agreement with XTO Energy Inc.

Filed Date: 10/01/2008.

Accession Number: 20081003–0120.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP97–13–033.

Applicants: East Tennessee Natural Gas, LLC.

Description: East Tennessee Natural Gas, LLC submits Original Sheet 31 *et al.* of its FERC Gas Tariff, Third Revised Volume 1 to be effective 10/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0119.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP99–480–022.

Applicants: Texas Eastern Transmission LP.

Description: Texas Eastern Transmission, LP submits First Revised Sheet No. 17 *et al.* to FERC Gas Tariff, Seventh Revised Volume No. 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0302.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP03–36–036.

Applicants: Dauphin Island Gathering Partners.

Description: Dauphin Island Gathering Partners submits its Fortieth Revised Sheet 9 to FERC Gas Tariff, First Revised Volume 1, to be effective 10/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0038.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP08–646–000.

Applicants: Dominion Transmission, Inc.

Description: Dominion Transmission, Inc. submits Thirty-Seventh Revised Sheet No. 31 *et al.* to FERC Gas Tariff, Third Revised Volume No. 1.

Filed Date: 09/30/2008.

Accession Number: 20081001–0115.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP08–647–000.

Applicants: Cameron Interstate Pipeline, LLC.

Description: Cameron Interstate Pipeline LLC submits Original Sheet 1 *et al.* to FERC Gas Tariff, Original Volume 1 effective 11/1/08.

Filed Date: 09/30/2008.

Accession Number: 20081003–0035.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–1–000.

Applicants: Northern Natural Gas Company.

Description: Northern Natural Gas Co. submits its 14th Revised Sheet 66C *et al.* to FERC Gas Tariff, Fifth Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0039.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–2–000.

Applicants: Portland Natural Gas Transmission System.

Description: Portland Natural Gas Transmission System submits Fifth Revised Sheet 100 *et al.* to FERC Gas Tariff, Original Volume 1.

Filed Date: 10/01/2008.

Accession Number: 20081003–0041.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–3–000.

Applicants: Texas Gas Transmission, LLC.

Description: Texas Gas Transmission LLC's First Revised Sheet 36 *et al.* to FERC Gas Tariff, Third Revised Volume 1.

Filed Date: 10/01/2008.

Accession Number: 20081003–0040.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–4–000.

Applicants: Cameron Interstate Pipeline, LLC.

Description: Cameron Interstate Pipeline, LLC submits First Revised Sheet 80 (Superseding First Original Sheet 80) to its FERC Gas Tariff, Original Volume 1 to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0042.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–5–000.

Applicants: Maritimes & Northeast Pipeline, L.L.C.

Description: Maritimes & Northeast Pipeline LLC submits Twelfth Revised Sheet 11 to FERC Gas Tariff, First Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0201.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–6–000.

Applicants: Trunkline Gas Company, LLC.

Description: Trunkline Gas Company LLC submits Eighteenth Revised Sheet 10 *et al.* to FERC Gas Tariff, Third Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0202.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–7–000.

Applicants: Texas Gas Transmission, LLC.

Description: Second Revised Sheet 2102 *et al.* to FERC Electric Gas, Third Revised Volume 1.

Filed Date: 10/01/2008.

Accession Number: 20081003–0203.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–8–000.

Applicants: Tuscarora Gas Transmission Company.

Description: Tuscarora Gas Transmission Co its entire FERC Gas Tariff, First Revised Volume 1 which replaces the Original Volume 1, Part 1 of 3.

Filed Date: 10/01/2008.

Accession Number: 20081003–0043.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–9–000.

Applicants: Panhandle Eastern Pipe Line Company, LP.

Description: Panhandle Eastern Pipe Line Company LP submits Twentieth Revised Sheet 4 *et al.* to FERC Gas Tariff, Third Revised Volume 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0204.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–10–000.

Applicants: Liberty Gas Storage.

Description: Liberty Gas Storage Company, LLC submits First Revised Sheet 132 to its FERC Gas Tariff,

Original Volume 1, to be effective 11/1/8.

Filed Date: 10/01/2008.

Accession Number: 20081003–0205.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–11–000.

Applicants: Guardian Pipeline, LLC.

Description: Guardian Pipeline LLC submits Sixteenth Revised Sheet 5, FERC Gas Tariff Original Volume 1, to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0206.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–12–000.

Applicants: Southwest Gas Storage Company.

Description: Southwest Gas Storage Co submits Twenty-Fourth Revised Sheet No. 5 to FERC Gas Tariff, First Revised Volume No. 1 to be effective 11/1/08.

Filed Date: 10/01/2008.

Accession Number: 20081003–0207.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–13–000.

Applicants: National Fuel Gas Supply Corporation.

Description: National Fuel Gas Supply Corporation submits Fifteenth Revised Sheet 478 with an effective date of 1/1/08 and a market version of Amendment III to Service Agreement F02092 with United Refining Company.

Filed Date: 10/01/2008.

Accession Number: 20081003–0208.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: RP09–14–000.

Applicants: Viking Gas Transmission Company.

Description: Viking Gas Transmission Co submits Twenty-Fourth Revised Sheet 5B to FERC Gas Tariff, First Revised Volume 1.

Filed Date: 10/01/2008.

Accession Number: 20081003–0209.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: CP06–76–004.

Applicants: Algonquin Gas Transmission, LLC.

Description: Algonquin Gas Transmission, LLC submits its Seventh Revised Sheet 24 to FERC Gas Tariff, Fifth Revised Volume 1, to be effective 11/1/08.

Filed Date: 09/30/2008.

Accession Number: 20081003–0037.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 14, 2008.

Docket Numbers: CP06–115–004.

Applicants: Texas Eastern Transmission, LP.

Description: Texas Eastern Transmission, LP submits Third Revised Sheet 35B, to FERC Gas Tariff, Seventh Revised Volume 1.

Filed Date: 09/30/2008.

Accession Number: 20081003–0036.

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 dockets(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. E8–23899 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

October 2, 2008.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG09–1–000.

Applicants: Tanglewood Storage & Transportation LLC.

Description: Notice of Self Certification of Exempt Wholesale Generator Status.

Filed Date: 10/01/2008.

Accession Number: 20081001–5080.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 22, 2008.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER05–644–008.

Applicants: PSEG Energy Resources & Trade LLC, PSEG Fossil LLC.

Description: Informational Filing of PSEG Energy Resources & Trade LLC, *et al.*

Filed Date: 10/01/2008.

Accession Number: 20081001–5063.

Comment Date: 5 p.m. Eastern Time on Wednesday, October 22, 2008.

Docket Numbers: ER05–1195–003.

Applicants: Silverhill LTD.

Description: Silverhill Ltd submits their request for determination of Category 1 status.

Filed Date: 09/29/2008.

Accession Number: 20081002–0131.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers: ER08–749–000.

Applicants: Xcel Energy, Southwestern Public Service Company.

Description: Notice to the Commission from Southwestern Public Service Company of the Commercial In-Service Date of the Lea Power Plant and Request for Commission Authorization for Rates to go into Effect, Subject to Refund, As September 16, 2008.

Filed Date: 09/24/2008.

Accession Number: 20080924–5032.

Comment Date: 5 p.m. Eastern Time on Friday, October 10, 2008.

Docket Numbers: ER08–1214–001.

Applicants: Wisconsin Electric Power Company.

Description: Wisconsin Electric Power Co submits an executed Settlement Agreement and associated documents.

Filed Date: 09/12/2008.

Accession Number: 20080912–4012.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 7, 2008.

Docket Numbers: ER08–1215–001.

Applicants: Wisconsin Electric Power Company.

Description: Wisconsin Electric Power Co submits an executed Settlement Agreement and associated documents.

Filed Date: 09/12/2008.

Accession Number: 20080912–4013.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 7, 2008.

Docket Numbers: ER08–1216–001; ER08–1217–001; ER08–1218–001.

Applicants: Wisconsin Electric Power Company.

Description: Wisconsin Electric Power Co submits an executed Settlement Agreement and associated documents.

Filed Date: 09/12/2008.

Accession Number: 20080912–4011.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 7, 2008.

Docket Numbers: ER08–1240–003.

Applicants: MH Partners LP.

Description: MH Partners LP submits an application for market-based rate authority.

Filed Date: 09/29/2008.

Accession Number: 20081002–0132.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers: ER08–1428–001.

Applicants: Public Service Company of New Mexico.

Description: Public Service Co of New Mexico submits an errata to submitted contracts under ER08–1428.

Filed Date: 10/01/2008.

Accession Number: 20081002–0140.

Comment Date: 5 p.m. Eastern Time on Thursday, October 9, 2008.

Docket Numbers: ER08–1523–000.

Applicants: Coburn Energy, LLC.

Description: Coburn Energy LLC submits Petition for Acceptance of Initial Tariff, Waivers and Blanket Authority.

Filed Date: 09/30/2008.

Accession Number: 20081002–0133.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers: ER08–1583–000.

Applicants: Tuolumne Wind Project, LLC.

Description: Tuolumne Wind Project, LLC submits petition for order accepting market-based rate tariff for filing and granting waivers and blanket approvals etc under ER08–1583.

Filed Date: 09/30/2008.

Accession Number: 20081002–0101.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers: ER08–1589–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits Network Integration Transmission Service Agreement between PacifiCorp and Bonneville Power Administration for Yakama Power to be designated as Second Revised Service Agreement 328 etc under ER08–1589.

Filed Date: 09/29/2008.

Accession Number: 20081002–0130.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1590–000.

Applicants: Niagara Mohawk Power Corporation.

Description: Niagara Mohawk Power Corp submits a power purchase agreement with Onondaga County Resources Recovery Agency.

Filed Date: 09/29/2008.

Accession Number: 20081002–0104.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1591–000.

Applicants: California Independent System Operator C.

Description: Petition of the California Independent System Operator Corporation for Waiver of Certain Business Practice Standards Adopted In Order No. 676–C.

Filed Date: 09/26/2008.

Accession Number: 20080926–5126.

Comment Date: 5 p.m. Eastern Time on Friday, October 17, 2008.

Docket Numbers ER08–1592–000.

Applicants: Niagara Mohawk Power Corporation.

Description: Niagara Mohawk Power Corp submits an interconnection agreement with Black River Limited Partnership *et al.* under ER08–1592.

Filed Date: 09/29/2008.

Accession Number: 20081002–0105.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1593–000.

Applicants: New England Power Company.

Description: New England Power Company submits a service agreement for Firm Local Generation Delivery Service dated 10/5/00 between NEP and Mascome Hydro Corporation under ER08–1593.

Filed Date: 09/29/2008.

Accession Number: 20081002–0106.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1594–000.

Applicants: Avista Corporation.

Description: Avista Corporation submits Fourth Revised Sheet 8 *et al.* to First Revised FERC Rate Schedule 184 under ER08–1594.

Filed Date: 09/29/2008.

Accession Number: 20081002–0129.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1595–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits a letter agreement with the City of Victorville under ER08–1595.

Filed Date: 09/29/2008.

Accession Number: 20081002–0128.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1596–000.

Applicants: Xcel Energy Services Inc.

Description: Northern States Power Companies submits Notices of Cancellation for Agreement of Legacy Point-toPoint Transmission Service Agreements etc under ER08–1596.

Filed Date: 09/29/2008.

Accession Number: 20081002–0127.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1597–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits proposed changes to its Open Access Transmissions Tariff under ER08–1597.

Filed Date: 09/30/2008.

Accession Number: 20081002–0124.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1598–000.

Applicants: New England Power Pool.

Description: The New England Power Pool Participants Committee submits counterpart signature pages of the New England Power Pool Agreement dated as of 9/1/71 under ER08–1598.

Filed Date: 09/30/2008.

Accession Number: 20081002–0123.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1599–000.

Applicants: Puget Sound Energy, Inc.

Description: Puget Sound Energy Inc submits Residential Purchase and Sale Agreement with United States of America Department of Energy under ER08–1599.

Filed Date: 09/30/2008.

Accession Number: 20081002–0122.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1600–000.

Applicants: Basin Electric Power Cooperative, Inc.

Description: Basin Electric Power Cooperative submits revised tariff sheets that modify the rates in the joint open-access transmission tariff of Black Hills Power, Inc under ER08–1600.

Filed Date: 09/29/2008.

Accession Number: 20081002–0107.

Comment Date: 5 p.m. Eastern Time on Monday, October 20, 2008.

Docket Numbers ER08–1601–000.

Applicants: Southwest Power Pool Inc.

Description: Southwest Power Pool, Inc submits proposed amendments to its

Bylaws, Open Access Transmission Tariff and Membership Agreement under ER08–1601.

Filed Date: 09/30/2008.

Accession Number: 20081002–0121.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1602–000.

Applicants: Avista Corporation.

Description: Avista Corp submits the Short-Term Bridge Residential Purchase and Sale Agreement.

Filed Date: 09/30/2008.

Accession Number: 20081002–0120.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1604–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Service Agreement for Network Integration Transmission Service with Oklahoma Gas and Electric Co.

Filed Date: 09/30/2008.

Accession Number: 20081002–0108.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1605–000.

Applicants: El Paso Electric Company.

Description: El Paso Electric Company submits First Revised Sheet 193 *et al* to their Open Access Transmission, Fourth Revised Volume 1.

Filed Date: 09/30/2008.

Accession Number: 20081002–0109.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1606–000.

Applicants: ISO New England Inc.

Description: ISO New England Inc submits the Request for Limited Waiver of NAESB WEQ Standards.

Filed Date: 09/30/2008.

Accession Number: 20081002–0111.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1607–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits the Residential Purchase and Sale Agreement between the Bonneville Power Administration and PacifiCorp.

Filed Date: 09/30/2008.

Accession Number: 20081002–0110.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1608–000.

Applicants: Portland General Electric Company.

Description: Portland General Electric Co submits the Short-Term Bridge Residential Purchase and Sale Agreement.

Filed Date: 09/30/2008.

Accession Number: 20081002–0119.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1609–000.

Applicants: WSPP.

Description: WSPP, Inc submits a letter requesting the Commission to amend their Agreement to include 3 Phases Renewables, LLC *et al* as members of the WSPP.

Filed Date: 09/30/2008.

Accession Number: 20081002–0118.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Docket Numbers ER08–1610–000.

Applicants: Arizona Public Service Company.

Description: Arizona Public Service Co submits revisions to FERC Electric Rate Schedule 182 under ER08–1610.

Filed Date: 09/30/2008.

Accession Number: 20081002–0102.

Comment Date: 5 p.m. Eastern Time on Tuesday, October 21, 2008.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern Time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–23933 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. 2085–014; 67–113; 2175–014; 120–020]

Southern California Edison, California; Notice of Intent To Hold a Public Meeting To Discuss the Draft Environmental Impact Statement for the Big Creek Alp Hydroelectric Projects

October 2, 2008.

On September 12, 2008, the Commission issued a Draft Environmental Impact Statement (draft EIS) for four Big Creek Hydroelectric Projects and mailed it to resource and land management agencies, interested organizations, Tribes, and individuals.

The Environmental Protection Agency noticed the draft EIS in the **Federal Register** on September 19, 2008 (73 FR 54393); comments are due November 3, 2008. The draft EIS evaluates the environmental consequences and developmental benefits of issuing new licenses for operating and maintaining the Mammoth Pool Project (FERC No. 2085); Big Creek Nos. 2A, 8 and Eastwood (FERC No. 67); Big Creek Nos. 1 and 2 (FERC No. 2175); and Big Creek No. 3 (FERC No. 120), located in Fresno and Madera Counties, California. Besides evaluating the projects as they now operate, the draft EIS evaluates the projects with the Settlement Agreement and with staff-recommended measures.

The public meeting, which will be recorded by an official stenographer, is scheduled as follows.

Date: Wednesday, October 15, 2008.

Time: 1–4 p.m. (PST).

Place: Piccadilly Inn Airport, 5115 East McKinley Ave, Fresno, CA 93727, Phone: (559) 251–6000.

At the meeting, resource agency personnel and other interested persons will have the opportunity to provide

oral and written comments and recommendations regarding the draft EIS for the Commission's public record.

For further information, contact James Fargo at (202) 502–6095 or at *james.fargo@ferc.gov*.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–23934 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–19–009; Docket No. ER05–168–008 (Consolidated); Docket No. ER06–274–012 (Not Consolidated)]

Golden Spread Electric Cooperative, et al. v. Southwestern Public Service Company; Notice of Filing

October 2, 2008.

On September 30, 2008, Southwestern Public Service Company, on behalf of itself, Golden Spread Electric Cooperative, Inc., Lyntegar Electric Cooperative, Inc., Occidental Permian Ltd. and Occidental Power Marketing, L.P., filed an Amendment No. 3 to its Offer of Settlement and Settlement Agreement filed on December 3, 2007 and approved by the Commission on April 21, 2008 in this proceeding.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant and all the parties in this proceeding.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on October 6, 2008.

Nathaniel Davis,

Deputy Secretary.

[FR Doc. E8–23936 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL05–19–009; Docket No. ER05–168–008 (consolidated); Docket No. ER06–274–012 (not consolidated)]

Golden Spread Electric Cooperative, et al. v. Southwestern Public Service Company; Notice of Filing

October 2, 2008.

On September 30, 2008, Southwestern Public Service Company, on behalf of itself, Golden Spread Electric Cooperative, Inc., Lyntegar Electric Cooperative, Inc., Occidental Permian Ltd. and Occidental Power Marketing, L.P., filed an Amendment No. 3 to its Offer of Settlement and Settlement Agreement filed on December 3, 2007 and approved by the Commission on April 21, 2008 in this proceeding.

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Comment Date: 5 p.m. Eastern Time on October 6, 2008.

Kimberly D. Bose,

Secretary.

[FR Doc. E8–23939 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OA08–62–000]

California Independent System; Operator Corporation; Notice of FERC Staff Attendance

October 2, 2008.

The Federal Energy Regulatory Commission (Commission) hereby gives notice that on October 3, 2008, members of its staff will participate in a meeting to be conducted by the California Independent System Operator (CAISO) regarding the CAISO's transmission planning standards agreement. The information and documents for the meeting can be obtained from Judi Sanders, *jsanders@caiso.com*.

Sponsored by the CAISO, this meeting is open to all market participants, and staff's participation is part of the Commission's ongoing outreach efforts. This meeting may discuss matters at issue in the above captioned docket.

For further information, contact Saeed Farrokhpay at *saeed.farrokhpay@ferc.gov*; (916) 294–0233 or Maury Kruth at *maury.kruth@ferc.gov,* (916) 294–0275.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E8–23937 Filed 10–8–08; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2008–0425; FRL–8728–4]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NESHAP for Natural Gas Transmission and Storage, EPA ICR Number 1789.06, OMB Control Number 2060–0418

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 that is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before November 10, 2008.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2008–0425, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 2201T, 1200 Pennsylvania Avenue, 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: John Schaefer, Office of Air Quality Planning and Standards, Sector Policies and Programs Division (D243–05), Measurement Policy Group, Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0296; fax number: (919) 541–3207; e-mail address: *schaefer.john@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 May 30, 2008 (73 FR 31088), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2008–0425, which is available for public viewing online at *http://www.regulations.gov*, in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744 and the telephone number for the Enforcement and Compliance Docket is (202) 566–1927.

Use EPA's electronic docket and comment system at *http://www.regulations.gov* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select ''docket search,'' then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NESHAP for Natural Gas Transmission and Storage (Renewal).

ICR Numbers: EPA ICR Number 1789.06, OMB Control Number 2060–0418.

ICR Status: This ICR is scheduled to expire on January 31, 2009. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The National Emission Standards for Hazardous Air Pollutants (NESHAP) for Natural Gas Transmission and Storage, published at 40 CFR part 63, subpart HHH, were proposed on February 6, 1998 and promulgated on June 17, 1999. These regulations apply to existing facilities and new facilities that are major sources of hazardous air pollutants (HAP) and that transport or store natural gas prior to entering the pipeline to a local distribution company or to a final end user (if there is no local distribution company).

In general, all NESHAP standards require initial notifications, performance tests, and periodic reports by the owners/operators of the affected facilities. They are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. These notifications, reports, and records are essential in determining compliance, and are required of all affected facilities subject to NESHAP.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 15 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of natural gas transmission and storage facilities.

Estimated Number of Respondents: 832.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 753.

Estimated Total Annual Cost: $61,085 in annual labor costs, exclusive of $0 for both annualized capital/startup and O&M costs.

Changes in the Estimates: There is a decrease of 4 hours in the total estimated burden currently identified in the OMB Inventory of Approved ICR Burdens.

Dated: October 6, 2008.

Sara Hisel-McCoy,

Director, Collection Strategies Division.

[FR Doc. E8–24029 Filed 10–8–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2008–0720; FRL–8728–2]

Request for Nominations to the EPA Human Studies Review Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) Office of the Science Advisor (OSA) is soliciting nominations of people qualified in the areas of bioethics, biostatistics, human health risk assessment and human toxicology to serve on the Human Studies Review Board (HSRB). The HSRB is a Federal advisory committee, operating in accordance with the Federal Advisory Committee Act (FACA) 5 U.S.C. App. 2 § 9, providing advice and recommendations to EPA on scientific and ethical aspects of research with human subjects.

DATES: Nominations (''comments'') should be submitted to EPA no later than November 10, 2008.

ADDRESSES: Submit your nominations, identified by Docket ID No. EPA–HQ–ORD–2008–0720, by any of the following methods:

Internet: http://www.regulations.gov: Follow the on-line instructions for submitting comments.

E-mail: ORD.Docket@epa.gov.

USPS Mail: ORD Docket, Environmental Protection Agency, Mailcode: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

Hand or Courier Delivery: EPA Docket Center (EPA/DC), Room 3304, EPA West Building, 1301 Constitution Avenue NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–ORD–2008–0720. Deliveries are accepted from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your nominations to Docket ID No. EPA–HQ–ORD–2008–0720. EPA's policy is that all nominations 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 nomination includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information through *http://www.regulations.gov* or e-mail that you consider to be CBI or otherwise protected from disclosure.

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 nomination. By contrast, if you send an e-mail nomination directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the nomination that is placed in the public docket and made available on the Internet. If you submit a nomination electronically, EPA recommends that you include your name and other contact information in the body of your nomination and with any disk or CD–ROM you submit. If EPA cannot read your nomination due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider it. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index under the docket number. Even though it will be listed by title in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Copyright material will be publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the ORD Docket, EPA/DC, Room 3334, EPA West, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Paul I. Lewis, Office of the Science Advisor, Mail Code 8105R, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460; telephone number: (202) 564–8381, fax number: (202) 564–2070, e-mail: *lewis.paul@epa.gov.*

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of particular interest to persons who conduct or assess human studies, especially studies on substances regulated by EPA, and to persons who may sponsor or conduct research with human subjects with the intention to submit it to EPA for consideration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) or section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA). Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document and Other Related Information?

You may access this **Federal Register** document electronically either through *http://www.regulations.gov* or through the EPA Web site under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

C. What Should I Consider as I Prepare My Nomination for EPA?

You may find the following suggestions helpful for preparing your nomination:

1. Provide as much supporting information as possible about the nominee, including contact information.

2. Make sure to submit your nomination by the deadline in this document.

3. To ensure proper receipt by EPA, be sure to include the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date and **Federal Register** citation.

SUPPLEMENTARY INFORMATION

Background

On February 6, 2006 the Agency published a final rule for protection of human subjects of research (71 FR 24 6138) that called for creating a new, independent human studies review board (i.e. HSRB). The HSRB is a Federal advisory committee operating in accordance with the Federal Advisory Committee Act (FACA) 5 U.S.C. App. 2 § 9. The HSRB provides advice, information, and recommendations to EPA on issues related to scientific and ethical aspects of human subjects research. The major objectives of the HSRB are to provide advice and recommendations on: (1) Research proposals and protocols; (2) reports of completed research with human subjects; and (3) how to strengthen

EPA's programs for protection of human subjects of research. The HSRB reports to the EPA Administrator through EPA's Science Advisor.

This notice solicits nominations of individuals with expertise in bioethics, biostatistics, human health risk assessment and/or human toxicology to fill anticipated vacancies on the Board. General information concerning the HSRB, including its charter, current membership, and activities can be found on the EPA Web site at *http://www.epa.gov/osa/hsrb/.*

Process and Deadline for Submitting Nominations

Any interested person or organization may nominate someone to be considered as prospective nominees for the HSRB. Additional avenues and resources may be utilized in the solicitation of nominees to encourage a broad pool of expertise. Nominees should be experts who have sufficient professional qualifications, by training and experience, to provide expert comment on the ethical and scientific issues that may come before the HSRB. Responsibilities of HSRB members include reviewing extensive background materials between meetings of the Board, preparing draft responses to Agency charge questions, attending Board meetings, participating in the discussion and deliberations at these meetings, drafting assigned sections of meeting reports, and reviewing and helping to finalize Board reports.

EPA seeks nominees who are nationally recognized experts in one or more of the following areas:

- Bioethics: Expertise in the ethics of research with human subjects.
- Biostatistics: Expertise in statistical design and analysis of research with human subjects, especially research with small sample sizes.
- Human health risk assessment: Expertise in epidemiology, exposure analysis, public health or human research regulations.
- Human toxicology: Expertise in toxicity of environmental substances, mechanisms of toxicity and/or clinical studies.

All nominations should include: (1) A current curriculum vitae (C.V.) providing the nominee's educational background, qualifications, leadership positions in national associations or professional societies, relevant research experience and publications; and (2) a summary of the above in a one-page biographical sketch.

The qualifications of nominees for membership on the HSRB will be assessed in terms of the specific expertise sought for the HSRB. Qualified nominees who agree to be considered further will be included in a smaller ''Short List''. The Short List of nominees' names and biographical sketches will be posted for 14 calendar days for public comment on the EPA Web site at *http://www.epa.gov/osa/index.htm.* The public will be encouraged to provide additional information about the nominees that EPA should consider. At the completion of this comment period, EPA will select new Board members from the Short List. Candidates not selected for HSRB membership at this time may be considered for HSRB membership as vacancies arise in the future, or for service as consultants to the HSRB. The Agency estimates that the names of Short List candidates will be posted in February, 2009. However, please be advised that this is an approximate time frame and the date could change. Thus, if you have any questions concerning posting of Short List candidates on the OSA Web site, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Interested candidates who are employees of a federal department or agency (other than EPA) or are members of another federal advisory committee are eligible to serve on the HSRB, and their nominations are welcome. Other factors that will be considered include: Availability to participate in the Board's scheduled meetings, absence of any conflicts of interest and absence of an appearance of a lack of impartiality, and independence with respect to the matters likely to come under HSRB review. Though financial conflicts of interest or the appearance of a lack of impartiality, lack of independence, or bias may lead to nonselection, the absence of such concerns does not ensure that a candidate will be selected to serve on the HSRB. Numerous qualified candidates are likely to be identified. Selection decisions will involve careful weighing of many factors, including, but not limited to, the candidates' areas of expertise and professional qualifications, and responses to the Short List in achieving the overall balance of different perspectives and areas of expertise on the Board.

Members of the HSRB are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, each nominee will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The information provided is confidential and will not be disclosed to the public. Before a candidate is considered further for service on the HSRB, EPA will evaluate each candidate to assess whether there is any conflict of financial interest, appearance of a lack of impartiality, or prior involvement with matters likely to be reviewed by the Board.

Nominations should be submitted by one of the methods listed under **ADDRESSEES**. The Agency will consider all nominations received on or before November 10, 2008. Final selection of members is a discretionary function of the Agency and will be announced on the EPA Web site at *http://www.epa.gov/osa/hsrb* as soon as they are made.

Dated: September 26, 2008.

George M. Gray,

Science Advisor.

[FR Doc. E8–24032 Filed 10–8–08; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8726–7]

National and Governmental Advisory Committees to the U.S. Representative to the Commission for Environmental Cooperation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, Pub. L. 92–463, EPA gives notice of a meeting of the National Advisory Committee (NAC) and Governmental Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC). The National and Governmental Advisory Committees advise the EPA Administrator in his capacity as the U.S. Representative to the CEC Council. The Committees are authorized under Articles 17 and 18 of the North American Agreement on Environmental Cooperation (NAAEC), North American Free Trade Agreement Implementation Act, Pub. L. 103–182, and as directed by Executive Order 12915, entitled ''Federal Implementation of the North American Agreement on Environmental Cooperation.'' The NAC is composed of 12 members representing academia, environmental non-governmental organizations, and private industry. The GAC consists of 12 members representing state, local, and Tribal governments. The Committees are

responsible for providing advice to the U.S. Representative on a wide range of strategic, scientific, technological, regulatory, and economic issues related to implementation and further elaboration of the NAAEC.

The purpose of the meeting is to review and provide advice on CEC projects related to capacity building and information for decision-making. The committees will also provide advice on the CEC's 2009 Operational Plan and learn about regional transboundary environmental issues. A copy of the agenda will be posted at *http://www.epa.gov/ocem/nacgac-page.htm.*

DATES: The National and Governmental Advisory Committees will hold an open meeting on Thursday, October 23, from 8:30 a.m. to 5:30 p.m. and Thursday October 24, from 7 a.m. to 10 a.m.

ADDRESSES: The meeting will be held at the Cocopah Conference Center, 15268 S. Avenue B, Somerton, Arizona 85350. The meeting is open to the public, with limited seating on a first-come, first-served basis.

FOR FURTHER INFORMATION CONTACT: Oscar Carrillo, Designated Federal Officer, *carrillo.oscar@epa.gov,* 202–564–0347, U.S. EPA, Office of Cooperative Environmental Management (1601–M), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments or provide written comments to the Committees should be sent to Oscar Carrillo, Designated Federal Officer, at the contact information above.

Meeting Access: For information on access or services for individuals with disabilities, please contact Oscar Carrillo at 202–564–0347 or *carrillo.oscar@epa.gov.* To request accommodation of a disability, please contact Oscar Carrillo, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: September 25, 2008.

Oscar Carrillo,

Designated Federal Officer.

[FR Doc. E8–23865 Filed 10–8–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval, Comments Requested

October 3, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collections, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written PRA comments should be submitted on or before November 10, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, via Internet at *Nicholas_A._Fraser@omb.eop.gov* or via fax at (202) 395–5167; and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC, 20554, or via Internet at *Cathy.Williams@fcc.gov* and/or *PRA@fcc.gov.* Include in the comments the OMB control number of the collection as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Cathy Williams at (202) 418–2918, or via Internet at *Cathy.Williams@fcc.gov*, and/or *PRA@fcc.gov*. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0501.

Title: Section 73.1942, Candidates Rates; Section 76.206, Candidate Rates; Section 76.1611, Political Cable Rates and Classes of Time.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 19,717 respondents; 422,170 responses.

Estimated Time per Response: 0.5 hours to 20 hours.

Frequency of Response: Recordkeeping requirement; On occasion reporting requirement; Semi-annual requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 154(i) and 315 of the Communications Act of 1934, as amended.

Total Annual Burden: 984,293 hours.

Total Annual Cost: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: Section 315 of the Communications Act directs broadcast stations and cable operators to charge political candidates the ''lowest unit charge of the station'' for the same class and amount of time for the same period, during the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. 47 CFR 73.1942 requires broadcast licensees and 47 CFR 76.206 requires cable television systems to disclose any station practices offered to commercial advertisers that enhance the value of advertising spots and different classes of time (immediately preemptible,

preemptible with notice, fixed, fire sale, and make good). These rule sections also require licensees and cable TV systems to calculate the lowest unit charge. Broadcast stations and cable systems are also required to review their advertising records throughout the election period to determine whether compliance with these rule sections require that candidates receive rebates or credits. 47 CFR 76.1611 requires systems to disclose to candidates information about rates, terms, conditions and all value-enhancing discount privileges offered to commercial advertisers.

OMB Control Number: 3060–1089.

Title: Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers, CG Docket No. 03–123 and WC Docket No. 05–196, FCC 08–151.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Individuals or households; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 11 respondents; 1,680,044 responses.

Estimated Time per Response: 3 minutes (.05 hours) to 1 hour.

Frequency of Response: One-time, quarterly and on occasion reporting requirements; Recordkeeping requirement; Third party disclosure requirement.

Total Annual Burden: 98,616 hours.

Total Annual Cost: $4,224,346.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority is contained in sections 1, 2, 4(i), (4)(j), 225, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 225, 251, 303(r).

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because the Commission has no direct involvement in the collection of personally identifiable information (PII) from individuals and/or households.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On November 30, 2005, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Access to Emergency Services*, Notice of Proposed Rulemaking (VRS/IP Relay 911 *NPRM*), CG Docket No. 03–123, FCC 05–196, published at 71 FR 5221 (February 1, 2006), which addressed the issue of access to emergency services for Internet-based forms of Telecommunications Relay Services (TRS), namely Video Relay Service (VRS) and Internet Protocol (IP) Relay. The Commission sought to adopt means to ensure that such calls promptly reach the appropriate emergency service provider.

On May 8, 2006, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; Misuse of IP Relay Service and Video Relay Service*, Further Notice of Proposed Rulemaking *(IP Relay/VRS Misuse FNPRM)*, CG Docket No. 03–123, FCC 06–58, published at 71 FR 31131 (June 1, 2006), which sought further comment on whether IP Relay and VRS providers should be required to implement user registration systems and what information users should provide, as a means of curbing illegitimate IP Relay and VRS calls.

On May 9, 2006, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling and Further Notice of Proposed Rulemaking *(Interoperability Declaratory Ruling and FNPRM)*, CG Docket No. 03–123, FCC 06–57, published at 71 FR 30818 and 71 FR 30848 (May 31, 2006). In the *Interoperability Declaratory Ruling and FNPRM*, the Commission sought comment on the feasibility of establishing a single, open, and global database of proxy numbers for VRS users that would be available to all service providers, so that a hearing person can call a VRS user through any VRS provider, and without having first to ascertain the VRS user's current IP address.

On June 24, 2008, the Commission released *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking *(Report and Order)*, CG Docket No. 03–123 and WC Docket No. 05–196, FCC 08–151, addressing the issues raised in these notices. The *Report and Order* provides VRS and IP Relay users with a reliable and consistent means by which others (including emergency personnel) can identify or reach them by, among other things, integrating VRS and IP Relay users into the ten-digit, NANP numbering system.

First, to complete a telephone call to an Internet-based TRS user, a provider must have some method of logically associating the telephone number dialed by the caller to the Internet-based TRS user's device. That method, known as the TRS Numbering Directory, is a central database that maps each user's telephone number to routing information needed to find that user's device on the Internet. The *Report and Order* requires VRS and IP Relay providers to collect and maintain the routing information from their registered users and to provision that information to the TRS Numbering Directory so that this mapping can occur.

Second, because there is no reliable means for VRS and IP Relay providers, unlike wireline carriers, to automatically know the physical location of their users, the *Report and Order* requires VRS and IP Relay providers to collect and maintain the Registered Location of their registered users. And to ensure that authorities can retrieve a user's Registered Location (along with the provider's name and CA's identification number for callback purposes), the *Report and Order* requires VRS and IP Relay providers to provision that information into, or make that information available through, ALI databases across the country.

Third, to ensure that VRS and IP Relay users are aware of their providers' numbering and E911 service obligations and to inform those users of their providers' E911 capabilities, the *Report and Order* requires each VRS and IP Relay provider to post an advisory on its Web site, and in any promotional materials directed to consumers, addressing numbering and E911 services for VRS or IP Relay. Providers also must obtain and keep a record of affirmative acknowledgement from each of their registered users of having received and understood the user notification.

The new or modified information collection requirements are contained in 47 CFR 64.605(a) and (b), and 47 CFR 64.611(a), (b), (c) and (f), and subject to the PRA must be approved by the Office of Management and Budget before becoming effective.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–24002 Filed 10–8–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

September 30, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act (PRA) of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 8, 2008. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget, (202) 395–5887, or via fax at 202–395–5167 or via internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission, or an e-mail to *PRA@fcc.gov.* To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review'', (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Section 80.231, Technical Requirements for Class B Automatic Identification System (AIS) Equipment.

Form No.: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 20 respondents; 20 responses.

Estimated Time Per Response: 1 hour.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 20 hours.

Total Annual Cost: $25,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission adopted a Report and Order, FCC 08–208, WT Docket No. 04–344, which added new section 80.231 to Title 47 of the Code of Federal Regulations (CFR) (and is proposing this new information collection (IC)) to require manufacturers of Class B Automatic Identification System (AIS) transmitters for the Marine Radio Service include with each transmitting device a statement explaining how to enter static information accurately and a warning that entering inaccurate information is prohibited.

Prior to submitting a certification application for a Class B AIS device, the following information must be submitted in duplicate to the Commandant (CG–521), U.S. Coast Guard, 2100 2nd Street, SW., Washington, DC 20593–0001: (1) The name of the manufacturer or grantee and the model number of the AIS device; and (2) copies of the test report and test data obtained from the test facility showing that the device complies with the environmental and operational requirements identified in IEC 62287–1. After reviewing the information described in the certification application, the U.S. Coast Guard will issue a letter stating whether the AIS device satisfies all of the requirements specified in IEC 62287–1. A certification application for an AIS device submitted to the Commission must contain a copy of the U.S. Coast Guard letter stating that the device satisfies all of the requirements specified in IEC 62287–1, a copy of the technical test data, and the instruction manual(s).

The information collection requires that manufacturers of AIS transmitters label each transmitting device with a statement explaining how to enter static information and the following statement: *WARNING: It is a violation of the rules of the Federal Communications Commission to input an MMSI that has not been properly assigned to the end user, or to otherwise input any inaccurate data in this device.''*

These reporting and third party disclosure requirements aid the Commission monitoring advance marine vessel tracking and navigation information transmitted from Class B AIS devices to ensure that they are accurate and reliable, while promoting marine safety.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–24004 Filed 10–8–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collections Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

October 3, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden, invites the general public and other federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the

information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before December 8, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collections, contact Cathy Williams at (202) 418–2918 or send an e-mail to *PRA@fcc.gov* and/or *Cathy.Williams@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0546.

Title: Section 76.59, Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules.

Form Number: N/A

Type of Review: Extension of a currently approved collection

Respondents: Business or other for-profit entities.

Number of Respondents/Responses: 150.

Estimated Time Per Response: 4 to 80 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 2,880 hours.

Annual Cost Burden: $1,920,000.

Nature of Response: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Section 4(i) of the Communications Act of 1934, as amended, and Section 614 of the Cable Television Consumer Protection and Competition Act of 1992.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment(s): N/A.

Needs and Uses: 47 CFR 76.59 states (a) the Commission, following a written request from a broadcast station or a cable system, may deem that the television market of a particular commercial television broadcast station should include additional communities within its television market or exclude communities from such station's television market. In this respect, communities may be considered part of more than one television market.

OMB Control No.: 3060–0751.

Title: Reports Concerning International Private Lines Interconnected To the U.S. Public Switched Network.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents/Responses: 10 respondents; 10 responses.

Estimated Time Per Response: 8 hours.

Frequency of Response: Annual reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. Sections 154, 211, 219 and 220.

Total Annual Burden: 80 hours.

Annual Cost Burden: None.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality.

Needs and Uses: The Commission has determined that the authorized resale of international private lines interconnected to the U.S. public switched network would tend to divert international message telephone service (IMTS) traffic from the settlements process and increase the U.S. net settlements deficit. The information will be used by the Commission in reviewing the impact, if any, that end-user private line interconnections have on the Commission's international settlements policy. The data will also enhance the ability of both the Commission and interested parties to monitor the unauthorized resale of international private lines that are interconnected to the U.S. public switched network.

OMB Control No.: 3060–0768.

Title: 28 GHz Band Segmentation Plan Amending the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, to Reallocate the 29.5–30.0 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Services and for the Fixed Satellite Service.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents/Responses: 15 respondents; 60 responses.

Estimated Time Per Response: 1.5 hours.

Frequency of Response: On occasion reporting requirement; third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 154, 303(r) and 309(j).

Total Annual Burden: 90 hours.

Annual Cost Burden: $24,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality.

Needs and Uses: Applicants and licensees are required to provide the requested information to the Commission and other third parties whenever they seek authority to provide service in the 28 GHz band. If this information is compiled less frequently or not filed in conjunction with the Commission's rules, applicants and licensees will not obtain the authorization necessary to provide telecommunications services. Furthermore, the Commission would not be able to carry out its mandate as required by statute.

OMB Control No.: 3060–1035.

Title: Part 73, Subpart F International Broadcast Stations.

Form No.: FCC Forms 309, 310 and 311.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents/Responses: 54 respondents; 79 responses.

Estimated Time per Response: 2–6 hours.

Frequency of Response: On occasion, semi-annual, recordkeeping and annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. Sections 154, 155 and 303.

Total Annual Burden: 334 hours.

Annual Cost Burden: $194,275.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: In general, there is no need for confidentiality.

Needs and Uses: This information collection is used by the Commission to assign frequencies for use by international broadcast stations, to grant authority to operate such stations and to determine if interference or adverse propagation conditions exist that may impact the operation of such stations. The Commission collects this information pursuant to 47 CFR part 73, Subpart F. If the Commission did not collect this information, it would not be

in a position to effectively coordinate spectrum for international broadcasters or to act for entities in times of frequency interference or adverse propagation conditions.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–24007 Filed 10–8–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

October 3, 2008.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments December 8, 2008. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), (202) 395–5887, or via fax at 202–395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission (FCC). To submit your comments by e-mail send them to: *PRA@fcc.gov.*

To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review'', (3) click the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box and (6) when the list of FCC ICRs currently under review appears, look for the title of this ICR (or its OMB Control Number, if there is one) and then click on the ICR Reference Number to view detailed information about this ICR.

FOR FURTHER INFORMATION CONTACT: For additional information, send an e-mail to Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0093.

Title: Application for Renewal of Radio Station license for Experimental Radio Service.

Form No.: FCC Form 405.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 243 respondents; 243 responses.

Estimated Time Per Response: 2.25 hours.

Frequency of Response: On occasion and every two year reporting requirements and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection (IC) is contained in sections 4(i), 301, 302, 303(e), 303(f), and 303(r), of the Communications Act of 1934, as amended; 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f) and 303(r).

Total Annual Burden: 547 hours.

Annual Cost Burden: $63,180.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Applicants may request that any information supplied be withheld from public inspection, *e.g.,* granted confidentiality, pursuant to 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this information collection as an extension (no change in reporting and third party disclosure requirements) after this 60 day comment period in order to obtain the full three year clearance from the OMB. There is a slight adjustment increase to the annual estimated cost burden (+$1,180).

FCC Form 405 is used by the Experimental Radio Service to apply for renewal of radio station licenses at the FCC. Section 307 of the Communications Act of 1934, as amended, limits the term of radio licenses to five years and requires that written applications be submitted for renewal. The regular license period for stations in the Experimental Radio Service is either two or five years.

The information submitted on FCC Form 405 is used by Commission staff to evaluate the applicant/licensee's need for a license renewal. In performing this function, staff performs analysis of the renewal request as compared to the original license grant to ascertain if any changes are requested. If so, additional analysis is performed to determine if such changes met the requirements of the rules of the Experimental Radio Service for interference free operation. If needed, the collected information is used to coordinate such operation with other Commission bureaus or other Federal Agencies. All applications are also analyzed on their merits regarding whether they meet the general requirements for an Experimental license. These requirements are set out in 47 CFR part 5.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E8–24008 Filed 10–8–08; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Extension

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act (''PRA''). The FTC is seeking public comments on its proposal to extend through October 31, 2011, the current PRA clearance for information collection requirements contained in the Commission's Business Opportunity Rule (''Rule''). The current clearance expires on October 31, 2008.

DATES: Comments must be submitted on or before November 10, 2008.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to ''16 CFR Part 437: Paperwork Comment, FTC File No. P024404'' to facilitate the organization of comments. Please note that comments will be placed on the public record of this proceeding—including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*) — and therefore should not include any sensitive or confidential information. In particular, comments should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any ''[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential. . . .,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*http://secure.commentworks.com/ftc-bizopPRA*) (and following the instructions on the web-based form). To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink (*http://secure.commentworks.com/ftc-bizopPRA*) If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at *http://www.ftc.gov* to read the Notice and the news release describing it.

A comment filed in paper form should include the ''16 CFR Part 437: Paperwork Comment, FTC File No. P024404'' reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

All comments should additionally be submitted to: Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission. Comments should be submitted via facsimile to (202) 395-6974 because U.S. Postal Mail is subject to lengthy delays due to heightened security precautions.

FOR FURTHER INFORMATION CONTACT: Karen Hobbs, Attorney, Division of Marketing Practices, Bureau of Consumer Protection, (202) 326-3587, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington D.C. 20580.

SUPPLEMENTARY INFORMATION: On July 7, 2008, the FTC sought comment on the information collection requirements associated with the Business Opportunity Rule, 16 CFR Part 437 (Control Number: 3084-0142).[2] No comments were received. Pursuant to the OMB regulations, 5 CFR Part 1320, that implement the PRA, 44 U.S.C. 3501-3521, the FTC is providing this second opportunity for public comment while seeking OMB approval to extend the existing paperwork clearance for the Rule. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before November 10, 2008.

The Rule is designed to ensure that prospective purchasers of a business opportunity receive information that will help them evaluate the opportunity that is presented to them. Part 437 was promulgated in March of 2007, concurrently with the amendment of the Franchise Rule, Part 436. Part 437 mirrors the requirements and prohibitions of the original Franchise Rule, and imposes no additional disclosure or recordkeeping obligations or prohibitions.[3] The Rule requires business opportunity sellers to furnish to prospective purchasers a disclosure document that provides information relating to the seller, the seller's business, the nature of the proposed business opportunity, as well as additional information regarding any claims about actual or potential sales, income, or profits for a prospective business opportunity purchaser. The seller must also preserve information that forms a reasonable basis for such claims. These requirements are subject to the PRA. The FTC is seeking to extend the current PRA clearance to October 31, 2011.[4]

Estimated annual hours burden: 16,750 hours

Based on a review of trade publications and information from state regulatory authorities, staff believes that, on average, from year to year, there are approximately 2,500 business opportunity sellers, with perhaps about 10% of that total reflecting an equal amount of new and departing business entrants.

[1] FTC Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

[2] 73 FR 38451 (July 7, 2008).

[3] In March of 2008, the Commission published the Business Opportunity Rule Revised Notice of Proposed Rulemaking, 73 FR 16110 (March 26, 2008) (''Notice''). The Notice proposed amending the Business Opportunity Rule substantially, and would, among other things, reduce the number of required disclosures by sellers of business opportunities to prospective purchasers. Conversely, the Notice proposed amending the rule to expand the coverage of entities required to make disclosures to include a broader array of business opportunities than those covered by the original Franchise Rule. For now, however, only those businesses opportunities covered by the original Franchise Rule—such as vending machine and rack display opportunities—remain covered under part 437.

[4] The current clearance under recently assigned OMB Control Number 3084-0142 covers the terms of the original Franchise Rule as applied to business opportunity sellers. The portion of clearance applicable to franchisors under Part 436 is separately assigned to pre-existing OMB Control Number 3084-0107.

The burden estimates for compliance will vary depending on the particular business opportunity seller's prior experience with the original Franchise Rule. Staff estimates that 250 or so new business opportunity sellers will enter the market each year, requiring approximately 30 hours each to develop a Rule-compliant disclosure document. Thus, staff estimates that the cumulative annual disclosure burden for new business opportunity sellers will be approximately 7,500 hours. Staff further estimates that the remaining 2,250 established business opportunity sellers will require no more than approximately 3 hours each to update their disclosure document. Accordingly, the cumulative estimated annual disclosure burden for established business opportunity sellers will be approximately 6,750 hours.

Business opportunity sellers may need to maintain additional documentation for the sale of business opportunities in states not currently requiring these records as part of their regulation of business opportunity sellers. This might entail an additional hour of recordkeeping per year. Accordingly, staff estimates that business opportunity sellers will cumulatively incur approximately 2,500 hours of recordkeeping burden per year (2,500 business opportunity sellers x 1 hour).

Thus, the total burden for business opportunity sellers is approximately 16,750 hours (7,500 hours of disclosure burden for new business opportunity sellers + 6,750 hours of disclosure burden for established business opportunity sellers + 2,500 of recordkeeping burden for all business opportunity sellers).

Estimated annual labor cost: $3,595,000

Labor costs are determined by applying applicable wage rates to associated burden hours. Staff presumes an attorney will prepare or update the disclosure document at an estimated $250 per hour. As applied, this would yield approximately $3,562,500 in labor costs attributable to compliance with the Rule's disclosure requirements ((250 new business opportunity sellers x $250 per hour x 30 hours per seller) + (2,250 established business opportunity sellers x $250 per hour x 3 hours per seller)).

Staff anticipates that recordkeeping would be performed by clerical staff at approximately $13 per hour. At 2,500 hours per year for all affected business opportunity sellers (see above), this amounts to an estimated $32,500 of recordkeeping cost. Thus, the combined labor costs for recordkeeping and disclosure for business opportunity sellers is approximately $3,595,000.

Estimated non-labor cost: $3,887,500

Business opportunity sellers must also incur costs to print and distribute the disclosure document. These costs vary based upon the length of the disclosures and the number of copies produced to meet the expected demand. Staff estimates that 2,500 business opportunity sellers print and mail 100 documents per year at a cost of $15 per document, for a total cost of $3,750,000 (2,500 business opportunity sellers x 100 documents per year x $15 per document).

Business opportunity sellers must also complete and disseminate an FTC-required cover sheet that identifies the business opportunity seller, the date the document is issued, a table of contents, and a notice that tracks the language specifically provided in the Rule. Although some of the language in the cover sheet is supplied by the government for the purpose of disclosure to the public, and is thus excluded from the definition of ''collection of information'' under the PRA, *see* 5 CFR 1320.3(c)(2), there are residual costs to print and mail these cover sheets, including within them the presentation of related information beyond the supplied text. Staff estimates that 2,500 business opportunity sellers complete and disseminate 100 cover sheets per year at a cost of approximately $0.55 per cover sheet, or a total cost of approximately $137,500 (2,500 business opportunity sellers x 100 cover sheets per year x $0.55 per cover sheet).

Accordingly, the cumulative non-labor cost incurred by business opportunity sellers each year attributable to compliance will be approximately $3,887,500 ($3,750,000 for printing and mailing documents + $137,500 for completing and mailing cover sheets).

William Blumenthal

General Counsel

[FR Doc. E8–24021 Filed 10–8–08: 8:45 am]

[BILLING CODE 6750–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Meeting of the National Advisory Council for Healthcare Research and Quality

AGENCY: Agency for Healthcare Research and Quality (AHRQ).

ACTION: Notice of public meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. app. 2, this notice announces a meeting of the National Advisory Council for Healthcare Research and Quality.

DATES: The meeting will be held on Friday, November 7, 2008, from 9 a.m. to 3 p.m.

ADDRESSES: The meeting will be held at the Eisenberg Conference Center, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850.

FOR FURTHER INFORMATION CONTACT: Deborah Queenan, Coordinator of the Advisory Council, at the Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850, (301) 427–1330. For press-related information, please contact Karen Migdail at (301) 427–1855.

If sign language interpretation or other reasonable accommodation for a disability is needed, please contact Mr. Donald L. Inniss, Director, Office of Equal Employment Opportunity Program, Program Support Center, on (301) 443–1144, no later than October 27, 2008. The agenda, roster, and minutes are available from Ms. Bonnie Campbell, Committee Management Officer, Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850. Ms. Campbell's phone number is (301) 427–1554.

SUPPLEMENTARY INFORMATION:

I. Purpose

The National Advisory Council for Healthcare Research and Quality was established in accordance with Section 921 (now Section 931) of the Public Health Service Act 42 U.S.C. 299c. In accordance with its statutory mandate, the Council is to advise the Secretary of the Department of Health and Human Services and the Director, Agency for Healthcare Research and Quality (AHRQ), on matters related to actions of AHRQ to enhance the quality, improve the outcomes, and reduce the costs of health care services; improve access to such services through scientific research; and promote improvements in clinical practice and in the organization, financing, and delivery of health care services.

The Council is composed of members of the public, appointed by the Secretary, and Federal ex-officio members.

II. Agenda

On Friday, November 7, the Council meeting will convene at 9 a.m., with the

call to order by the Council Chair and approval of previous Council minutes. The AHRQ director will present her update on current research, programs, and initiatives. The agenda will include a discussion on Patient-centered Health Care and Cost Effective Health Care by the Council.

The final agenda will be available on the AHRQ Web site at *http://www.ahrq.gov* no later than November 3, 2008.

Dated: October 1, 2008.

Carolyn M. Clancy,

Director.

[FR Doc. E8–23732 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: State Developmental Disabilities Council 5-Year State Plan.

OMB No.: 0980–0162.

Description: A Plan developed by the State Council on Developmental Disabilities is required by federal statute. Each State Council on Developmental Disabilities must develop the plan, provide for public comments in the State, provide for approval by the State's Governor, and finally submit the plan on a five-year basis. On an annual basis, the Council must review the plan and make any amendments. The State Plan will be used (1) By the Council as a planning document; (2) by the citizenry of the State as a mechanism for commenting on the plans of the Council; and (3) by the Department as a stewardship tool, for ensuring compliance with the Developmental Disabilities Assistance and Bill of Rights Act, as one basis for providing technical assistance (*e.g.*, during site visits), and as a support for management decision making.

Respondents: State Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
State Developmental Disabilities Council 5–Year State Plan	55	1	367	20,185

Estimated Total Annual Burden Hours: 20,185.

In compliance with the requirements of Section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: October 3, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–23881 Filed 10–8–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Proposed Projects

Title: Financial Status Reporting Form for State Councils on Developmental Disabilities Program.

OMB No.: 0980–0212.

Description: For the program of the State Councils on Developmental Disabilities, funds are awarded to State agencies contingent on fiscal requirements in subtitle B of the Developmental Disabilities Assistance and Bill of Rights Act. The SF–269, ordinarily mandated in the revised OMB Circular A–102, provides no accounting breakouts necessary for proper stewardship. Consequently, the proposed streamlined form will substitute for the SF–269 and will allow compliance monitoring and proactive compliance maintenance and technical assistance.

Respondents: State Councils and Designated State Agencies.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of esponses per espondent	Average burden hours per response	Total burden hours
Financial Status Reporting Form for State Councils on Developmental Disabilities Program	55	3	5.10	841.50

Estimated Total Annual Burden Hours: 841.50.

In compliance with the requirements of section 506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. E-mail address: *infocollection@acf.hhs.gov*. All requests should be identified by the title of the information collection.

The Department specifically requests comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Dated: October 3, 2008.

Janean Chambers,

Reports Clearance Officer.

[FR Doc. E8–23884 Filed 10–8–08; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–1999–D–0128] (formerly Docket No. 1999D–2013)

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Guidance for Industry: Cooperative Manufacturing Arrangements for Licensed Biologics

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Guidance for Industry: Cooperative Manufacturing Arrangements for Licensed Biologics'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Jonna Capezzuto, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3794.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 19, 2007 (72 FR 65034), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. 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. OMB has now approved the information collection and has assigned OMB control number 0910–0629. The approval expires on September 30, 2011. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: September 29, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–23907 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0314]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Recall Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by November 10, 2008.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–6974, or e-mailed to *baguilar@omb.eop.gov*. All comments should be identified with the OMB control number 0910–0249. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Berbakos, Office of Information Management (HFA–710), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–796–3792.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

FDA Recall Regulations—21 CFR Part 7—(OMB Control Number 0910–0249—Extension)

Section 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371) and part 7, subpart C (21 CFR part 7, subpart C), set forth the recall regulations (guidelines) and provide guidance to manufacturers on recall responsibilities. The guidelines apply to all FDA regulated products (i.e., food, including animal feed; drugs, including animal drugs; medical devices, including in vitro diagnostic products; cosmetics; and biological products intended for human use). These responsibilities include: (1) developing a recall strategy that requires time by the firm to determine the actions or procedures required to manage the recall (§ 7.42); (2) providing FDA with complete details of the recall including reason(s) for the removal or correction, risk evaluation, quantity produced, distribution information, firm's recall strategy, a copy of any recall communication(s), and a contact official (§ 7.46); (3) notifying direct accounts of the recall, providing guidance regarding further distribution, giving instructions as to what to do with the product, providing recipients with a ready means of reporting to the recalling firm (§ 7.49); (4) submitting periodic status reports so that FDA may assess the progress of the recall (status report information may be determined by, among other things, evaluation return reply cards, effectiveness checks, and product returns) (§ 7.53); and (5) providing the opportunity for a firm to request in writing that FDA terminate the recall (§ 7.55).

A search of the FDA database was performed to determine the number of recalls that took place during fiscal year 2007. The resulting number of recalls from this database search (2,166) is used in estimating the current annual reporting burden for this report. FDA

estimates the total annual industry burden to collect and provide the previous information to 216,600 burden hours.

Table 1 of this document is a summary of the estimated annual burden hours for recalling firms (manufacturers, processors, and distributors) to comply with the voluntary reporting requirements of FDA's recall regulations.

In the **Federal Register** of June 3, 2008 (73 FR 31696), FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

Recognizing that there may be a vast difference in the information collection and reporting time involved in different recalls of FDA's regulated products, FDA estimates on average the burden of collection for recall information to be as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Recall strategy 7.42	2,166	1	2,166	20	43,320
Firm initiated recall and recall communications 7.46 and 7.49	2,166	1	2,166	30	64,980
Recall status reports and followup 7.53	2,166	4	8,664	10	86,640
Termination of a recall 7.55(b)	2,166	1	2,166	10	21,660
Total					216,600

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The annual reporting burdens are explained as follows:

Reporting

A. Recall Strategy

Request firms develop a recall strategy including provision for public warnings and effectiveness checks. Under this portion of the collection of information, the agency estimates it will receive 2,166 responses annually.

B. Firm Initiated Recall and Recall Communications

Request firms voluntarily remove or correct foods and drugs (human or animal), cosmetics, medical devices, and biologicals to immediately notify the appropriate FDA district office of such actions. The firm is to provide complete details of the recall reason, risk evaluation, quantity produced, distribution information, firms' recall strategy and a contact official as well as requires firms to notify their direct accounts of the recall and to provide recipients with a ready means of reporting to the recalling firm. Under these portions of the collection of information, the agency estimates it will receive 2,166 responses annually for each.

C. Recall Status Reports

Request that recalling firms provide periodic status reports so FDA can ascertain the progress of the recall. This collection of information will generate approximately 8,664 responses annually.

D. Termination of a Recall

Provide the firms an opportunity to request in writing that FDA end the recall. The agency estimates it will receive 2,166 responses annually.

Dated: October 1, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–23910 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0038]

Science Board to the Food and Drug Administration; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Science Board to the Food and Drug Administration (Science Board).

General Function of the Committee: The Science Board provides advice primarily to the Commissioner of Food and Drugs and other appropriate officials on specific complex and technical issues as well as emerging issues within the scientific community in industry and academia. Additionally, the Science Board provides advice to the agency on keeping pace with technical and scientific evolutions in the fields of regulatory science, on formulating an appropriate research agenda, and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of agency sponsored intramural and extramural scientific research programs.

Date and Time: The meeting will be held on Friday, October 31, 2008, from 8 a.m. to 3:30 p.m.

Location: Hilton, Washington DC North/Gaithersburg Hilton, 620 Perry Pkwy., Gaithersburg, MD 20877.

Contact Person: Carlos Peña, Office of the Commissioner, Food and Drug Administration (HF–33), 5600 Fishers Lane, Rockville, MD 20857, 301–827–6687, *carlos.peña@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512603. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: The Science Board will hear about and discuss a review of the draft assessment of Bisphenol A (BPA) for use in food contact applications by the

Science Board BPA Subcommittee. The Science Board will discuss 2009 agenda topics. The Science Board will also hear an overview of current methods for detection of contaminants in FDA-regulated products.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2008 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before October 24, 2008. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 16, 2008. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 17, 2008.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Carlos Peña at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: October 3, 2008.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E8–24051 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–D–0520]

Draft Guidance for Industry: Potency Tests for Cellular and Gene Therapy Products; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft document entitled ''Guidance for Industry: Potency Tests for Cellular and Gene Therapy Products'' dated October 2008. The draft guidance document provides manufacturers of cellular and gene therapy (CGT) products with recommendations for developing tests to measure potency. The recommendations are intended to clarify the potency information needed to support an Investigational New Drug Application (IND) or a Biologics License Application (BLA).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit written or electronic comments on the draft guidance by January 7, 2009.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Communication, Training, and Manufacturers Assistance (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 301–827–1800. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

Submit written comments on the draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Guidance for Industry: Potency Tests for Cellular and Gene Therapy Products'' dated October 2008. The draft guidance document provides manufacturers of CGT products with recommendations for developing tests to measure potency. The recommendations are intended to clarify the potency information needed to support an IND or a BLA. Because potency measurements are designed specifically for a particular product, the guidance does not make recommendations regarding specific types of potency assays, nor does it propose criteria for product release.

The draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent FDA's current thinking on this topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirement of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

The draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 211 has been approved under 0910–0139, expiration date September 20, 2008; the collections of information in 21 CFR part 312 has been approved under 0910–0014, expiration date May 31, 2009; the collections of information in 21 CFR part 601 has been approved under 0910–0338, expiration date June 30, 2010.

III. Comments

The draft guidance is being distributed for comment purposes only and is not intended for implementation

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

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/cber/guidelines.htm* or *http://www.regulations.gov*.

Dated: October 1, 2008.

Jeffrey Shuren,

Associate Commissioner for Policy and Planning.

[FR Doc. E8–24052 Filed 10–8–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: Health Professions Student Loan (HPSL) Program and Nursing Student Loan (NSL) Program Administrative Requirements (Regulations and Policy) (OMB No. 0915–0047)—Extension

The regulations for the Health Professions Student Loan (HPSL) Program and Nursing Student Loan (NSL) Program contain a number of reporting and recordkeeping requirements for schools and loan applicants. The requirements are essential for assuring that borrowers are aware of rights and responsibilities, that schools know the history and status of each loan account, that schools pursue aggressive collection efforts to reduce default rates, and that they maintain adequate records for audit and assessment purposes. Schools are free to use improved information technology to manage the information required by the regulations.

The annualized estimates of burden are as follows:

RECORDKEEPING REQUIREMENTS

Regulatory/section requirements	Number of recordkeepers	Hours per year	Total burden hours
HPSL Program:			
57.206(b)(2), Documentation of Cost of Attendance	432	1.17	505
57.208(a), Promissory Note	432	1.25	540
57.210(b)(1)(i), Documentation of Entrance Interview	432	1.25	540
57.210(b)(1)(ii), Documentation of Exit Interview	*472	0.33	156
57.215(a)&(d), Program Records	*472	10	4,720
57.215(b), Student Records	*472	10	4,720
57.215(c), Repayment Records	*472	18.75	8,850
HPSL Subtotal	472		20,031
NSL Program:			
57.306(b)(2)(ii), Documentation of Cost of Attendance	300	0.3	90
57.308(a), Promissory Note	300	0.5	150
57.310(b)(1)(i), Documentation of Entrance Interview	300	0.5	150
57.310(b)(1)(ii), Documentation of Exit Interview	*435	0.17	74
57.315(a)(1)&(a)(4), Program Records	*435	5	2,175
57.315(a)(2), Student Records	*435	1	435
57.315(a)(3), Repayment Records	*435	2.51	1,092
NSL Subtotal	435		4,166

*Includes active and closing schools.

HPSL data includes active and closing Loans for Disadvantaged Students (LDS) program schools.

REPORTING REQUIREMENTS

Regulatory/section requirements	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hour burden
HPSL Program:					
57.206(a)(2), Student Financial Aid Transcript	4,600	1	4,670	.25	1,150
57.208(c), Loan Information Disclosure	432	68.73	29,692	.0833	2,473
57.210(b)(1)(i), Entrance Interview	432	68.73	29,692	0.167	4,959
57.210(b)(1)(ii), Exit Interview	*472	12	5,664	0.5	2,832

REPORTING REQUIREMENTS—Continued

Regulatory/section requirements	Number of respondents	Responses per respondent	Total annual responses	Hours per response	Total hour burden
57.210(b)(1)(iii), Notification of Repayment	*472	30.83	14,552	0.167	2,430
57.210(b)(1)(iv), Notification During Deferment	*472	24.32	11,479	0.0833	957
57.210(b)(1)(vi), Notification of Delinquent Accounts	*472	10.28	4,853	0.167	811
57.210(b)(1)(x), Credit Bureau Notification	*472	8.03	3,790	0.6	2,274
57.210(b)(4)(i), Write-off of Uncollectible Loans	20	1.00	20	3.0	60
57.211(a) Disability Cancellation	10	1	10	.75	8
57.215(a)(2), Administrative Hearings	0	0	0	0	0
57.215(a)(d), Administrative Hearings	0	0	0	0	0
HPSL Subtotal	7,854		104,352		17,954
NSL Program:					
57.306(a)(2), Student Financial Aid Transcript	4,100	1	4,100	0.25	1,025
57.310(b)(1)(i), Entrance Interview	300	23.51	7,053	0.167	1,178
57.310(b)(1)(ii), Exit Interview	*435	3.77	1,640	0.5	820
57.301(b)(1)(iii), Notification of Repayment	*435	6.18	2,688	0.167	449
57.310(b)(1)(iv), Notification During Deferment	*435	0.65	283	0.083	24
57.310(b)(1)(vi), Notification of Delinquent Accounts	*435	4.61	2,006	0.167	335
57.310(b)(1)(x), Credit Bureau Notification	*435	8.3	3,611	0.6	2,167
57.310(b)(4)(i), Write-off of Uncollectible Loans	20	1.0	20	3.5	70
57.311(a), Disability Cancellation	10	1.0	10	0.8	8
57.315(a)(1)(ii), Administrative Hearings	0	0	0	0	0
57.316(a)(d), Administrative Hearings	0	0	0	0	0
NSL Subtotal	6,605		21,411		6,076

* Includes active and closing schools.

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the attention of the desk officer for HRSA.

Dated: October 3, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–23912 Filed 10–8–08; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review: Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget (OMB), in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: Application for Certification and Recertification as a Federally Qualified Health Center (FQHC) Look-Alike (OMB No. 0915–0142): Revision

The Health Resources and Services Administration (HRSA) collects applicant information for organizations applying for certification or recertification as a Federally Qualified Health Center (FQHC) Look-Alike for purposes of cost-based reimbursement under the Medicaid and Medicare programs. The information contained in the application guidance reflects legislative, policy, and technical requirements for applicant organizations.

The estimated burden is as follows:

Instrument	Number of respondents	Responses per respondent	Hours per response	Total burden hours
Application	40	1	100	4,000
Recertification	100	1	15	1,500
Total	140	.....	.....	5,500

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to the desk officer for HRSA, either by e-mail to *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974. Please direct all correspondence to the ''attention of the desk officer for HRSA.''

Dated: September 30, 2008.

Alexandra Huttinger,

Director, Division of Policy Review and Coordination.

[FR Doc. E8–23914 Filed 10–8–08; 8:45 am]

BILLING CODE 4165–15–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; Expedited Molecular and Cellular Mechanisms.

Date: October 27–28, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Richard Panniers, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MSC 7890, Bethesda, MD 20892, 301–435–1741, *pannierr@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: Center for Scientific Review Special Emphasis Panel; Molecular Basis of Neuronal Development and Disorders.

Date: October 28, 2008.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (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: Center for Scientific Review Special Emphasis Panel; Small Business Grant Applications: Immunology.

Date: October 31, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: The River Inn, 924 25th Street, N.W., Washington, DC 20037.

Contact Person: Stephen M. Nigida, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4212, MSC 7812, Bethesda, MD 20892, 301–435–1222, *nigidas@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Bacterial Pathogenesis.

Date: November 13–14, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bahia Resort Hotel, 998 West Mission Bay Drive, San Diego, CA 92109.

Contact Person: Rolf Menzel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, MSC 7808, Bethesda, MD 20892, 301–435–0952, *menzelro@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business Hematology.

Date: November 14, 2008.

Time: 8 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Delia Tang, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4126, MSC 7802, Bethesda, MD 20892, 301–435–2506, *tangd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Cell Biology SBIR/STTR.

Date: November 17–18, 2008.

Time: 8 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Alexandra M. Ainsztein, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5144, MSC 7840, Bethesda, MD 20892, 301–451–3848, *ainsztea@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Metal Ion Homeostasis.

Date: November 17–18, 2008.

Time: 10 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Janet M. Larkin, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1102, MSC 7840, Bethesda, MD 20892, 310–435–1026, *larkinja@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Digestive Sciences.

Date: November 18–19, 2008.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bonnie L. Burgess-Beusse, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2191C, MSC 7818, Bethesda, MD 20892, 301–435–1783, *beusseb@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; CMBK Member Conflicts B.

Date: November 18, 2008.

Time: 2 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: Krystyna E. Rys-Sikora, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4016J, MSC 7814, Bethesda, MD 20892, 301–451–1325, *ryssokok@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; ZRG1 CB P 40 P: Program Project: Motor Proteins.

Date: November 20, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Elena Smirnova, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187, MSC 7840, Bethesda, MD 20892, 301–435–1236, *smirnove@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Special Topics in Biological Sciences.

Date: November 20–21, 2008.

Time: 11 a.m. to 11 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Donald L. Schneider, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5160, MSC 7842, Bethesda, MD 20892, (301) 435–1727, *schneidd@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Human Microbiome Project References.

Date: November 20, 2008.

Time: 2 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: Michael A. Marino, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2216, MSC 7890, Bethesda, MD 20892, (301) 435–0601, *marinomi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Urology and Kidney Development: Small Business and Member Conflicts.

Date: November 20, 2008.

Time: 12 p.m. to 2 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: Shirley Hilden, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7814, Bethesda, MD 20892, (301) 435–1198, *hildens@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Instrumentation.

Date: November 21, 2008.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Marc Rigas, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7849, Bethesda, MD 20892, 301–402–1074, *rigasm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93,333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–23780 Filed 10–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Alternative Medicine Special Emphasis Panel, Omics and Variable Responses to CAM: Secondary Analysis of CAM Clinical Trials.

Date: December 15, 2008.

Time: 12 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Martina Schmidt, PhD, Scientific Review Officer, Office of Scientific Review, National Center for Complementary, and Alternative Medicine, NIH, 6707 Democracy Blvd., Suite 401, Bethesda, MD 20892, 301–594–3456, *schmidma@mail.nih.gov.*

Dated: October 3, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–24053 Filed 10–8–08; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Nursing Research Special Emphasis Panel, October 17, 2008, 10 a.m. to October 17, 2008, 12 p.m. Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD, 20814 which was published in the **Federal Register** on September 8, 2008, FR Doc. E8–20642.

Time change from 10 a.m.–12 p.m. to 8 a.m.–9:30 a.m. The meeting is closed to the public.

Dated: October 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–23781 Filed 10–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Nursing Research Initial Review Group, October 16, 2008, 8 a.m. to October 17, 2008, 5 p.m. Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD, 20814 which was published in the **Federal Register** on September 9, 2008, FR Doc. E8–20642.

Date change to October 16, 2008 only and time change to 8 a.m.–6 p.m. The meeting is closed to the public.

Dated: October 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–23782 Filed 10–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Environmental Health Sciences Review Committee; EHS Training Grants Review Meeting.

Date: November 12–13, 2008.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Sheraton Chapel Hill, One Europa Drive, Chapel Hill, NC 27517.

Contact Person: Linda K Bass, PhD, Scientific Review Administrator, Nat'l. Institute of Environmental Health Sciences, P.O. Box 12233, MD EC–24, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: October 1, 2008.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E8–23783 Filed 10–8–08; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the laboratories currently certified to meet the standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908), on September 30, 1997 (62 FR 51118), and on April 13, 2004 (69 FR 19644).

A notice listing all currently certified laboratories is published in the **Federal Register** during the first week of each month. If any laboratory's certification is suspended or revoked, the laboratory will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any laboratory has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end, and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. Subpart C of the Mandatory Guidelines, ''Certification of Laboratories Engaged in Urine Drug Testing for Federal Agencies,'' sets strict standards that laboratories must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies. To become certified, an applicant laboratory must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a laboratory must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories which claim to be in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with Subpart C of the Mandatory Guidelines dated April 13, 2004 (69 FR 19644), the following laboratories meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016. (Formerly: Bayshore Clinical Laboratory)

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150.

Aegis Sciences Corporation, 345 Hill Ave., Nashville, TN 37210, 615–255–2400. (Formerly: Aegis Analytical Laboratories, Inc.)

Baptist Medical Center—Toxicology Laboratory, 9601 I–630, Exit 7, Little Rock, AR 72205–7299, 501–202–2783. (Formerly: Forensic Toxicology Laboratory Baptist Medical Center)

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Diagnostic Services, Inc., dba DSI, 12700 Westlinks Drive, Fort Myers, FL 33913. 239–561–8200/800–735–5416.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974, 215–674–9310.

DynaLIFE Dx*, 10150–102 St., Suite 200, Edmonton, Alberta, Canada T5J 5E2, 780–451–3702/800–661–9876. (Formerly: Dynacare Kasper Medical Laboratories)

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Gamma-Dynacare Medical Laboratories*, a Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630.

Kroll Laboratory Specialists, Inc., 1111 Newton St., Gretna, LA 70053, 504–

361–8989/800–433–3823. (Formerly: Laboratory Specialists, Inc.)

Kroll Laboratory Specialists, Inc., 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130. (Formerly: Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.)

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986. (Formerly: Roche Biomedical Laboratories, Inc.)

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984. (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group)

Laboratory Corporation of America Holdings, 550 17th Ave., Suite 300, Seattle, WA 98122, 206–923–7020/800–898–0180. (Formerly: DrugProof, Division of Dynacare/Laboratory of Pathology, LLC; Laboratory of Pathology of Seattle, Inc.; DrugProof, Division of Laboratory of Pathology of Seattle, Inc.)

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339. (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center)

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845. (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.)

Maxxam Analytics*, 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8, 905–817–5700. (Formerly: Maxxam Analytics Inc., NOVAMANN (Ontario), Inc.)

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515.

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774. (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory)

Oregon Medical Laboratories, 123 International Way, Springfield, OR 97477, 541–341–8092.

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942. (Formerly: Centinela Hospital Airport Toxicology Laboratory)

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891 x7.

Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121, 858–643–5555.

Quest Diagnostics Incorporated, 3175 Presidential Dr., Atlanta, GA 30340, 770–452–1590/800–729–6432. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216. (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories)

Quest Diagnostics Incorporated, 7600 Tyrone Ave., Van Nuys, CA 91405, 866–370–6699/818–989–2521. (Formerly: SmithKline Beecham Clinical Laboratories)

S.E.D. Medical Laboratories, 5601 Office Blvd., Albuquerque, NM 87109, 505–727–6300/800–999–5227.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x276.

Southwest Laboratories, 4645 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027.

Sparrow Health System, Toxicology Testing Center, St. Lawrence Campus, 1210 W. Saginaw, Lansing, MI 48915, 517–364–7400. (Formerly: St. Lawrence Hospital & Healthcare System)

St. Anthony Hospital Toxicology Laboratory, 1000 N. Lee St., Oklahoma City, OK 73101, 405–272–7052.

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273.

Toxicology Testing Service, Inc., 5426 N.W. 79th Ave., Miami, FL 33166, 305–593–2260.

US Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St., Fort George G. Meade, MD 20755–5235, 301–677–7085.

The following laboratory will be voluntarily withdrawing from the National Laboratory Certification Program on October 15, 2008: Laboratory Corporation of America Holdings, 13112 Evening Creek Drive, Suite 100, San Diego, CA 92128, 858–668–3710/800–882–7272. (Formerly: Poisonlab, Inc.)

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 13, 2004 (69 FR 19644). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Elaine Parry,

Acting Director, Office of Program Services, SAMHSA.

[FR Doc. E8–24129 Filed 10–8–08; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2008–0062]

Science and Technology (S&T) Directorate; Submission for Review; Information Collection Request for the DHS S&T Project 25 (P25) Compliance Assessment Program (CAP)

AGENCY: Science and Technology Directorate, DHS.

ACTION: 60-day Notice and request for comment.

SUMMARY: The Department of Homeland Security (DHS) invites the general public to comment on a new data collection form for the DHS Science and Technology Directorate's Project 25 (P25) Compliance Assessment Program (CAP): Supplier's Declaration of Compliance (SDoC) (DHS Form 10044) and Summary Test Report. The attacks of September 11, 2001, and the destruction of Hurricane Katrina made apparent the need for emergency response radio systems that can interoperate, regardless of which organization manufactured the equipment. In response, and per congressional direction, DHS and the National Institute of Standards and Technology (NIST) developed the P25 CAP to improve the emergency response community's confidence in purchasing land mobile radio (LMR) equipment built to P25 LMR standards. The P25 CAP establishes a process for ensuring that equipment complies with P25 standards and is capable of interoperating across manufacturers.

The Department of Homeland Security needs to be able to collect essential information from manufacturers on their products that have met P25 standards as demonstrated through the P25 CAP. Equipment suppliers will provide information to publicly attest to their products' compliance with a specific set of P25 standards. Accompanied by a Summary Test Report that substantiates this declaration, the SDoC constitutes a company's formal, public attestation of compliance with the standards for the equipment. In providing this information, companies will consent to making this information public. In turn, the emergency response community will use this information to identify P25-compliant communications systems.

The P25 CAP Program Manager will perform a simple administrative review to ensure the documentation is complete and accurate in accordance with the current P25 CAP processes. This notice and request for comments is required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Comments are encouraged and will be accepted until December 8, 2008. Comments: Interested persons are invited to submit written comments on the proposed information collection. Comments should be addressed to the PRA Coordinator for the Department of Homeland Security, Science & Technology Directorate, and sent via electronic mail to *michael.bowerbank@associates.dhs.gov* or faxed to 202–254–6171. Please include docket number [DHS–2008–0062] in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Michael Bowerbank, 202–254–6895 (**Note**: This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The SDoC and Summary Test Report forms will be posted on the SAFECOM Web site at *http://www.safecomprogram.gov/SAFECOM/currentprojects/project25cap/project25cap.htm.* The forms will be available in Adobe PDF format. The supplier may complete the forms electronically or by hand. The completed forms may then be submitted via fax, e-mail, or mail to the Office for Interoperability and Compatibility P25 CAP Program Manager.

Overview of Information Collection:

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Project 25 Compliance Assessment Program *Agency Form Number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* DHS Science & Technology Directorate, DHS Form 10044 (04/08).

(3) *Affected public who will be asked or required to respond, as well as a brief abstract:* Businesses; the data will be gathered from manufacturers of radio systems who wish to declare that their products are compliant with P25 standards for radio systems.

(4) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

a. *Estimate of the total number of respondents:* 10.

b. *An estimate of the time for an average respondent to respond:* 1.0 burden hour.

Dated: September 18, 2008.

Kenneth D. Rogers,

Chief Information Officer, Science and Technology Directorate, Department of Homeland Security.

[FR Doc. E8–23901 Filed 10–8–08; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Accreditation and Approval of Intertek USA, Inc., as a Commercial Gauger and Laboratory

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of accreditation and approval of Intertek USA, Inc., as a commercial gauger and laboratory.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 151.12 and 19 CFR 151.13, Intertek USA, Inc., 801 West Orchard St., Suite 5, Bellingham, WA 98225, has been approved to gauge and accredited to test petroleum and petroleum products, organic chemicals and vegetable oils for customs purposes, in accordance with the provisions of 19 CFR 151.12 and 19 CFR 151.13. Anyone wishing to employ this entity to conduct laboratory analyses and gauger services should request and receive written assurances from the entity that it is accredited or approved by the U.S. Customs and Border Protection to conduct the specific test or gauger service requested. Alternatively, inquiries regarding the specific test or gauger service this entity is accredited or approved to perform may be directed to the U.S. Customs and Border Protection by calling (202) 344–1060. The inquiry may also be sent to *cbp.labhq@dhs.gov.* Please reference the Web site listed below for a complete listing of CBP approved gaugers and accredited laboratories.

http://cbp.gov/xp/cgov/import/operations_support/labs_scientific_svcs/commercial_gaugers/

DATES: The accreditation and approval of Intertek USA, Inc., as commercial gauger and laboratory became effective on March 14, 2007. The next triennial inspection date will be scheduled for March 2010.

FOR FURTHER INFORMATION CONTACT: Randall Breaux, Laboratories and Scientific Services, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Suite 1500N, Washington, DC 20229, 202–344–1060.

Dated: October 2, 2008.

Ira S. Reese,

Executive Director, Laboratories and Scientific Services.

[FR Doc. E8–24041 Filed 10–8–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Customs and Border Protection

Notice of Revocation of Customs Broker License

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: General Notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 U.S.C. 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker license is canceled with prejudice.

Name	License No.	Issuing port
Sherri N. Boynton	10691	Los Angeles.

Dated: September 24, 2008.

Daniel Baldwin,

Assistant Commissioner, Office of International Trade.

[FR Doc. E8–24049 Filed 10–8–08; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5220–C–04]

Notice of Funding Availability (NOFA) for the Continuum of Care Homeless Assistance Program: Extension of Application Due Date

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice of Funding Availability (NOFA), Extension of Application Due Date.

SUMMARY: On July 10, 2008, HUD published the NOFA for the Continuum of Care (CoC) Homeless Assistance Program. Through this NOFA, HUD is making available approximately $1.42 billion in Fiscal Year (FY) 2008 for the CoC program. On August 13, 2008, HUD published a notice that established the deadline date for the submission of applications and corrected or clarified portions of the CoC NOFA. Since that date, Hurricane Ike has greatly impacted Continuums of Care in Texas, Louisiana and other places. In response to this disaster, today's publication extends the deadline date for the submission of applications.

DATES: The application deadline date for the CoC NOFA is Thursday, October 23, 2008. Electronic applications must be received by *e-snaps* by 4 p.m. eastern time on the deadline date. HUD will close *e-snaps* at 4:01 p.m. eastern time. Similarly, paper applications from applicants granted a waiver from the electronic application submission requirement must be received by HUD by 4 p.m. eastern time on the deadline date.

FOR FURTHER INFORMATION CONTACT: Individuals may direct questions regarding the CoC NOFA to the HUD Field Office serving their area, at the telephone numbers shown in HUD's FY2008 Notice of Funding Availability (NOFA); Policy Requirements and General Section to HUD's FY2008 NOFAs for Discretionary Programs (General Section) published on March 19, 2008 (73 FR 14883), or may contact the *e-snaps* Help Desk at 1–877–6esnaps (1–877–637–6277). Individuals who are hearing- or speech-impaired should use the Information Relay Service at 1–800–877–8339. These are toll-free numbers.

SUPPLEMENTARY INFORMATION:

On April 30, 2008 (73 FR 23483), HUD published its Notice of FY2008 Opportunity to Register and Other Important Information for Electronic Application Submission for Continuum of Care Homeless Assistance Programs (CoC Early Registration Notice). The CoC Early Registration Notice alerted the public that HUD would require Continuums of Care to submit applications electronically, using *e-snaps*, an electronic system separate from Grants.gov. On July 10, 2008 (73 FR 39840), HUD published its CoC NOFA, making available approximately $1.42 billion in FY 2008 for the CoC program. The purpose of the CoC program is to reduce the incidence of homelessness in communities by assisting homeless individuals and families to move to self sufficiency and permanent housing. In the July 10, 2008, CoC NOFA, HUD stated that the application portion of the *e-snaps* system had not yet been launched and that HUD, as a result, was unable to establish a due date for the FY2008 CoC competition. HUD stated, however, that it would announce the application due date for the program through a separate **Federal Register** notice. On August 13, 2008 (73 FR 47205), HUD published a notice establishing the deadline date for the submission of applications and correcting or clarifying portions of the CoC NOFA published on July 10, 2008.

Today's publication extends the deadline date for applications to Thursday, October 23, 2008. The change in the deadline date for applications is in response to Hurricane Ike, which severely impacted Continuums of Care in Texas, Louisiana and other areas, and made it difficult for applicants in those localities to meet the previously established deadline. Because the new *e-snaps* system currently does not allow for the application to be available to a subset of applicants at any given time, the extension will apply to all applicants.

Deadline for Applications

The application deadline date for the CoC NOFA is extended to Thursday, October 23, 2008. Electronic applications must be received by *e-snaps* by 4 p.m. eastern time on the deadline date. HUD will close *e-snaps* at 4:01 p.m. eastern time. Similarly, paper applications from applicants granted a waiver from the electronic submission requirement must be received by HUD by 4 p.m. eastern time on the deadline date.

Dated: October 3, 2008.

Susan D. Peppler,

Assistant Secretary for Community Planning and Development.

[FR Doc. E8–23923 Filed 10–8–08; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Proposed Renewal of Information Collection: OMB Control Number 1084–0010, Claim for Relocation Payments—Residential, DI–381 and Claim for Relocation Payments—Nonresidential, DI–382

AGENCY: Office of the Secretary, Office of Acquisition and Property Management.

ACTION: Notice and Request for Comments.

SUMMARY: In compliance with section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Acquisition and Property Management announces the proposed extension of a public information collection and seeks public comments on the provisions thereof.

DATES: Consideration will be given to all comments received by *December 8, 2008.*

ADDRESSES: Send your written comments to Mary Heying, Office of Acquisition and Property Management, 1849 C St., NW., MS 2607 MIB, Washington, DC 20240. Send any faxed comments to (202) 219–4244. Send e-mailed comments to *mary_heying@ios.doi.gov*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information on this proposed information collection or its Relocation Forms should be directed to Mary Heying, Office of Acquisition and Property Management, 1849 C Street, NW., MS 2607 MIB, Washington, DC 20240, or send your request by e-mail to *mary_heying@ios.doi.gov,* or by fax to (202) 219–4244.

SUPPLEMENTARY INFORMATION: Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection activity that the Office of Acquisition and Property Management will submit to OMB for extension or re-approval. Form DI–381, Claim for Relocation Payments—Residential, and DI–382, Claim for Relocation Payments—Nonresidential, permit the applicant to present allowable moving expenses and certify to occupancy status, after having been displaced because of Federal acquisition of their real property.

Comments are invited on: (1) The need for the collection of information for the performance of the function of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collections; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. Individuals providing comments should reference Relocation Forms, OMB Control # 1084–0010. A summary of the public comments will accompany the Office of the Secretary's submission of the information collection request to OMB.

This notice provides the public with 60 days in which to comment on the following information collection activity:

Title: Claim for Relocation Payments—Residential, Claim for Relocation Payments—Nonresidential.

OMB Control Number: 1084–0010.

Summary: The information required is obtained through application made by displaced person(s) or business(es) to the funding agency for determination as to the specific amount of monies due under the law.

Bureau Form Numbers: DI–381, DI–382.

Frequency of Collection: On occasion.

Description of Respondents: Individuals and businesses who are displaced because of Federal acquisitions of their real property.

Total Annual Responses: 200.

Total Annual Burden Hours: 90 hours.

Dated: October 2, 2008.

Debra E. Sonderman,

Director, Office of Acquisition and Property Management.

[FR Doc. E8–24047 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–RF–P

DEPARTMENT OF THE INTERIOR

Central Utah Project Completion Act

AGENCIES: Department of the Interior, Office of the Assistant Secretary—Water and Science.

ACTION: Notice of Availability, Draft Environmental Assessment (EA), Francis Sub-Area water conversion from irrigation to municipal and industrial purposes, Summit County, Utah.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969, as amended, the Department of the Interior and the Central Utah Water Conservancy District, are evaluating the impacts of converting Central Utah Project (CUP) Bonneville Unit water, delivered to the Francis Sub-Area of Summit County, Utah, from irrigation to municipal and industrial (M&I) use. In addition, the area of delivery would be expanded. The water conversion will involve up to 3,000 acre-feet of irrigation water that has historically been delivered to agricultural tracts under Bureau of Reclamation (Reclamation) law and policy. The irrigation water would be converted incrementally to M&I use over a period of up to 25 years. The expanded Francis Sub-Area would be restricted to lands within the Central Utah Water Conservancy District boundary, in the upper Provo River drainage, upstream of Jordanelle Reservoir.

The Bonneville Unit of the CUP was authorized to develop a portion of central Utah's water resources. Under the authority of Reclamation Law and the Central Utah Project Completion Act (Pub. L. 102–575), the Secretary of the Interior oversees implementation of the CUP and therefore has authority to convert CUP water from irrigation to M&I use. Current and proposed changes in land use in the Francis Sub-Area of Summit County, Utah, resulted in a request made by governing officials and local water companies to initiate the process for water conversion from irrigation to M&I and to expand the Francis Sub-Area to be eligible for CUP M&I water.

FOR FURTHER INFORMATION CONTACT: Additional information may be obtained by contacting Ms. Annette Marvin, Central Utah Project Completion Act Office, 302 East 1860 South, Provo, Utah 84606, by calling (801) 379–1260, or e-mail at *amarvin@uc.usbr.gov.*

Copies of the draft EA are available for inspection at: Central Utah Water Conservancy District, 355 West University Parkway, Orem, Utah 84058–7303; Department of the Interior, Central Utah Project Completion Act Office, 302 East 1860 South, Provo, Utah 84606.

In addition, the document is available at *http://www.cuwcd.com.*

SUPPLEMENTARY INFORMATION: None.

Dated: October 3, 2008.

Reed R. Murray,

Program Director, Central Utah Project Completion Act, Department of the Interior.

[FR Doc. E8–23981 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R5–ES–2008–N0210; 50120–1113–0000–F5]

Endangered and Threatened Wildlife and Plants; Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on the following applications to conduct certain activities with endangered species.

DATES: Comments on these permit applications must be received on or before November 10, 2008.

ADDRESSES: Written data or comments should be submitted to the U.S. Fish and Wildlife Service, Endangered Species Program Coordinator, Region 5, 300 Westgate Center Drive, Hadley, Massachusetts (telephone: 413–253–8615; facsimile: 413–253–8482). Please refer to the respective permit number for each application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Mary Parkin, Acting Endangered Species Permits Coordinator, see **ADDRESSES** (telephone: 413–253–8617; facsimile: 413–253–8482).

SUPPLEMENTARY INFORMATION: We solicit reviews and comments on the following applications for issuance of a scientific research permit and an enhancement of survival permit, respectively, to conduct certain activities with endangered species pursuant to Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

We have made a determination that issuance of these permits would be categorically excluded from further consideration under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)), as provided under part 516 of the Department of the Interior's Departmental Manual (DM) Chapter 2, Appendix 1, and 516 DM 8.

Permit Number: TE–191589

Applicant: Maine Cooperative Fisheries and Wildlife Unit, Orono, Maine.

The applicant requests a permit to take Atlantic salmon (*Salmo salar*) within the Gulf of Maine Distinct Population Segment in conjunction with a habitat use study in Washington, Hancock, and Penobscot Counties in Maine for the purpose of enhancing its survival and recovery.

Permit Number: TE–813745–1

Applicant: National Mohawk Power Corporation, dba National Grid, Syracuse, New York.

The applicant requests renewal of an existing valid permit to take Karner blue butterfly (*Lycaeides melissa samuelis*) in conjunction with operations resulting in maintenance of habitat for the purpose of enhancing its survival.

All comments received, including names and addresses, will become part of the official administrative record and may be made available to the public. Before including your address, telephone number, electronic 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.

We solicit public review and comment on each permit application. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Author: The primary author of this notice is Mary Parkin from the Service's Northeast Regional Office, Endangered Species Program (see **ADDRESSES** section).

Authority: The authority for this section is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

Dated: August 6, 2008.

Sherry Morgan,

Acting Regional Director, Northeast Region, Fish and Wildlife Service.

[FR Doc. E8–23243 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UT–020–08–5410–FR–J260; UTU–82909]

Application for the Conveyance of Federally Owned Mineral Interest

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The surface owner of the lands described in this notice, aggregating approximately 1,015.49 acres, has filed an application to purchase the Federally owned mineral interests in the lands. Publication of this notice temporarily segregates the mineral interest from appropriation under the public land laws, including the mining laws.

DATES: Interested parties may submit comments regarding this notice to the BLM Salt Lake Field Officer Manager, at the address below. Questions or comments on this notice should be directed to the Salt Lake Field Office as indicated below, and should reference the serial number UTU–82909.

Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must clearly state this at the beginning of your written comment. 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.

ADDRESSES: Submit all written comments concerning this notice to the Salt Lake Field Office, 2370 South 2300 West, Salt Lake City, UT 84119.

FOR FURTHER INFORMATION CONTACT: David Watson, Realty Specialist, Salt Lake Field Office, (801) 977–4368, *David_S_Watson@blm.gov*.

SUPPLEMENTARY INFORMATION: The surface owner of the following described lands has filed an application pursuant to Section 209 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1719(b)), for the purchase of the Federally owned mineral interest in the lands:

Salt Lake Base and Meridian, Salt Lake County, Utah
T. 4 S., R 3 W.,
Section 11; Lots 7, 8, 16–18, SE¼SE¼;
Section 12; Lots 7, 10, 11, S½SW¼;
Section 13; Lots 2, 3, NW¼, N½SW¼, S½SE¼;
Section 14; Lots 7–12, NE¼NE¼;
Section 24; Lots 5–10.

The BLM will process the pending application in accordance with the regulations in 43 CFR part 2720. The regulations provide for the purchase of the Federally owned mineral interest to consolidate the surface and subsurface mineral ownership in cases where (1) there are no known mineral values, or (2) in those instances where the Federal mineral interest reservation interferes with or precludes appropriate non-mineral development and such development is a more beneficial use of the land than the mineral development.

Upon publication of this notice in the **Federal Register** and subject to valid and existing rights, the mineral interests owned by the United State in the private lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. The segregative effect shall terminate upon: (1) Issuance of a patent or deed of such mineral interest; (2) upon final rejection of the mineral conveyance application; or (3) two years from the date of publication of this notice, whichever occurs first.

Dated: October 2, 2008.

Donald R. Banks,

State Director, Acting.

[FR Doc. E8–23968 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–DQ–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Colorado: Filing of Plats of Survey

September 30, 2008.

Summary: The plats of survey of the following described land will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado, effective 10 a.m., September 30, 2008. All inquiries should be sent to the Colorado State Office (CO–956), Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

The supplemental plat of section 24, in Township 15 South, Range 70 West, Sixth Principal Meridian, Colorado was accepted on April 17, 2008.

The plat, in duplicate, of the entire record, of the dependent resurvey, in Township 6 North, Range 93 West, Sixth Principal Meridian, Colorado, was accepted on June 19, 2008.

The supplemental plat in sections 23, 24, 26, 27 of Township 13 South, Range

82 West, Sixth Principal Meridian, Colorado, was accepted on June 25, 2008.

The plat and field notes, in duplicate, of the dependent resurvey and surveys in Township 35 North, Ranges 11 and 12 West, of the New Mexico Principal Meridian, Colorado, were accepted on August 26, 2008.

The plat (in seven sheets) and field notes, in duplicate, of the dependent resurvey and the resurvey of certain mineral surveys in section 19, Township 1 North, Range 71 West, Sixth Principal Meridian, Colorado, were accepted on September 9, 2008.

The plat and field notes, in duplicate, of the dependent resurvey and section subdivision in Township 43 North, Range 10 East, New Mexico Principal Meridian, Colorado, and the plat (in 3 sheets) and field notes, in duplicate of the dependent resurvey of a portion of the north and west boundaries of the Luis Maria Baca Land Grant No. 4, a portion of the south boundary of Township 43 North, Range 11 East, and the metes-and-bounds survey of the north, east, and a portion of the west boundary of the Baca National Wildlife Refuge within the Luis Maria Baca Land Grant No. 4, in the state of Colorado were accepted on September 12, 2008.

The plat and field notes, in duplicate, of the dependent resurvey and survey, in section 33, Township 22 South, Range 69 West, Sixth Principal Meridian, Colorado, were accepted on September 16, 2008.

The plat and field notes, in duplicate, of the dependent resurvey of a portion of the west boundary and subdivisional lines and the subdivision of section 7, in Township 21 South, Range 71 West, Sixth Principal Meridian, Colorado, were accepted on September 17, 2008.

The plat and field notes, in duplicate, of the dependent resurvey and surveys in Township 50 North, Range 9 West, New Mexico Principal Meridian, Colorado, were accepted on September 22, 2008.

The plat and field notes, in duplicate, of the dependent resurvey and section subdivision of sections 14, 23 and 26, Township 45 North, Range 6 East, New Mexico Principal Meridian, Colorado, were accepted on September 23, 2008.

Randall M. Zanon,

Chief Cadastral Surveyor for Colorado.

[FR Doc. E8–23875 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[UTU–42903, UTU–42913, UTU–42914, UTU–42916, UTU–42922, UTU–079344, UTU–087798, and UTU–0105337]

Proposed Continuation of Withdrawals; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Proposed Realty Action.

SUMMARY: The Bureau of Reclamation (BOR) proposes that 9 withdrawals for the Provo River Project be continued for 20 years. The lands are still needed for the purpose for which they were withdrawn. The lands would remain withdrawn as specified in the orders.

DATES: Comments must be received on or before January 7, 2009.

ADDRESSES: Comments should be sent to the Regional Director, BOR, Upper Colorado Regional Office, 125 South State Street, Room 6107, Salt Lake City, Utah 84138–1147, Attn. Dalia Hernandez.

FOR FURTHER INFORMATION CONTACT: Dalia Hernandez, BOR, at the above address, 801–524–3763, or *dhernandez@uc.usbr.gov* or Rhonda Flynn, Bureau of Land Management, Utah State Office, 440 West 200 South, Suite 500, Salt Lake City, Utah 84101–1345, 801–539–4132 or *rhonda_flynn@blm.gov.*

SUPPLEMENTARY INFORMATION: The BOR has determined that the lands are still needed for reclamation purposes. Two of the Secretarial Orders have the same date. Copies of the Secretarial Orders and Public Land Orders containing a legal description of the lands involved are available from the BOR at the address above.

The BOR proposes that the withdrawals made by the Secretarial Orders dated June 17, 1905, April 18, 1939, November 19, 1940, January 15, 1942, January 15, 1942, and September 23, 1943; and Public Land Order No. 3163 (28 FR 7986), Public Land Order No. 3169 (28 FR 7988), and Public Land Order No. 3170 (28 FR 7988) which withdrew lands on behalf of the Bureau of Reclamation for the Provo River Project be continued for a period of 20 years. The lands would remain withdrawn as specified in the orders.

The lands referenced aggregate approximately 5,463 acres in Duchesne, Salt Lake, Summit, Utah, and Wasatch Counties.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed action may present their views in writing to the BOR Regional Director, at the address above.

Comments, including names and street addresses of respondents, and records relating to the proposed land transfer will be available for public review during regular business hours at the BOR Regional Office at the address above. Individual respondents may request confidentiality. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2310.3–1.

Dated: October 2, 2008.

Donald R. Banks,

State Director, Acting.

[FR Doc. E8–23969 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS), Central Planning Area (CPA) in the Gulf of Mexico (GOM), Oil and Gas Lease Sale 213 in 2010

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Call for Information and Nominations/Notice of Preparation (Call/NOP) of an Environmental Assessment (EA).

SUMMARY: This Call for Information and Nominations (hereinafter referred to as the ''Call'') is the initial step in the prelease process. The purpose of the Call is to gather information on oil and gas leasing, exploration, and development that might result from an OCS oil and gas lease sale tentatively scheduled in early 2010. The purpose of the NOP is to announce MMS's intent to prepare an EA for CPA Sale 213.

DATES: Comments must be received no later than November 10, 2008 at the address specified below.

FOR FURTHER INFORMATION CONTACT: For information on this Call, please contact Mr. Carrol Williams, Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park

Boulevard, New Orleans, Louisiana 70123–2394, telephone (504) 736–2803. For information on the NOP, you may contact Mr. Gary Goeke, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, telephone (504) 736–3233.

SUPPLEMENTARY INFORMATION: On July 14, 2008, the President modified an Executive order, thereby making additional acreage available for leasing in the Central Planning Area of the Gulf of Mexico. The EA associated with this NOP will update the environmental and socioeconomic analyses. The MMS plans to complete National Environmental Policy Act (NEPA), OCS Lands Act (OCSLA), and Coastal Zone Management Act (CZMA) coverage for the proposed lease sale.

Call for Information and Nominations

1. Authority

This Call is published pursuant to the OCSLA as amended (43 U.S.C. 1331–1356), and the regulations issued thereunder (30 CFR part 256).

2. Purpose of Call

The purpose of the Call is to gather information for the following tentatively scheduled OCS Lease Sale in the Central Planning Area.

Lease Sale, OCS Planning Area:
Lease Sale 213, Central Planning Area.
Tentative Lease Sale Date:
March 2010.

Information and nominations on oil and gas leasing, exploration, development and production within this portion of the CPA is sought from all interested parties. This early planning and consultation step is important for ensuring that all interests and concerns are communicated to the Department of the Interior for future decisions in the leasing process pursuant to the OCSLA and regulations at 30 CFR part 256.

Final delineation of this area for possible leasing will be made at a later date and in compliance with applicable laws including all requirements of the NEPA, CZMA and OCSLA. Established Departmental procedures will be employed.

3. Description of Area

A Call for the majority of the acreage in the CPA was issued in April 2006. This Call encompasses approximately 90,998.2424 acres in that portion of the CPA made available by the President's action. A standard Call for Information Map depicting this portion of the Central Planning Area is available without charge from: Minerals Management Service, Public Information Unit (MS 5034), 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, or telephone: 1–800–200–GULF. The map is also available via the MMS Web site at *http://www.mms.gov.*

4. Instructions on Call

Comments must be received no later than 30 days following publication of this document in the **Federal Register** in envelopes labeled ''Comments on the Call for Information and Nominations for Proposed Lease Sale 213 in 2010,'' submitted to the Gulf of Mexico Region's Leasing Activities Section, Sales and Support Unit (Attention: Mr. Carrol Williams) at the previously noted address.

The standard Call for Information Map delineates the Call area, all of which has been identified by the MMS as having potential for the discovery of accumulations of oil and gas.

Comments are sought from all interested parties about particular geological, environmental (including natural disasters), biological, archaeological and socioeconomic conditions or conflicts, or other information that might bear upon the potential leasing and development of this area. Comments are also sought on possible conflicts between future OCS oil and gas activities that may result from the proposed lease sale and State Coastal Management Programs (CMP's). If possible, these comments should identify specific CMP policies of concern, the nature of the conflict foreseen, and steps that the MMS could take to avoid or mitigate the potential conflict. Comments may be in terms of broad areas or restricted to particular blocks of concern. Those submitting comments are requested to list block numbers or outline the subject area on the standard Call for Information Map.

5. Use of Information From Call

Information submitted in response to this Call will be used for several purposes. First, comments on possible environmental effects and potential use conflicts will be used in the analysis of environmental conditions in and near the Call area. Comments on environmental and other use conflicts will be used to make a preliminary determination of the potential advantages and disadvantages of oil and gas exploration and development to the region and the Nation. Second, comments may be used in developing lease terms and conditions to ensure environmentally safe offshore operations, and, third, comments may be used to assess potential conflicts between offshore gas and oil activities and a State CMP.

6. Existing Information

The MMS routinely assesses the status of information acquisition efforts and the quality of the information base for potential decisions on a tentatively scheduled lease sale. An extensive environmental studies program has been underway in the GOM since 1973. The emphasis, including continuing studies, has been on ''environmental analysis'' of biologically sensitive habitats, physical oceanography, ocean-circulation modeling, ecological effects of oil and gas activities, and hurricane impacts on coastal communities and the environment.

You may obtain a complete listing of available study reports and information for ordering copies from the Public Information Unit referenced above. You may also order the reports for a fee, from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, or telephone (703) 605–6000 or (800) 553–6847. In addition, you may obtain a program status report for continuing studies in this area from the Chief, Environmental Sciences Section (MS 5430), Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394, or telephone (504) 736–2752, or via the MMS Web site at *http://www.gomr.mms.gov/homepg/regulate/environ/studiesprogram.html.*

7. Tentative Schedule

Milestones for Proposed Lease Sale 213 in 2010

NOP for an EA, October 2008.
Call for Information and Nominations, October 2008.
Comments received on Call/NOP, November 2008.
Area Identification Decision, December 2008–January 2009.
NOA/Final EA, September–October 2009.
Proposed Notice and Coastal Zone Management Consistency Determination, October 2009.
Final Notice of Sale, February 2010.
Tentative Lease Sale Date, March 2010 (Lease Sale 213).

Notice of Preparation of an Environmental Assessment

1. Authority

This NOP is published pursuant to the regulations (40 CFR 1501.7) implementing the provisions of the NEPA of 1969 as amended (42 U.S.C. 4321 *et seq.* (1988)).

2. Purpose of Notice of Preparation

Pursuant to the regulations implementing the procedural provisions of NEPA, MMS is announcing its preparation of an Environmental Assessment on an oil and gas lease sale tentatively scheduled in early 2010 in the CPA offshore the States of Louisiana, Mississippi, Alabama, and Florida. The MMS is issuing this notice to facilitate public involvement. The preparation of this EA is an important step in the decision process for Lease Sale 213. The proposal for Lease Sale 213 was analyzed in the *Gulf of Mexico OCS Oil and Gas Lease Sales: 2009–2012; Western Planning Area Sales 210, 215, and 218; Central Planning Area Sales 208, 213, 216, and 222—Final Supplemental Environmental Impact Statement* (Supplemental EIS, OCS EIS/EA MMS 2008–041). This EA for proposed Lease Sale 213 will reexamine the potential environmental effects of the proposed lease sale and its alternatives (*i.e.*, excluding the unleased blocks near biologically sensitive topographic features; excluding the unleased blocks within 15 miles of the Baldwin County, Alabama, Coast; and no action) based on any new information regarding potential impacts and issues that were not available at the time the Supplemental EIS was prepared. This EA for proposed Lease Sale 213 will also examine the potential environmental effects of the addition of two small areas within the CPA, located greater than 100 miles from the coasts of Alabama and Florida, that were not previously examined by the Supplemental EIS (OCS EIS/EA MMS 2008–041) or Multisale EIS (OCS EIS/EA MMS 2007–018), but were included in the 5-year program.

3. Supplemental Information

The Multisale EIS (OCS EIS/EA MMS 2007–018) addressed CPA lease sales Sale 205 in 2007, Sale 206 in 2008, Sale 208 in 2009, Sale 213 in 2010, Sale 216 in 2011, and Sale 222 in 2012; and WPA lease sales Sale 204 in 2007, Sale 207 in 2008, Sale 210 in 2009, Sale 215 in 2010, and Sale 218 in 2011. However, the Gulf of Mexico Energy Security Act of 2006 repealed the Congressional moratorium on approximately 5.8 million acres located in the southeastern part of the Central Planning Area (CPA). Therefore, it was necessary to prepare additional NEPA documentation to address the MMS proposal to expand the CPA by the 5.8 million acre area. Federal regulations allow for several related or similar proposals to be analyzed in one EIS (40 CFR 1502.4). Since each proposed lease sale and its projected activities are very similar each year for each planning area, a single Supplemental EIS was prepared for the remaining seven Western Planning Area (WPA) and CPA lease sales scheduled in the *OCS Oil and Gas Leasing Program: 2007–2012* (5-Year Program). In September 2008, MMS published a Supplemental EIS (OCS EIS/EA MMS 2008–041) that addressed seven proposed Federal actions that would offer for lease areas on the GOM OCS that may contain economically recoverable oil and gas resources.

After completion of this EA, MMS will determine whether to prepare a Finding of No New Significant Impact (FONNSI) or a Supplemental EIS. The MMS prepares a Consistency Determination (CD) to determine whether the lease sale is consistent with each affected State's federally-approved coastal zone management program. Finally, MMS will solicit comments via the Proposed Notice of Sale (PNOS) from the governors of the affected States on the size, timing, and location of the lease sale. The tentative schedule for the prelease decision process for Lease Sale 213 is as follows: EA/FONNSI or Supplemental EIS decision, September–October 2009; CD's will be sent to affected States five months before the lease sale; PNOS sent to governors of the affected States, five months before the lease sale; Final Notice of Sale, if applicable, published in the **Federal Register**, February 2010.

For more information on the EA, you may contact Gary Goeke, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, MS 5410, New Orleans, Louisiana 70123–2394 or e-mail *environment@mms.gov*. You may also contact Mr. Goeke by telephone at (504) 736–3233.

4. Comments

Federal, State, and local government agencies, and other interested parties are requested to send their written comments on the EA, significant issues that should be addressed, and alternatives that should be considered in one of the following three ways:

1. Electronically using MMS's Public Connect on-line commenting system at *https://ocsconnect.mms.gov*. From the Public Connect ''Welcome'' screen, search for ''Lease Sale 213 EA'' or select it from the ''Projects Open for Comment'' menu.

2. In written form enclosed in an envelope labeled ''Comments on the Lease Sale 213 EA'' and mailed (or hand carried) to the Regional Supervisor, Leasing and Environment (MS 5410), Minerals Management Service, Gulf of Mexico OCS Region, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123–2394.

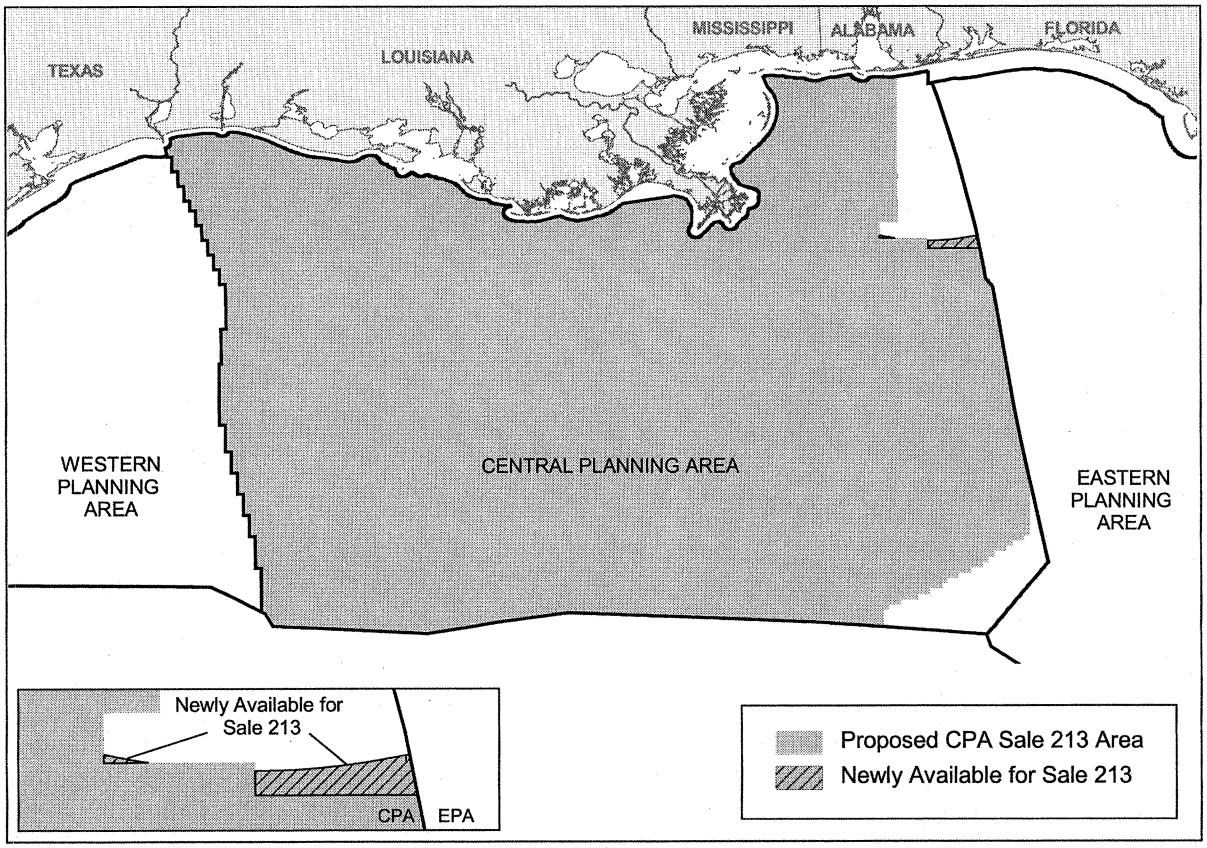
3. Electronically to the MMS e-mail address: *environment@mms.gov*.

Comments should be submitted no later than 30 days from the publication of this NOP.

Dated: September 30, 2008.

Randall B. Luthi,

Director, Minerals Management Service.



[FR Doc. E8–23975 Filed 10–8–08; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Notice on Outer Continental Shelf Oil and Gas Lease Sales

AGENCY: Minerals Management Service, Interior.

ACTION: List of Restricted Joint Bidders.

SUMMARY: Pursuant to the authority vested in the Director of the Minerals Management Service by the joint bidding provisions of 30 CFR 256.41, each entity within one of the following groups shall be restricted from bidding with any entity in any other of the following groups at Outer Continental Shelf oil and gas lease sales to be held during the bidding period November 1, 2008 through April 30, 2009. The List of Restricted Joint Bidders published in the **Federal Register** April 22, 2008, and the correction published in the **Federal Register** on June 27, 2008, covered the period May 1, 2008 through October 31, 2008.

Group I

Exxon Mobil Corporation
ExxonMobil Exploration Company

Group II

Shell Oil Company
Shell Offshore Inc
SWEPI LP
Shell Frontier Oil & Gas Inc.
Shell Consolidated Energy Resources Inc.
Shell Land & Energy Company
Shell Onshore Ventures Inc.
Shell Offshore Properties and Capital II, Inc.
Shell Rocky Mountain Production LLC
Shell Gulf of Mexico Inc.

Group III

BP America Production Company
BP Exploration & Production Inc.
BP Exploration (Alaska) Inc.

Group IV

TOTAL E&P USA, Inc.

Group V

Chevron Corporation
Chevron U.S.A. Inc.
Chevron Midcontinent, L.P.
Unocal Corporation
Union Oil Company of California
Pure Partners, L.P.

Group VI

ConocoPhillips Company
ConocoPhillips Alaska, Inc.
ConocoPhillips Petroleum Company
Phillips Pt. Arguello Production Company
Burlington Resources Oil & Gas Company LP
Burlington Resources Offshore Inc.
The Louisiana Land and Exploration Company
Inexeco Oil Company

Group VII

Eni Petroleum Co. Inc.
Eni Petroleum US LLC
Eni Oil US LLC
Eni Marketing Inc.
Eni BB Petroleum Inc.
Eni US Operating Co. Inc.
Eni BB Pipeline LLC

Group VIII

Petrobras America Inc.

Group IX

StatoilHydro ASA
Statoil Gulf of Mexico LLC
StatoilHydro USA E&P, Inc.
StatoilHydro Gulf Properties Inc.

Dated: September 24, 2008.

Randall B. Luthi,

Director, Minerals Management Service.

[FR Doc. E8–23976 Filed 10–8–08; 8:45 am]
BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Correction: Notice of Boundary Revision at Joshua National Park

AGENCY: National Park Service, Interior.

ACTION: Correction: Notice of boundary revision at Joshua National Park.

SUPPLEMENTARY INFORMATION: In the **Federal Register** dated October 3, 2008, Volume 73, No. 193, page 57650, information was printed incorrectly. In the first paragraph of the second column, the ninth line down should read Joshua Tree National Park, not Mesa Verde National Park.

Jerry Buckbinder,

Printing Officer.

[FR Doc. E8–23980 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: Horner Collection, Oregon State University, Corvallis, OR; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

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 Horner Collection, Oregon State University, Corvallis, OR, that meet the definition of ''unassociated funerary objects'' 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.

This notice corrects the number of unassociated funerary objects in the Notice of Intent to Repatriate Cultural Items published in the **Federal Register** of August 21, 2008 (FR Doc E8–19312, pages 49477–49479), by the removal of one string of beads.

The **Federal Register** notice of August 21, 2008, paragraph 3 is corrected by substituting the following paragraph:

The 16 cultural items are 1 club, 1 beaded flask, 9 utility baskets, 1 goblet-shaped basket, 1 small bag, 1 projectile point, 1 porcupine quill headband, and 1 string of beads or sash.

In the **Federal Register** of August 21, 2008, paragraph number 11 is corrected by substituting the following paragraph:

On June 8, 1973, the C.B Kennedy family and Ruth Kennedy, wife of Dr. N.L. Tartar, donated two baskets and a string of beads or sash to the Oregon State University Museum. The Horner collection does not have a provenience for these items. Tribal representatives of the Redding Rancheria, California have identified these items as Pit River in cultural affiliation and as items that would typically have been buried with the owner. Based on the consultation evidence, officials of the Horner Collection, Oregon State University reasonably believe the cultural items are unassociated funerary objects.

In the **Federal Register** of August 21, 2008, paragraph number 14 is corrected by substituting the following paragraph:

Officials of the Horner Collection, Oregon State University have determined that, pursuant to 25 U.S.C. 3001 (3(B), the 16 cultural items 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 and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of Horner Collection, Oregon 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 unassociated funerary objects and the Pit River Tribe, California and Redding Rancheria, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Sabah Randhawa, Executive Vice President and Provost, President's Office, Oregon State University, 600 Kerr Administration Building, Corvallis, OR 97331, telephone (541) 737–8260, before November 10, 2008. Repatriation of the unassociated funerary objects to the Redding Rancheria, California may proceed after that date if no additional claimants come forward.

The Horner Collection, Oregon State University is responsible for notifying the Alturas Indian Rancheria, California; Bear River Band of the Rohnerville Rancheria, California; Big Lagoon Rancheria, California; Big Valley Band of Pomo Indians of the Big Valley Rancheria, California; Blue Lake Rancheria, California; Bridgeport Paiute Indian Colony of California; Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Cahto Indian Tribe of the Laytonville Rancheria, California; Cedarville Rancheria, California; Cher-Ae Heights Indian Community of the Trinidad Rancheria, California; Cloverdale Rancheria of Pomo Indians of California; Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians of Oregon; Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of the Siletz Reservation, Oregon; Cortina Indian Rancheria of Wintu Indians of California; Coyote Valley Band of Pomo Indians of California; Dry Creek Rancheria of Pomo Indians of California; Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria, California; Elk Valley Rancheria, California; Fort Bidwell Indian Community of the Fort Bidwell Reservation of California; Grindstone Indian Rancheria of Wintun-Wailaki Indians of California; Guidiville Rancheria of California; Hoopa Valley Tribe, California; Hopland Band of Pomo Indians of the Hopland Rancheria, California; Kashia Band of Pomo Indians of Stewarts Point Rancheria, California; Klamath Indian Tribe of Oregon; Lytton Rancheria of California; Manchester Band of Pomo Indians of the Manchester-Point Arena Rancheria, California; Middletown Rancheria of Pomo Indians of California; Modoc Tribe of Oklahoma; Pinoleville Pomo Nation, California; Pit River Tribe, California; Potter Valley Tribe, California; Quartz Valley Indian Community of the Quartz Valley Reservation of California; Redding Rancheria, California; Redwood Valley Rancheria of Pomo Indians of California; Resighini Rancheria, California; Robinson Rancheria of Pomo Indians of California; Round Valley Indian Tribes of the Round Valley Reservation, California; Rumsey Indian Rancheria of Wintun Indians of California; Scotts Valley Band of Pomo Indians of California; Sherwood Valley Rancheria of Pomo Indians of California; Smith River Rancheria, California; Susanville Indian Rancheria, California; Upper Lake Band of Pomo Indians of Upper Lake Rancheria of California; Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California; and Yurok Tribe of the Yurok Reservation, California that this notice has been published.

Dated: September 10, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23959 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Archaeological Center, San Diego, 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. 3005, of the intent to repatriate cultural items in the possession of the San Diego Archaeological Center, San Diego, CA, that meet the definitions of ''unassociated funerary objects'' or ''sacred objects'' 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 1973 and 1974, cultural items were removed from archeological site CA-SDI–681 in the County of San Diego, CA, as part of an archeological excavation performed by an avocational archeological group. In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The 378 cultural items are 1 piece of hematite, 1 piece of ochre, 16 pieces of ceramic pipe fragments, 1 ceramic effigy, 1 ceramic effigy fragment, 2 quartz crystals, and 356 shell disc beads.

Site CA-SDI–681 is located in the unincorporated City of Bonsall about 11 miles northeast of the San Luis Rey River. This site falls within traditional Luiseno territory. Hematite, ochre, ceramic pipes, ceramic effigies and crystals are known to be used by the Luiseno Nation in sacred rites. Therefore, 22 of the cultural items removed from site CA-SDI–681 are considered sacred objects. Disc shell beads are known to be used as funerary objects. Therefore, the 356 shell disc beads removed from site CA-SDI–681 are considered unassociated funerary objects.

In 1981, cultural items were removed from CA-SDI–8629 and CA-SDI–8639H near Warner Springs, in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). On May 10, 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The two cultural items are one quartz crystal and one ceramic pipe fragment.

Cyrstals and pipes are known to be used the Luiseno Nation in sacred rites, and are considered sacred objects.

Sites CA-SDI–8629 and CA-SDI–8639H are located on the U.S. Geographical Survey topographic map of Warner Springs. The Warner Springs Ranch is located in the eastern part of San Diego County. These sites fall within traditional Cupeno territory and are considered to be part of the ethnohistoric village of Cupa. The reporting archeologist determined that artifacts from the test units gave a clear impression that the deposits relate to Late Prehistoric and historic times. Descendants of the Cupeno Nation (Cupa, Kuupangaxwichem) reside on the Pala reservation. The Pala reservation is also home to the Pala Band of Luiseno Mission Indians of the Pala Reservation, California, which is a member of the Luiseno Nation.

The Luiseno Nation is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group.

Officials of the San Diego Archaeological Center have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 356 cultural items 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 and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the San Diego Archaeological Center also have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the 24 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.

Lastly, officials of the San Diego Archaeological Center 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 sacred objects and unassociated funerary objects to the Luiseno Nation, which is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects and/or sacred objects should contact Cindy Stankowski, San Diego Archaeological Center, 16666 San Pasqual Valley Road, Escondido, CA 92027–7001, telephone (760) 291–0370, before November 10, 2008. Repatriation of the unassociated funerary objects and/or sacred objects to the Luiseno Nation, which is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group, may proceed after that date if no additional claimants come forward.

The San Diego Archaeological Center is responsible for notifying the Cupeno (Cupa, Kuupangaxwichem) Nation of the Pala Reservation, California; La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon

Reservation, California; Soboba Band of Luiseno Indians, California; and Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group, that this notice has been published.

Dated: September 12, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23947 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Archaeological Center, San Diego, 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. 3005, of the intent to repatriate cultural items in the possession of the San Diego Archaeological Center, San Diego, CA, that meet the definition of ''sacred objects'' 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 1982, one cultural item was removed from archeological site CA-SDI–4616 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The one cultural item is a quartz crystal.

CA-SDI–4616 is located on the U.S. Geographical Survey topographic map of Del Mar north of Carmel Valley Road. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Crystals are known to be used by the Kumeyaay Nation in sacred rites.

In 1980, 21 cultural items were removed from archeological site CA-SDI–1057 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The 21 cultural items are 3 quartz crystals, 3 shell beads, 3 pieces of ochre, 2 pieces of tourmaline, 2 shell pendants, 7 ceramic spheres, and 1 carved ceramic sherd.

Site CA-SDI–1057 is located in the City of Escondido. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Crystals, shell beads, ochre, pendants, ceramic spheres, and carved ceramic pieces are known to be used by the Kumeyaay Nation in sacred rites.

In 1979, one cultural item was removed from archeological site CA-SDI–5505, San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The one cultural item is a quartz crystal.

Site CA-SDI–5505 is located in the northern part of the City of Escondido, south of the San Luis Rey River. This site falls within traditional Kumeyaay territory. Crystals are known to be used by the Kumeyaay Nation in sacred rites.

In 1978 through 1981, 32 cultural items were removed from archeological site CA-SDI–5669 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The 32 cultural items are 23 ceramic pipe fragments, 8 pieces of ochre, and 1 quartz crystal.

Site CA-SDI–5669 is located in the City of Santee. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Ceramic pipes, ochre and crystals are known to be used by the Kumeyaay Nation in sacred rites.

At an unknown date, one cultural item was removed from archeological site CA-SDI–6704 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The one cultural item is a quartz crystal.

Site CA-SDI–6704 is located in the U.S. Geographical Survey topographic map of Rodriquez Mountain, east of the junction of Valley Parkway and Woods Valley Road, and south of the San Luis Ray River. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Crystals are known to be used by the Kumeyaay Nation in sacred rites.

In 1979, fragments of one ceramic pipe were removed from archeological site CA-SDI–6874 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA.

Site CA-SDI–6874 is located in the U.S. Geographical Survey quadrangle of Agua Caliente. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Ceramic pipes are known to be used by the Kumeyaay Nation in sacred rites.

In 1982, 93 cultural items were removed from archeological site CA-SDI–6669 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The 93 cultural items are 1 ceramic bead, 14 ceramic pipe pieces, 1 rim sherd, 1 chalcedony knife, 1 stone bead, 1 stone pendant, 1 quartzite palette, 1 shaft straightener, 1 small pestle, 48 quartz crystals, 7 tourmaline crystals, 15 mineral specimens, and 1 shell bead.

Site CA-SDI–6669 (SDM-W–230) is located on the U.S. Geographical Survey topographic map of Poway, at the intersection of Sabre Springs Parkway and Poway Road near the City of Poway. This site falls within traditional Kumeyaay territory, and based on radiocarbon date had two periods of occupation. Locus A, B, and C were occupied from A.D. 1120 to A.D. 1750. Feature 4, locus B had radiocarbon dates establishing occupation at 1000 B.C. Ceramic beads, ceramic pipes, pottery, stone knives, stone beads, stone pendants, stone palettes, shaft

straighteners, pestles, crystals and minerals are known to be used by the Kumeyaay Nation in sacred rites.

In 1994 and 1995, seven cultural items were removed from archeological site CA-SDI–12126 in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. The seven cultural items are three pieces of ochre, one shell bead fragment, and three shell beads.

Site CA-SDI–12126 is located along the San Diego River Valley, 4 miles east of the ocean. This site falls within traditional Kumeyaay territory, and the reporting archeologists determined it to be of the ''Late Prehistoric Period.'' Ochre and shell beads are known to be used by the Kumeyaay Nation in sacred rites.

The Kumeyaay Nation is represented by the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation (formerly the Sycuan Band of Diegueno Mission Indians of California); and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Officials of the San Diego Archaeological Center have determined that, pursuant to 25 U.S.C. 3001 (3)(C), the 157 cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents. Officials of the San Diego Archaeological 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 sacred objects and the Kumeyaay Nation, as represented by the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the sacred objects should contact Cindy Stankowski, San Diego Archaeological Center, 16666 San Pasqual Valley Road, Escondido, CA 92027–7001, telephone (760) 291–0370, before November 10, 2008. Repatriation of the sacred objects to the Kumeyaay Nation, on behalf of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California may proceed after that date if no additional claimants come forward.

The San Diego Archaeological Center is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Rseservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California that this notice has been published.

Dated: September 10, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23971 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Museum of Man, San Diego, 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. 3005, of the intent to repatriate cultural items in the possession of the San Diego Museum of Man, San Diego, CA, that meet the definition of ''unassociated funerary objects'' or ''objects of cultural patrimony'' 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.

The cultural items are 26 unassociated funerary objects and 2 objects of cultural patrimony.

In 1959, cultural items were removed by M.J. Rogers from an abandoned Papago Village approximately four miles west of Covered Wells, Pima County, AZ, on the south side of Highway 86. The 26 unassociated funerary objects are 24 pottery sherds, 1 cockle shell fragment, and 1 metavolcanic stone (possibly rhyolite) scraper.

The 24 pottery sherds are reasonably believed to have been placed as part of a pottery sacrifice on graves covered with boulders. Based on consultation with tribal representative of the Tohono O'odham Nation of Arizona, the cockle shell frament and metavolcanic stone scraper are also reasonably believed to be unassociated funerary objects.

In 1976, one medicine bundle container (dated to circa 1930) was acquired from Mrs. Martinez of Havanna Naka (Crow Hang) Village on what was called the Papago Reservation. The medicine bundle belonged to Mrs. Martinez' husband, a local medicine man.

In 1986, one Wihosa mask was acquired from Sylvester Matthias, a Pima, from Komatke, AZ, who inherited it as the last person in the (hereditary) line. The cultural item is used in the Navichu ceremony.

Based on consultation with a tribal representative of the Tohono O'odham Nation of Arizona, the officials of the San Diegeo Museum of Man have reasonably determined that the two cultural items are objects of cultural patrimony used in important ceremonies of the O'odham people and could not have been alienated by a single individual.

Recorded information from museum records about the unassociated funerary items and items of cultural patrimony states that all the items were located on either traditional Papago (Tohono O'odham) or Pima (Akimel O'odham) land. Descendants of the O'odham people are members of the Tohono O'odham Nation of Arizona.

Consultation with a tribal representative of the Gila River Indian Community of the Gila River Indian Reservation, Arizona, also determined that the cultural items, whether traditional Pima or Papago, should be repatriated to the Tohono O'odham Nation of Arizona based on the location of where they were found.

Officials of the San Diego Museum of Man have determined that, pursuant to 25 U.S.C. 3001 (3)(B), the 26 cultural items 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 and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the San Diego Museum of Man also have determined that, pursuant to 25 U.S.C. 3001 (3)(D), the two cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual. Lastly, officials of the San Diego Museum of Man 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 objects and objects of cultural patrimony and the Tohono O'odham Nation of Arizona.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects and objects of cultural patrimony should contact Philip Hoog, NAGPRA Coordinator, San Diego Museum of Man, 1350 El Prado, Balboa Park, San Diego, CA 92101, telephone (619) 239–2001, before November 10, 2008. Repatriation of the unassociated funerary objects and objects of cultural patrimony to the Tohono O'odham Nation of Arizona may proceed after that date if no additional claimants come forward.

The San Diego Museum of Man is responsible for notifying the Gila River Indian Community of the Gila River Indian Reservation, Arizona and Tohono O'odham Nation of Arizona that this notice has been published.

Dated: September 10, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23953 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: U.S. Department of Agriculture, Forest Service Kootenai National Forest, Libby, MT

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 U.S. Department of Agriculture, Forest Service, Kootenai National Forest, Libby, MT, that meet the definition of ''objects of cultural patrimony'' 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 the mid–1970s, objects of cultural patrimony were removed from a documented traditional cultural property located in Lincoln County, MT. The removal was an illegal action by a private citizen. In 1979, the private citizen turned the collection over to the University of Montana, Missoula, MT. In 1995, in consultation with the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, the Kootenai National Forest secured the collection through the relinquishment of ownership by the University of Montana. The 560 cultural items consist of various modified artifacts, such as scrapers, bone beads, shells, tools, and animal teeth.

The site area is within the aboriginal and traditional territory of the Kootenai Tribe, as demonstrated by oral histories of the Kootenai Elders, Hellgate Treaty of 1855, several ethnographies, ethno histories, historic newspapers, and the United States Court of Claims. During consultation, the Kootenai Tribe explained how the materials are associated with the Kootenai Tribe's culture, and are central to the tribe and its traditions. The cultural items are also communal property, as they were considered inalienable at the time of their removal, and cannot be alienated, appropriated, or conveyed by any individual. Based on consultation evidence presented by the Kootenai Tribe, the Forest Service has determined the cultural items meet the definition of objects of cultural patrimony under NAGPRA. Based on consultation, ethnographic evidence, and historic documents, the Forest Service has determined that the cultural items are culturally affiliated with the Kootenai Tribe. Descendants of the Kootenai Tribe are members of the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Montana.

Officials of the Forest Service have determined that, pursuant to 25 U.S.C. 3001 (3)(D), the 560 cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or

culture itself, rather than property owned by an individual. Officials of the Forest Service 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 objects of cultural patrimony and the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the objects of cultural patrimony should contact Paul Bradford, Forest Supervisor, United States Department of Agriculture, Forest Service, Kootenai National Forest, 1101 Highway 2 West, Libby, MT 59923, telephone (406) 293–6211, before November 10, 2008. Repatriation of the objects of cultural patrimony to the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Montana may proceed after that date if no additional claimants come forward.

The Kootenai National Forest is responsible for notifying the Confederated Salish & Kootenai Tribes of the Flathead Indian Reservation, Montana that this notice has been published.

Dated: September 16, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23962 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Archaeological Center, San Diego, 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 possession of the San Diego Archaeological Center, San Diego, CA. The human remains and associated funerary objects were removed from archeological sites CA–SDI–8629 and CA–SDI–8639H in San Diego 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 San Diego Archaeological Center professional staff in consultation with representatives of the Luiseno Nation, which is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group.

In 1981, human remains representing a minimum of one individual were removed from archeological sites CA–SDI–8629 and CA–SDI–8639H near Warner Springs in San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). On May 10, 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. No known individual was identified. The six associated funerary objects are one chipped stone projectile point, four shell beads and one cooking stone.

The sites are located on the U.S. Geographical Survey topographic map of Warner Springs. The Warner Springs Ranch is located in the eastern part of San Diego County. The site falls within traditional Cupeno territory and is considered to be part of the ethnohistoric village of Cupa. The reporting archeologist surmised that artifacts from the test units gave a clear impression that the deposits relate to Late Prehistoric and historic times. Descendants of the Cupeno Nation (Cupa, Kuupangaxwichem) reside on the Pala reservation. The Pala reservation is also home to the Pala Band of Luiseno Mission Indians of the Pala Reservation, California, which is a member of the Luiseno Nation.

The Luiseno Nation is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group.

Officials of the San Diego Archaeological 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 San Diego Archaeological Center also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the six 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 San Diego Archaeological Center 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 Luiseno Nation, which is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Cindy Stankowski, San Diego Archaeological Center, 16666 San Pasqual Valley Road, Escondido, CA 92027–7001, telephone (760) 291–0370, before November 10, 2008. Repatriation of the human remains and associated funerary objects to the Luiseno Nation, which is represented by the La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the

Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group, may proceed after that date if no additional claimants come forward.

The San Diego Archaeological Center is responsible for notifying the Cupeno (Cupa, Kuupangaxwichem) Nation of the Pala Reservation, California; La Jolla Band of Luiseno Mission Indians of the La Jolla Reservation, California; Pala Band of Luiseno Mission Indians of the Pala Reservation, California; Pauma Band of Luiseno Mission Indians of the Pauma & Yuima Reservation, California; Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California; Rincon Band of Luiseno Mission Indians of the Rincon Reservation, California; Soboba Band of Luiseno Indians, California; and Twenty-Nine Palms Band of Luiseno Mission Indians of California; and San Luis Rey Band of Mission Indians, a non-federally recognized Indian group, that this notice has been published.

Dated: September 12, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23964 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Office of the State Archaeologist, University of Iowa, Iowa City, IA and State Historical Society of Iowa, Des Moines, IA

AGENCY: National Park Service, Interior.

ACTION: Notice.

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 and associated funerary objects was made by the Office of the State Archaeologist, University of Iowa professional staff in consultation with representatives of the Citizen Potawatomi Nation, Oklahoma; Flandreau Santee Sioux Tribe of South Dakota; Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Lower Sioux Indian Community in the State of Minnesota; Omaha Tribe of Nebraska; Otoe-Missouria Tribe of Indians, Oklahoma; Pawnee Nation of Oklahoma; Peoria Tribe of Indians of Oklahoma; Ponca Tribe of Indians of Oklahoma; Ponca Tribe of Nebraska; Prairie Band Potawatomi Nation, Kansas; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas; Sac & Fox Nation, Oklahoma; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Winnebago Tribe of Nebraska; Yankton Sioux of South Dakota; and the Mendota Mdewakanton Dakota Community, a non-federally recognized Indian group.

In 1937, human remains representing a minimum of one individual were recovered from an unknown bluff north of the Yellow River in Allamakee County, IA, by Harrison Toney. At an unknown date, the human remains were donated to the State Historical Society of Iowa (BP1034). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1034). These human remains cannot be dated or identified with an archeological context.

In 1936, human remains representing a minimum of one individual were excavated from a mound at 13AM81, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1038). No known individual was identified. The three possible associated funerary objects are two sherds and one stone tool.

The human remains from 13AM81 have been identified as Native American based on their context and association with diagnostic artifacts within a Late Woodland burial mound (BP1038).

In 1936, human remains representing a minimum of one individual were excavated from a mound at 13AM86, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1045). No known individual was identified. The one possible associated funerary object is a potsherd.

The human remains from 13AM86 have been identified as Native American based on their context and possible association with a diagnostic artifact within a Woodland burial mound (BP1045).

In 1929, human remains representing a minimum of one individual were excavated from a rock shelter, 13AM96, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1039). No known individual was identified. No associated funerary objects are present.

The human remains from 13AM96 have been identified as Native American based on the overall bone condition (BP1039). These human remains cannot be dated or identified with an archeological context.

In 1934 and 1936, human remains representing a minimum of four individuals were excavated from mounds at 13AM104, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1040). No known individuals were identified. No associated funerary objects are present.

The human remains from 13AM104 have been identified as Native American based on their context within a Woodland burial mound (BP1040).

In 1936, human remains representing a minimum of 10 individuals were excavated from mounds at 13AM105, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1041). No known individuals were identified. The one possible associated funerary object is a sherd.

The human remains from 13AM105 have been identified as Native American based on their context and association with a diagnostic artifact within a Woodland burial mound (BP1041).

In 1934 and 1936, human remains representing a minimum of 17 individuals were excavated from mounds at 13AM108, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1042). No known individuals were identified. No associated funerary objects are present.

The human remains from 13AM108 have been identified as Native American

based on their context within a Woodland burial mound (BP1042).

In 1936, human remains representing a minimum of one individual were excavated from a mound at 13AM116, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1043). No known individual was identified. No associated funerary objects are present.

The human remains from 13AM116 have been identified as Native American based on their context within a Woodland burial mound (BP1043)

In 1934, human remains representing a minimum of one individual were excavated from a mound at 13AM120, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1044). No known individual was identified. No associated funerary objects are present.

The human remains from 13AM120 have been identified as Native American based on their context within a Woodland burial mound (BP1044).

In 1934, human remains representing a minimum of one individual were excavated from a mound at 13AM160, Allamakee County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1046). No known individual was identified. No associated funerary objects are present.

The human remains from 13AM160 have been identified as Native American based on their context within a Woodland burial mound (BP1046).

In 1926, human remains representing a minimum of one individual were collected from the surface at 13BV24, Buena Vista County, IA, by Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1048). No known individual was identified. No associated funerary objects are present.

The human remains from 13BV24 have been identified as Native American based upon the overall condition of the bone (BP1048). These human remains cannot be dated or identified with an archeological context.

In 1905, human remains representing a minimum of two individuals were collected from a mound in an unknown location near Washta, Cherokee County, IA, by G.G. Wheat. Sometime prior to 1950, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1049). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1049). These human remains cannot be dated or identified with an archeological context.

In 1935, human remains representing a minimum of one individual were excavated from a mound at 13CN7, Clinton County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1054). No known individual was identified. No associated funerary objects are present.

The human remains from 13CN7 have been identified as Native American based on their context within a Woodland burial mound (BP1054).

In 1935, human remains representing a minimum of three individuals were excavated from mounds at 13CT44, Clayton County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1051). No known individuals were identified. No associated funerary objects are present.

The human remains from 13CT44 have been identified as Native American based on their context within a Woodland burial mound (BP1051).

In 1935, human remains representing a minimum of one individual were excavated from a mound at 13CT66, Clayton County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1052). No known individual was identified. No associated funerary objects are present.

The human remains from 13CT66 have been identified as Native American based on their context within a Woodland burial mound (BP1052).

In 1935, human remains representing a minimum of nine individuals were excavated from mounds at 13CT166, Clayton County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1053). No known individuals were identified. The eight associated funerary objects are four stone tools, one modified bone, and three shell fragments.

The human remains from 13CT166 have been identified as Native American based on their context within a Woodland burial mound (BP1053).

At an unknown date, human remains representing a minimum of two individuals were excavated from a mound at 13CW7, Chickasaw County, IA, by Clement L. Webster. At an unknown date, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1050). No known individuals were identified. No associated funerary objects are present.

The human remains from 13CW7 have been identified as Native American based on their context within a Woodland burial mound (BP1050).

In 1904, human remains representing a minimum of 22 individuals were excavated from a mound at 13DK39, Dickinson County, IA, by Duren Ward. At an unknown date, the human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1055). No known individuals were identified. No associated funerary objects are present.

The human remains from 13DK39 have been identified as Native American based on their context within a Woodland burial mound (BP1055).

At an unknown date, human remains representing a minimum of one individual were reportedly collected from a burial mound near Charles City, Floyd County, IA, by Clement L. Webster. In 1927, the human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1057). No known individual was identified. No associated funerary objects are present.

These human remains have been identified as Native American based on their reported context within a Woodland burial mound (BP1057).

At an unknown date, human remains representing a minimum of five individuals were reportedly collected from a burial mound near the town of Floyd, Floyd County, IA, by Clement L. Webster. In 1927, the human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1107). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on their reported context within a Woodland burial mound (BP1107).

At an unknown date, human remains representing a minimum of two individuals were collected from a mound at 13FD2, Floyd County, IA, by Clement L. Webster. In 1927, the human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1058). No known individuals were identified. No associated funerary objects are present.

The human remains from 13FD2 have been identified as Native American

based on their context within a Woodland burial mound (BP1058).

In 1883, human remains representing a minimum of two individuals were collected from an unknown location in Fremont County, IA, by Ernest O. Svenson. At an unknown date, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1059). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1059). These human remains cannot be dated or identified with an archeological context.

In the late 1800s, human remains representing a minimum of one individual were excavated from a mound at 13FT2, Fayette County, IA, by F.J. Becker. In 1930, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1056). In 1927, human remains representing eight individuals were excavated from mounds at this site by Ellison Orr under the supervision of Charles R. Keyes. These human remains also became part of the Keyes Collection. No known individuals were identified. No associated funerary objects are present.

The human remains from 13FT2 have been identified as Native American based on their context within a Woodland burial mound (BP1056).

Sometime probably prior to 1921, human remains representing a minimum of one individual were excavated from an unknown location near the town of Humboldt, Humboldt County, IA, by G.G. Wheat. Sometime prior to 1950, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1061). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1061). These human remains cannot be dated or identified with an archeological context.

In 1938, human remains representing a minimum of one individual were excavated from a mound at 13HM1, Hamilton County, IA, by Mildred Mott (Wedel) under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1060). No known individual was identified. No associated funerary objects are present.

The human remains from 13HM1 have been identified as Native American based on their context within a Woodland burial mound (BP1060).

In 1935, human remains representing a minimum of three individuals were excavated from mounds at 13JK11, Jackson County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1062). No known individuals were identified. No associated funerary objects are present.

The human remains from 13JK11 have been identified as Native American based on their context within a Woodland burial mound (BP1062).

In 1935, human remains representing a minimum of two individuals were collected from mounds at 13JK14, Jackson County, IA, by Ellison Orr. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1063). No known individuals were identified. No associated funerary objects are present.

The human remains from 13JK14 have been identified as Native American based on their context within a Woodland burial mound (BP1063).

In 1935, human remains representing a minimum of one individual were excavated from a mound at 13JK17, Jackson County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1064). No known individual was identified. No associated funerary objects are present.

The human remains from 13JK17 have been identified as Native American based on their context within a Woodland burial mound (BP1064).

In 1925, human remains representing a minimum of 14 individuals were excavated from a rock shelter, 13JN10, Jones County, IA, by Frank L. Baldwin and Albert E. Coe. In the 1920s, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1066). No known individuals were identified. No associated funerary objects are present.

The human remains from 13JN10 have been identified as Native American based on their context within a rock shelter where Woodland period artifacts were also found (BP1066).

Sometime between 1925 and 1928, human remains representing a minimum of one individual were excavated from a rock shelter, 13JN11, Jones County, IA, by Albert E. Coe. In 1928, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1067). No known individual was identified. No associated funerary objects are present.

The human remains from 13JN11 have been identified as Native American based on their context within a rock shelter where Woodland period artifacts were also found (BP1067).

In 1938, human remains representing a minimum of 10 individuals were excavated from mounds at 13ML49, Mills County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1069). No known individuals were identified. The one possible associated funerary object is a shell fragment.

The human remains from 13ML49 have been identified as Native American based on their context within a Woodland burial mound (BP1069).

In 1938, human remains representing a minimum of one individual were excavated from a mound at 13ML117, Mills County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1070). No known individual was identified. No associated funerary objects are present.

The human remains from 13ML117 have been identified as Native American based on their context within a Woodland burial mound (BP1070).

At an unknown date, human remains representing a minimum of one individual were collected from the surface of 13ML184, Mills County, IA, by Paul Rowe. At an unknown date, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1076). No known individual was identified. No associated funerary objects are present.

The human remains from 13ML184 have been identified as Native American based on their context within a Woodland burial mound (BP1076).

At an unknown date, human remains representing a minimum of one individual were collected from the surface along the banks of Little Pony Creek, in the vicinity of 13ML203 and 13ML220, Mills County, IA, by Paul Rowe. At an unknown date, the human remains were donated to the State Historical Society of Iowa and became part of the Keyes Collection (BP1075). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1075). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were collected from the general mound surface of 13ML247, Mills County, IA, by Paul Rowe. In 1937, the human remains were donated to the Keyes Collection, State Historical Society of Iowa. In 1938, human remains representing a minimum of one individual were excavated from a mound at the site by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1074, 1077). No known individuals were identified. No associated funerary objects are present.

The human remains from 13ML247 have been identified as Native American based on their context within a Woodland burial mound (BP1074, 1077).

In 1939, human remains representing a minimum of one individual were excavated from 13PM1, Plymouth County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1078). No known individual was identified. No associated funerary objects are present.

The human remains from 13PM1 have been identified as Native American based on the overall condition of the bone (BP1078). These human remains cannot be dated or identified with an archeological context.

In 1929 or 1933, human remains representing a minimum of one individual were collected from the surface of 13PM5, Plymouth County, IA, by Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1080). No known individual was identified. No associated funerary objects are present.

The human remains from 13PM5 have been identified as Native American based on the overall condition of the bone and their presence on the surface of a Woodland site (BP1080).

In 1926, human remains representing a minimum of two individuals were collected from the surface of 13PM20, Plymouth County, IA, by Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1082). No known individuals were identified. No associated funerary objects are present.

The human remains from 13PM20 have been identified as Native American based on the overall condition of the bones (BP1082). These human remains cannot be dated or identified with an archeological context.

In 1934, human remains representing a minimum of one individual were excavated from 13PM30, Plymouth County, IA, by Ellison Orr under the direction of Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1081). No known individual was identified. No associated funerary objects are present.

The human remains from 13PM30 have been identified as Native American based on the overall condition of the bone (BP1081). These human remains cannot be dated or identified with an archeological context.

In 1924, human remains representing a minimum of one individual were exposed by a road cut across a possible mound, 13PW43, Pottawattamie County, IA. Charles R. Keyes was present at the site and is assumed to have collected the remains. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1083). No known individual was identified. No associated funerary objects are present.

The human remains from 13PW43have been identified as Native American based on the overall condition of the bone (BP1083). These human remains cannot be dated or identified with an archeological context.

In 1925, human remains representing a minimum of one individual were collected from the surface of 13WD60, Woodbury County, IA, by Charles R. Keyes. The human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1084). No known individual was identified. No associated funerary objects are present.

The human remains collected at 13WD60 have been identified as Native American based on the overall condition of the bone (BP1084). These human remains cannot be dated or identified with an archeological context.

In 1922, human remains representing a minimum of two individuals were collected during road construction at an unknown location in Worth County, IA, by E.E. Brown. In 1927, the human remains were donated to the Keyes Collection, State Historical Society of Iowa (BP1085). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on osteological evidence and the overall condition of the bones (BP1085). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were collected from an unknown location in northern Iowa, possibly Chickasaw, Bremer, or Floyd Counties, by Otho Laird. In 1949, the human remains became part of the Keyes Collection, State Historical Society of Iowa (BP1087). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1087). These human remains cannot be dated or identified with an archeological context.

In 1992, human remains representing a minimum of four individuals were recovered during earthmoving work at a private campground, Dickinson County, IA. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP596). No known individuals were identified. No associated funerary objects are present.

Archeological investigations suggested the human remains were deposited several years earlier as a result of earthmoving work and had probably come from a nearby burial mound, 13DK39 (BP596). The human remains have been identified as Native American based on the overall condition of the bones and their probable context within a Woodland burial mound.

In 1973, human remains representing a minimum of three individuals were recovered during excavations at 13CK405, Cherokee County, IA. All of the materials from the excavations reposed at the Office of the State Archaeologist, University of Iowa (BP928). In 1996, three deciduous teeth were discovered in the collections and identified as human. No known individuals were identified. No associated funerary objects are present.

The human remains from 13CK405 have been identified as Native American based on their archeological context in an Early Archaic component of the site (BP928).

At an unknown date, human remains representing a minimum of one individual were recovered on a sandbar along the Skunk River, north of Ames, Story County, IA, by a local resident. In 1967, the resident gave the materials to the Iowa State University Archaeological Laboratory, Ames, IA. In 1996, the Iowa State University Archaeological Laboratory transferred the human remains to the Office of the State Archaeologist, University of Iowa (BP945). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on osteological evidence and overall bone condition (BP945). These human

remains cannot be dated or identified with an archeological context.

In the 1960s or 1970s, human remains representing a minimum of two individuals were recovered from a possible mound near Ridgeport, Boone County, IA, by unknown individuals from Iowa State University, Ames, IA. At an unknown date, the human remains were transferred to the Boone County Historical Museum. In 1996, the remains were found in the Boone County Historical Museum, identified as human, and transferred to the Office of the State Archaeologist, University of Iowa (BP962). The location of any other human remains from this site is unknown. No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on their reported context within a Woodland burial mound (BP962).

In 1996 and 1999, human remains representing a minimum of two individuals were recovered from the eroding surface of 13WD27, Woodbury County, IA, by the Office of the State Archaeologist, University of Iowa (BP980, 1357). No known individuals were identified. The six possible associated funerary objects are one sherd, one shell fragment, one modified shell fragment, and three shell beads.

The human remains from 13WD27, as originally reported, have been reburied as part of the reburial of culturally unidentifiable human remains from Iowa, pursuant to an agreement approved by the NAGPRA Review Committee (BP980, 1357). Subsequently, additional human remains from this site were found in the collection. Whether they represent an additional number of individuals or belong to the individuals previously reported on the 1995 NAGPRA inventory is not known. The human remains have been identified as Native American based on the overall bone condition and their recovery from a Great Oasis site.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location, Louisa County, IA, by a Mr. Parsons. At an unknown date, Mr. Parsons donated his collections to the Louisa County Historical Museum, Wapello, IA. In 1996, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP994). No known individual was identified. No associated funerary objects are present.

The individual from this unknown location in Louisa County has been identified as Native American based on the overall condition of the bone (BP994). These human remains cannot be dated or identified with an archeological context.

Between 1990 and 1994, excavations were conducted at 13LA12, Louisa County, IA, by University of Iowa Department of Anthropology field schools. The human remains from this site were originally reported in the 1995 NAGPRA inventory where they were determined to be culturally unidentifiable, and were reburied, pursuant to a disposition agreement approved by the NAGPRA Review Committee. In 1996, 1999, and 2000, fragments of human remains representing a minimum of 14 individuals, were identified during laboratory analysis. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1004, 1334, 1423). The remains of four individuals might belong to the group originally reported on the 1995 NAGPRA inventory. No known individuals were identified. No associated funerary objects are present.

The human remains from 13 LA12 have been identified as Native American based on their archeological context in a Woodland habitation site.

At an unknown date, human remains representing a minimum of one individual were recovered in a rock shelter, 13JN23, Jones County, IA, by a local resident. In 1996, the resident gave the materials to the Office of the State Archaeologist, University of Iowa (BP1018, 1224). In 1998, limited archeological excavations were conducted at the site by University of Iowa Department of Anthropology and Department of Geology personnel. During laboratory analysis, human remains representing an additional six individuals were identified and transferred to the Office of the State Archaeologist. No known individuals were identified. No associated funerary objects are present.

The human remains from 13JN23 have been identified as Native American based on their archeological context within a Woodland site (BP1018, 1224).

In 1996, human remains representing a minimum of one individual were recovered from a sandbar along Waterman Creek, O'Brien County, IA, by a local collector. That same year, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1032). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1032). These human remains cannot be dated or identified with an archeological context.

In 1996, human remains representing a minimum of one individual were recovered during test excavations at 13JK220, Jackson County, IA, by Louis Berger Group, Inc. The human remains were identified during laboratory analysis and transferred to the Office of the State Archaeologist, University of Iowa (BP1091). No known individual was identified. No associated funerary objects are present.

The human remains from 13JK220 have been identified as Native American based on their recovery from a Late Archaic or Woodland archeological component and the overall bone condition (BP1091).

At an unknown date, human remains representing a minimum of two individuals were recovered at an unknown location in northwest Iowa, possibly Buena Vista, Cherokee, or O'Brien Counties, IA, by a local collector. At an unknown date, the human remains were donated to the Buena Vista County Historical Society. In 1996, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1105). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1105). These human remains cannot be dated or identified with an archeological context.

In 1963, human remains representing a minimum of one individual were recovered from 13CA5, Cass County, IA, by a local resident. In 1997, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1111). No known individual was identified. No associated funerary objects are present.

The human remains from 13CA5 have been identified as Native American based on their probable archeological context within an Archaic site and the overall bone condition (BP1111).

In 1977, excavations were conducted at 13DA11, Dallas County, IA, by the Office of the State Archaeologist, University of Iowa. In 1997, two tooth fragments were found in the repository of the Office of the State Archaeologist and identified as probably human. At minimum, they represent one individual (BP1189). No known individual was identified. No associated funerary objects are present.

The human remains from 13DA11 have been identified as Native American based on their archeological context

within a Woodland or Great Oasis site (BP1189).

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location in Allamakee County, IA, by Henry P. Field. At an unknown date, Dr. Field donated his collections to the Luther College Archaeological Laboratory, Decorah, IA. In 1988, the human remains were transferred to the Office of the State Archaeologist, University of Iowa, but were inadvertently left off the 1995 NAGPRA inventory (BP1190). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1190). These human remains cannot be dated or identified with an archeological context.

In 1998, human remains representing a minimum of six individuals were recovered during excavations at 13WD88, Woodbury County, IA, by the Office of the State Archaeologist, University of Iowa (BP1210). No known individuals were identified. No associated funerary objects are present.

The human remains from 13WD88 have been identified as Native American based on their recovery from a Great Oasis habitation site (BP1210).

In 1998, human remains representing a minimum of one individual were recovered from an eroding bluff face adjacent to an active quarry, 13ML635, Mills County, IA, by a quarry employee, and during a follow-up investigation, by the Office of the State Archaeologist, University of Iowa. The human remains were transferred to the Office of the State Archaeologist (BP1245). No known individual was identified. No associated funerary objects are present.

The human remains from 13ML635 have been identified as Native American based on the overall condition of the bone (BP1245). These human remains cannot be dated or identified with an archeological context.

In 1967, excavations were conducted at 13PM25, Plymouth County, IA, by the Office of the State Archaeologist, University of Iowa. The human remains from this site were reported on the 1995 NAGPRA inventory where they were determined to be culturally unidentifiable and reburied, pursuant to a disposition agreement approved by the NAGPRA Review Committee. In 1998, three human bone fragments representing a minimum of two individuals were identified in the Office of the State Archaeologist repository (BP1247). They probably date to the 1967 excavation. No known individuals were identified. No associated funerary objects are present.

The human remains from 13PM25 have been identified as Native American based on their context within a Great Oasis habitation site and the overall condition of the bones (BP1247).

In 1935, human remains representing a minimum of two individuals were excavated from a mound, 13JK17, Jackson County, IA, by Ellison Orr under the supervision of Charles R. Keyes. In 1999, the human remains were found in an attic at Cornell College, Mount Vernon, IA, and were transferred to the Office of the State Archaeologist, University of Iowa (BP1294). No known individuals were identified. No associated funerary objects are present.

The human remains from 13JK17 have been identified as Native American based on their context within a Woodland burial mound (BP1294).

Sometime in the 1970s, human remains representing a minimum of four individuals were recovered at an unknown location in Woodbury County, IA, by an unknown individual. In 1999, a member of the Menominee Tribe of Wisconsin contacted the curator at the Milwaukee Public Museum concerning the human remains in the possession of an acquaintance. The tribal member requested the museum's assistance in returning the human remains to Iowa. In 1999, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1300). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1300). These human remains cannot be dated or identified with an archeological context.

In the early 1990s, human remains representing a minimum of four individuals were recovered from two unknown locations in Woodbury County, IA, by an unknown individual. In 1999, the human remains were turned over to the University of South Dakota Archaeology Laboratory, and subsequently transferred to the Office of the State Archaeologist, University of Iowa (BP1309). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1309). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location, possibly Jackson or Jones County, IA, by Paul Sagers. In 1999, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1313). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1313). These human remains cannot be dated or identified with an archeological context.

In 1955, human remains were recovered from 13MN2, Monona County, IA, by the Sanford Museum, Cherokee, Cherokee County, IA. In 1999, human remains representing a minimum of one individual were found in the museum collections and transferred to the Office of the State Archaeologist, University of Iowa (BP1331). No known individual was identified. No associated funerary objects are present.

The human remains from 13MN2 appear to be the missing cranial portions of a subadult reburied in 1988. These human remains have been identified as Native American based on their context within an Archaic burial site (BP1331).

In 1999, human remains representing a minimum of one individual were recovered from the surface of 13IA5, Ida County, IA, by Dennis Laughlin. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1336). No known individual was identified. No associated funerary objects are present.

The human remains from 13IA5 have been identified as Native American based on the overall bone condition (BP1336). These human remains cannot be dated or identified with an archeological context.

In 1999, human remains representing a minimum of one individual were found on a sandbar near the confluence of Beaver Creek and Soldier River, Crawford County, IA, by Dennis Laughlin. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1337). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1337). These human remains cannot be dated or identified with an archeological context.

In 1968, excavations were conducted at 13AM100, Allamakee County, IA, by a University of Iowa student. The collection reposed at the Office of the

State Archaeologist, University of Iowa. In 2000, several bone fragments in the repository collection were identified as possibly human, representing two individuals (BP1373). No known individuals were identified. No associated funerary objects are present.

The human remains from 13AM100 have been identified as Native American based on their context within a Woodland burial mound (BP1373).

In 2000, human remains representing a minimum of one individual were recovered from the surface of 13WD13, Woodbury County, IA, by Louis Berger Group, Inc. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1397). No known individual was identified. No associated funerary objects are present.

The human remains from 13WD13 have been identified as Native American based on the overall bone condition (BP1397). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location in Polk County, IA, by an unknown individual. In 2000, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1401). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1401). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location in Mills County, IA, by an unknown individual. In 2000, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1414). No known individual was identified. No associated funerary objects are present.

The human remains removed from this unknown location in Mills County have been identified as Native American based on the overall bone condition (BP1414). These human remains cannot be dated or identified with an archeological context.

Sometime prior to 1926, human remains representing a minimum of one individual were recovered at an unknown location in Mills County, IA, by an unknown individual. In 1926, the human remains were sent to the University of Iowa College of Dentistry. At an unknown date, much of the museum collection was put into storage, and its existence was forgotten. In 2000, the human remains were found and transferred to the Office of the State Archaeologist, University of Iowa (BP1446). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1446). These human remains cannot be dated or identified with an archeological context.

Sometime prior to 1932, human remains representing a minimum of one individual were found at a gravel pit near the town of Humboldt, Humboldt County, IA, by an unknown individual. In 1932, the human remains were sent to the University of Iowa College of Dentistry. At an unknown date, much of the museum collection was put into storage, and its existence was forgotten. In 2000, the human remains were found and transferred to the Office of the State Archaeologist, University of Iowa (BP1447). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1447). These human remains cannot be dated or identified with an archeological context.

Sometime prior to 1932, human remains representing a minimum of one individual were excavated from a bluff near Council Bluffs, Pottawattamie County, IA, by an unknown individual. In 1932, the human remains were sent to the University of Iowa College of Dentistry. At an unknown date, much of the museum collection was put into storage, and its existence was forgotten. In 2000, the human remains were found and transferred to the Office of the State Archaeologist, University of Iowa (BP1448). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1448). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location in Allamakee County, IA, by Henry P. Field. At an unknown date, Dr. Field donated the human remains to the Luther College Archaeological Laboratory, Decorah, IA. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1472). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1472). These human remains cannot be dated or identified with an archeological context.

In or around 1937, human remains representing a minimum of one individual were recovered at an unknown location within Iowa, by an unknown individual. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1487). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on osteological evidence and the overall bone condition (BP1487). These human remains cannot be dated or identified with an archeological context.

In 1960, human remains representing a minimum of four individuals were recovered from the surface of 13HM10, Hamilton County, IA, by two unknown individuals. In 2002, the human remains were transferred to the Office of the State Archaeologist, University of Iowa. Around 1970, human remains representing a minimum of four individuals were recovered from 13HM10 by Rex Hansman. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa. Other human remains from 13HM10 were included in a 1995 NAGPRA inventory, and were determined to be culturally unidentifiable. They were reburied, pursuant to a disposition agreement approved by the NAGPRA Review Committee. Whether the human remains from 13HM10 reported in this notice represent additional individuals to those on the 1995 NAGPRA inventory is unknown (BP1500, 1602). No known individuals were identified. No associated funerary objects are present.

The human remains from 13HM10 have been identified as Native American based on their recovery from a prehistoric burial site (Archaic, Woodland, and Great Oasis) and the overall condition of the bones (BP1500, 1602).

In the 1960s, human remains representing a minimum of one individual were recovered near the town square, Fort Dodge, Webster County, IA, by city workers. The human remains were given to Rex Hansman. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1501). No known individual was

identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1501). These human remains cannot be dated or identified with an archeological context.

In 2001, human remains representing a minimum of one individual were recovered from the Big Sioux River near Hawarden, Sioux County, IA, by an unknown individual. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1503). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1503). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the surface of a rock shelter in an unknown location, Jackson County, IA, by the landowner. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1540). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1540). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of two individuals were recovered from the surface of 13PM81, Plymouth County, IA, by Paul Williams. In 2001, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1591). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1591). These human remains cannot be dated or identified with an archeological context.

In 1905, human remains representing a minimum of two individuals were recovered at 13SR206 during construction of a high school in Story County, IA, by unknown individuals. At an unknown date, the human remains were given to the local school. In 2003, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1641). No known individuals were identified. No associated funerary objects are present.

The human remains from 13SR206 have been identified as Native American based on osteological evidence and the overall condition of the bones (BP1641). These human remains cannot be dated or identified with an archeological context.

In 2003, human remains representing a minimum of four individuals were uncovered during earthmoving activities at 13CY52, Clay County, IA, by the landowner, and collected by the Clay County Sherriff's Office and the Office of the State Archaeologist, University of Iowa (BP1647). The human remains were transferred to the Office of the State Archaeologist. No known individuals were identified. The 71 possibly associated funerary objects are 57 sherds, 2 projectile points, 10 flakes, and 2 shell fragments.

The human remains from 13CY52 have been identified as Native American based on their context within a Woodland site (BP1647).

In 1970, human remains representing a minimum of one individual were recovered from the surface of 13LO414, Lyon County, IA, by the University of Nebraska Department of Anthropology. In 2003, the collection from this site was transferred to the Office of the State Archaeologist, University of Iowa, and several bone fragments were identified as human (BP1660). No known individual was identified. No associated funerary objects are present.

The human remains from 13LO414 have been identified as Native American based on the overall condition of the bones (BP1660). These human remains cannot be dated or identified with an archeological context.

In 1970, human remains representing a minimum of one individual were recovered from the surface of 13LO421, Lyon County, IA, by University of Nebraska Department of Anthropology. In 2003, the collection from this site was transferred to the Office of the State Archaeologist, University of Iowa, where bone fragments were identified as human (BP1661). No known individual was identified. No associated funerary objects are present.

The human remains from 13LO421 have been identified as Native American based on the overall condition of the bones (BP1661). These human remains cannot be dated or identified with an archeological context.

In 1966, human remains representing a minimum of one individual were recovered at an unknown location, Allamakee County, IA, by Robert Stoddard. In the late 1990s or early 2000s, Mr. Stoddard donated his collections to the Luther College Archaeological Laboratory, Decorah, IA. In 2003, as the collections were being accessioned, the human remains were identified and transferred to the Office of the State Archaeologist, University of Iowa (BP1679). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1679). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the surface of 13AM335 (formerly 13AM208), Allamakee County, IA, by Henry P. Field. At an unknown date, Dr. Field donated the human remains to the Luther College Archaeological Laboratory, Decorah, IA. In 2003, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1680). No known individual was identified. No associated funerary objects are present.

The human remains from 13AM335 have been identified as Native American based on their recovery from a Woodland site and the overall condition of the remains (BP1680). These human remains cannot be dated or identified with an archeological context.

In 2003, human remains representing a minimum of one individual were exposed during house construction at 13DK109, Dickinson County, IA, and recovered by the Dickinson County Sheriff's Office. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1707). No known individual was identified. No associated funerary objects are present.

The human remains from 13DK109 have been identified as Native American based on the overall condition of the bone (BP1707). These human remains cannot be dated or identified with an archeological context.

In 1977, excavations were conducted at 13JF52, Jefferson County, IA, by the Office of the State Archaeologist, University of Iowa. In 2003, two small bone fragments in the Office of the State Archaeologist repository collection were identified as probably human, representing a minimum of one individual (BP1717). No known individual was identified. No associated funerary objects are present.

The human remains from 13JF52 have been identified as Native American based on their context in a Woodland site and the overall condition of the bones (BP1717).

In 2004, human remains representing a minimum of one individual were

found on a sandbar in the Maple River, Ida County, IA, by Dennis Laughlin. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1782). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on osteological evidence and the overall condition of the bone (BP1782). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location in Iowa, possibly Lyon County, by an unknown individual. At an unknown date, the unknown individual's collections were donated to the Lyon County Conservation Board, IA. In 2004, four teeth in the collection were identified as human, and were transferred to the Office of the State Archaeologist, University of Iowa (BP1788). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the teeth (BP1788). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the West Nishnabotna River, Mills County, IA, by John Boruff. In 2004, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1797). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on osteological evidence and the overall condition of the bone (BP1797). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of two individuals were recovered at an unknown location, possibly a mound in Boone County, IA, by an unknown individual. At an unknown date, the human remains were donated to the Madrid Historical Society, Madrid, IA, and may have been part of the C.L. Lucas collection. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1807). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bones (BP1807). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at an unknown location, possibly in Hamilton County, IA, by an unknown individual. At an unknown date, the human remains were donated to Wilson Brewer Park, Hamilton County, IA. In 2006, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1826). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP1826). These human remains cannot be dated or identified with an archeological context.

In 1979, human remains representing a minimum of one individual were removed from 13WN172, Winnebago County, IA, by Steve Lensink during archeological testing, but the human remains were not identified as such at that time. The collection from the site reposed at the Office of the State Archaeologist, University of Iowa. In 2005, a bone fragment was identified as possibly human (BP1833). No known individual was identified. No associated funerary objects are present.

The human remains from 13WN172 have been identified as Native American based on the overall condition of the bone (BP1833). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the surface of 13PM247, Plymouth County, IA, by Paul Williams. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1869). No known individual was identified. No associated funerary objects are present.

The human remains removed from 13PM247 have been identified as Native American based on the overall condition of the bone (BP1869). These human remains cannot be dated or identified with an archeological context.

In 2005, human remains representing a minimum of 58 individuals were recovered from 13PM248, Plymouth County, IA, initially by a landowner during earthmoving activities, and subsequently through salvage excavations by the Office of the State Archaeologist. The human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1881). No known individuals were identified. The nine associated funerary objects are four sherds, two projectile pointes, one worked bone, and two bird bones.

The human remains from 13PM248 have been identified as Native American based on the overall condition of the bones and prehistoric cultural materials recovered from the site (BP1881).

At an unknown date, human remains representing a minimum of one individual were recovered from a sandbar in the Little Sioux River, O'Brien County, IA, by an unknown individual. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1902). No known individual was identified. No associated funerary objects are present.

The human remains from the Little Sioux River have been identified as Native American based on the overall condition of the bone (BP1902). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from a sandbar in the Iowa River, Hardin County, IA, by an unknown individual. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1904). No known individual was identified. No associated funerary objects are present.

The human remains removed from the Iowa River have been identified as Native American based on the overall condition of the bone (BP1904). These human remains cannot be dated or identified with an archeological context.

In 1960, excavations were conducted at 13WB1, Webster County, IA, by Richard Flanders and Rex Hansman. Human remains were not identified at that time. At an unknown date, Flanders and Hansman donated their collection to the Office of the State Archaeologist, University of Iowa (BP1916). In 2005, very fragmented remains were identified as possibly human, and representing a minimum of one individual. No known individual was identified. No associated funerary objects are present.

The human remains from 13WB1 have been identified as Native American based on their context within a Woodland burial mound and the overall condition of the bones (BP1916). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at 13MC241, Muscatine County, IA, by Jennifer Hill. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1922). No known individual was

identified. No associated funerary objects are present.

The human remains from 13MC241 have been identified as Native American based on the overall condition of the remains (BP1922). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered, possibly from 13LA29, Louisa County, IA, by an unknown individual. In 1983, the human remains came into the possession of the Harris County, Texas Medical Examiner's Office. In 2005, the human remains were transferred to the University of North Texas Laboratory of Forensic Anthropology, and subsequently, to the Office of the State Archaeologist, University of Iowa (BP1925). No known individual was identified. No associated funerary objects are present.

The human remains from 13LA29 have been identified as Native American based on their possible context within a Woodland burial mound and the overall condition of the bones (BP1925). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the West Nishnabotna River, Pottawattamie County, IA, by an unknown individual. In 2005, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1940). No known individual was identified. No associated funerary objects are present.

The human remains from the West Nishnabotna River have been identified as Native American based on the overall condition of the bone (BP1940). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of three individuals were recovered at an unknown location, probably in northeast Iowa, possibly Allamakee or Winneshiek County, IA, by Gavin Sampson. In 1969, Mr. Sampson donated the human remains to the Luther College Archaeological Laboratory, Decorah, IA. In 1996, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP1970). No known individuals were identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP1970). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from mud rock piles at a quarry near the town of Shenandoah, Page County, IA, by Larry O'Brien. In 2007, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP2003). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP2003). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from 13ML0o, West Nishnabotna River, Mills County, IA, by John Boruff. In 2004, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP2009). No known individual was identified. No associated funerary objects are present.

The human remains from 13ML0o have been identified as Native American based on the overall condition of the bone (BP2009). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered from the West Nishnabotna River, Pottawattamie County, IA, by John Boruff. In 2004, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP2010). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP2010). These human remains cannot be dated or identified with an archeological context.

In 1887, human remains representing a minimum of one individual were recovered during grading of Jackson Square, City of Dubuque, Dubuque County, IA, by an unknown individual. At an unknown date, the human remains were donated to the University of Iowa Geology Repository. In 2006, the human remains were transferred to the Office of the State Archaeologist, University of Iowa (BP2029). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall condition of the bone (BP2029). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at 13MA11, Marion County, IA, by an unknown individual. At an unknown date, the human remains were included in repository collections at Iowa State University Archaeological Laboratory. In 2006, a single tooth was found and identified as human and transferred to the Office of the State Archaeologist, University of Iowa (BP2048). No known individual was identified. No associated funerary objects are present.

The human remains from 13MA11 have been identified as Native American based on the overall condition of the tooth (BP2048). These human remains cannot be dated or identified with an archeological context.

In 2007, human remains representing a minimum of one individual were recovered from a small stream at an unknown location, Fremont County, IA, by an unknown individual. The human remains were sent to the State Medical Examiner's Office, Des Moines, IA, and subsequently transferred to the Office of the State Archaeologist, University of Iowa (BP2119). No known individual was identified. No associated funerary objects are present.

The human remains have been identified as Native American based on the overall bone condition (BP2119). These human remains cannot be dated or identified with an archeological context.

At an unknown date, human remains representing a minimum of one individual were recovered at 13PM8, Plymouth County, IA, by an unknown individual. In 2007, the human remains were found in the collections of the Sanford Museum, Cherokee, IA, and transferred to the Office of the State Archaeologist, University of Iowa (BP2161). No known individual was identified. No associated funerary objects are present.

The human remains from 13PM8 have been identified as Native American based on the overall condition of the bone and possible context within a Great Oasis habitation site (BP2161).

At an unknown date, human remains representing a minimum of one individual were recovered at 13PM50, Plymouth County, IA, by an unknown individual. In 2007, a single tooth identified as human was found in collections of the Sanford Museum, Cherokee, IA, and transferred to the Office of the State Archaeologist, University of Iowa (BP2162). No known individual was identified. No associated funerary objects are present.

The human remains from 13PM50 have been identified as Native American

based on the overall condition of the tooth and possible context within a Great Oasis habitation site (BP2162).

At an unknown date, an unknown individual collected material from 13LE136, Lee County, IA. In 1979, the unknown individual donated the collection to the Office of the State Archaeologist, University of Iowa (BP2167). In 1980, human remains from this site had been reported on and reburied by the Office of the State Archaeologist. In 2007, a small fragment of tooth enamel was found, and determined to be human, and to represent one individual. No known individual was identified. No associated funerary objects are present.

The human remain from 13LE136 has been identified as Native American based on the possible association of the tooth enamel with the earlier reburied human remains (BP2167). These human remains cannot be dated or identified with an archeological context.

The Native American human remains described above fall into two main categories – known archeological manifestations (Archaic, Woodland, and Great Oasis) and general prehistoric. Because of the antiquity of the human remains and the lack of identifiable or traceable cultural continuity, no tribal affiliation could be established for the Archaic, Woodland, or Great Oasis period human remains. The general prehistoric human remains are either from known sites lacking diagnostic materials, archeological context, or insufficient osteological evidence; or they are from unknown locations.

Officials of the Office of the State Archaeologist, University of Iowa 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 329 individuals of Native American ancestry. Officials of the Office of the State Archaeologist, University of Iowa also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 100 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 Office of the State Archaeologist, University of Iowa have determined that, pursuant to 25 U.S.C. 3001 (2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian tribe.

The Office of the State Archaeologist, University of Iowa administers the provisions in the Code of Iowa that provide for any human remains over 150 years old to be reburied in a state cemetery. The Office of the State Archaeologist, University of Iowa and the State Historical Society of Iowa have in their possession the human remains of 329 Native American individuals from Iowa whose cultural affiliation is unknown, and 100 associated or possibly associated funerary objects. These human remains are considered ''culturally unidentifiable'' under NAGPRA, 43 C.F.R 10.10 (g). Federal regulations currently preclude disposition of culturally unidentifiable human remains absent an overriding legal requirement or a recommendation from the Secretary of the Interior, 43 C.F.R 10.9 (e)(6). In 2004, the Iowa Office of the State Archaeologist started to develop a process, in consultation with tribes with a historic interest in Iowa, for the disposition of culturally unidentifiable human remains from Iowa. The Native American Graves Protection and Repatriation Review Committee (Review Committee) is responsible for recommending specific actions for disposition of culturally unidentifiable human remains.

In October 2004, the Iowa Office of the State Archaeologist, University of Iowa, the State Historical Society of Iowa, and the Office of the State Archaeologist Indian Advisory Council (a group composed of representatives of Native American tribes in and from Iowa) hosted a tribal conference where 21 Federally-recognized tribes and 1 non-federally recognized tribe were invited to develop the process for disposition of culturally unidentifiable human remains and associated funerary objects from Iowa in possession of the Office of the State Archaeologist, University of Iowa, and the State Historical Society of Iowa, in accordance with Iowa law (Code of Iowa 263B.8). Final drafting of the process was conducted through on-going tribal consultation involving phone calls, mail, and email.

On May 30–31, 2006, the process developed through consultation was considered by the Review Committee. A June 14, 2006, letter on behalf of the Review Committee from the Designated Federal Officer provisionally authorized the Iowa Office of State Archaeologist to proceed with the development of the process for disposition. In 2007, the Iowa Office of State Archaeologist and the tribes completed the NAGPRA process document. A March 25, 2008, letter from the Assistant Secretary for Fish and Wildlife and Parks, as the designee for the Secretary of the Interior, transmitted the authorization for the disposition according to provisions of the Code of Iowa 263B.8 and the NAGPRA process document, subject to publication of a Notice of Inventory Completion in the **Federal Register**. This notice fulfills that requirement.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Shirley Schermer, Burials Program Director, Office of the State Archaeologist, 700 Clinton Street Building, University of Iowa, Iowa City, IA 52242, telephone (319) 384–0740, or Jerome Thompson, State Historical Society of Iowa, 600 East Locust, Des Moines, IA 50319–0290, telephone (515) 281–4221, before November 10, 2008. Disposition of the human remains to the Citizen Potawatomi Nation, Oklahoma; Flandreau Santee Sioux Tribe of South Dakota; Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Lower Sioux Indian Community in the State of Minnesota; Omaha Tribe of Nebraska; Otoe-Missouria Tribe of Indians, Oklahoma; Pawnee Nation of Oklahoma; Peoria Tribe of Indians of Oklahoma; Ponca Tribe of Indians of Oklahoma; Ponca Tribe of Nebraska; Prairie Band Potawatomi Nation, Kansas; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas; Sac & Fox Nation, Oklahoma; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Winnebago Tribe of Nebraska; and Yankton Sioux of South Dakota may proceed after that date if no additional claimants come forward.

The Office of the State Archaeologist is responsible for notifying the Citizen Potawatomi Nation, Oklahoma; Flandreau Santee Sioux Tribe of South Dakota; Ho-Chunk Nation of Wisconsin; Iowa Tribe of Kansas and Nebraska; Iowa Tribe of Oklahoma; Lower Sioux Indian Community in the State of Minnesota; Omaha Tribe of Nebraska; Otoe-Missouria Tribe of Indians, Oklahoma; Pawnee Nation of Oklahoma; Peoria Tribe of Indians of Oklahoma; Ponca Tribe of Indians of Oklahoma; Ponca Tribe of Nebraska; Prairie Band Potawatomi Nation, Kansas; Sac & Fox Tribe of the Mississippi in Iowa; Sac & Fox Nation of Missouri in Kansas; Sac & Fox Nation, Oklahoma; Santee Sioux Nation, Nebraska; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, South Dakota; Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota; Winnebago Tribe of Nebraska; Yankton Sioux of South Dakota; and the Mendota Mdewakanton Dakota

Community, a non-federally recognized Indian group.

Dated: September 10, 2008.

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23972 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Archaeological Center, San Diego, 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 an associated funerary object in the possession of the San Diego Archaeological Center, San Diego, CA. The human remains and associated funerary object were removed from archeological sites CA-SDI–6669 (SDM-W–230) and CA-SDI–5669, San Diego 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 object. The National Park Service is not responsible for the determinations in this notice.

A detailed assessment of the human remains was made by San Diego Archaeological Center professional staff in consultation with representatives of the Kumeyaay Nation, on behalf of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation (formerly the Sycuan Band of Diegueno Mission Indians of California); and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

In 1983, human remains representing a minimum of one individual were removed from archeological site CA-SDI–6669 (SDM-W–230), Sabre Springs, San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). On May 10, 2006, the collection was accessioned by the San Diego Archaeological Center, and assessed for objects eligible for repatriation in accordance with NAGPRA. No known individual was identified. The one associated funerary object is an olla.

Site CA-SDI–6669 is located on the U.S. Geological Survey topographic map of Poway, at the intersection of Sabre Springs Parkway and Poway Road near the City of Poway. This site falls within traditional Kumeyaay territory, and based on radiocarbon date had two periods of occupation. Locus A, B, and C were occupied from A.D. 1120 to A.D. 1750. Feature 4, locus B had radiocarbon dates establishing occupation at 1000 B.C.

From 1978 to 1981, human remains representing a minimum of one individual were removed from archeological site CA-SDI–5669 (Santee Greens) San Diego County, CA, as part of an archeological excavation performed in compliance with the California Environmental Quality Act (CEQA). In 1998, the collection was accessioned by the San Diego Archaeological Center. In 2004, objects from the collection were repatriated. In 2006, reassessment of the collection was performed and the human remains from this site were identified. No known individual was identified. No associated funerary objects are present.

CA-SDI–5669 is located in the Southeast part of San Diego County in the City of Santee. The site is located adjacent to Mongolia Avenue and approximately 1.6 kilometers north of the San Diego River bridge crossing. The archeology report states that the site falls within the traditional Kumeyaay territory. The report also states that artifacts found at the site are typical of the Late Prehistoric Period. The Kumeyaay Nation is represented by the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Officials of the San Diego Archaeological Center 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 San Diego Archaeological Center also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the one object 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. Lastly, officials of the San Diego Archaeological Center 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 object and the Kumeyaay Nation, which is represented by the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation,

California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary object should contact Cindy Stankowski, San Diego Archaeological Center, 16666 San Pasqual Valley Road, Escondido, CA 92027–7001, telephone (760) 291–0370, before November 10, 2008. Repatriation of the human remains and associated funerary object to the Kumeyaay Nation, on behalf of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California may proceed after that date if no additional claimants come forward.

The San Diego Archaeological Center is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Capitan Grande Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California that this notice has been published.

Dated: September 10, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23965 Filed 10–8–08; 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, U.S. Fish and Wildlife Service, Region 7, Anchorage, AK, and Alutiiq Museum and Archaeological Repository, Kodiak, 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, U.S. Fish and Wildlife Service, Region 7, Anchorage, AK, and in the possession of the Alutiiq Museum and Archaeological Repository, Kodiak, AK. The human remains were removed from Chief Cove Island, Kodiak 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 Alutiiq Museum and Archaeological Repository professional staff on behalf of the U.S. Fish and Wildlife Service, Region 7, in consultation with representatives of Koniag, Inc., Native Village of Larsen Bay, and Native Village of Port Lions.

In 1977, human remains representing a minimum of one individual were removed from 49–KOD–00172, an archeological site on Chief Cove Island, in the Kodiak Island Borough, AK, during testing of the site by Mike Nowak, U.S. Fish and Wildlife Service archeologist. Following the excavation, materials from the site were housed at the University of Alaska Fairbanks Museum, then transferred to the University of Alaska's Department of Anthropology under the care of Dr. Richard Jordan. Sometime between 1988 and 1991, it is believed that Dr. Jordan inadvertently shipped the human remains to the Hunter College Department of Anthropology with faunal samples intended for analysis. In 2000, Robert Kopperl, a graduate student of University of Washington, Department of Anthropology, gained permission to move the 49–KOD–00172 faunal samples from Hunter College to Seattle, as part of his dissertation research project. During unpacking of the collection, the human remains were identified. In July of 2006, the human remains were hand carried from Seattle to the Alutiiq Museum by a visiting researcher. The Alutiiq Museum is a regional research facility governed by representatives of Kodiak's Alutiiq Corporations, and as such, represents all of the Alutiiq people of the Kodiak region and agreed to care for the human remains and to work with the U.S. Fish and Wildlife Service to complete the necessary NAGPRA consultation to determine their appropriate disposition. No known individual was identified. No associated funerary objects are present.

Site 49–KOD–00172 is a large prehistoric settlement on Chief Cove Island at the entrance to Spiridon Bay, an arm of the Uyak Bay, in Alaska's Kodiak Archipelago. Stratigraphic observations, cultural materials, and carbon dates indicate that the site contains deposits spanning at least 2,000 years, from both the Late Kachemak and Koniag traditions. Archeological data indicate that modern Alutiiqs evolved from these archeologically documented societies. As such, the human remains from 49–KOD–00172 are likely Native American and most closely affiliated with the modern Kodiak Alutiiq people. According to guidelines of the Kodiak Alutiiq Repatriation Commission, the culturally related groups for the area of Chief Cove Island are the Koniag, Inc., Native Village of Larsen Bay, and Native Village of Port Lions. Specifically, Chief Cove Island falls within the area traditionally used by the Native Village of Larsen Bay.

Officials of the U.S. Fish and Wildlife Service, Region 7 and Alutiiq Museum and Archaeological Repository 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 U.S. Fish and Wildlife Service, Region 7 and Alutiiq Museum and Archaeological Repository 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 Koniag, Inc., Native Village of Larsen Bay, and Native Village of Port Lions.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact U.S. Fish and Wildlife Service, Region 7, Archaeologist Debbie Corbett, 1011 East Tudor Road, Anchorage, AK 99503, telephone (907) 786–3399, before November 10, 2008. Repatriation of the human remains to the Koniag, Inc., Native Village of Larsen Bay, and Native Village of Port Lions may proceed after that date if no additional claimants come forward.

The U.S. Fish and Wildlife Service is responsible for notifying the Koniag, Inc., Native Village of Larsen Bay, and Native Village of Port Lions that this notice has been published.

Dated: September 16, 2008

Sherry Hutt,

Manager, National NAGPRA Program.

[FR Doc. E8–23955 Filed 10–8–08; 8:45 am]

BILLING CODE 4312–50–S

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Cachuma Lake Resource Management Plan (RMP), Santa Barbara County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Extension of comment period for review of the Draft Environmental Impact Statement (DEIS).

SUMMARY: The Bureau of Reclamation is extending the review period for the DEIS to October 31, 2008. The notice of availability of the DEIS was published in the **Federal Register** on July 25, 2008 (73 FR 43472). The public review period was originally to end on September 23, 2008.

DATES: Written comments on the DEIS will be accepted on or before October 31, 2008.

ADDRESSES: Send written comments on the DEIS to Mr. Jack Collins , Bureau of Reclamation, 1243 N Street, Fresno, CA 93721.

Copies of the DEIS may be requested from Mr. Jack Collins, by writing to Bureau of Reclamation, 1243 N Street, Fresno, CA 93721; by calling 559–349–4544 (TDD 559–487–5409), or e-mail *jcollins@mp.usbr.gov*.

The DEIS is also accessible from the following Web site: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=283*. See **SUPPLEMENTARY INFORMATION** Section for locations where copies of the DEIS are available for public review.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, Bureau of Reclamation, at 559–349–4544 (TDD 559–487–5409) or e-mail *jcollins@mp.usbr.gov*.

SUPPLEMENTARY INFORMATION: Due to public interest in an extended comment period, Reclamation is revising the close of the comment period to October 31, 2008.

Copies of the DEIS are available for public review at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, CA 93721.
- Cachuma Lake State Recreation Area, Highway 154, Santa Barbara, CA 93105.
- Santa Maria Public Library, 420 South Broadway Avenue, Santa Maria, CA 93454.
- Santa Barbara Public Library, Central Location, 40 East Anapamu Street, Santa Barbara, CA 93101.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW., Main Interior Building, Washington, DC 20240–0001.

Public Disclosure

Before including your name, 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.

Dated: September 12, 2008.

Susan M. Fry,

Regional Environmental Officer, Mid-Pacific Region.

[FR Doc. E8–23987 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Lake Casitas Resource Management Plan (RMP), Ventura County, CA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Extension of comment period for review of the Draft Environmental Impact Statement (DEIS).

SUMMARY: The Bureau of Reclamation is extending the review period for the DEIS to October 31, 2008. The notice of availability of the DEIS was published in the **Federal Register** on July 28, 2008 (73 FR 43785). The public review period was originally to end on September 26, 2008.

DATES: Written comments on the DEIS will be accepted on or before October 31, 2008.

ADDRESSES: Send written comments on the DEIS to Mr. Jack Collins, Bureau of Reclamation, 1243 N Street, Fresno, CA 93721.

Copies of the DEIS may be requested from Mr. Jack Collins, by writing to Bureau of Reclamation, 1243 N Street, Fresno, CA 93721; by calling 559–349–4544 (TDD 559–487–5409), or e-mail *jcollins@mp.usbr.gov*.

The DEIS is also accessible from the following Web site: *http://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=792*. See **SUPPLEMENTARY INFORMATION** Section for locations where copies of the DEIS are available for public review.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Collins, Bureau of Reclamation, at 559–349–4544 (TDD 559–487–5409), or e-mail *jcollins@mp.usbr.gov.*

SUPPLEMENTARY INFORMATION: Due to public interest in an extended comment period, Reclamation is revising the close of the comment period to October 31, 2008.

Copies of the DEIS are available for public review at the following locations:

- Bureau of Reclamation, Mid-Pacific Region, Regional Library, 2800 Cottage Way, Sacramento, CA 95825.
- Bureau of Reclamation, South-Central California Area Office, 1243N Street, Fresno, CA 93721.
- Ojai Ranger District Station, 1190 East Ojai Avenue, Ojai, CA 93023.
- E.P. Foster Public Library, 651 Main Street, Ventura, CA 93001.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street NW., Main Interior Building, Washington, DC 20240–0001.

Public Disclosure

Before including your name, 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.

Dated: September 12, 2008.

Susan M. Fry,

Regional Environmental Officer, Mid-Pacific Region.

[FR Doc. E8–23985 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Southern Delivery System Project, CO

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Publication and Announcement of Public Hearing for the Supplemental Information Report (SIR) for the Southern Delivery System (SDS) Draft Environmental Impact Statement (Draft EIS).

SUMMARY: The Bureau of Reclamation (Reclamation), under the National Environmental Policy Act of 1969, is announcing the opportunity for the public to review and comment on a SIR for the SDS Draft EIS. A public hearing to supplement the opportunity to comment on the SIR is also being announced. Reclamation previously published a notice in the **Federal Register** (73 FR 50055) on August 25, 2008, providing for extended public commenting on the water quality portion of the Draft EIS. Since then Reclamation has completed additional water quality analysis and is providing an opportunity for the public to comment on the new analysis. With this notice Reclamation is therefore closing the comment period on the original water quality analysis as mentioned in the August 25, 2008, notice and opening the comment period for the new water quality analysis. Reclamation has included this analysis in a SIR for the Draft EIS that updates and provides additional information that was not in the Draft EIS. The additional information includes, but is not necessarily limited to, the following topics: water quality analyses, potential effects on the western slope of Colorado, potential effects of a failure of new dams, effects of physical changes to the alternatives and reasonably foreseeable actions, clarification of Reclamation's purpose and need statement, changes in the project sponsors' Proposed Action, and identification of Reclamation's preferred alternative. The new and additional information is contained in the report titled ''Supplemental Information Report for the Draft Environmental Impact Statement, Southern Delivery System Project, Colorado.'' For access to the report and dates and locations of the public hearing, please see the **SUPPLEMENTARY INFORMATION** section in this announcement.

DATES: Reclamation will accept comments on the SIR during a 45-day comment period beginning with the date this notice is published. Comments must be received on or before November 24, 2008, in order to be considered.

Public Hearing

Reclamation will hold a public hearing to receive oral and written comments on the SIR at the following time and place:

- October 29, 2008, 6 p.m.–9 p.m., Pueblo Convention Center, 320 Central Main Street, Pueblo, Colorado 81003

The meeting place is accessible to people with physical disabilities. People needing special assistance to attend and/or participate in the hearing should contact Kara Lamb at 970–962–4326 as soon as possible. To allow sufficient time to process special requests, please call no later than one week before the hearing date.

ADDRESSES: Comments may be submitted in writing by facsimile, e-mail, or at the public hearing. Send comments to Supplemental Information Report, Southern Delivery System EIS, Bureau of Reclamation, Eastern Colorado Area Office, 11056 W. County Road 18E, Loveland, CO 80537. Send facsimiles to the attention of Kara Lamb at 970–663–3212. E-mail comments may be sent to *klamb@gp.usbr.gov* with SIR SDS Comment as the subject line.

FOR FURTHER INFORMATION CONTACT: Kara Lamb, telephone: (970) 962–4326 or FAX (970) 663–3212 or e-mail *klamb@gp.usbr.gov*. Mail requests should be addressed to the Bureau of Reclamation at the address provided in the **ADDRESSES** section.

SUPPLEMENTARY INFORMATION: The SIR is available online at the *http://www.sdseis.com* Web site or by contacting Kara Lamb at the address above. Comments on the SIR would be added to those already received on the Draft EIS and will be considered in preparation of the Final EIS. For those people who have provided comments on the Draft EIS your comments do not need to be submitted again.

Public Disclosure Statement: Before including your name, 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.

Dated: October 3, 2008.

Roxanne E. Peterson,

Acting, Assistant Regional Director, Great Plains Region.

[FR Doc. E8–23963 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0036

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for 30 CFR part 780 which relates to surface mining permit applications—minimum requirements for reclamation and operation plans has been forwarded to the Office of Management and Budget (OMB) for review and comment. The information collection request describes the nature of the information collection and the expected burden and cost.

DATES: OMB has up to 60 days to approve or disapprove the information collections but may respond after 30 days. Therefore, public comments should be submitted to OMB by November 10, 2008, in order to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection request, contact John A. Trelease at (202) 208–2783, or electronically to *jtrelease@osmre.gov.*

ADDRESSES: Comments may be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Department of the Interior Desk Officer, via e-mail at *OIRA_Docket@omb.eop.gov*, or by facsimile to (202) 395–6566. Also, please send a copy of your comments to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202–SIB, Washington, DC 20240, or electronically

to *jtrelease@osmre.gov.* Please reference 1029–0036 in your correspondence.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. OSM has submitted a request to OMB to renew its approval of the collection of information contained in 30 CFR Part 780—Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plans. OSM is requesting a 3-year term of approval for each information collection activity.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1029–0036.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on this collection of information was published on July 1, 2008 (73 FR 37486). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activities:

Title: 30 CFR Part 780—Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan.

OMB Control Number: 1029–0036.

SUMMARY: Sections 507(b), 508(a), 510(b), 515(b) and (d), and 522 of Public Law 95–87 require applicants to submit operations and reclamation plans for coal mining activities. Information collection is needed to determine whether the plans will achieve the reclamation and environmental protections pursuant to the Surface Mining Control and Reclamation Act. Without this information, Federal and State regulatory authorities cannot review and approve permit application requests.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mine permits on Federal lands and State regulatory authorities.

Total Annual Respondents: 225 applicants and 221 State responses.

Total Annual Burden Hours for Applicants: 281,706.

Total Annual Burden Hours for State Regulatory Authorities: 78,457.

Total Annual Burden Hours for All Respondents: 360,163.

Total Annual Burden Costs for All Respondents: $1,992,395.

Send comments on the need for the collections of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collections; and ways to minimize the information collection burdens on respondents, such as use of automated means of collections of the information, to the individual listed in **ADDRESSES**. Please refer to OMB control number 1029–0036 in all correspondence.

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.

Dated: October 2, 2008.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. E8–23794 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 1029–0059

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed authority to collect information for: OSM grant forms—OSM–47 (Budget Information Report), OSM–49 (Budget Information and Financial Reporting) and OSM–51 (Performance and Program narrative); 30 CFR part 735 (Grants for Program Development and Administration and Enforcement); and 30 CFR part 886 (State and Tribal Reclamation Grants).

DATES: Comments on the proposed information collection must be received by December 8, 2008, to be assured of consideration.

ADDRESSES: Comments may be mailed to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 202–SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request, contact John A. Trelease, at (202) 208–2783 or electronically at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. This notice identifies information collections that OSM will be submitting to OMB for approval. These collections are contained in OSM grant forms—OSM–47 (Budget Information Report), OSM–49 (Budget Information and Financial Reporting) and OSM–51 (Performance and Program narrative); 30 CFR part 735 (Grants for Program Development and Administration and Enforcement); and 30 CFR part 886 (State and Tribal Reclamation Grants). OSM will request a 3-year term of approval for each information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

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.

The following information is provided for the information collection: (1) Title of the information collection; (2) OMB control number; (3) summary of the information collection activity; and (4) frequency of collection, description of the respondents, estimated total annual responses, and the total annual

reporting and recordkeeping burden for the collection of information.

Title: Budget information, financial reporting, and performance reporting forms.

OMB Control Number: 1029–0059.

Summary: State and Tribal reclamation and regulatory authorities are requested to provide specific budget and program information as part of the grant application and reporting processes authorized by the Surface Mining Control and Reclamation Act.

Bureau Form Numbers: OSM–47, OSM–49 and OSM–51.

Frequency of Collection: Semi-annually and annually.

Description of Respondents: State and Tribal regulatory and reclamation authorities.

Total Annual Responses: 132.

Total Annual Burden Hours: 680 hours.

Dated: October 2, 2008.

John A. Trelease,

Acting Chief, Division of Regulatory Support.

[FR Doc. E8–23797 Filed 10–8–08; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF LABOR

Proposed Information Collection for Workforce Innovation in Regional Economic Development (WIRED) Initiative Evaluation; Comment Request

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance 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 ETA is soliciting comments on a new data collection for the Workforce Innovation in Regional Economic Development (WIRED) Initiative Evaluation.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed below in the addressee section of this notice or by accessing: *http://www.doleta.gov/OMBCN/OMBControlNumber.cfm*.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or December 8, 2008.

ADDRESSES: Submit written comments to the Employment and Training Administration, Room N–5641, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Eileen Pederson, Telephone number: 202–693–3647 (this is not a toll-free number), Fax number: 202–693–2766. e-mail: *Pederson.eileen@dol.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In February 2006, under authority of Section 414 of the American Competitiveness and Workforce Improvement Act of 1998, the ETA awarded grants to 13 regions across the United States to support community efforts to link their varied knowledge resources with their business and innovation assets, to ensure that their workforces have the skill requirements and knowledge to work effectively in new and emerging industries. At the same time that these grants were awarded, ETA selected another 13 regions to receive $100,000 to support their participation in peer-to-peer grantee conferences and other training opportunities. In early 2007, ETA increased the funds awarded to the second group of regions, at which time they became known as the Generation II regions. Finally, in June 2007, ETA awarded grants to 13 more regions, known as the Generation III regions.

The WIRED Initiative focuses on labor market areas that are comprised of multiple jurisdictions within states or across state borders. It supports innovative approaches for workforce development, training and education that go beyond traditional strategies for preparing workers to compete and succeed both within the United States and globally. Through the initiative, WIRED regions have a unique opportunity to design and implement strategic approaches for coordinating regional economic development, job growth and talent development. For the grant awards, ETA selected regions that demonstrated the presence of labor market elements (unemployment, low-wages, low levels of new job creation) and economic conditions (such as industries that are declining or industries targeted for growth) that drive the need for transformation. In addition, each grant recipient described how the region will: Implement new strategic efforts designed to integrate workforce, economic development and education systems; promote innovation in addressing challenges; and utilize and build upon existing structures, resources, and legislatively-funded programs. Finally, each region outlined the presence of a strategic partnership that is representative of the entire economic region and is comprised of a strong team of leaders which will lead the regional transformation.

This data collection covers qualitative information to be obtained through a survey of key partners and stakeholders in these regional transformation efforts. The WIRED survey will gather information about the nature of regional leaders and their organizations' roles and relationships in the evolving collaborative partnerships. It will provide information about their efforts to achieve regional transformation of workforce development, economic development and related education systems during the period of the Initiative.

The second administration of the survey, approximately six months after Federal funding of the initiative ends, will be to collect information about the sustainability of efforts to work collaboratively to achieve regional transformation, to reveal whether these substantial investments successfully inspired continued efforts to promote integration of regional systems to further talent development.

Subsequent to awarding the Generation I grants in early 2006, the ETA has expended considerable effort to promote the importance of collaboration for guiding future talent development, and to encourage creative efforts to initiate and bring new partners into networks created to transform a region, including partners who do not receive direct funding through the WIRED collaborative. Thus, it is anticipated that Generations II and III regional efforts may be affecting entities that are not directly involved in the federally-funded transformation efforts, spearheaded by this initiative. In addition, ETA substantially reduced the amount of funding for Generations II and III, thereby leading many of these regions to partner with entities which also have a vested interest in achieving long-term regional economic success and stability. A pre-WIRED survey, the screener survey, will first be administered in the Generation II and III regions in order to gather information about how widely disbursed the ongoing efforts are to transform these regions' economic, education and workforce development systems,

including those which receive direct funding and those who do not receive direct funding, but which benefit from the initiative's increased collaboration for regional growth. The screener survey will be administered to a wide range of regional leaders to identify the range of organizations involved in regional transformation. In doing so, it will identify the key individuals and organizations that support the transformative efforts, and who will then be administered the WIRED survey.

II. Review Focus

The Department is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance and 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

Type of Review: New.

Agency: Employment and Training Administration.

Title: Workforce Innovation in Regional Economic Development (WIRED) Initiative Evaluation.

OMB Number: 1205–0NEW.

Recordkeeping: NA.

Affected Public: State, local, or tribal government; business or other for-profit; and not-for-profit institutions.

Total Respondents: Approximately 4,160 for the screener survey and 7,800 for the WIRED survey. Both surveys will be administered twice.

Survey type	Number of respondents	Per survey administration
Screener Survey (for Generations II and III)	4,160	2,080
WIRED Survey (for Generations I, II, and III)	7,800	3,900

Frequency: As noted, each survey will be administered two times. The first screener survey will be administered while the Generation II and III grants are operating, in early 2009. The second administration of the screener survey to the Generation II and III regions will be approximately six months after the grants expire, in 2011. The WIRED survey will also be administered two times, in 2009 and again in 2011.

Screener survey

Year	Group of regions	Number of respondents	Average time per response (in minutes)	Annual burden (in hours)
2009	Gen. II	1,040	5	173
	Gen. III	1,040	5	
2011	Gen. II	1,040	5	173
	Gen. III	1,040	5	
Two-Year Total		4,160		346

WIRED survey

Year	Group of regions	Number of respondents	Average time per response (in minutes)	Annual burden (in hours)
2009	Gen. I	1,300	30	1,950
	Gen. II	1,300	30	
	Gen. III	1,300	30	
2011	Gen. I	1,300	30	1,950
	Gen. II	1,300	30	
	Gen. III	1,300	30	
Two-Year Total		7,800		3,900

Total Annual Responses: An average of approximately 2,080 for the screener survey and 3,900 for the WIRED survey.

Average Time per Response: Five (5) minutes for the screener survey and thirty (30) minutes for the WIRED survey.

Estimated Total Burden Hours: The total annual burden hours is estimated to be 346 hours for the screener survey and 3,900 hours for the WIRED survey.

Total Burden Cost: The total burden cost, based on an annual average salary of $75,000 per respondent, is estimated to be $12,528 for the screener survey and $140,400 for the WIRED survey, per the following tables.

Screener survey				
Year	Group of regions	Annual burden (in hours)	Average cost per hour	Annual burden cost
2009	Generation II	87	$36	$6,264
	Generation III	87	36	
2011	Generation II	87	36	6,264
	Generation III	87	36	
Total		348		12,528

WIRED survey				
Year	Group of regions	Annual burden (in hours)	Average cost per hour	Annual burden cost
2009	Generation I	650	$36	$70,200
	Generation II	650	36	
	Generation III	650	36	
2011	Generation I	650	36	70,200
	Generation II	650	36	
	Generation III	650	36	
Total		3,900		140,400

Comments submitted in response to this request 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: October 2, 2008.

Douglas F. Small,

Deputy Assistant Secretary, Employment and Training Administration.

[FR Doc. E8–23942 Filed 10–8–08; 8:45 am]

BILLING CODE 4510–FN–P

LEGAL SERVICES CORPORATION

Sunshine Act Meeting of the Board of Directors Finance Committee

TIMES AND DATES: The Finance Committee of the Legal Services Corporation's Board of Directors will meet at 11 a.m. Eastern Time, on October 14, 2008.

LOCATION: Legal Services Corporation Headquarters, 3rd Floor Conference Center, 3333 K Street, NW., Washington, DC.

PUBLIC OBSERVATION BY TELEPHONE: Members of the public who wish to listen to the meeting live may do so by following the telephone call-in directions provided below. You are asked to keep your telephone muted in order to eliminate background noises. Comments from the public may be solicited from time-to-time by the Committee's Chairman.

Call-In Directions

• Call toll-free number 1–800–988–9769;

• When prompted, enter the following numeric pass code: 13523;

• When connected to the call, please ''mute'' your telephone immediately. You may do so by dialing ''*6.''

STATUS OF MEETING: Open.

MATTERS TO BE CONSIDERED:

Agenda

1. Approval of agenda.

2. Presentation on FY 2009 Budget Calculation error.

—Presentation by David Richardson
—Comments by Charles Jeffress

3. Presentation on Management's Recommendation for LSC's FY 2010 Budget Request to Congress.

—Presentation by Charles Jeffress
—Comments by John Constance

4. Public Comment.

—Robert Stein, on behalf of SCLAID
—Don Saunders, on behalf of NLADA
—Other

5. Consider and act on recommending to the Board Resolution # 2008–014, *A Resolution Adopting LSC's FY 2010 Budget Request to Congress.*

6. Consider and act on other business.

7. Consider and act on adjournment of meeting.

CONTACT PERSON FOR INFORMATION: Patricia D. Batie, Manager of Board Operations, at (202) 295–1500.

SPECIAL NEEDS: Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments. Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia D. Batie, at (202) 295–1500.

Dated: October 7, 2008.

Victor M. Fortuno,

Vice President for Legal Affairs, General Counsel & Corporate Secretary.

[FR Doc. E8–24190 Filed 10–7–08; 4:15 pm]

BILLING CODE 7050–01–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–074)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: A patent application on the invention listed below assigned to the National Aeronautics and Space Administration, has been filed in the United States Patent and Trademark Office, and is available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Randy Heald, Patent Counsel, Kennedy Space Center, Mail Code CC–A, Kennedy Space Center, FL 32899; telephone (321) 867–7214; fax (321) 867–1817.

NASA Case No. KSC–12909: Repair Procedure Development System.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24035 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–075)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Linda B. Blackburn, Patent Counsel, Langley Research Center, Mail Code 141, Hampton, VA 23681–2199; telephone (757) 864–3221; fax (757) 864–9190.

NASA Case No. LAR–17335–1: Deconvolution Methods and Systems for the Mapping of Acoustic Sources from Phased Microphone Arrays;

NASA Case No. LAR–16867–2: Sensing/Actuating Materials Made from Carbon Nanotube Polymer Composites and Methods for Making Same;

NASA Case No. LAR–17432–1: Forward Voltage Short-Pulse Technique for Measuring High Power Laser Diode Array Junction Temperature;

NASA Case No. LAR–17485–1: Metal/Fiber Laminate and Fabrication Using a Porous Metal/Fiber Preform;

NASA Case No. LAR–16538–1: Micro-LiDAR Velocity, Temperature, Density, Concentration Sensor;

NASA Case No. LAR–17477–1: Method and System for Aligning Fibers During Electrospinning;

NASA Case No. LAR–16640–1: Dynamic Optical Grating Device and Associated Method for Modulating Light;

NASA Case No. LAR–17361–1: Airfoil System for Cruising Flight;

NASA Case No. LAR–17526–1: Adaptive Refinement Tools for Tetrahedral Unstructured Grids;

NASA Case No. LAR–17413–1: Nanoparticle-Containing Thermoplastic Composites and Methods of Preparing Same;

NASA Case No. LAR–17243–1: Variably Transmittive, Electronically-Controlled Eyewear.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24039 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–068)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: James J. McGroary, Patent Counsel, Marshall Space Flight Center, Mail Code LS01, Huntsville, AL 35812; telephone (256) 544–0013; fax (256) 544–0258.

NASA Case No. MFS–32333–1: Ultra Thin Protective Layer by Chemical Conversion for Vacuum Ultra-Violet Optics Applications;

NASA Case No. MFS–32369–1: Method for Determining Lightning Charges Using Electric Field Mill and VHF Channel Mapping Date;

NASA Case No. MFS–32429–1: Orbital Fabrication of Aluminum Foam and Apparatus Therefore;

NASA Case No. MFS–32280–1: Multi-Functional Layered Structure Having Structural and Radiation Shielding Attributes.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24056 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–069)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Robert M. Padilla, Patent Counsel, Ames Research Center, Code 202A–4, Moffett Field, CA 94035–1000; telephone (650) 604–5104; fax (650) 604–2767.

NASA Case No. ARC–15977–1: Artificial Immune System Approach For Airborne Vehicle Maneuvering;

NASA Case No. ARC 16135–1: Efficiency Solar Cell Using Nano-Sculpted Substrate.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24057 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–070)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Kaprice L. Harris, Attorney Advisor, Glenn Research Center at Lewis Field, Code 500–118, Cleveland, OH 44135; telephone (216) 433–5754; fax (216) 433–6790.

NASA Case No. LEW–18256–1: An N Channel Jfet Based Digital Logic;

NASA Case No. LEW–17904–3: Synthesis of Asymmetric 6F-Dianhydride and Corresponding Tetracarboxylic Acid;

NASA Case No. LEW–18291–1: Adaptive Morphological Feature-Based Object Classifier for a Color Imaging System;

NASA Case No. LEW 18254–1: Simultaneous Non-Contact Precision Measurement of Microstructural and Thickness Variation in Dielectric Materials Using Terahertz Energy.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24058 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–071)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Bryan A. Geurts, Patent Counsel, Goddard Space Flight Center, Mail Code 140.1, Greenbelt, MD 20771–0001; telephone (301) 286–7351; fax (301) 286–9502.

NASA Case No. GSC–15349–1: Multiple Frequency Optical Mixer and Demultiplexer and Apparatus for Remote Sensing;

NASA Case No. GSC–15483–1: A Method and Apparatus for Relative Navigation Using Reflected GPS Signals;

NASA Case No. GSC–15136–1: Blocking Contacts for N-Type Cadmium Zinc Telluride;

NASA Case No. GSC–15470–1: Broadband Planar Magic-T with Low-Phase and Amplitude Imbalance.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24059 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–072)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Mark W. Homer, Patent Counsel, NASA Management Office—JPL, 4800 Oak Grove Drive, Mail Stop 180–200, Pasadena, CA 91109; telephone (818) 354–7770.

NASA Case No. DRC–008–001: Improved, Real-time, Interactive Sonic Boom Display;

NASA Case No. NPO–45219–1: Hybrid Multifoil Aerogel Thermal Insulation and Method;

NASA Case No. NPO–45053–1: Method of Fabricating a Whispering Gallery Mode Resonator;

NASA Case No. NPO–42884–1: Mirror Support.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24060 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–073)]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Edward K. Fein, Patent Counsel, Johnson Space Center, Mail Code AL, Houston, TX 77058–8452; telephone (281) 483–4871; fax (281) 483–6936.

NASA Case No. MSC–22939–4: Externally Triggered Microcapsules;

NASA Case No. MSC–24343–1: Cryogenic Transport of High Pressure System Recharge Gas.

Dated: October 3, 2008.

Michael C. Wholley,

General Counsel.

[FR Doc. E8–24061 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (08–076)]

NASA Advisory Committee; Notice of Renewal.

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Renewal of the Charter for the NASA Advisory Council.

SUMMARY: Pursuant to sections 14(b)(1) and 9(c) of the Federal Advisory Committee Act (Pub. L. 92–463), and after consultation with the Committee Management Secretariat, General Services Administration, the Administrator of the National Aeronautics and Space Administration (NASA) has determined that a renewal of the Charter for the Agency-established NASA Advisory Council is necessary and in the public interest in connection with the performance of duties imposed upon NASA by law. The purpose of the NASA Advisory Council is to provide advice and make recommendations to the NASA Administrator on Agency programs, policies, plans, financial controls and other matters pertinent to the Agency's responsibilities. The structure and duties of this Council is unchanged.

FOR FURTHER INFORMATION CONTACT: Ms. P. Diane Rausch, Advisory Committee Management Officer, Office of External Relations, National Aeronautics and Space Administration, Washington, DC 20546, 202–358–4510.

Dated: October 2, 2008.

P. Diane Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. E8–24036 Filed 10–8–08; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL INSTITUTE FOR LITERACY

National Institute for Literacy Advisory Board

AGENCY: National Institute for Literacy.

ACTION: Notice of a partially closed meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming open meeting of the National Institute for Literacy Advisory Board. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend. This notice is appearing in the **Federal Register** less than 15 days before the meeting due to administrative issues related to the selection of a new Director of the Institute.

DATES: October 23–24, 2008.

Time: October 23 from 10:30 a.m.–5 p.m.; October 24 from 9 a.m.–1 p.m.; closed session October 23 from 9 a.m.–10:30 a.m.

Location: The National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Steve Langley, Staff Assistant, the National Institute for Literacy; 1775 I St., NW., Suite 730; phone: (202) 233–2043; fax: (202) 233–2050; e-mail: *slangley@nifl.gov.*

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The National Institute for Literacy Advisory Board is authorized by section 242 of the Workforce Investment Act of 1998, Public Law 105–220 (20 U.S.C. 9252). The Board consists of 10 individuals appointed by the President with the advice and consent of the Senate. The Board advises and makes recommendations to the Interagency Group that administers the Institute. The Interagency Group is composed of the Secretaries of Education, Labor, and Health and Human Services. The Interagency Group considers the Board's recommendations in planning the goals of the Institute and in implementing any programs to achieve those goals. Specifically, the Board performs the following functions: (a) Makes recommendations concerning the appointment of the Director and the staff of the Institute; (b) provides independent advice on operation of the Institute; and (c) receives reports from the Interagency Group and the Institute's Director.

The purpose of this meeting is to discuss the Institute's future and current program priorities; status of on-going Institute work; other relevant literacy activities and issues; and other Board business as necessary.

On October 23, 2008 from 9 a.m. to 10:30 a.m., the Board will meet in closed session to discuss personnel issues. The discussion relates to the national search for the position of Director. The discussion is likely to disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personnel privacy. The discussion must therefore be held in closed session under exemptions 2 and 6 of the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (6). A summary of the activities at the closed session and related matters that are informative to the public and consistent with the policy of 5 U.S.C. 552b will be available to the public within 14 days of the meeting.

Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistance listening devices, or materials in alternative format) should notify Steve Langley at 202–233–2043 no later than October 16, 2008. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Request for Public Written Comment. The public may send written comments to the Advisory Board no later than 5 p.m. on October 16, 2008, to Steve Langley at the National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006, e-mail: *slangley@nifl.gov.*

Records are kept of all Committee proceedings and are available for public inspection at the National Institute for Literacy, 1775 I St., NW., Suite 730, Washington, DC 20006, from the hours of 9 a.m. to 5 p.m., Eastern Time Monday through Friday.

Electronic Access to This Document: You may 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/federegister.*

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: October 2, 2008.

Sandra Baxter,

Director, The National Institute for Literacy.

[FR Doc. E8–24063 Filed 10–8–08; 8:45 am]

BILLING CODE 6055–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Polar Programs; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Polar Programs (1130).

Date/Time: November 4, 2008, 8 a.m. to 5 p.m. November 5, 2008, 8 a.m. to 3 p.m.

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford II–595.

Type of Meeting: Open.

Contact Person: Sue LaFratta, Office of Polar Programs (OPP). National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8030.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs, and activities on the polar research community, to provide advice to the Director of OPP on issues related to long-range planning.

Agenda: Staff presentations and discussion on opportunities and challenges for polar research, education and infrastructure; planning for Arctic and Antarctic Committees of Visitors; discussion on renewable and alternative energy technologies; and discussion of NSF's IPY activity and how it relates to IPY activity worldwide.

Dated: October 6, 2008.

Susanne Bolton,

Committee Management Officer.

[FR Doc. E8–24068 Filed 10–8–08; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

Entergy Operations, Inc.; Notice of Receipt and Availability of Application for a Combined License

On July 28, 2008, as supplemented by letter dated September 24, 2008, Union Electric Company d/b/a AmerenUE, filed with the U.S. Nuclear Regulatory Commission (NRC, the Commission) pursuant to Section 103 of the Atomic Energy Act and Title 10 of the Code of Federal Regulations (10 CFR) part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants,'' an application for a combined license (COL) for an evolutionary power reactor (US EPR) nuclear power plant at the existing Callaway Power Plant site located in Callaway County, Missouri. The reactor is to be identified as Callaway Plant Unit 2.

An applicant may seek a COL in accordance with Subpart C of 10 CFR part 52. The information submitted by the applicant includes certain administrative information such as financial qualifications submitted pursuant to [10 CFR 52.77], as well as technical information submitted pursuant to [10 CFR 52.79].

Subsequent **Federal Register** notices will address the acceptability of the tendered COL application for docketing and provisions for participation of the public in the COL 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, Public File Area O1 F21, 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 ML082140630. 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@nrc.gov.* The application is also available at *http://www.nrc.gov/reactors/new-reactors/col.html.*

Dated at Rockville, Maryland this 1st, day of October 2008.

For the Nuclear Regulatory Commission.

Surinder Arora,

Project Manager, US EPR Projects Branch, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. E8–24014 Filed 10–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–305]

Dominion Energy Kewaunee, Inc., Kewaunee Power Station; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

Dominion Energy Kewaunee, Inc. (DEK) has submitted an application for renewal of Facility Operating License No. DPR–43 for an additional 20 years of operation at Kewaunee Power Station (KPS). KPS is located on the west-central shore of Lake Michigan in Kewaunee County, Wisconsin, approximately 30 miles east-southeast of Green Bay and 8 miles south of the City of Kewaunee. The operating license for KPS expires on December 21, 2013. The application for renewal, dated August 14, 2008, was submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR) Part 54. A notice of receipt and availability of the application, which included the environmental report (ER), was published in the **Federal Register** on August 29, 2008 (73 FR 51023). A notice of acceptance for docketing of the application for renewal of the facility operating license was published in the **Federal Register** on October 1, 2008 (73 FR 57154). The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) related to the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29. In addition, as outlined in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' the NRC plans to coordinate compliance with section 106 of the National Historic Preservation Act in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA).

In accordance with 10 CFR 51.53(c) and 10 CFR 54.23, DEK submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR Part 51 and is publicly available at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, or from the NRC's Agencywide Documents Access and Management System (ADAMS). The ADAMS Public Electronic Reading Room is accessible at *http://adamswebsearch.nrc.gov/dologin.htm.* The Accession Number for the ER is ML082341039. 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 *pdr.resource@nrc.gov.* The ER may also be viewed on the Internet at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications/kewaunee.html.* In addition, the ER is available for public inspection near KPS at the following public library: Kewaunee Public Library, 822 Juneau Street, Kewaunee, WI 54216.

This notice advises the public that the NRC intends to gather the information necessary to prepare a plant-specific supplement to the Commission's ''Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants'' (NUREG–1437), related to the review of the application for renewal of the KPS operating license for an additional 20 years. Possible alternatives to the proposed action (license renewal) include no action and reasonable alternative energy sources. The NRC is required by 10 CFR 51.95 to prepare a supplement to the GEIS in connection with the renewal of an operating license. This notice is being published in accordance with NEPA and the NRC's regulations found in 10 CFR part 51.

The NRC will first conduct a scoping process for the supplement to the GEIS and, as soon as practicable thereafter, will prepare a draft supplement to the GEIS for public comment. Participation in the scoping process by members of the public and local, State, Tribal, and Federal government agencies is encouraged. The scoping process for the supplement to the GEIS will be used to accomplish the following:

a. Define the proposed action which is to be the subject of the supplement to the GEIS.

b. Determine the scope of the supplement to the GEIS and identify the significant issues to be analyzed in depth.

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant.

d. Identify any environmental assessments and other ElSs that are being or will be prepared that are related to, but are not part of, the scope of the supplement to the GEIS being considered.

e. Identify other environmental review and consultation requirements related to the proposed action.

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decision-making schedule.

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the supplement to the GEIS to the NRC and any cooperating agencies.

h. Describe how the supplement to the GEIS will be prepared, and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, Dominion Energy Kewaunee, Inc.

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved, or that is authorized to develop and enforce relevant environmental standards.

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards.

d. Any affected Indian tribe.

e. Any person who requests or has requested an opportunity to participate in the scoping process.

f. Any person who has petitioned or intends to petition for leave to intervene.

In accordance with 10 CFR 51.26, the scoping process for an EIS may include a public scoping meeting to help identify significant issues related to a proposed activity and to determine the scope of issues to be addressed in an EIS. The NRC has decided to hold public meetings for the KPS license renewal supplement to the GEIS. The scoping meetings will be held at the Carlton Town Hall, N 1296 Town Hall Road, Kewaunee, WI 54216 on October 22, 2008. There will be two sessions to accommodate interested parties. The first session will convene at 1:30 p.m. and will continue until 4:30 p.m., as necessary. The second session will convene at 7 p.m. with a repeat of the overview portions of the meeting and will continue until 10 p.m., as necessary. Both meetings will be transcribed and will include: (1) An overview by the NRC staff of the NEPA environmental review process, the proposed scope of the supplement to the GEIS, and the proposed review schedule; and (2) the opportunity for interested government agencies, organizations, and individuals to submit comments or suggestions on the environmental issues or the proposed scope of the supplement to the GEIS. Additionally, the NRC staff will host informal discussions one hour prior to the start of each session at the same location. No formal comments on the proposed scope of the supplement to the GEIS will be accepted during the informal discussions. To be considered, comments must be provided either at the transcribed public meetings or in writing, as discussed below. Persons may register to attend or present oral comments at the meetings on the scope of the NEPA review by contacting the NRC Environmental Project Manager, Ms. Sarah Lopas, by telephone at 1–800–368–5642, extension 1147, or by e-mail at *sarah.lopas@nrc.gov* no later than October 17, 2008. Members of the public may also register to speak at the meeting within 15 minutes of the start of each session. Individual oral comments may be limited by the time available, depending on the number of persons who register. Members of the public who have not registered may also have an opportunity to speak, if time permits. Public comments will be considered in the scoping process for the supplement to the GEIS. Ms. Lopas will need to be contacted no later than October 15, 2008, if special equipment or accommodations are needed to attend or present information at the public meeting, so that the NRC staff can determine whether the request can be accommodated.

Members of the public may send written comments on the environmental scope of the KPS license renewal review to: Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Comments may also be delivered to the NRC, Room T–6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland 20852, from 7:30 a.m. to 4:15 p.m. during Federal workdays. To be considered in the scoping process, written comments should be postmarked by December 8, 2008. Electronic comments may be sent by e-mail to the NRC at *Kewaunee.EIS@nrc.gov*, and should be sent no later than December 8, 2008, to be considered in the scoping process. Comments will be available electronically and accessible through ADAMS at *http://adamswebsearch.nrc.gov/dologin.htm*.

Participation in the scoping process for the supplement to the GEIS does not entitle participants to become parties to the proceeding to which the supplement to the GEIS relates. Notice of opportunity for a hearing regarding the renewal application was the subject of the aforementioned **Federal Register** notice (73 FR 57154). Matters related to participation in any hearing are outside the scope of matters to be discussed at this public meeting.

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process. The summary will also be available for inspection in ADAMS at *http://adamswebsearch.nrc.gov/dologin.htm*. The staff will then prepare and issue for comment the draft supplement to the GEIS, which will be the subject of separate notices and separate public meetings. Copies will be available for public inspection at the above-mentioned addresses, and one copy per request will be provided free of charge. After receipt and consideration of the comments, the NRC will prepare a final supplement to the GEIS, which will also be available for public inspection.

Information about the proposed action, the supplement to the GEIS, and the scoping process may be obtained from Ms. Lopas at the aforementioned telephone number or e-mail address.

Dated at Rockville, Maryland, this 2nd day of October 2008.

For the Nuclear Regulatory Commission.

Brian Holian,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E8–23944 Filed 10–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–250 and 50–251]

Florida Power and Light Company; Notice of Issuance of Amendment to Renewed Facility Operating License and Final Determination of No Significant Hazards Consideration (TAC Nos. MD9229 and MD9330)

The U.S. Nuclear Regulatory Commission (NRC or Commission) has issued Amendment Nos. 238 and 233 to Facility Operating License Nos. DPR–31 and DPR–41, respectively, issued to Florida Power and Light Company (the licensee), which revised the Technical Specifications (TSs) for operation of the Turkey Point Nuclear Plant, Units 3 and 4, located in Miami-Dade County, Florida. The amendment was effective as of the date of its issuance.

These amendments remove the notes associated with License Amendment No. 221 regarding the inoperability of the Unit 4 Rod Position Indication (RPI) system for control rod F–8 in Shutdown Bank B, and the notes associated with Amendment No. 230 regarding the inoperability of the Unit 3 RPI system for control rod M–6 in Control Bank C. The RPI system for control rod F–8 was repaired during the Unit 4 Cycle 22 refueling outage in spring 2005; thus, the associated TS License Amendment No. 221 revisions are no longer required. Similarly, the RPI system for control rod M–6 was repaired in June 2007; thus, the associated TS License Amendment No. 230 revisions are no longer required.

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.

Notice of Consideration of Issuance of Amendment and Proposed No Significant Hazards Consideration Determination and Opportunity for

Hearing in connection with this action was published in the **Federal Register** on July 29, 2008 (73 FR 43956). A request for a hearing was filed on August 18, 2008, by Thomas Saporito, President of Saporito Energy Consultants.

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 Safety Evaluation related to this action. Accordingly, as described above, the amendment has been issued and made immediately effective and any hearing will be held after issuance.

The Commission has determined that this amendment satisfies 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 this amendment.

For further details with respect to this action, see the application for amendment dated September 5, 2007, as supplemented by letter dated September 8, 2008, which are available for public inspection 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 System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 30th day of September, 2008.

For the Nuclear Regulatory Commission.

Brenda L. Mozafari,

Senior Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–23945 Filed 10–8–08; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–266 and 50–301]

FPL Energy Point Beach LLC; Notice of Withdrawal of Application for Amendment to Renewed Facility Operating Licenses DPR–24 and DPR–27

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of FPL Energy Point Beach, LLC (the licensee) to withdraw its December 29, 2007, application for proposed amendment to Renewed /Facility Operating License Nos. DPR–24 and DPR–27 for Point Beach Nuclear Plant, Unit Nos. 1 and 2, located in Town of Two Creeks, Manitowoc County, Wisconsin.

The proposed amendment would have revised the Technical Specifications for the Point Beach Nuclear Plant (PBNP) Units 1 and 2 Technical Specifications (TS) requirement for the completion time (CT) of TS 3.7.5.C. This revision would allow two separate one-time extensions of the CT for TS 3.7.5.C from 7 days to 16 days.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on January 28, 2008 (73 FR 5220). However, by letter dated August 21, 2008, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated December 29, 2007, and the licensee's letter dated August 21, 2008, which withdrew the application for 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 System (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 19th day of September 2008.

For the Nuclear Regulatory Commission.

Jack Cushing,

Senior Project Manager, Plant Licensing Branch III–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E8–24012 Filed 10–8–08; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Standard Data Elements for Electronic Summary Reports of Inventions

AGENCY: Office of Management and Budget, Office of Federal Financial Management.

ACTION: Notice of standard data elements.

SUMMARY: The Office of Management and Budget (OMB) is establishing a standard set of data elements for a government-wide summary report of inventions and the Interagency Edison extramural invention reporting system (iEdison) as the host site for collecting this information.

FOR FURTHER INFORMATION CONTACT: Marguerite Pridgen, Office of Federal Financial Management, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503; telephone 202–395–7844; fax 202–395–3952; e-mail *mpridgen@omb.eop.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On October 30, 2002, the Office of Management and Budget (OMB) proposed the establishment of a government-wide standard set of data elements for the summary report of inventions [67 FR 66178–66183]. The proposal included implementation of a standard dataset via a single interactive Internet web form. The OMB notice proposed locating this interactive web form on the Interagency Edison extramural invention reporting system (iEdison) because iEdison facilitates compliance with the Bayh-Dole Act (Pub. L. 96–517 (codified at 35 U.S.C. 200 *et seq*.) Dec. 12, 1980) (''Bayh-Dole Act'') and its implementing regulations and iEdison is recognized by federal funding recipients as being used by most Federal agencies for invention reporting and tracking. In response to the **Federal Register** notice, OMB received six sets of comments from eight entities: three universities; a group of universities that participate with Federal agencies in a demonstration program on research administration; one association of research universities; and three Federal agencies. The vast

majority of the comments relate to the implementation of the interactive Internet web form and whether Federal agencies actually need this report. Few comments addressed the content of the proposed standard data elements. This final notice establishes the data elements found in the attachment to this notice, and also establishes iEdison as the future host site for the summary report of inventions subject to addressing agency budgeting and associated implementation issues. Information on the burden associated with information collections made using these data elements will be maintained by NIH at *https://s-edison.info.nih.gov/iEdison/omb.jsp*. The OMB Approval Number is 0925–0001.

With the data elements defined, NIH can work with other federal agencies to begin the development of the Internet web form and will consider comments related to system design (e.g., electronic submission and search capabilities) as it finalizes the implementation solution. OMB will publish proposed policy guidance after the web form is completed. The policy guidance will address only a uniform means for submitting summary reports of inventions. It will not create any new reporting requirements. The following section presents a summary of the major comments grouped by subject and our responses to them. Changes to the standard data elements are discussed in the responses to the comments.

II. Comments and Responses

Summary Invention Reporting Requirement

Comments: Several commenters questioned the need for an interim or final summary report of inventions. They noted that the summary report is duplicative of information contained in the standard Bayh-Dole invention reports that must be submitted to the federal agency within 60 days of the inventor disclosing the invention to the grantee/contractor. They recommended eliminating the summary report of inventions and allowing Federal program and contracting officers to have access to the more comprehensive invention reports.

Response: Both the Bayh-Dole Act and the Government-wide patent regulations issued by the Department of Commerce recognize that some Federal agencies need an interim or final summary report for proper oversight of inventions conceived or first actually reduced to practice during the term of an award (35 U.S.C. 209(d)(2); 37 CFR 401.5(f)(1) and (3)). There are two reasons some Federal agencies need this report. First, unlike the standard Bayh-Dole invention report that is only submitted when an invention is created, a summary report reflects negative reporting. Unless the grantee/contractor lists all subject inventions or states that there were none as part of the summary report, the federal agency has no way of knowing if the grantee/contractor failed to provide a Bayh-Dole invention report. Experience has shown that recipients are more actively aware of their invention reporting obligations if they are required to indicate if no inventions were made under the award.

The second reason for the report is to ensure that two components of the grantee/contractor organization reconcile their records prior to closeout. Generally, Bayh-Dole reporting is undertaken by the organization's technology transfer component, and summary reporting is accomplished by the organization's Office of Sponsored Research or office of grant/contract administration. Submittal of a summary report requires that these two components reconcile their records prior to closeout, which ensures more accurate reporting.

Proposed Data Elements

Comments: We received very few comments on the data elements. Specific suggestions were made to change the names of certain data elements. For example, it was suggested that the term, ''Subcontractor'' be changed to the more generic term, ''Subawardee.'' It was also suggested that we include the Dun and Bradstreet Data Universal Numbering System (DUNS) number as a means to identify the grantee, since the OMB proposed to establish the DUNS number as the universal identifier in government funding agreements. In addition, several people were confused as to whether the form could be used to report more than one invention.

Response: We agree with the recommendations to use more generic names and to include the entity's DUNS number. We believe that the template attached to the proposed notice may have been misinterpreted, because it could not adequately represent how the form would work on the web. To address any confusion regarding the reporting of multiple inventions, we changed the Group ''Description'' fields to clarify that a single summary report can accommodate multiple inventions, multiple patents, patent applications, plant varieties and multiple inventors per invention, patent, patent application or plant varieties. In addition, this notice makes other changes to the proposed data elements as follows:

- The guidance has been expanded to include the reporting of plant varieties as required by 7 U.S.C. 2321 *et seq.*; Plant Variety Protection Act Amendments of 1994 (7 U.S.C. 2401 note).
- The words ''patent application or plant variety'' have been added after the word ''patent,'' wherever it appears, to clarify that the awardee must report patents, patent applications and plant varieties.
- The Prime Awardee's DUNS number is added as a required element for organizations in accordance with the OMB grants management policy published in the **Federal Register** on June 27, 2003 (68 FR 38402–38405).
- The Subawardee DUNS field and the Subawardee Number field are being added as required fields since the Federal Funding Accountability and Transparency Act of 2006 requires OMB to collect subawardee data (Pub. L. 109–282 (Sept. 26, 2006) (codified at 31 U.S.C. 6101 note)).
- Various ''Required?'' fields have been revised to clarify that the information is required for each invention, inventor, patent, patent application, and plant variety reported.
- The words ''Patent Cooperation Treaty (PCT) or'' have been added before ''Foreign Application Filed'' to clarify that this data element includes PCT applications as well as foreign patent and foreign plant variety applications (or equivalent foreign protection). The description for this field has been revised to read: ''Has a PCT, foreign patent or foreign plant variety application been filed?''
- The ''Foreign Countries Indicated'' description has been clarified to read: ''For PCT or foreign filings, have all countries been noted in the report?''
- The ''Election of Title'' and ''Confirmatory License'' fields were added as required elements to affirm the Reporting Institution's interest in the invention and the Government's interests in the reported invention are appropriately addressed consistent with the Bayh-Dole Act.

Other minor clarifications, additions, and editorial changes were made. For example, the word ''contract'' was changed to ''award'' for consistency; the words ''Subcontractor'' and ''Subcontract'' were changed to ''Subawardee'' and ''Subaward,'' respectively; and the words ''entire award period'' were changed to ''reporting period'' to clarify that the reporting period may include both interim and final reporting periods. Further, the following data fields have been added as Optional elements to allow for consistency for agencies that

currently collect this data and those that do not: ''Signatory Telephone Number'' (Optional), ''Signatory Email Address'' (Optional), ''Reporting Institution's Subawardee Name'' (Optional), ''Prime Awardee Organization Type Code'' (Optional), ''Prime Award Completion Date'' (Optional), ''Awarding Agency Prime Award Monitor First Name'' (Optional), ''Awarding Agency Prime Award Monitor Last Name'' (Optional). The ''Reporting Institution's Subawardee Address'' and ''Reporting Institution's Subawardee(s) Funding Agreement Number'' fields are conditional so they are only required if the optional ''Reporting Institution's Subawardee Name'' is reported.

Electronic Implementation of Summary Reporting of Inventions

Comments: This aspect of the proposed policy received the greatest number and variety of comments. Many commenters expressed concern over the limited value of promoting an interactive Web interface hosted on the Interagency Edison site (*http://www.iEdison.gov*) as the only way to obtain and complete the proposed summary report. Specific problems with the proposed implementation include:

- The requirement that the summary report be signed by the organization's authorized official. The proposed notice required that the form be completed on-line, printed, signed and either faxed or sent via U.S. mail. It was suggested that there was adequate Federal precedence to use strong password authentication.
- The need to key information into an interactive Web form. Many grantee/contractor organizations have database systems and would prefer to submit the summary information as a datastream.
- The need to continue to maintain hard copies of the report.
- The compatibility of the data standard with other approved standards being implemented throughout the government.

Response: NIH will consider these issues as the interactive Web form is developed with the other agencies. The system would include electronic authentication. While an interactive Web form will not allow for the submission of a datastream directly, the intent is to have the system automatically populate fields on the form if the data has been previously entered into iEdison. The data dictionary would be reviewed to ensure compatibility with other government standards. Comments will be sought from users on a test site as soon as the Web form is developed.

Applicability to Contracts

Comment: The language in the ''Summary'' indicates that this effort is a result of the streamlining activities under Public Law 106–107, which relate to financial assistance administration. However, other parts of the notice and the data elements themselves indicate that they apply equally to contracts. We suggest that this notice clearly specify the intent with regard to contracts.

Response: As the commenter noted, this action is the result of a financial assistance streamlining effort. When we publish a proposed notice of policy, it will specify that the policy applies only to financial assistance. However, since many agencies currently use the same summary invention reporting form for both financial assistance and procurement contracts, the workgroup followed this example and established data elements that are equally applicable to contractors so that agencies could use the report for contracts if they chose.

Danny Werfel,

Deputy Controller.

Attachment: Government-Wide Standard Data Elements for Summary Reporting of Inventions

Government-Wide Data Elements for Summary Reporting of Inventions

These data elements are the government-wide standard set of elements for the summary reporting of all inventions, patent applications, patents and plant varieties that have been made, filed for, and/or granted using Federal funds during the term of a Federal funding agreement. The data elements include the identification of the agency source of funding, the reporting period, whether the report is an interim or final report and the name and title of the official authorized to submit the information. Any number of inventions can be reported, including the invention title, inventors' names, and invention docketing numbers and the date upon which the invention was formally reported to the funding agency consistent with Bayh-Dole regulations. A similar set of information is available for summary reporting of patent or plant variety protection applications that relate to each invention.

Group	Description	Required?
Document	The Document group represents data elements relevant to the entire Summary Report of Inventions.	Required. Identify one only.
Invention	The Invention group identifies the data elements relevant to one invention listed on this Summary Report of Inventions. The report will accommodate multiple inventions.	Required if subject invention(s) are reported. May list more than one.
Inventor	The Inventor group identifies the data elements relevant to one inventor for one invention listed on this Summary Report of Inventions. The report will accommodate multiple inventors per invention. In the case of a variety of plant, please use the ''breeder'' as the ''inventor.''	Required if subject invention(s) are reported. May list more than one.
Patent	The Patent group identifies the data elements relevant to one patent, patent application or plant variety, listed on this Summary Report of Inventions. The report will accommodate multiple items.	Optional. May list more than one. Patent applications include new applications (provisional & non-provisional), continuations, continuations-in-part, and divisional.
Patent Inventor	The Patent Inventor group identifies the data elements relevant to one inventor for one patent, patent application or plant variety listed on this Summary Report of Inventions. In the context of reporting a plant variety, please use the ''breeder'' as the ''patent inventor.'' The report will accommodate multiple inventors per patent, patent application or plant variety.	At least one entry required per Patent group. May list more than one.

Tag	Length	Description	Required?	Group
Report Type Code	1	Code specifying the type of report: I = Interim. F = Final.	Required. Identify one only	Document.

Tag	Length	Description	Required?	Group
Report Period Start Date.	8	Month, day and year that the reporting period starts. Format is MMDDYYYY.	Required. Identify one only	Document.
Report Period End Date.	8	Month, day and year that the reporting period ends. Format is MMDDYYYY.	Required. Identify one only	Document.
Subject Inventions Number.	3	Number of subject inventions conceived of or first actually reduced to practice or the plant varieties recognized to be new, distinct, uniform and stable during the reporting period.) Valid values are 0–999.	Required. Identify one only	Document.
Subject Inventions Reported.	1	Were all the subject inventions reported? Y = Yes. N = No.	Required. Identify one only	Document.
Prime Awardee Name.	100	Name of the organization that has been awarded the federal funding award (e.g., grant, cooperative agreement, or contract).	Required. Identify one only	Document.
Prime Awardee DUNS.	15	The DUNS number of the organization that has been awarded the federal funding award.	Required. Identify one only. If the Prime Awardee is an individual that does not have a DUNS number, enter 000000000.	Document.
Prime Award Number.	30	Agency-specific number assigned to the federal funding award.	Required. Identify one only	Document.
Awarding Agency ...	100	Agency that awarded the federal funding award.	Required. Identify one only	Document.
Subawardee Name	100	The name of the organization submitting this Summary Report of Inventions, if different from the Prime Awardee Name.	Optional. Identify one only	Document.
Subawardee DUNS	15	The DUNS number of the organization submitting this Summary Report of Inventions, if different from the Prime Awardee Name.	Required if Subawardee is submitting report. Identify one only. If the Subawardee is an individual that does not have a DUNS number, enter 000000000.	Document.
Subaward Number	30	Number assigned to the subaward in the context of this federal funding award.	Optional. Identify one only	Document.
Signatory Prefix	15	Prefix of the organizational official authorized to submit this report.	Optional. Identify one only	Document.
Signatory First Name.	30	First name of the organizational official authorized to submit this report.	Required. Identify one only	Document.
Signatory Middle Initial.	1	Middle initial of the organizational official authorized to submit this report.	Optional. Identify one only	Document.
Signatory Last Name.	30	Last name of the organizational official authorized to submit this report.	Required. Identify one only	Document.
Signatory Suffix	5	Suffix of the organizational official authorized to submit this report.	Optional. Identify one only	Document.
Signatory Title	240	Position title of the organizational official authorized to submit this report.	Required. Identify one only	Document.
Signatory Telephone Number.	15	Telephone number of the organizational official authorized to submit this report.	Optional. Identify one only	Document.
Signatory Email Address.	30	Email address of the organizational official authorized to submit this report.	Optional. Identify one only	Document.
Report Submission Date.	8	Month, day and year that this report is submitted to the Federal government. Format is MMDDYYYY.	Required. Identify one only	Document.
Reporting Institution's Subawardee Name.	100	Name of Subawardee to organization submitting this Summary Report of Inventions (''Reporting Institution'').	Optional. May list more than one	Document.
Reporting Institution's Subawardee Address.	240	Address of Subawardee to organization submitting this Summary Report of Inventions.	Required if ''Reporting Institution's Subawardee Name'' is reported. May list more than one.	Document.
Reporting Institution's Subawardee(s) Funding Agreement Number.	50	Number assigned to the federal funding agreement to this Subawardee by the Reporting Institution.	Required if ''Reporting Institution's Subawardee Name'' is reported. May list more than one.	Document.

Tag	Length	Description	Required?	Group
Prime Awardee Organization Type Code.	1	Code specifying type of organization: L = Large Business. S = Small Business. U = College/University. N = Non-profit organization. O = Other.	Optional	Document.
Prime Award Completion Date.	8	Month, day, and year that the award is completed. Format is MMDDYYYY.	Optional	Document.
Awarding Agency Prime Award Monitor First Name.	30	First name of the federal agency official that monitor's the prime awardee's performance (e.g., project manager, grant monitor, or Contracting Officer's Technical Representative (COTR)).	Optional	Document.
Awarding Agency Prime Award Monitor Last Name.	30	Last name of the federal agency official that monitors the prime awardee's performance (e.g., project manager, grant monitor, or Contracting Officer's Technical Representative (COTR)).	Optional	Document.
Invention Title	300	Title of the subject invention	Required if subject invention(s) are reported. Identify one only per invention.	Invention.
Invention Docket Number.	25	Number by which the awardee tracks the subject invention.	Optional. Identify one only per invention	Invention.
Invention Report Date.	8	Month, day and year that the subject invention is reported to the Federal government. Format is MMDDYYYY.	Required if subject invention(s) are reported. Identify one only per invention.	Invention.
Agency Invention Number.	25	Number by which the Awarding Agency tracks the subject invention.	Optional. Identify one only per invention	Invention.
Invention Reported by Code.	1	Code specifying who reported the subject invention: A = Awardee. S = Subawardee.	Optional. Identify one only per invention	Invention.
Election of Title	1	Did organization elect title to invention as of the date of this report? Y = Yes. N = No.	Required	Invention.
Confirmatory License.	1	Did organization provide funding agency with Government confirmatory license as of the date of this report? Y = Yes. N = No.	Required	Invention.
Inventor First Name	30	First name of the inventor of the subject invention.	Required if subject invention(s) are reported. Identify one only per inventor.	Inventor.
Inventor Middle Name.	30	Middle name of the inventor of the subject invention.	Optional. Identify one only per inventor.	Inventor.
Inventor Last Name	30	Last name of the inventor of the subject invention.	Required if subject invention(s) are reported. Identify one only per inventor.	Inventor.
Patent or Patent Application Title.	300	Title of the subject patent, patent application or plant variety (use variety name).	Required if the field U.S. Application Filed is Y. Identify one only per patent, patent application, or PVP.	Patent.
Patent ID Number	25	The patent number, patent application serial number or plant variety protection office number.	Required if known. Identify one only per patent, patent application, or PVP.	Patent.
Patent Filing or Issue Date.	8	Month, day and year that the patent application was filed, the patent was issued, or plant variety application was made. Format is MMDDYYYY.	Required if the field U.S. Application Filed is Y. Identify one only per patent, patent application, or PVP.	Patent.
Patent Docket Number.	25	Number by which the awardee tracks the subject patent, patent application, or plant variety.	Optional. Identify one only per patent, patent application, or PVP.	Patent.
Patent Reported by Code.	1	Code specifying who reported the subject patent, patent application, or plant variety: A = Awardee. S = Subawardee.	Optional. Identify one only per patent, patent application, or PVP.	Patent.
U.S. Application Filed.	1	Has a U.S. patent or U.S. plant variety protection application been filed? Y = Yes. N = No.	Required. Identify one only per patent, patent application, or PVP.	Patent.
Patent Cooperation Treaty (PCT) or Foreign Application Filed.	1	Has a PCT, foreign patent or foreign plant variety application been filed? Y = Yes. N = No.	Required. Identify one only per patent, patent application, or PVP.	Patent.

Tag	Length	Description	Required?	Group
Foreign Countries Indicated.	1	For PCT or foreign filings, have all countries been noted in the report? Y = Yes. N = No.	Required if the field PCT or Foreign Application Filed is Y. Identify one only per patent or patent application.	Patent.
Patent Inventor First Name.	30	First name of the inventor of the subject patent, patent application or plant variety.	Required if field U.S. Application Filed is Y. Identify one only per patent inventor.	Patent Inventor.
Patent Inventor Middle Name.	30	Middle initial of the inventor of the subject patent, patent application or plant variety.	Optional. Identify one only per patent inventor.	Patent Inventor.
Patent Inventor Last Name.	30	Last name of the inventor of the subject patent, patent application or plant variety.	Required if field U.S. Application Filed is Y. Identify one only per patent inventor.	Patent Inventor.

[FR Doc. E8–23902 Filed 10–8–08; 8:45 am]
BILLING CODE 3110–01–P

PEACE CORPS

Notice of an Amendment to a Privacy Act System of Records

AGENCY: Peace Corps.

ACTION: Notice of an amendment to a Privacy Act system of records.

SUMMARY: As required under the Privacy Act of 1974, (5 U.S.C. 552a), as amended, the Peace Corps is giving notice of an amendment to a Privacy Act system of records, PC–10 Office of Private Sector Initiatives Database. The amendment removes contributor's birth date and adds contributor's e-mail address in the categories of records in the system. It also makes Peace Corps' Routine Use M applicable to the system.

DATES: This action will be effective without further notice on November 24, 2008 unless comments are received by November 10, 2008 that would result in a contrary determination.

ADDRESSES: You may submit comments by e-mail to *nmiller@peacecorps.gov*. Include Privacy Act System of Records in the subject line of the message. You may also submit comments by mail to Nancy G. Miller, Office of the General Counsel, Peace Corps, Suite 8200, 1111 20th Street, NW., Washington, DC 20526. Contact Nancy G. Miller for copies of comments.

FOR FURTHER INFORMATION CONTACT: Nancy G. Miller, Associate General Counsel, 202–692–2150, *nmiller@peacecorps.gov*.

SUPPLEMENTARY INFORMATION: The Privacy Act, 5 U.S.C. 552a, provides that the public will be given a 30-day period in which to comment on the new system. The Office of Management and Budget (OMB), which has oversight responsibility under the Act, requires a 40-day period in which to review the proposed system. In accordance with 5 U.S.C. 552a, Peace Corps has provided a report on this system to OMB and the Congress.

SYSTEM NAME:

PC–10, Office of Private Sector Initiatives Database.

SECURITY CLASSIFICATION:

Not applicable.

SYSTEM LOCATION:

Office of Private Sector Initiatives, Peace Corps, 1111 20th St., NW., Washington, DC 20526.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals making donations to Peace Corps partnership projects or inquiring about partnership projects; volunteers.

CATEGORIES OF RECORDS IN THE SYSTEM:

For donors: name, address, telephone number, e-mail address, donor number, and contribution amount. For volunteers: name, address, and close of service date.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Peace Corps Act, 22 U.S.C. 2501 *et seq.*

PURPOSE(S):

To record and track donations to the Peace Corps and to provide program and project updates to donors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USERS:

General routine uses A through M apply to this system.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

On paper and in a computerized database.

RETRIEVABILITY:

By donor name, donor number, project name or project number.

SAFEGUARDS:

Computer records are maintained in a secure, password-protected computer system. Paper records are maintained in lockable file cabinets. All records are maintained in a secure, access-controlled area.

RETENTION AND DISPOSAL:

Records are kept until three years after completion of project, and then retired to the Federal Records Center to be maintained and destroyed in accordance with General Records Schedule 6.1.2.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Private Sector Initiative, Peace Corps, Office of Private Sector Initiatives, 1111 20th St., NW., Washington, DC 20526.

NOTIFICATION PROCEDURE:

Any individual who wants notification that this system of records contains a record about him or her should make a written request to the System Manager. Requesters will be required to provide adequate identification, such as a driver's license, employee identification card, or other identifying documentation. Additional identification may be required in some instances. Complete Peace Corps Privacy Act procedures are set out in 22 CFR part 308.

RECORD ACCESS PROCEDURES:

Any individual who wants access to his or her record should make a written request to the System Manager. Requesters will be required to provide adequate identification, such as a driver's license, employee identification card, or other identifying documentation. Additional identification may be required in some instances. Complete Peace Corps Privacy Act procedures are set out in 22 CFR part 308.

CONTESTING RECORD PROCEDURES:

Any individual who wants to contest the contents of a record should make a written request to the System Manager. Requesters will be required to provide adequate identification, such as a driver's license, employee identification card, or other identifying documentation. Additional identification may be required in some instances. Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete Peace Corps Privacy Act procedures are set out in 22 CFR part 308.

RECORD SOURCE CATEGORIES:

Donor and Peace Corps volunteers.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: October 3, 2008.

Carl R. Sosebee,

Acting General Counsel.

[FR Doc. E8–23891 Filed 10–8–08; 8:45 am]

BILLING CODE 6051–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 31a–1, SEC File No. 270–173, OMB Control No. 3235–0178.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension.

Rule 31a–1 (17 CFR 270.31a–1) under the Investment Company Act of 1940 (the ''Act'') (15 U.S.C. 80a) is entitled ''Records to be maintained by registered investment companies, certain majority-owned subsidiaries thereof, and other persons having transactions with registered investment companies.'' Rule 31a–1 requires registered investment companies (''funds''), and every underwriter, broker, dealer, or investment adviser that is a majority-owned subsidiary of a fund, to maintain and keep current accounts, books, and other documents which constitute the record forming the basis for financial statements required to be filed pursuant to section 31 of the Act (15 U.S.C. 80a–30) and of the auditor's certificates relating thereto. The rule lists specific records to be maintained by funds. The rule also requires certain underwriters, brokers, dealers, depositors, and investment advisers to maintain the records that they are required to maintain under federal securities laws.

There are approximately 4,621 investment companies registered with the Commission, all of which are required to comply with rule 31a–1. For purposes of determining the burden imposed by rule 31a–1, the Commission staff estimates that each fund is divided into approximately four series, on average, and that each series is required to comply with the recordkeeping requirements of rule 31a–1. Based on conversations with fund representatives, it is estimated that rule 31a–1 imposes an average burden of approximately 1,750 hours annually per series for a total of 7,000 annual hours per fund. The estimated total annual burden for all 4,621 funds subject to the rule therefore is approximately 32,347,000 hours. Based on conversations with fund representatives, however, the Commission staff estimates that even absent the requirements of rule 31a–1, 90 percent of the records created pursuant to the rule are the type that generally would be created as a matter of normal business practice and to prepare financial statements. Thus, the Commission staff estimates that the total annual burden associated with rule 31a–1 is 3,234,700 hours.

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study. 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.

Written comments are requested on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burden(s) of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Lewis W. Walker, Acting Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23924 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 11a1–1(T), OMB Control No. 3235–0478, SEC File No. 270–428.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 11a1–1(T)—Transactions Yielding Priority, Parity, and Precedence

On January 27, 1976, the Commission adopted Rule 11a1–1(T)—Transactions Yielding Priority, Parity, and Precedence (17 CFR 240.11a1–1(T)) under the Securities Exchange Act of 1934 (15 U.S.C. 78 *et seq.*) (''Exchange Act''), to exempt certain transactions of exchange members for their own accounts that would otherwise be prohibited under Section 11(a) of the Exchange Act. The rule provides that a member's proprietary order may be executed on the exchange of which the trader is a member, if, among other things: (1) The member discloses that a bid or offer for its account is for its account to any member with whom such bid or offer is placed or to whom it is communicated; (2) any such member through whom that bid or offer is communicated discloses to others participating in effecting the order that it is for the account of a member; and (3) immediately before executing the

order, a member (other than a specialist in such security) presenting any order for the account of a member on the exchange clearly announces or otherwise indicates to the specialist and to other members then present that he is presenting an order for the account of a member.

Without these requirements, it would not be possible for the Commission to monitor its mandate under the Exchange Act to promote fair and orderly markets and ensure that exchange members have, as the principle purpose of their exchange memberships, the conduct of a public securities business.

There are approximately 1,151 respondents that require an aggregate total of 32 hours to comply with this rule. Each of these approximately 1,151 respondents makes an estimated 20 annual responses, for an aggregate of 23,020 responses per year. Each response takes approximately 5 seconds to complete. Thus, the total compliance burden per year is 32 hours (23,020 × 5 seconds/60 seconds per minute/60 minutes per hour = 32 hours). The approximate cost per hour is $519, resulting in a total cost of compliance for the annual burden of $16,608 (32 hours @ $519).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to: Lewis W. Walker, Acting Director, Chief Information Officer, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, Virginia 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23929 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12f–1, OMB Control No. 3235–0128, SEC File No. 270–139.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 12f–1 (17 CFR 240.12f–1)—Applications for permission to reinstate unlisted trading privileges.

Rule 12f–1 (the ''Rule''), originally adopted in 1934 pursuant to Sections 12(f) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''), as modified in 1995 and 2005, sets forth the information which an exchange must include in an application to reinstate its ability to extend unlisted trading privileges to any security for which such unlisted trading privileges have been suspended by the Commission, pursuant to Section 12(f)(2)(A) of the Act. An application must provide the name of the issuer, the title of the security, the name of each national securities exchange, if any, on which the security is listed or admitted to unlisted trading privileges, whether transaction information concerning the security is reported pursuant to an effective transaction reporting plan contemplated by Rule 601 of Regulation NMS, the date of the Commission's suspension of unlisted trading privileges in the security on the exchange, and any other pertinent information. Rule 12f–1 further requires a national securities exchange seeking to reinstate its ability to extend unlisted trading privileges to a security to indicate that it has provided a copy of such application to the issuer of the security, as well as to any other national securities exchange on which the security is listed or admitted to unlisted trading privileges.

The information required by Rule 12f–1 enables the Commission to make the necessary findings under the Act prior to granting applications to reinstate unlisted trading privileges. This information is also made available to members of the public who may wish to comment upon the applications. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

There are currently 11 national securities exchanges subject to Rule 12f–1. The burden of complying with Rule 12f–1 arises when a potential respondent seeks to reinstate its ability to extend unlisted trading privileges to any security for which unlisted trading privileges have been suspended by the Commission, pursuant to Section 12(f)(2)(A) of the Act. The staff estimates that each application would require approximately one hour to complete. Thus each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 11 responses annually and that each respondent's related cost of compliance with Rule 12f–1 would be $168.00, or, the cost of one hour of professional work needed to complete the application. The total annual related reporting cost for all potential respondents, therefore, is $1,848.00 (11 responses × $168.00 /response).

Compliance with Rule 12f–1 is mandatory. Rule 12f–1 does not have a record retention requirement *per se*. However, responses made pursuant to Rule 12f–1 are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 of the Act. Information received in response to Rule 12f–1 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23930 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available from: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 12f–3, OMB Control No. 3235–0249, SEC File No. 270–141.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit the existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 12f–3 (17 CFR 240.12f–3)—Termination or Suspension of Unlisted Trading Privileges

Rule 12f–3 (the ''Rule''), which was originally adopted in 1934 pursuant to Sections 12(f) and 23(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Act''), as modified in 1995, prescribes the information which must be included in applications for and notices of termination or suspension of unlisted trading privileges for a security as contemplated in Section 12(f)(4) of the Act. An application must provide, among other things, the name of the applicant; a brief statement of the applicant's interest in the question of termination or suspension of such unlisted trading privileges; the title of the security; the name of the issuer; certain information regarding the size of the class of security and its recent trading history; and a statement indicating that the applicant has provided a copy of such application to the exchange from which the suspension or termination of unlisted trading privileges are sought, and to any other exchange on which the security is listed or admitted to unlisted trading privileges.

The information required to be included in applications submitted pursuant to Rule 12f–3, is intended to provide the Commission with sufficient information to make the necessary findings under the Act to terminate or suspend by order the unlisted trading privileges granted a security on a national securities exchange. Without the Rule, the Commission would be unable to fulfill these statutory responsibilities.

The burden of complying with Rule 12f–3 arises when a potential respondent, having a demonstrable bona fide interest in the question of termination or suspension of the unlisted trading privileges of a security, determines to seek such termination or suspension. The staff estimates that each such application to terminate or suspend unlisted trading privileges requires approximately one hour to complete. Thus each potential respondent would incur on average one burden hour in complying with the Rule.

The Commission staff estimates that there could be as many as 11 responses annually and that each respondent's related cost of compliance with Rule 12f–3 would be $168.00, or, the cost of one hour of professional work needed to complete the application. The total annual related reporting cost for all potential respondents, therefore, is $1,848.00 (11 responses × $168.00/response).

Compliance with the application requirements of Rule 12f–3 is mandatory, though the filing of such applications is undertaken voluntarily. Rule 12f–3 does not have a record retention requirement *per se.* However, responses made pursuant to Rule 12f–3 are subject to the recordkeeping requirements of Rules 17a–3 and 17a–4 of the Act. Information received in response to Rule 12f–3 shall not be kept confidential; the information collected is public information.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23931 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 24b–1, OMB Control No. 3235–0194, SEC File No. 270–205.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

• Rule 24b–1 (17 CFR 240.24b–1)—Documents to be Kept Public by Exchanges.

Rule 24b–1 under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) requires a national securities exchange to keep and make available for public inspection a copy of its registration statement and exhibits filed with the Commission, along with any amendments thereto.

There are eleven national securities exchanges that spend approximately one half hour each complying with this rule, for an aggregate total compliance burden of five and one half hours per year. The staff estimates that the average cost per respondent is $65.18 per year, calculated as the costs of copying ($13.97) plus storage ($51.21), resulting in a total cost of compliance for the respondents of $716.98.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Comments should be directed to Lewis W. Walker, Acting Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*.

Dated: October 1, 2008.

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23932 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58712; File No. SR–Amex–2008–73]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by American Stock Exchange LLC Relating to the Amex Price List After the Acquisition of NYSE Euronext

October 2, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 29, 2008, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

In connection with its pending acquisition by NYSE Euronext—the parent company of the New York Stock Exchange LLC (''NYSE'') and NYSE Arca—the American Stock Exchange LLC (''Amex'' or ''Exchange'') is seeking to revise the Amex Price List that will be put in effect after the acquisition closes.

The text of the proposed rule change is available on the Amex's Web site at *http://www.amex.com,* the Office of the Secretary, the Amex and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 self-regulatory organization 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

Background

Pursuant to an agreement dated January 17, 2008, the Amex is being acquired by NYSE Euronext—the parent company of the NYSE and NYSE Arca—through a series of mergers as described in SR–Amex–2008–62 (the ''Transaction'').[3] Following completion of the Transaction, Amex will become one of the U.S. Regulated Subsidiaries [4] of NYSE Euronext and will continue to engage in the business of operating a national securities exchange registered under Section 6 of the Securities Exchange Act of 1934, as amended (the ''Act'').[5] Following the Transaction, the name of the new exchange will be NYSE Alternext US LLC. NYSE Alternext US will continue to operate a marketplace for the listing and trading of equities, options, bonds and for a limited period of time Exchange Traded Fund shares (''ETFs'') and certain structured products. It is anticipated that after a period of transition during which these products will continue to trade on Amex legacy trading systems and facilities, the trading of these products will be relocated to trading systems and facilities operated by NYSE or NYSE Arca on behalf of NYSE Alternext US.[6] The substantive changes to the Amex Price List proposed herein will be in effect during the transition period, beginning with the first complete billable month after the completion of the Transaction through to the relocation of the trading of each of the product lines. The non-substantive changes such as changes to the name of the Exchange and elimination of references to seat owners and memberships will take place immediately after the Transaction closes.

During the transition period NYSE Alternext US intends to make available to persons and entities that apply and meet certain requirements a temporary trading permit (to be known as an ''86 Trinity Permit'') to allow holders to trade products currently traded on the Exchange prior to the relocation of the trading of the products as described above.[7] To ensure continuity following the Transaction, persons and entities that were authorized to trade on the Exchange immediately prior to the Transaction, will be deemed to have satisfied applicable requirements necessary to receive an 86 Trinity Permit. Any person or organization seeking access to the Exchange during the transition period will need to obtain an 86 Trinity Permit.

Description of Changes to the Price List

In addition to changing the name of the Amex Price List to the NYSE Alternext U.S. Price List and revisions to references related to seat owner and memberships to reflect the issuance of 86 Trinity Permits, the Exchange proposes to make the following changes:

1. The following floor fees will be waived for holders of 86 Trinity Permits during the transition period beginning with the first complete billable month after the Transaction closes (referred to hereinafter as the ''Operative Date''). For example, if the Transaction closes in September, floor fees will be waived beginning in October. Floor fees include Floor Clerk Fee, Floor Facility Fee, Floor Wire Privilege Fee, Post Fee per Podium Fee, Specialist Registration Fee and the Technology Fee.

2. The Cable TV fee will be increased from $360 per year to $420 per year to reflect an increase in the cost of this service to the Exchange; this fee

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 58284 (August 1, 2008), 73 FR 46086 (August 7, 2008) Notice of Filing of Proposed Rule Change SR–Amex 2008–62.

[4] The term ''U.S. Regulated Subsidiary'' is defined under Article VII, Section 7.3(G) of the Bylaws of NYSE Euronext.

[5] 15 U.S.C. 78f.

[6] For more information regarding the relocation of equity products see Securities Exchange Act Release No. 58265 (July 30, 2008) 73 FR 46075 (August 7, 2008) Notice of Filing of Proposed Rule Change SR–Amex 2008–63. In addition, the Exchange will submit separate rule filings regarding the relocation of options, bonds, ETFs and structured products in the near future.

[7] For a further description of 86 Trinity Permit Holders see Securities Exchange Act Release No. 58284 (August 1, 2008) 73 FR 46086 (August 7, 2008) Notice of Filing of Proposed Rule Change SR–Amex 2008–62.

increase will go into effect on the Operative Date. In addition the Price List will be revised to include the monthly rate charged for services that are billed on a monthly rather than annual basis. Reference to the Membership Certificate fee of $20.00 will be eliminated since the Exchange will no longer issue such certificates.

3. The Price List section on Booth Rental and Order Pads is revised and updated to eliminate the references to (i) Order Pads since there is no fee indicated for order pads in that section; and (ii) the Booth Rental fees no longer in effect.

4. The Price List section on Members Fees is revised to (i) change the name of the section to 86 Trinity Permit Holder Fees; (ii) eliminate Membership Dues; (iii) eliminate Initiation Fees, except for the Application Processing Fee and the $45 fee for use of the Exchange's in-house fingerprinting service; (iv) change the name of the subsection Membership Fees to 86 Trinity Permit Holder Fees and waive the Limited Trading Permits (''LTP'') fee for those LTP holders who become 86 Trinity Permit Holders after the Transaction closes[8] The LTP Fee is billed at the beginning of each quarter, therefore, if the Transaction closes in the middle of a quarter, waiver of the fee will be effective at the beginning of the next quarter and will not be applied retroactively; (v) eliminate the Qualifying Maintenance fee charged to Interim Members; and (vi) eliminate obsolete notes.

5. The Price List section on Registration and IDC Fees is being revised to replace NASD with FINRA.

References throughout the Price List to Amex or ASE will be revised to NYSE Alternext U.S. or Exchange where appropriate.

(2) Statutory Basis

The Exchange believes that the proposed fee change is consistent with Section 6(b)(4) of the 1934 Act[9] regarding the equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities. In particular the Exchange is revising its Price List to be in effect during the transition period after the closing of its Transaction with NYSE Euronext. Most of the fees currently in place on the Amex will remain in effect after the closing of the Transaction and throughout the transition period, however, certain member fees are being waived for the transition period to help off-set costs it is anticipated members will incur when transitioning their operations to NYSE Alternext's new trading facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 1934 Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective immediately pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2)[11] thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary of appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Securities Exchange Act of 1934.

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–Amex–2008–73 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–Amex–2008–73. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of 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–Amex–2008–73 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23925 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

[8] As discussed in proposed rule change SR–Amex 2008–62, during the transition period physical and electronic access to NYSE Alternext US's trading facilities will only be made available to individuals that obtain an 86 Trinity Permit, thus the access a LTP holder had prior to the Transaction will be cancelleld and for continued access such former LTP holder may obtain an 86 Trinity Permit.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58718; File No. SR–CBOE–2008–102]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Change the Permissible Exercise Price and Premium Calculations for FLEX Equity Options

October 2, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

September 30, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rules 24A.4 and 24B.4 to change the permissible exercise price and premium calculations for FLEX Equity Options.[5] The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, our rules provide that FLEX Equity Options exercise prices and premiums may be stated in dollar amount or percentage of the price of the underlying security, rounded to the nearest minimum tick (which may be as small as $0.01) or, in the case of exercise prices, to the nearest one-eighth of a dollar or $0.10.[6] The purpose of this rule change is to revise the permissible exercise price and premium calculations for FLEX Equity Options to be more aligned with the permissible calculations for FLEX Index Options.[7] Under the proposed rule:

- Exercise prices and premiums for FLEX Equity Options may be stated in a dollar amount, which is the same as the current rule allows.
- Exercise prices and premiums may also be stated in a percentage of the price of the underlying security at the time of the trade, which is the same as the current rule allows, or as of the open or close of trading on the Exchange on the trade date. Providing the flexibility to use a percentage based on the open or close of the underlying security is consistent with our FLEX Index Option rules, which permit exercise prices to be specified in terms of a percentage of the index value calculated as of the open or close of trading on the Exchange on the trade date.[8]
- Exercise prices and premiums may also be stated in a method for fixing such a number at the time a FLEX Request for Quote or FLEX Order is traded. For example, the exercise price and premium for a FLEX Equity Option might be based on the volume-weighted average price (''VWAP'') of the underlying for the trade day. Providing the flexibility to determine a particular method for fixing the exercise prices or premiums at the time of a trade is consistent with our FLEX Index Option rules, which permit exercise prices to be specified in terms of a method for fixing such a number at the time of a trade.[9]

We are also proposing to update the rounding formula for FLEX Equity Option exercises. As indicated above, the existing rules provide that the exercise price will be rounded to the nearest minimum increment, one-eighth of a dollar or $0.10. We are proposing to change the $0.10 parameter to instead be a decimal increment determined by the Exchange on a class-by-class basis, provided the increment cannot be smaller than $0.01. This change will provide the Exchange with more flexibility to determine to make a smaller increment available. We note that the minimum increment for each FLEX Equity Option is determined by the Exchange on a class-by-class basis and can be as small as $0.01.[10] As a result, having an exercise price in a $0.01 increment is already permissible under our rules in those FLEX Equity Option classes where the minimum increment is $0.01.

The Exchange believes that expanding the permissible exercise price and premium calculations is important and necessary to the Exchange's efforts to create a product and market that provides members and investors interested in FLEX-type options with an improved but comparable alternative to the over-the-counter (''OTC'') market in customized options, which can take on contract characteristics similar to FLEX Equity Options but are not subject to the same restrictions. By expanding the permissible calculations for FLEX Equity Options, market participants will now have greater flexibility in determining whether to execute their customized options in an exchange environment or in the OTC market. CBOE believes market participants benefit from being able to trade these customized options in an exchange environment in several ways, including, but not limited to the following: (1) Enhanced efficiency in initiating and closing out positions; (2) increased market transparency; and (3) heightened contra-party creditworthiness due to the role of The Options Clearing Corporation as issuer and guarantor of FLEX Equity Options.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') [11] and the rules and regulations under the Act applicable to national securities exchanges and, in particular, the requirements of Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change will provide more flexibility to calculate exercise prices and premiums for FLEX Equity Options in a manner that is consistent with the calculations for FLEX Index Options, which should provide members and

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] FLEX Equity Options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices.

[6] *See* Rules 24A.4(c)(2), 24A.5(f), 24B.4(c)(2) and 24B.5(e).

[7] FLEX Index Options are options on specified underlying indexes and, like FLEX Equity Options, provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices.

[8] *See* Rules 24A.4(b)(2)(i)(c) and 24B.4(b)(2)(i)(c).

[9] *See* Rules 24A.4(b)(2)(i)(b) and 24B.4(b)(2)(i)(b).

[10] *See* Rules 24A.5(f) and 24B.5(e).

[11] 15 U.S.C. 78s(b)(1).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

investors interested in FLEX Equity Options with additional opportunities to trade customized options in an exchange environment, and investors will benefit as a result.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b-4(f)(6) thereunder.[15] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–102 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–CBOE–2008–102. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–102 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23926 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58719; File No. SR–CBOE–2008–103]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit Electronic Indicative FLEX Quotes

October 2, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2008, the Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules related to Flexible Exchange Options (''FLEX Options'') [5] in order to adopt provisions codifying certain electronic Indicative FLEX Quote functionality. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] FLEX Options provide investors with the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices.

The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to modify Rule 24B.14, *FLEX Official*, and to include a new definition of the term ''Indicative FLEX Quote'' in Rule 24B.1, *Definitions*, in order to make clear that non-binding electronic indications of the market for particular series of FLEX Options may be periodically supplied by FLEX Traders [6] and displayed on the FLEX Hybrid Trading System communications network, which is made available to all FLEX Traders that chose to receive the information. Under the proposed rule text, a FLEX Official [7] may call for such Indicative FLEX quotes at any time during the course of trading and with respect to any series of FLEX Options that the FLEX Official deems appropriate. In addition, FLEX Traders may call for Indicative FLEX Quotes, updates thereto, or cancellations thereof.

This ability to call for and provide electronic Indicative FLEX Quotes is somewhat like the Indicative FLEX Quote functionality that CBOE previously utilized on its open outcry-based FLEX RFQ System (the ''legacy FLEX system''),[8] except that under the proposed FLEX Hybrid Trading System application: FLEX Officials and all FLEX Traders have the ability to electronically request an Indicative FLEX Quote (previously under the legacy FLEX system, only FLEX Officials had the ability to make a verbal request on their own motion or at the request of a Market-Maker); FLEX Traders can now electronically communicate their Indicative FLEX Quotes (previously such quotes were only verbalized by Market-Makers in open outcry); and the information is disseminated over the FLEX Hybrid Trading System communications network interface (previously the information was disseminated at the trading post and over a different communications network). We believe the ability to request and provide Indicative FLEX Quotes over the interface serves as a useful tool for FLEX Traders to obtain information about indicative FLEX markets, and the above-described distinctions represent an enhancement to the former process by providing a more efficient and effective means of communication.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b) of the Act [9] and the rules and regulations thereunder, in general, and Section 6(b)(5),[10] in particular, in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change allows FLEX Traders to more efficiently and effectively communicate information about indicative prices to the benefit of customers.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2008–103 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–CBOE–2008–103. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

[6] The reference to ''FLEX Traders'' includes any Exchange members that have been approved by the Exchange to use the FLEX Hybrid Trading System and any non-member Sponsored Users that have been provided electronic access, through Sponsoring Members, to the FLEX Hybrid Trading System in accordance with Rule 6.20A, *Sponsored Users*.

[7] The Exchange may at any time designate an Exchange employee or independent contractor to act as a FLEX Official in one or more classes of FLEX Options. A FLEX Official performs the functions set out in Rule 24B.14.

[8] *See* Securities Exchange Act Release Nos. 31920 (February 24, 1993), 58 FR 12280 (March 3, 1993)(SR–CBOE–92–17)(approval of rule change that, among other things, established the legacy FLEX system rule provisions pertaining to Indicative FLEX Quotes) and 56792 (November 15, 2007), 72 FR 65776 (November 23, 2007)(SR–CBOE–2006–99)(approval of rule change that, among other things, deleted the legacy FLEX system rule provisions pertaining to Indicative FLEX Quotes because the then-existing functionality was no being longer utilized).

[9] 15 U.S.C. 78s(b)(1).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

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 will also be available for inspection and copying at the principal office of the self-regulatory organization. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2008–103 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23927 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58730; File No. SR–DTC–2008–09]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change To Expand DTC's Debit Cap Look-Ahead Processing

October 3, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 12, 2007, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by DTC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend the Look-Ahead Process in DTC's Settlement Services Guide to allow Money Market Issuance Deliveries pending for a Custodian's or Dealer's net debit cap to complete against Maturity Presentments pending for an Issuing/Paying Agent's net debit cap. DTC's processing system would calculate the net effect of the dollar amount of offsetting transactions in the accounts of the two Participants involved. If the net of the transactions would result in positive risk management controls in those two accounts, the transactions would be completed.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On June 10, 2003, the Commission approved a proposed rule change to establish a transaction Look-Ahead Process which became available for municipal and corporate bonds, including Money Market Instruments (''MMIs'').[3] On August 11, 2004, the Commission approved another proposed rule change which expanded the application and extended the benefit of the Look-Ahead Process to all equity transactions.[4] With this proposed rule change, DTC is proposing to expand the Look-Ahead Process to MMIs.

The purpose of DTC's Look-Ahead Process is to reduce the number of recycling transactions in the system caused by the Net Debit Cap Risk Management Control.[5] The existing Look-Ahead Process finds delivery transactions that are pending because the Receiving Participant has reached its net debit cap.[6] It then looks to see whether the Receiving Participant has a pending delivery for the same security to another Participant.[7] In such a situation, DTC's Account Transaction Processor (''ATP'')[8] will calculate the net effect to the collateral[9] and net debit cap controls for all three Participants involved. If the net effect will not result in a deficit in the collateral or net debit cap controls for any of the three Participants, ATP processes the transactions simultaneously. Without the Look-Ahead Process, the transaction would pend in DTC's system until another transaction created sufficient credit in the Receiving Participant's account. Most credits are generated when a Participant delivers securities versus payment, pledges securities for value, receives principal, dividend or other interest allocations, or wires funds (a Settlement Progress Payment (''SPP'')) to DTC's account at the Federal Reserve Bank of New York in order to reduce its DTC net debit.

In order to further reduce the number of recycling transactions in the system and to improve the timeliness and certainty of transactions completing, DTC is proposing to expand the Look-Ahead Process beyond same securities for MMIs to allow pairs of money market instrument transactions between two Participants (*i.e.*, an Issuing Paying Agent [''IPA''] and a custodian or dealer) that are pending for both party's net debit caps to complete. This situation occurs when an IPA has a delivery of a new money market instrument to a custodian or a dealer for X dollars and that same custodian or dealer has a maturity of a money market instrument of equal or greater value awaiting acceptance by the same IPA. The proposed rule change would allow ATP to process those transactions simultaneously, as long as neither Participant's risk management controls were overridden.

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] Securities Exchange Act Release No. 48007 (June 10, 2003), 68 FR 35744 (June 16, 2003) (File No. SR–DTC–2003–07).

[4] Securities Exchange Act Release No. 50182 (August 11, 2004), 69 FR 51341 (August 18, 2004) (File No. SR–DTC–2004–05).

[5] Net debit caps help ensure that DTC can complete settlement, even if a Participant fails to settle.

[6] Before completing a transaction in which a Participant is the receiver, DTC calculates the resulting effect the transaction would have on the Participant's account and determines whether the resulting net balance would exceed the Participant's net debit cap. Any transaction that would cause the Participant's net settlement debit to exceed its net debit cap is placed in a pending (recycling) queue until another transaction creates credits in the Participant's account.

[7] For example, Participant A is delivering shares to Participant B and Participant B has a delivery obligation of shares with the same CUSIP to Participant C.

[8] ATP is the core processing system for all transaction activity affecting security positions held at DTC.

[9] DTC tracks collateral in a Participant's account through its Collateral Monitor (''CM''). At all times, the CM reflects the amount by which the collateral in the account exceeds the net debit in the account. When processing a transaction, DTC verifies that the deliverer's and receiver's CMs will not become negative when the transaction completes. If the transaction would cause either party to have a negative CM, the transaction will recycle until the deficient account has sufficient collateral for the transaction to complete.

This enhancement to the Look-Ahead Process will reduce the number of MMI recycling transactions. The Look-Ahead enhancement to DTC's processing system will not result in any systematic changes for Participants.

The proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to DTC in that the proposed rule change will promote the prompt and accurate clearance and settlement of securities transactions because it will allow transactions to settle through a Look-Ahead Process and as such will allow MMI transactions to clear and settle in a more prompt and efficient manner. The proposed rule change will be implemented in a manner that is consistent with DTC's risk management controls.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments from relating to the proposed rule change have not yet been solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve the proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–DTC–2008–09 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–DTC–2008–09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of DTC. 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–DTC–2008–09 and should be submitted on or before October 30, 2008.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23979 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58728; File No. SR–Phlx–2008–70]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc. Relating to an Order Entry Port Fee

October 3, 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 September 24, 2008, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, pursuant to Section 19(b)(1) of the Act[3] and Rule 19b–4 thereunder,[4] proposes to adopt a monthly order entry port fee of $250 assessed per member organization order entry mnemonic.[5]

While changes to the Exchange's fee schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed monthly $250 order entry port fee to be implemented beginning October 1, 2008.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.phlx.com/regulatory/reg_rulefilings.aspx*.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] For purposes of this proposal, order entry mnemonics are codes that identify member organization order entry ports. Member organizations send order flow to the Exchange via these order entry ports. A member organization may have more than one order entry port. To clarify, order entry mnemonics would not include those mnemonics entered through internal Exchange applications, such as the Floor Broker Management System, because the proposed fee is intended to help cover the costs of establishing and maintaining connectivity to the Exchange through external order entry ports. (*See* Exchange Rule 1063).

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of adopting the proposed order entry port fee is to establish a connectivity fee in connection with routing orders to the Exchange. Member organizations access the Exchange's network through these order entry ports. Currently, member organizations do not pay for this service.[6] The Exchange believes that it is appropriate for members to pay a uniform monthly fee to support the infrastructure associated with market access.

The $250 per month order entry port fee would be assessed per member organization order entry mnemonic. The $250 per month order entry port fee would be assessed on any order entry mnemonic that was active during that billing month.[7]

The proposed monthly $250 order entry port fee is scheduled to be implemented beginning October 1, 2008.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange member organizations. The Exchange believes that the proposed order entry port fee is reasonable and should allow member organizations to connect to the Exchange without being unduly financially burdensome. The Exchange believes that the proposal is an equitable allocation of reasonable fees among member organizations because the proposed order entry port fee would be assessed on those member organizations who send orders to the Exchange through these external order entry ports.

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 not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and paragraph (f)(2) of Rule 19b–4[11] thereunder. 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–Phlx–2008–70 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–Phlx–2008–70. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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–Phlx–2008–70 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23940 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

[6] The proposed order entry port fee is different than the ''SQF Port Fee and Corresponding Credit'' that appears on Appendix A of the Exchange's fee schedule. ''SQF'' stands for specialized quote feed and is a proprietary quoting system that allows specialists, streaming quote traders and remote streaming quote traders to connect and send quotes into Phlx XL, bypassing the Exchange's Auto-Quote System. *See* Exchange Rule 1080, Commentary .01(b). Thus, the proposed order entry port fee would be assessed in connection with sending orders to the Exchange, while the SQF port fee is assessed in connection with sending quotes to the Exchange.

[7] For purposes of this proposal, an order entry mnemonic would be considered active if a member organization sends at least one order to the Exchange using that order entry mnemonic during the applicable billing month.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58721; File No. SR–NASDAQ–2008–079]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Order Routing

October 2, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on September 29, 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 prepared by NASDAQ. NASDAQ filed the proposed rule change as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders it 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 modify Rule 4758, Order Routing, to require that orders routed to the New York Stock Exchange LLC (''NYSE'') or the American Stock Exchange LLC (''AMEX'') through NASDAQ's DOT routing strategy check the NASDAQ book prior to routing, except in the case of orders directed for participation in the NYSE or AMEX opening or closing processes. NASDAQ proposes to make the change operative on October 1, 2008. The text of the proposed rule amendment is as follows, with deletions in [brackets] and additions *italicized:*

4758. Order Routing

(a) Order Routing Process

(1) The Order Routing Process shall be available to Participants from 7:00 a.m. until 8:00 p.m. Eastern Time, and shall route orders as described below: All routing of orders shall comply with Rule 611 of Regulation NMS under the Exchange Act.

(A) The System provides three routing options. Of these three, DOT is only available for orders ultimately sought to be directed to either the New York Stock Exchange (''NYSE'') or the American Stock Exchange (''AMEX''). The System will consider the quotations only of accessible markets. The three System routing options are:

(i) DOT (''DOT'')—under this option, after checking the System for available shares [if so instructed by the entering firm], orders are sent to other available market centers for potential execution, per entering firm's instructions, before being sent to the destination exchange, so long as the price at such market centers would not violate the Order Protection Rule. Any un-executed portion will thereafter be sent to the NYSE or AMEX, as appropriate, at the order's original limit order price. This option may only be used for orders with time-in-force parameters of either SDAY, SIOC, MDAY, MIOC, GTMC or market-on-open/close. *Notwithstanding the foregoing, orders designated for participation in the NYSE or AMEX opening or closing processes will not check the System for available shares prior to routing.*

(ii)–(iii) No change.

(B) No change.

(b) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ 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. NASDAQ 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

NASDAQ is amending Rule 4758 to make its procedures for routing orders to NYSE and AMEX more consistent with its procedures for routing to other trading venues. Currently, a NASDAQ member seeking to route orders that are eligible for posting on the NYSE or AMEX books has the option of instructing NASDAQ Execution Services, the routing broker for NASDAQ, to bypass the NASDAQ book altogether and route the order directly to the destination exchange. By contrast, members seeking to bypass the NASDAQ book to reach venues other than NYSE and AMEX may do so only for the purpose of removing liquidity from the other venue through the use of ''directed orders.'' As NYSE's and AMEX's share of trading in U.S. cash equities decreases, less volume is being routed through this specialized routing option. Accordingly, NASDAQ proposes to eliminate the functionality that allows members to post liquidity on the NYSE or AMEX books without first checking the NASDAQ book, while continuing to allow members to post on NYSE or AMEX after checking the NASDAQ book, or to route directed orders to NYSE or AMEX that remove liquidity without first checking the NASDAQ book.

Members seeking to use NASDAQ to route to NYSE and AMEX will continue to have the following options: (i) Access available liquidity on NASDAQ and then route for posting at the away market;[5] (ii) access available liquidity, route to the away market to access available liquidity, and then return to NASDAQ for posting;[6] (iii) access only displayed liquidity on NASDAQ and other venues (including NYSE and/or AMEX) prior to cancelling or returning to NASDAQ for posting;[7] or (iv) route directed orders to NYSE or AMEX without checking the NASDAQ book, but on an immediate-or-cancel (IOC) basis only.[8] In addition, members seeking to route orders to NYSE or AMEX for purposes of participating in opening or closing processes will continue to have the option of bypassing the NASDAQ book.[9]

2. Statutory Basis

NASDAQ believes the proposed rule change is consistent with the provisions of Section 6 of the Act,[10] in general, and with Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. The change will eliminate functionality that allows members to post liquidity on the NYSE or AMEX books without first checking the NASDAQ book, in accordance with decreasing use of this functionality. Following the change, members will continue to have numerous options for routing to NYSE and AMEX, including the use of

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* NASDAQ Rule 4758(a)(1)(A)(i) (including proposed amendments).

[6] *See* NASDAQ Rule 4758(a)(1)(A)(ii) and (iii). Orders that return for posting may, in turn, be designated as eligible either for routing again if they subsequently become executable (''STGY'') or designated to remain on the NASDAQ book after posting (''SCAN'').

[7] *Id.* Both SCAN and STGY allow market participants to instruct whether the order should access all available liquidity or only displayed liquidity.

[8] *See* NASDAQ Rule 4751(f)(9).

[9] *See* NASDAQ Rule 4758(a)(1)(A)(i) (including proposed amendments).

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

directed IOC orders that bypass the NASDAQ book, and orders that are eligible for posting at NYSE or AMEX after checking the NASDAQ book.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[14] However, Rule 19b–4(f)(6)(iii) [15] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange states that waiver of the 30-day operative delay will allow NASDAQ to make its processes for routing to various exchanges consistent at the beginning of October 2008. Because the current functionality for routing and posting to NYSE and AMEX without checking the NASDAQ book has a particular fee associated with it, elimination of this option will affect the calculation of NASDAQ's bills to members, which are prepared on a monthly basis. Therefore, making the proposed change effective at the beginning of the month will promote efficiency and clarity in NASDAQ's billing processes.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission hereby grants the Exchange's request and designates the proposal as operative beginning on October 1, 2008.[16]

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 No. SR–NASDAQ–2008–079 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2008–079. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. 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–2008–079 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23978 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has complied with this requirement.

[15] *Id.*

[16] For purposes only of waiving the 30-day operative delay of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58722; File No. SR–NYSE–2008–95]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 104.10 To Extend the Duration of the Pilot Program Applicable to Conditional Transactions as Defined in Rule 104.10(6)(i) in all Securities to the Earlier of December 31, 2008 or the Approval of SR–NYSE–2008–46

October 2, 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 September 30, 2008, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 104.10 to extend the duration of the pilot program applicable

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

to Conditional Transactions as defined in Rule 104.10(6)(i) in all securities to the earlier of December 31, 2008 or the approval of SR–NYSE–2008–46.

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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to amend Exchange Rule 104.10 to extend the duration of the pilot program applicable to Conditional Transactions as defined in Rule 104.10(6)(i) in all securities to the earlier of December 31, 2008 or the approval of SR–NYSE–2008–46.[3]

On October 26, 2007, the Securities and Exchange Commission (the ''Commission'') approved the ability of NYSE specialists to effect Conditional Transactions pursuant to Exchange Rule 104.10(6) in all securities traded on the NYSE to operate as a pilot through March 31, 2008 (the ''Conditional Transaction Pilot'').[4]

(1) Current Conditional Transaction Pilot

Conditional Transactions are specialists' transactions that establish or increase a position and reach across the market to trade as the contra-side to the Exchange published bid or offer. Under the current Conditional Transaction Pilot, NYSE specialists are allowed to effect Conditional Transactions in all securities traded on the NYSE until September 30, 2008.

When a specialist effects a Conditional Transaction, he or she has obligations to re-enter the market on the opposite side from which the specialist effected his or her Conditional Transaction pursuant to the rule. Specifically, pursuant to Exchange Rule 104.10(6)(ii), ''Appropriate'' re-entry means ''re-entry on the opposite side of the market at or before the price participation point or the 'PPP.' '' [5] Depending on the type of Conditional Transaction, a specialist's obligation to re-enter may be immediate or subject to the same re-entry conditions of Non-Conditional Transactions.[6] Conditional Transactions are subject to a specialist's overall negative obligation.[7] As a condition of operating the Conditional Transaction Pilot, the Exchange committed to providing the Commission with data related to specialist executions of Conditional Transactions. The Exchange has provided the Commission's Division of Trading and Markets and the Office of Economic Analysis with statistics related to market quality, specialist trading activity and sample statistics for the months of November 2007 through July 2008. The data included the daily Consolidated Tape volume in shares, daily number of trades, daily high-low volatility in basis points, and daily close price in dollars.

The Exchange will continue to provide data to the Commission on or before the 20th of the calendar month as outlined in its filing to create the Exchange New Market Model.[8]

Furthermore, NYSE Regulation (''NYSER'') continues to have appropriate surveillance procedures in place to surveil for compliance with the negative obligations of specialists. NYSER monitors, using a pattern-and-practice and/or outlier approach, specialist activity that appears to cause or exacerbate excessive price movement in the market (since such transactions would appear to be in violation of a specialist's negative obligation). In this connection, NYSER continues to surveil for specialist compliance with the PPP re-entry requirements, and, based on its reviews of surveillance data to date, has not identified significant compliance issues. The Division of Market Surveillance of NYSER also monitors specialist trading to cushion such price movements.

(2) Conclusion

The Exchange believes that an extension of the current Conditional Transaction Pilot program will continue to provide NYSE specialists with the flexibility to compete and to efficiently and systematically trade and quote in their securities as well as equip them to fluidly manage their risk.

In view of the above, the NYSE believes it is appropriate to extend the operation of the Conditional Transaction Pilot program to the earlier of December 31, 2008 or the approval of SR–NYSE–2008–46.

[3] *See* Securities Exchange Act Release No. 58184 (July 17, 2008), 73 FR 42853 (July 23, 2008) (SR–NYSE–2008–46) (''New Market Model filing'').

[4] *See* Securities Exchange Act Release No. 56711 (October 26, 2007), 72 FR 62504 (November 5, 2007) (SR–NYSE–2007–83). The Pilot was next extended for an additional three months until June 30, 2008. *See* Securities Exchange Act Release No. 57592 (April 1, 2008), 73 FR 18836 (April 7, 2008) (SR–NYSE–2008–23). On June 26, 2008, the operation of the Pilot was extended until September 30, 2008. *See* Securities Exchange Act Release No. 58040 (June 26, 2008), 73 FR 38272 (July 3, 2008) (SR–NYSE–2008–50).

[5] NYSE Rule 104.10(6)(iii)(a) provides that the PPP identifies the price at or before which a specialist is expected to re-enter the market after effecting a Conditional Transaction. PPPs are only minimum guidelines and compliance with them does not guarantee that a specialist is meeting its obligations. The Exchange issued guidance regarding PPPs in January 2007. *See* NYSE Member Education Bulletin 2007–1 (January 18, 2007).

[6] NYSE Rule 104.10(6)(iii)(c) provides that immediate re-entry is required after the following Conditional Transactions:

(I) A purchase that (1) reaches across the market to trade with an Exchange published offer that is above the last differently priced trade on the Exchange and above the last differently priced published offer on the Exchange, (2) is 10,000 shares or more or has a market value of $200,000 or more, and (3) exceeds 50% of the published offer size.

(II) A sale that (1) reaches across the market to trade with an Exchange published bid that is below the last differently priced trade on the Exchange and below the last differently priced published bid on the Exchange, (2) is 10,000 shares or more or has a market value of $200,000 or more, and (3) exceeds 50% of the published bid size.

Pursuant to current NYSE Rule 104.10(6)(iv), Conditional Transactions that involve:

(a) A specialist's purchase from the Exchange published offer that is priced above the last differently-priced trade on the Exchange or above the last differently-priced published offer on the Exchange; and

(b) A specialist's sale to the Exchange published bid that is priced below the last differently-priced trade on the Exchange or below the last differently-priced published bid on the Exchange are subject to the re-entry requirements for Non-Conditional Transactions pursuant to Rule 104.10 (5)(i)(a)(II)(c).

NYSE Rule 104.10(5)(i)(a)(II)(c) provides:

Re-entry Obligation Following Non-Conditional Transactions—The specialist's obligation to maintain a fair and orderly market may require re-entry on the opposite side of the market trend after effecting one or more Non-Conditional Transactions. Such re-entry transactions should be commensurate with the size of the Non-Conditional Transactions and the immediate and anticipated needs of the market.

[7] The negative obligation, which is part of NYSE Rule 104, requires that specialists restrict their dealings so far as practicable to those reasonably necessary to permit the specialists to maintain a fair and orderly market. Specifically, NYSE Rule 104(a) provides:

No specialist shall effect on the Exchange purchases or sales of any security in which such specialist is registered, for any account in which he, his member organization or any other member, allied member, or approved person, (unless an exemption with respect to such approved person is in effect pursuant to Rule 98) in such organization or officer or employee thereof is directly or indirectly interested, unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security.

[8] *See* Securities Exchange Act Release No. 58184 (July 17, 2008), 73 FR 42853 (July 23, 2008) (SR–NYSE–2008–46) (''New Market Model filing'').

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act[9] in that it is designed to prevent fraudulent and manipulative practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1)[10] in that it seeks to assure economically efficient execution of securities transactions. The Exchange believes that extending the operation of the Conditional Transaction Pilot will provide specialists with the required flexibility to compete, thus adding value to the Exchange market by encouraging specialists to continue to commit capital. Ultimately, the Exchange believes that the Conditional Transaction Pilot benefits the marketplace by allowing specialists to manage their risk and, therefore, provides them with the ability to increase the liquidity they provide at prices outside the best bid and offer, as well as meet their obligation to bridge temporary gaps in supply and demand and dampen volatility.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has designated the proposed rule change as one that: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. Therefore, the foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Exchange Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative until 30 days after the date of filing.[13] However, Rule 19b–4(f)(6)(iii)[14] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange believes that the instant filing is non-controversial because it merely seeks to extend the operation of the current Conditional Transaction Pilot. For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4.[15]

The Exchange further respectfully requests that the Commission waive the 30-day delayed operative date so that the proposed rule change may become effective and operative upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act[16] and Rule 19b–4(f)(6)[17] thereunder. The Exchange submits that good cause exists to justify waiver of the operative delay because the instant filing seeks to extend the operation the Conditional Transaction Pilot without interruption thus allowing specialists to continue managing their risk and therefore providing them with the ability to increase the liquidity they provide at prices outside the best bid and offer, as well as meeting their obligation to bridge temporary gaps in supply and demand, and dampening volatility. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the Conditional Transaction Pilot to continue without interruption through the earlier of December 31, 2008 or the approval SR–NYSE–2008–46 and provide the Exchange and the Commission additional time to evaluate the pilot.[18] Accordingly, the Commission designates the proposed rule change effective and operative upon filing with the Commission.

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–NYSE–2008–95 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–NYSE–2008–95. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available

[9] See Securities Exchange Act Release No. 58184 (July 17, 2008), 73 FR 42853 (July 23, 2008)(SR–NYSE–2008–46) (''New Market Model filing'').

[10] 15 U.S.C. 78k–1(a)(1).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] *Id.* In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4.

[18] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78(c)(f).

for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–95 and should be submitted on or before October 30, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23928 Filed 10–8–08; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 6388]

Bureau of Educational and Cultural Affairs (ECA); Request for Grant Proposals: International Arrival and Departure Program

Announcement Type: New Cooperative Agreement.

Funding Opportunity Number: ECA/PE/V/C/R–09–01.

Catalog of Federal Domestic Assistance Number: 19.402.

Key Dates: January 1, 2009 through September 30, 2010.

Application Deadline: November 6, 2008.

Executive Summary: The Community Relations Branch of the Office of International Visitors, Bureau of Educational and Cultural Affairs (ECA/PE/V/C/R) invites proposal submissions for the design and implementation of an airport arrival and departure program at New York's John F. Kennedy (JFK) International Airport and New Jersey's Newark International Airport.

It is anticipated that a cooperative agreement for $195,000 will be awarded on or about January 1, 2009, pending availability of FY 2009 funds. This 18-month award will begin on or about January 1, 2009 and end September 30, 2010, and will be based on a combination of 500 incoming and outgoing flights between the two international points of entry stated above.

Proposed funding would support the following specific activities: Meet incoming International Visitor Leadership Program (IVLP) participants at JFK International Airport, New York, and assist them to their connecting flights; meet incoming IVLP participants at Newark International Airport, New Jersey, and assist participants to their connecting flights; provide assistance to outgoing IVLP participants, through U.S. Customs, at JFK International Airport, New York, and Newark International Airport, New Jersey; and liaise with U.S. Customs and Border Protection (CBP), Transportation Security Administration (TSA) officials, and Port Authority officials at both points of international entry in order to carry out scope of work under the cooperative agreement.

I. Funding Opportunity Description

Authority

Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, as amended, Public Law 87–256, also known as the Fulbright-Hays Act. The purpose of the Act is ''to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other countries of the world.'' The funding authority for the program above is provided through legislation.

Purpose: The Bureau of Educational and Cultural Affairs (ECA) is seeking detailed proposals for the airport arrival and departure program from not-for-profit organizations that have an established reputation and experience with:

(1) International airport arrivals and departures for official participants under the International Visitor Leadership Program or other international exchange and training programs;

(2) U.S. Customs and Border Protection (CBP), Department of Homeland Security;

(3) Transportation Security Administration (TSA);

(4) National Security Entry and Exit Registration System (NSEERS) and requirements;

(5) International airport facilities and services;

(6) Airport security regulations;

(7) U.S. Department of State Diplomatic Security to secure background checks and badges;

(8) Port Authority Officials to secure background checks and badges;

(9) Recruiting, interviewing, selecting, hiring, training, monitoring of international airport arrivals Reception Officers;

(10) Accessing the Federal Inspections areas;

(11) Handling groups and individuals, especially from the Middle East who are subject to the NSEERS process.

In a cooperative agreement, ECA is substantially involved in program activities above and beyond routine grant monitoring. ECA activities and responsibilities for this program are as follows: Washington Office: Community Relations Branch, ECA/PE/V/C/R:

A. Provides flight manifests to Department of Homeland Security (DHS) and Transportation Security Administration (TSA), for clearance, prior to airport reception approval.

B. Clears all reception officers for entry to restricted zones at JFK International Airport, New York and at Newark International Airport, New Jersey.

New York Office: New York Program Branch, ECA/PE/V/C/N:

A. Consults with DOS—ECA/PE/V Staff concerning all flight information, before requesting reception service from award recipient.

B. Prioritizes and finalizes all flight information for reception services and forwards to award recipient to implement for JFK International Airport, New York and Newark International Airport, New Jersey.

C. Communicates with award recipient concerning any missed flights, changed arrival time, no shows, cancellations, etc.

D. Sets up and secures DOS background security checks and DOS ID Badges for all award recipient contract reception officers.

II. Award Information

Type of Award: Cooperative Agreement.

Fiscal Year Funds: 2009.

Approximate Total Funding: $195,000.

Approximate Number of Awards: 1.

Approximate Average Award: $195,000.

Floor of Award Range: $195,000.

Ceiling of Award Range: $195,000.

Anticipated Award Date: On or around January 1, 2009, pending availability of FY 2009 funds.

Anticipated Project Completion Date: September 30, 2010.

Additional Information: Pending successful implementation of this program and the availability of funds in subsequent fiscal years, it is ECA's intent to renew this cooperative agreement for two additional fiscal years, before openly competing it again.

[19] 17 CFR 200.30–3(a)(12).

III. Eligibility Information

III.1. Eligible Applicants

Applications may be submitted by public and private not-for-profit organizations meeting the provisions described in Internal Revenue Code section 26 U.S.C. 501(c)(3).

III.2. Cost Sharing or Matching Funds

There is no minimum or maximum percentage required for this competition. However, ECA encourages applicants to provide maximum levels of cost sharing and funding in support of its programs.

When cost sharing is offered, it is understood and agreed that the applicant must provide the amount of cost sharing as stipulated in its proposal and later included in an approved cooperative agreement. Cost sharing may be in the form of allowable direct or indirect costs. For accountability, you must maintain written records to support all costs which are claimed as your contribution, as well as costs to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A–110, (Revised), Subpart C.23—Cost Sharing and Matching. In the event you do not provide the minimum amount of cost sharing as stipulated in the approved budget, ECA's contribution will be reduced in like proportion.

III.3. Other Eligibility Requirements

(a.) ECA grant guidelines require that organizations with less than four years experience in conducting international exchanges be limited to $60,000 in Bureau funding. ECA anticipates making one award, in an amount up to $195,000 to support program and administrative costs required to implement this exchange program. Therefore, organizations with less than four years experience in conducting international exchanges are ineligible to apply under this competition.

(b.) *Technical Eligibility:* All proposals must comply with the following or they will result in your proposal being declared technically ineligible and given no further consideration in the review process.

IV. Application and Submission Information

Note: Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, ECA staff may not discuss this competition with applicants until the proposal review process has been completed.

IV.1. Contact Information To Request an Application Package

Please contact the Community Relations Branch, Office of International Visitors, ECA/PE/V/C/R, Room 247, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, telephone 202/453–8625, fax number 202/453–8631, or e-mail *yateskf@state.gov* to request a Solicitation Package. Please refer to the Funding Opportunity Number ECA/PE/V/C/R–09–01 located at the top of this announcement when making your request. Alternatively, an electronic application package may be obtained from grants.gov. Please see section IV.3f for further information.

The Solicitation Package contains the Proposal Submission Package, which consists of required application forms, and standard guidelines for proposal preparation.

It also contains the Project Objectives, Goals and Implementation (POGI) document, which provides specific information, award criteria and budget instructions tailored to this competition.

Please specify Program Manager Carmen Marrero, *marrerocm@state.gov* and refer to the Funding Opportunity Number ECA/PE/V/C/R–09–01 located at the top of this announcement on all other inquiries and correspondence.

IV.2. To Download a Solicitation Package Via Internet

The entire Solicitation Package may be downloaded from the Bureau's Web site at *http://exchanges.state.gov/education/rfgps/menu.htm* or from the Grants.gov Web site at *http://www.grants.gov*.

Please read all information before downloading.

IV.3. Content and Form of Submission

Applicants must follow all instructions in the Solicitation Package. The original and 10 copies of the application should be sent per the instructions under IV.3f. ''Submission Dates and Times section'' below.

IV.3a. You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the U.S. Government. This number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Please ensure that your DUNS number is included in the appropriate box of the SF–424 which is part of the formal application package.

IV.3b. All proposals must contain an executive summary, proposal narrative and budget.

Please Refer to the Solicitation Package. It contains the mandatory Proposal Submission Instructions (PSI) document and the Project Objectives, Goals and Implementation (POGI) document for additional formatting and technical requirements.

IV.3c. You must have nonprofit status with the IRS at the time of application. *Please note:* Effective March 14, 2008, all applicants for ECA federal assistance awards must include with their application, a copy of page 5, Part V–A, ''Current Officers, Directors, Trustees, and Key Employees'' of their most recent Internal Revenue Service (IRS) Form 990, ''Return of Organization Exempt From Income Tax.'' If an applicant does not file an IRS Form 990, but instead files Schedule A (Form 990 or 990–EZ)—''Organization Exempt Under Section 501(c)(3),'' applicants must include with their application a copy of Page 1, Part 1, ''Compensation of the Five Highest Paid Employees Other Than Officers, Directors and Trustees,'' of their most recent Internal Revenue Service (IRS) Form—Schedule A (Form 990 or 990–EZ).

If your organization is a private nonprofit which has not received a grant or cooperative agreement from ECA in the past three years, or if your organization received nonprofit status from the IRS within the past four years, you must submit the necessary documentation to verify nonprofit status as directed in the PSI document. Failure to do so will cause your proposal to be declared technically ineligible.

IV.3d. Please take into consideration the following information when preparing your proposal narrative:

IV.3d.1. Adherence to All Regulations Governing the J Visa

The Bureau of Educational and Cultural Affairs places critically important emphases on the security and proper administration of the Exchange Visitor (J visa) Programs and adherence by award recipients and sponsors to all regulations governing the J visa. Therefore, proposals should demonstrate the applicant's capacity to meet all requirements governing the administration of the Exchange Visitor Programs as set forth in 22 CFR part 62, including the oversight of Responsible Officers and Alternate Responsible Officers, screening and selection of program participants, provision of pre-arrival information and orientation to participants, monitoring of participants, proper maintenance and security of

forms, record-keeping, reporting and other requirements.

ECA will be responsible for issuing DS–2019 forms to participants in this program.

A copy of the complete regulations governing the administration of Exchange Visitor (J) programs is available at *http://exchanges.state.gov* or from: United States Department of State, Office of Exchange Coordination and Designation, ECA/EC/ECD—SA–44, Room 734, 301 4th Street, SW., Washington, DC 20547, Telephone: (202) 203–5029, FAX: (202) 453–8640.

Please refer to Solicitation Package for further information.

IV.3d.2. Diversity, Freedom, and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. ''Diversity'' should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and disabilities. Applicant is strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into your proposal. Public Law 104–319 provides that ''in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy,'' the Bureau ''shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries.'' Public Law 106–113 requires that the governments of the countries described above do not have inappropriate influence in the selection process. Proposals should reflect advancement of these goals in their program contents, to the full extent deemed feasible.

IV.3d.3. Program Monitoring and Evaluation

Proposals must include a plan to monitor and evaluate the project's success, both as the activities unfold and at the end of the program. The Bureau recommends that your proposal include a draft survey questionnaire or other technique plus a description of a methodology to use to link outcomes to original project objectives.

Successful monitoring and evaluation depend heavily on setting clear goals and outcomes at the outset of a program. Your evaluation plan should include a description of your project's objectives, your anticipated project outcomes, and how and when you intend to measure these outcomes (performance indicators). The more that outcomes are ''smart'' (specific, measurable, attainable, results-oriented, and placed in a reasonable time frame), the easier it will be to conduct the evaluation. You should also show how your project objectives link to the goals of the program described in this RFGP.

We encourage you to assess the following two levels of outcomes, as they relate to the program goals set out in the RFGP (listed below):

1. Participant satisfaction with the program.

2. Institutional changes, such as increased collaboration and partnerships, new programming/activities, and organizational improvements.

Overall, the quality of your monitoring and evaluation plan will be judged on how well it (1) specifies intended outcomes; (2) gives clear descriptions of how each outcome will be measured; (3) identifies when particular outcomes will be measured; and (4) provides a clear description of the data collection strategies for each outcome (i.e., surveys, interviews, or focus groups, etc.).

Award recipient will be required to provide reports of its evaluation findings to the Bureau in it regular program reports. Any data collected, including survey responses and contact information, if applicable, must be maintained for a minimum of three years and provided to the Bureau upon request.

IV.3d.4. For informational and planning purposes, we are informing all potential applicants that ECA is in the process of developing comprehensive approaches to alumni programming, Web portal development supported through ECA assistance awards (grants/cooperative agreements) and the expansion of private/public partnerships to increase the reach of ECA's exchange programs. In the event your proposal is recommended for funding, you may receive additional guidance/information related to these topics during the negotiation stage of the approval process.

In addition, all recipients of ECA grants or cooperative agreements should be prepared to state in any announcement or publicity where it is not inappropriate, that activities are assisted financially by the Bureau of Educational and Cultural Affairs of the United States Department of State under the authority of the Fulbright-Hays Act of 1961, as amended.

IV.3e. Please take the following information into consideration when preparing your budget:

Describe your overall program management, staffing and coordination with ECA/PE/V/C/R. ECA/PE/V/C/R considers program management, staffing and coordination with the Department of State essential elements of your program. Please be sure to give sufficient attention to these elements in your proposal. Please refer to the Technical Eligibility Requirements in section V. Application Review Information for specific guidelines.

IV.3e.1. Applicants must submit a comprehensive budget for the entire program. The award may not exceed $195,000. While there is no rigid ration of administrative to program costs, the Bureau urges applicant organizations to keep administrative costs as low and reasonable as possible. There must be a summary budget as well as breakdown reflecting both administrative and program budgets for FY 2009. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification.

IV.3e.2. Allowable costs for the program include the following:

(1) Recruitment, selection and training/orientations of airport reception officers and coordinator;

(2) Reimbursement of travel to and/or parking at airport for airport reception officers assigned to duty;

(3) Part-time seasonal (.5 Full-time equivalent or FTE) Contractor at the Federal General Schedule Level 12 (GS–12) for the New York area, not-to-exceed 1380 hours for the duration of the cooperative agreement, stationed at the U.S. Department of State' New York Program Branch to coordinate the airport reception program locally.

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

IV.3f. Application Deadlines and Methods of Submission

Application Deadline Date: Monday, November 6, 2008.

Reference Number: ECA/PE/V/C/R –09–01.

Methods of Submission:

Applications may be submitted in one of two ways:

1. In hard-copy, via a nationally recognized overnight delivery service (i.e., DHL, Federal Express, UPS, Airborne Express, or U.S. Postal Service Express Overnight Mail, etc.), or

2. Electronically through *http://www.grants.gov.*

Along with the Project Title, all applicant must enter the above Reference Number in Box 11 on the SF–424 contained in the mandatory Proposal Submission Instructions (PSI) of the solicitation document.

IV.3f.1 Submitting Printed Applications

Applications must be shipped no later than the above deadline. Delivery services used by applicants must have in-place, centralized shipping identification and tracking systems that may be accessed via the Internet and delivery people who are identifiable by commonly recognized uniforms and delivery vehicles. Proposals shipped on or before the above deadline but received at ECA more than seven days after the deadline will be ineligible for further consideration under this competition. Proposals shipped after the established deadlines are ineligible for consideration under this competition. ECA will *not* notify you upon receipt of application. It is each applicant's responsibility to ensure that each package is marked with a legible tracking number and to monitor/confirm delivery to ECA via the Internet. Delivery of proposal packages *may not* be made via local courier service or in person for this competition. Faxed documents will not be accepted at any time. Only proposals submitted as stated above will be considered.

Important note: When preparing your submission please make sure to include one extra copy of the completed SF–424 form and place it in an envelope addressed to ''ECA/EX/PM''.

Applicant must follow all instructions in the Solicitation Package.

The original and 10 copies of the application should be sent to: U.S. Department of State, SA–44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/V/C/R–09–01, Program Management, ECA/EX/PM, Room 534, 301 4th Street, SW., Washington, DC 20547.

IV.3f.2. Submitting Electronic Applications

Applicants have the option of submitting proposals electronically through Grants.gov (*http://www.grants.gov*). Complete solicitation packages are available at Grants.gov in the ''Find'' portion of the system. Please follow the instructions available in the 'Get Started' portion of the site (*http://www.grants.gov/GetStarted*).

Several of the steps in the Grants.gov registration process could take several weeks. Therefore, applicants should check with appropriate staff within their organizations immediately after reviewing this RFGP to confirm or determine their registration status with Grants.gov.

Once registered, 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. In addition, validation of an electronic submission via Grants.gov can take up to two business days.

Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.

The Grants.gov website includes extensive information on all phases/aspects of the Grants.gov process, including an extensive section on frequently asked questions, located under the ''For Applicants'' section of the website. ECA strongly recommends that all potential applicants review thoroughly the Grants.gov website, well in advance of submitting a proposal through the Grants.gov system. ECA bears no responsibility for data errors resulting from transmission or conversion processes.

Direct all questions regarding Grants.gov registration and submission to:

Grants.gov Customer Support.

Contact Center Phone: 800–518–4726.

Business Hours: Monday–Friday, 7 a.m.–9 p.m. Eastern Time.

E-mail: support@grants.gov.

Applicants have until midnight (12 a.m.), Washington, DC time of the closing date to ensure that their entire application has been uploaded to the Grants.gov site. *There are no exceptions to the above deadline. Applications uploaded to the site after midnight of the application deadline date will be automatically rejected by the grants.gov system, and will be technically ineligible.*

Please refer to the Grants.gov Web site, for definitions of various ''application statuses'' and the difference between a submission receipt and a submission validation. Applicants will receive a validation e-mail from grants.gov upon the successful submission of an application. Again, validation of an electronic submission via Grants.gov can take up to two business days. *Therefore, we strongly recommend that you not wait until the application deadline to begin the submission process through Grants.gov.* ECA will not notify you upon receipt of electronic applications.

It is the responsibility of all applicants submitting proposals via the Grants.gov web portal to ensure that proposals have been received by Grants.gov in their entirety, and ECA bears no responsibility for data errors resulting from transmission or conversion processes.

IV.3g. Intergovernmental Review of Applications: Executive Order 12372 does not apply to this program.

V. Application Review Information

V.1. Review Process

The Bureau will review all proposals for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be subject to compliance with Federal and Bureau regulations and guidelines and forwarded to Bureau grant panels for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Assistant Secretary for Educational and Cultural Affairs. Final technical authority for cooperative agreements resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of the Program Plan and Ability to Achieve Program Objectives:* Proposals should exhibit originality, substance, precision, and relevance to the Bureau's mission. The program director and key program staff must have expert knowledge of international airport arrivals and departure activities and qualifications to perform these services. Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistics.

Objectives should be reasonable, feasible, and flexible. Your proposal should clearly demonstrate how the institution will meet the program's objectives and plan.

2. *Support of Diversity:* Proposals should demonstrate substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials and follow-up activities).

3. *Institutional Track Record/Ability:* Proposals should demonstrate an institutional record of successful exchange programs, including

responsible fiscal management and full compliance with all reporting requirements for past Bureau grants and/or cooperative agreements as determined by Bureau Grants Staff. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants. Proposed personnel and institutional resources should be fully qualified to achieve the project's goals.

4. *Evaluation:* Proposals should include a plan to evaluate the activity's success, both as the activities unfold and at the end of the program. A draft survey questionnaire or other technique plus description of a methodology to use to link outcomes to original project objectives is recommended.

5. *Cost-effectiveness/Cost Sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support, as well as institutional direct funding contributions.

VI. Award Administration Information

VI.1a. Award Notices

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures. Successful applicant will receive a Federal Assistance Award (FAA) from the Bureau's Grants Office. The FAA and the original proposal with subsequent modifications (if applicable) shall be the only binding authorizing document between the recipient and the U.S. Government. The FAA will be signed by an authorized Grants Officer, and mailed to the recipient's responsible officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review from the ECA program office coordinating this competition.

VI.2. Administrative and National Policy Requirements

Terms and Conditions for the Administration of ECA agreements include the following:

Office of Management and Budget Circular A–122, ''Cost Principles for Nonprofit Organizations.''

Office of Management and Budget Circular A–21, ''Cost Principles for Educational Institutions.''

OMB Circular A–87, ''Cost Principles for State, Local and Indian Governments''.

OMB Circular No. A–110 (Revised), Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Nonprofit Organizations.

OMB Circular No. A–102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments.

OMB Circular No. A–133, Audits of States, Local Government, and Non-profit Organizations

Please reference the following Web sites for additional information: *http://www.whitehouse.gov/omb/grants. http://fa.statebuy.state.gov*

VI.3. Reporting Requirements

You must provide ECA with a hard copy original plus two copies of the following reports:

Mandatory:

(1.) A final program and financial report no more than 90 days after the expiration of the award;

(2.) A concise, one-page final program summarizing program outcomes no more than 90 days after the expiration of the award. This one-page report will be transmitted to OMB, and be made available to the public via OMB's USAspending.gov website—as part of ECA's Federal Funding Accountability and Transparency Act (FFATA) reporting requirements.

(3.) Quarterly financial reports are due within thirty (30) days following the end of the calendar year quarter for all services under this agreement. Airport receptions statistical reports are due within 15 days after the close of the previous month's activities. These reports (use Microsoft Word only) must list separately the number of visitors/flights met at both John F. Kennedy International Airport, New York, and Newark International Airport, New Jersey, date, visitor name, flight, name of assigned greeter(s) and whether or not ECA/PE/V is charged and how much is paid to each reception officer for each flight met i.e. if more than one visitor is on a flight, only one charge is made for airport reception, and any expenses incurred, such as miscellaneous parking or other incurred expense covered under the agreement. The reports must be submitted to ECA/PE/V/C/R and to ECA–IIP/EX/G.

Award recipients will be required to provide reports analyzing their evaluation findings to the Bureau in their regular program reports. (Please refer to IV. Application and Submission Instructions (IV.3.d.3) above for Program Monitoring and Evaluation information.

All data collected, including survey responses and contact information, must be maintained for a minimum of three years and provided to the Bureau upon request.

All reports must be sent to the ECA Grants Officer and ECA Program Officer listed in the final assistance award document.

VII. Agency Contacts

For questions about this announcement, contact: Carmen Marrero, Chief, Community Relations Branch, Office of International Visitors, ECA/PE/V/C/R, Room Number 247, Reference Number ECA/PE/V/C/R–09–01, U.S. Department of State, SA–44, 301 4th Street, SW., Washington, DC 20547, telephone 202/453–8629, fax number 202/453–8631, *marrerocm@state.gov*.

All correspondence with the Bureau concerning this RFGP should reference the above title and number (ECA/PE/V/C/R–09–01).

Please read the complete announcement before sending inquiries or submitting proposals. Once the RFGP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

VIII. Other Information

Notice

The terms and conditions published in this RFGP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFGP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements per section VI.3 above.

Dated: October 2, 2008.

Goli Ameri,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. E8–24020 Filed 10–8–08; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice: 6387]

Bureau of Verification, Compliance and Implementation: Termination of Measures Against a Foreign Person

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made to terminate sanctions imposed pursuant to Section 3 of the Iran, North Korea, and Syria Nonproliferation Act on a Singaporean entity (72 FR 5781).

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: On general issues: Mr. Stephen J. Tomchik, Bureau of Verification, Compliance, and Implementation, Department of State, Telephone (202) 647–1192. For U.S. Government procurement ban issues: Kimberly Triplett, Office of the Procurement Executive, Department of State, Telephone: (703) 875–4079.

SUPPLEMENTARY INFORMATION: Pursuant to Section 4 of the Iran, North Korea, and Syria Nonproliferation Act (Pub. L. 106–178), the U.S. Government determined on September 19, 2008 that sanctions imposed effective April 17, 2007 (72 FR 5781) on the Singaporean entity Sokkia Singapore are terminated.

Dated: October 2, 2008.

Stephen A. Elliott,

Acting Assistant Secretary for Verification, Compliance, and Implementation, Department of State.

[FR Doc. E8–23898 Filed 10–8–08; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF STATE

[Public Notice 6386]

Department of State Performance Review Board Members

In accordance with section 4314(c)(4) of 5 United States Code, the Department of State has appointed the following individuals to the Department of State Performance Review Board for non-career Senior Executive Service members:

Carrie B. Cabelka, Senior Advisor to the Secretary and Director of White House Liaison, Office of the Under Secretary for Management, Department of State;

David Gordon, Director of Policy Planning, Office of the Secretary, Department of State;

Brian F. Gunderson, Chief of Staff, Office of the Secretary, Department of State; and

Philippe A. Lussier, Office Director, Office of Resource Management and Organization Analysis, Bureau of Human Resources, Department of State.

Dated: October 1, 2008.

Harry K. Thomas, Jr.,

Director General of the Foreign Service and Director of Human Resources, Department of State.

[FR Doc. E8–23897 Filed 10–8–08; 8:45 am]

BILLING CODE 4710–15–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Passenger Facility Charge (PFC) Application 08–08–C–00–SMF, To Impose and Use PFC Revenue at Sacramento International Airport, Sacramento, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Sacramento International Airport, under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before November 10, 2008.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261, or San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. G. Hardy Acree, Director of Airports, Sacramento County Airport System, at the following address: 6900 Airport Boulevard, Sacramento, CA 95837. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Sacramento County Airport System under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: T J Chen, Program Manager, San Francisco Airports District Office, 831 Mitten Road, Room 210, Burlingame, CA 94010, Telephone: (650) 876–2778, extension 625. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Sacramento International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158). On July 28, 2008, the application was found not substantially complete and the public agency supplemented the application on September 11, 2008, within the requirements of section 158.27 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than January 9, 2009.

The following is a brief overview of the impose and use application No. 08–08–C–00–SMF:

Proposed charge effective date: July 1, 2011.

Proposed charge expiration date: October 1, 2030.

Level of the proposed PFC: $4.50.

Total estimated PFC revenue: $603,497,524.

Description of Proposed Project:

Impose and use: Terminal Modernization Program (TMP)—This project is a new landside Central Terminal B to replace the existing Terminal B facilities. The new Central Terminal B will be connected via an automated people mover to the 19 gate airside Concourse B. The new Terminal B will be served by a dual level roadway system and a new automobile parking garage. The TMP also includes construction of remote public parking, a centralized receiving warehouse, landscaping, demolition of existing facilities, and modification of Terminal A for additional tenants and gates.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Sacramento County Airport System.

Issued in Lawndale, California, on September 24, 2008.

Mia Paredes Ratcliff,

Acting Manager, Airports Division Western-Pacific Region.

[FR Doc. E8–23911 Filed 10–8–08; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Indexing the Annual Operating Revenues of Railroads

The Surface Transportation Board (STB) is publishing the annual inflation-adjusted index factors for 2007. These factors are used by the railroads to

adjust their gross annual operating revenues for classification purposes. This indexing methodology ensures that railroads are classified based on real business expansion and not from the affects of inflation. Classification is important because it determines the extent to which individual railroads must comply with STB reporting requirements.

The STB's annual inflation-adjusted factors are based on the annual average Railroad's Freight Price Index, which is developed by the Bureau of Labor Statistics. The STB's deflator factor is used to deflate revenues for comparison with established revenue thresholds.

The base year for railroads is 1991. The inflation index factors are presented as follows:

STB RAILROAD INFLATION-ADJUSTED INDEX AND DEFLATOR FACTOR TABLE

Year	Index	Deflator
1991	409.50	100.00 [1]
1992	411.80	99.45
1993	415.50	98.55
1994	418.80	97.70
1995	418.17	97.85
1996	417.46	98.02
1997	419.67	97.50
1998	424.54	96.38
1999	423.01	96.72
2000	428.64	95.45
2001	436.48	93.73
2002	445.03	91.92
2003	454.33	90.03
2004	473.41	86.40
2005	522.41	78.29
2006	567.34	72.09
2007	588.27	69.52

DATES: *Effective Date:* January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Scott Decker 202–245–0330. [Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.] By the board, Leland L. Gardner, Director, Office of Economics, Environmental Analysis, and Administration.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–23986 Filed 10–8–08; 8:45 am]

BILLING CODE 4915–01–P

[1] Ex Parte No. 492, *Montana Rail Link, Inc., and Wisconsin Central Ltd., Joint Petition For Rulemaking With Respect To 49 CFR 1201*, 8 I.C.C. 2d 625 (1992), raised the revenue classification level for Class I railroads from $50 million (1978 dollars) to $250 million (1991 dollars), effective for the reporting year beginning January 1, 1992. The Class II threshold was also raised from $10 million (1978 dollars) to $20 million (1991 dollars).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, ''Fiduciary Activities of National Banks—12 CFR part 9.''

DATES: You should submit written comments by December 8, 2008.

ADDRESSES: You should direct all written comments to: Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0140, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874–4448, or by electronic mail to *regs.comments@occ.treas.gov*. You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Additionally, you should send a copy of your comments to OCC Desk Officer, 1557–0140, by mail to U.S. Office of Management and Budget, 725 17th Street, NW., #10235, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: You can request additional information or a copy of the collection from Mary H. Gottlieb, OCC Clearance Officer, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is requesting OMB approval for a revision to the following information collection:

Title: Fiduciary Activities of National Banks—12 CFR part 9.

OMB Control No.: 1557–0140.

Description: This submission covers an existing regulation and involves no change to the regulation or to the information collection. The OCC requests only that OMB approve its revised estimate of the burden and extend its approval of the information collection.

Under 12 U.S.C. 92a, the OCC regulates the fiduciary activities of national banks, including the administration of collective investment funds. The requirements in 12 CFR part 9 enable the OCC to perform its responsibilities relating to the fiduciary activities of national banks and collective investment funds. The collections of information in part 9 are found in §§ 9.8, 9.9(a) and (b), 9.17(a), 9.18(b)(1), 9.18(b)(6)(ii), 9.18(b)(6)(iv), and 9.18(c)(5) as follows:

- Section 9.8 requires a national bank to maintain fiduciary records;
- Section 9.9(a) and (b) require a national bank to note the results of a fiduciary audit in the minutes of the board of directors;
- Section 9.17(a) requires a national bank that wants to surrender its fiduciary powers to file with the OCC a certified copy of the resolution of its board of directors;
- Section 9.18(b)(1) requires a national bank to establish and maintain each collective investment fund in accordance with a written plan;
- Section 9.18(b)(1) also requires a national bank to make the plan available for public inspection and to provide a copy of the plan to any person who requests it;
- Section 9.18(b)(6)(ii) requires a national bank to prepare a financial report of the fund;
- Section 9.18(b)(6)(iv) requires a national bank to disclose the financial report to investors and other interested persons; and
- Section 9.18(c)(5) requires a national bank to request OCC approval of special exemption funds.

Type of Review: Regular.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 492.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 126,403 hours.

Comments submitted in response to this notice will be summarized and 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 has 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 on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: October 3, 2008.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. E8–23900 Filed 10–8–08; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of six additional entities and ten additional individuals whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Secretary of the Treasury of the six entities and ten individuals identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on October 2, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property subject to U.S. jurisdiction which are owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property or interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On October 2, 2008, OFAC designated an additional six entities and ten individuals whose property and interests in property are blocked pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act.

The list of additional designees follows:

Entities

1. AMERICAN TUNE UP, S.A. DE C.V., Guadalajara, Jalisco, Mexico; Registration ID MAT 46–47 TOMO 460 L. (Mexico); (ENTITY) [SDNTK]

2. FARMACIA JERLYNE, S.A. DE C.V. (a.k.a. FARMACIA JARLYNE, S.A. DE C.V.; a.k.a. FARMACIA JARLINE, S.A. DE C.V.; a.k.a. FARMACIAS JERLYNE, S.A. DE C.V.); Buenaventura 391, Fraccionamiento Chapultepec, Tijuana, Baja California, Mexico; Avenida Benito Juarez 2020–8, Colonia Zona Centro, Tijuana, Baja California, Mexico; Cascadas 100–2, Colonia Las Huertas, Tijuana, Baja California, Mexico; Lot 18, Sector 21, Centro Urbano 70–76, Colonia Mesa de Otay, Baja California, Mexico; Lot 70, Sector 6, Colonia Jardines de Chapultepec, Baja California, Mexico; Lots 13, 14, Sector A, Rancho El Grande, Baja California, Mexico; Avenida Revolucion 2020, Tijuana, Baja California 22000, Mexico; (ENTITY) [SDNTK]

3. LABORATORIOS WILLMAR, S.A. DE C.V., Calle Esteban Loera 481, Colonia Beatriz Hernandez, Guadalajara, Jalisco 44760, Mexico; Calle Esteban Loera No. 481, Colonia Zona Obrera, Guadalajara, Jalisco 44760, Mexico; Los Placeres No. 1030, Colonia Chapalita, Guadalajara, Jalisco 44100, Mexico; R.F.C. LW1760923BT6 (Mexico); (ENTITY) [SDNTK]

4. PRODUCTOS FARMACEUTICOS COLLINS, S.A. DE C.V. (a.k.a. GRUPO COLLINS; a.k.a. GRUPO FARMACEUTICO COLLINS; a.k.a. LABORATORIOS COLLINS); Avenida Lopez Mateos No. 1938, Colonia Agua Blanca, Zapopan, Jalisco 45070, Mexico; Pedro de Alacron No. 167, Zapopan, Jalisco, Mexico; Cipres No. 1677, Colonia Del Fresno, Guadalajara, Jalisco 44900, Mexico; Calle Vicente Guerrero 337, Colonia Agua Blanca, Zapopan, Jalisco 44008, Mexico; Prolongacion Lopez Mateos 1938, Colonia Agua Blanca, Zapopan, Jalisco 45070, Mexico; Calle Agua Prieta 1100, Colonia Agua Blanca, Zapopan, Jalisco 44008, Mexico; Puerto Soto La Marina 1632 A, Guadalajara, Jalisco 44330, Mexico; R.F.C. PFC8301273D1 (Mexico); (ENTITY) [SDNTK]

5. SALUD NATURAL MEXICANA, S.A. DE C.V., Alvaro Obregon 250, Colonia Agua Blanca, Zapopan, Jalisco 45235, Mexico; Avenida Inglaterra #3109, Guadalajara, Jalisco 44500, Mexico; R.F.C. SNM–950403–FA5 (Mexico); (ENTITY) [SDNTK]

6. LOMEDIC, S.A. DE C.V. (a.k.a. MEDIC EXPRESS, S.A. DE C.V.); Av. del Parque #489, Col. San Andres, Guadalajara, Jalisco 44810, Mexico; R.F.C. LOM–990211–KQ2 (Mexico); (ENTITY) [SDNTK]

Individuals

1. ALVAREZ VAZQUEZ, Jose Gerardo (a.k.a. ZALDIVAR VEGA, Javier; a.k.a. SANCHEZ SALAMANCA, Salvador; a.k.a. ALVAREZ VASQUEZ, Jose Gerardo; a.k.a. ALVAREZ ALVAREZ, Gerardo; a.k.a. ALVAREZ VASQUEZ, Joel; a.k.a. ALVAREZ VELASQUEZ, Jose Gerardo; a.k.a. ''El Indio''; a.k.a. ''El Gera''); c/o AMERICAN TUNE UP, S.A. DE C.V., Guadalajara, Jalisco, Mexico; Avenida Gonzalez Gallo #2537, Sector Reforma, Guadalajara, Jalisco, Mexico;

DOB 03 Nov 1963; Alt. DOB 24 Sep 1965; Alt. DOB 10 May 1966; POB Las Avilas, Guerrero, Mexico; Citizen Mexico; Nationality Mexico; (INDIVIDUAL) [SDNTK]

2. AMEZCUA CONTRERAS, Adan (a.k.a. MANZANO, Jose Luis); Carlos Chavez 5, Colima, Colima, Mexico; Francisco I. Madero 749, Colonia Moralete, Colima, Colima, Mexico; Toreros No. 672, Colonia Jardines de Guadalupe, Guadalajara, Jalisco, Mexico; Belizario Dominguez, No. 511, Colima, Colima, Mexico; Calle General Juan Alvarez 1010, Colonia Lomas Vista Hermosa, Colima, Colima, Mexico; DOB 27 Jun 1969; Citizen Mexico; Nationality Mexico; R.F.C. AECA–690627 (Mexico); (INDIVIDUAL) [SDNTK]

3. AMEZCUA CONTRERAS, Patricia (a.k.a. AMEZCUA DE LADINO, Patricia; a.k.a. AMEZCUA CONTRERAS, Patty); c/o FARMACIA JERLYNE, S.A. DE C.V., Tijuana, Baja California, Mexico; Calle Jesus Ponce 1083, Colonia Jardin Vista Hermosa, Colima, Colima, Mexico; DOB 18 Mar 1967; Citizen Mexico; Nationality Mexico; R.F.C. AECP–670318 (Mexico); C.U.R.P. AECP670318MJCMNT07 (Mexico); (INDIVIDUAL) [SDNTK]

4. LADINO AVILA, Jaime Arturo (a.k.a. COLOSIO, Vincente; a.k.a. CONTREAS, Miguel Angel; a.k.a. ''El Ojon''; a.k.a. ''Fayo''); c/o GRUPO ROLA S.A. DE C.V., Colima, Colima, Mexico; Calle Jesus Ponce 1083, Colonia Jardin Vista Hermosa, Colima, Colima, Mexico; DOB 24 Jul 1964; Alt. DOB 26 Aug 1962; Alt. DOB 13 Nov 1964; Citizen Mexico; Nationality Mexico; R.F.C. LAAJ640724 (Mexico); C.U.R.P. LAAJ640724HCMDVM07 (Mexico); (INDIVIDUAL) [SDNTK]

5. TIRADO ESCAMILLA, Telesforo Baltazar (a.k.a. TIRADO ESCAMILLA, Telesforo Baltasar; a.k.a. TIRADO MARTINEZ, Baltazar); c/o PRODUCTOS FARMACEUTICOS COLLINS, S.A. DE C.V., Zapopan, Jalisco, Mexico; Maya 3290, Guadalajara, Jalisco, Mexico; Rinconada Del Tulipan 3485, Guadalajara, Jalisco, Mexico; Calle Mallas 3278, Guadalajara, Jalisco, Mexico; DOB 10 Jan 1939; Alt. DOB 09 Jan 1939; POB Nayarit, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. TIET390110HNTRSL04 (Mexico); (INDIVIDUAL) [SDNTK]

6. PULIDO VALDIVIA, Javier (a.k.a. PULIDO VALDIVIA, Francisco); c/o LABORATORIOS WILLMAR, S.A. DE C.V., Guadalajara, Jalisco, Mexico; Mexico; Calle Fray Junipero Serra #1932, Colonia Jardines Alcalde, Guadalajara, Jalisco, Mexico; DOB 14 Jan 1953; Citizen Mexico; Nationality Mexico; C.U.R.P. PUVJ530114HJCLLV06 (Mexico); (INDIVIDUAL) [SDNTK]

7. TIRADO DIAZ, Rolando, c/o PRODUCTOS FARMACEUTICOS COLLINS, S.A. DE C.V., Zapopan, Jalisco, Mexico; DOB 28 Mar 1971; POB Jalisco, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. TIDR710328HJCRZL02 (Mexico); (INDIVIDUAL) [SDNTK]

8. TIRADO DIAZ, Luis Alfonso, c/o PRODUCTOS FARMACEUTICOS COLLINS, S.A. DE C.V., Zapopan, Jalisco, Mexico; DOB 20 Jul 1968; POB Jalisco, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. TIDL680720HJCRZS04 (Mexico); (INDIVIDUAL) [SDNTK]

9. LOMELI BOLANOS, Carlos, c/o LOMEDIC, S.A. DE C.V., Guadalajara, Jalisco, Mexico; DOB 05 Aug 1959; POB Guadalajara, Mexico; Citizen Mexico; Nationality Mexico; C.U.R.P. LOBC590805HJCMLR02 (Mexico); (INDIVIDUAL) [SDNTK]

10. RENDON POBLETE, Rosalinda (a.k.a. RENDON DE PULIDO, Rosalinda); c/o LABORATORIOS WILLMAR, S.A. DE C.V., Guadalajara, Jalisco, Mexico; DOB 23 Nov 1953; POB Cuahutla, Morelos, Mexico; Citizen Mexico; Nationality Mexico; (INDIVIDUAL) [SDNTK]

Dated: October 2, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–24011 Filed 10–8–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Narcotics Trafficker Pursuant to Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the name of three individuals whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, *Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers.*

DATES: The unblocking and removal from the list of Specially Designated Narcotics Traffickers of the individuals identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on October 2, 2008.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: (202) 622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia*, of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and Secretary of State, to play a significant role in international narcotics trafficking centered in Colombia; or (3) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to this order; and (4) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to this Order.

On October 2, 2008, the Director of OFAC removed from the list of Specially Designated Narcotics Traffickers the individuals listed below, whose property and interests in property were blocked pursuant to the Order.

The listing of the unblocked individuals follows:

GALVEZ FERNANDEZ, Isabel Cristina, Carrera 30 No. 90–82, Bogota, Colombia; c/o INTERCONTINENTAL DE AVIACION S.A., Bogota, Colombia; c/o COMERCIALIZADORA ANDINA BRASILERA S.A., Bogota, Colombia;

c/o INDUSTRIAL MINERA Y PECUARIA S.A., Bogota, Colombia; c/o LA FRONTERA UNION GALVEZ Y CIA S EN C, Bogota, Colombia; DOB 23 Sep 1955; POB Cali, Colombia; Cedula No. 31280944 (Colombia); Passport AF146067 (Colombia) (individual) [SDNT].

GAVIRIA MEJIA, Luis Fernando, Calle 114 No. 0–45 Torre 3 Apt. 303, Bogota, Colombia; c/o DURATEX S.A., Bogota, Colombia; DOB 11 Mar 1947; POB Bogota, Colombia; Cedula No. 17163914 (Colombia); Passport AJ241295 (Colombia) (individual) [SDNT].

PATINO TORRES, Juan Carlos, c/o GAVIOTAS LTDA., Cartago, Valle, Colombia; Carrera 5 No. 13–10, Ofc. 204, Cartago, Valle, Colombia; DOB 26 Jun 1971; POB Cartago, Valle, Colombia; citizen Colombia; nationality Colombia; Cedula No. 10141042 (Colombia); Passport AG172869 (Colombia) (individual) [SDNT].

ARENAS OSORIO, Martha Cecilia, c/o INVERSIETE S.A., Cali, Colombia; DOB 24 May 1965; Passport 25160258 (Colombia); Cedula No. 25160258 (Colombia) (individual) [SDNT].

Dated: October 2, 2008.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. E8–24010 Filed 10–8–08; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2008–58

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 Notice 2008–58, Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms, Tornadoes, and Flooding in Iowa.

DATES: Written comments should be received on or before December 8, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms, Tornadoes, and Flooding in Iowa.

OMB Number: 1545–2106.

Notice Number: Notice 2008–58.

Abstract: The Internal Revenue Service is suspending certain requirements under section 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, and flooding in Iowa.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: This is an extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 500.

Estimated Average Time per Respondent: 15 min.

Estimated Total Annual Burden Hours: 125.

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: October 1, 2008.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–23920 Filed 10–8–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 2008–61

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 Notice 2008–61, Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms, Tornadoes, and Flooding in Wisconsin.

DATES: Written comments should be received on or before December 8, 2008 to be assured of consideration.

ADDRESSES: Direct all written comments to Glenn P. Kirkland, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of notice should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Relief From Certain Low-Income Housing Credit Requirements Due to Severe Storms, Tornadoes, and Flooding in Wisconsin.

OMB Number: 1545–2107.

Notice Number: Notice 2008–61.

Abstract: The Internal Revenue Service is suspending certain requirements under Section 42 of the Internal Revenue Code for low-income housing credit projects in the United States to provide emergency housing relief needed as a result of the devastation caused by severe storms, tornadoes, and flooding in Wisconsin beginning on June 5, 2008.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: This is an extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 500.

Estimated Average Time per Respondent: 15 min.

Estimated Total Annual Burden Hours: 125.

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: October 1, 2008.

Glenn Kirkland,

IRS Reports Clearance Officer.

[FR Doc. E8–23921 Filed 10–8–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Electronic Tax Administration Advisory Committee (ETAAC)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of open meeting.

SUMMARY: In 1998 the Internal Revenue Service established the Electronic Tax Administration Advisory Committee (ETAAC). The primary purpose of ETAAC is for industry partners to provide an organized public forum for discussion of electronic tax administration issues in support of the overriding goal that paperless filing should be the preferred and most convenient method of filing tax and information returns. ETAAC offers constructive observations about current or proposed policies, programs, and procedures, and suggests improvements. Listed is a summary of the agenda along with the planned discussion topics.

Summarized Agenda

8:30 a.m.—Meet and Greet.
9 a.m.—Meeting Opens.
11 a.m.—Meeting Adjourns.

The topics for discussion include:

(1) The IRS' response to ETAAC's recommendations.

(2) A reading of written comments received from the public.

(3) Report from the ETAAC's subcommittee: MeF 1040 Executive Steering Committee.

Note: Last-minute changes to these topics are possible and could prevent advance notice.

DATES: There will be a meeting of ETAAC on Friday, October 31, 2008. You must register in advance to be put on a guest list to attend the meeting. This meeting will be open to the public, and will be in a room that accommodates approximately 40 people, including members of ETAAC and IRS officials. Members of the public may file written statements sharing ideas for electronic tax administration or comments on the key recommendations in the Annual Report to Congress *http://www.irs.gov/pub/irs-pdf/p3415.pdf.* Send written statements to *etaac@irs.gov.* Seats are available to members of the public on a first-come, first-served basis. Escorts will be provided so attendees are encouraged to arrive at least 30 minutes before the meeting begins.

ADDRESSES: The meeting will be held at the Internal Revenue Service, 1111 Constitution Avenue, NW., Room 2116, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: You must provide your name to me in advance for the guest list and be able to show your state issued picture identification on the day of the meeting. Otherwise, you will not be able to attend the meeting as this is a secured building. To receive a copy of the agenda or general information about ETAAC, please contact Cassandra Daniels on 202–283–2178 or at *etaac@irs.gov* by Monday, October 27, 2008. Notification of intent should include your name, organization and telephone number. Please spell out all names if you leave a voice message.

SUPPLEMENTARY INFORMATION: ETAAC reports to the Director, Electronic Tax Administration and Refundable Credits, who is also the executive responsible for the electronic tax administration program. Increasing participation by external stakeholders in the development and implementation of the strategy for electronic tax administration will help IRS achieve the goal that paperless filing should be the preferred and most convenient method of filing tax and information returns.

ETAAC members are not paid for their time or services, but consistent with Federal regulations, they are reimbursed for their travel and lodging expenses to attend the public meetings, working sessions, and an orientation each year.

Dated: October 1, 2008.

Phyllis Gattos,

Acting Director, Strategic Services Division.

[FR Doc. E8–23919 Filed 10–8–08; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Performance Review Board Members

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Under the provisions of 5 U.S.C. 4314(c)(4) agencies are required to publish a notice in the **Federal Register** of the appointment of Performance Review Board (PRB) members. This notice updates the VA Performance Review Board of the Department of Veterans Affairs that was published in the **Federal Register** on October 30, 2007 (72 FR 61421).

DATES: *Effective Date:* October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Shonna James, Director, Executive Resources, Office of Human Resources Management (052), Department of Veterans Affairs, 810 Vermont Avenue,

NW, Washington, DC 20420, (202) 461–7089.

VA Performance Review Board (PRB)

Willie L. Hensley, Executive in Charge of the Office of the Assistant Secretary for Human Resources and Administration (Chairperson)
Thomas G. Bowman, Chief of Staff
Sharon K. Barnes, Deputy Chief of Staff
Kenneth M. Greenberg, Executive Secretary to the Department (Alternate)
Michael Walcoff, Deputy Under Secretary for Benefits, Veterans Benefits Administration
Geraldine Breakfield, Associate Deputy Under Secretary for Management (Alternate)
Louise R. Van Diepen, VHA Chief of Staff
Gerald M. Cross, M.D. FAAFP, Principal Deputy Under Secretary for Health, Veterans Health Administration (Alternate)
William F. Feeley, Deputy Under Secretary for Health for Operations and Management, Veterans Health Administration (Alternate)
William F. Tuerk, Under Secretary for Memorial Affairs
Steve L. Muro, Director, Field Programs Service (Alternate)
James J. O'Neill, Assistant Inspector General for Investigations
Paul J. Hutter, General Counsel
John H. Thompson, Deputy General Counsel (Alternate)
Joseph Bauernfeind, Director, Office of Business Oversight
Robert T. Howard, Assistant Secretary for Information Technology
Karen W. Pane, Deputy Assistant Secretary for Planning and Evaluation
Irene Trowell-Harris, Director, Center for Women Veterans
Patricia C. Adams, Non-VA Executive

Veterans Benefits Administration PRB

Michael Walcoff, Deputy Under Secretary for Benefits
Geraldine V. Breakfield, Associate Deputy Under Secretary for Management
R. Keith Pedigo, Associate Deputy Under Secretary for Policy and Program Management
Diana M. Rubens, Associate Deputy Under Secretary for Field Operations
Jimmy A. Norris, Chief Financial Officer
Michael A. Dusenbery, Director, Southern Area Office
Sharon K. Barnes, Deputy Chief of Staff, Office of the Secretary
Jacy Thurmond, Jr., Senior Advisor to the Deputy Commissioner of the Social Security Administration, U.S. Social Security Administration

Veterans Health Administration PRB

Gerald M. Cross, MD, FAAFP, Principal Deputy Under Secretary for Health, Co-Chair
William F. Feeley, Co-Chair, Deputy Under Secretary for Health for Operations and Management
Madhulika Agarwal, MD, Chief Patient Care Services Officer
Michael E. Moreland, Network Director, VISN 4
Lawrence A. Biro, Network Director, VISN 7
Everett A. Chasen, Chief Communications Officer
Joleen M. Clark, Chief, Workforce Management and Consulting Officer
Stephan D. Fihn, MD, Chief, Quality and Performance Officer
Glen W. Grippen, Network Director, VISN 19
W. Paul Kearns III, Chief Financial Officer
Craig B. Luigart, VHA Chief Information Officer
Caitlin O'Brien, Chief Compliance and Business Integrity Officer
Robert A. Petzel, MD, Network Director, VISN 23
James W. Roseborough, Network Director, VISN 12
Patricia Vandenberg, Assistant Deputy Under Secretary for Health for Policy and Planning
Louise R. Van Diepen, VHA Chief of Staff
Nevin M. Weaver, Network Director, VISN 8
Marla Weston, PhD, Deputy Director, Workforce Management and Consulting Office (Ex Officio)
Joseph A. Williams Jr, Assistant Deputy Under Secretary for Health for Operations and Management
Maureen E. Gormley, Chief Operating Officer, National Institutes of Health Clinical Center
Ken Greenberg, Executive Secretary to the Department
Sharon K. Barnes, Deputy Chief of Staff (Alternate)

Office of Inspector General PRB

Thomas J. Howard, Deputy Inspector General, National Air and Space Administration, Office of Inspector General
Elliot P. Lewis, Assistant Inspector General for Audit, Department of Labor, Office of Inspector General
Norbert E. Vint, Deputy Inspector General and Assistant Inspector General for Investigations, Office of Personnel Management, Office of Inspector General

Dated: October 6, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

[FR Doc. E8–24138 Filed 10–8–08; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Thursday,
October 9, 2008

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1926

Cranes and Derricks in Construction; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket ID–OSHA–2007–0066]

RIN 1218–AC01

Cranes and Derricks in Construction

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule.

SUMMARY: OSHA is proposing a rule to protect employees from the hazards associated with hoisting equipment when used to perform construction activities. Under this proposed rule, employers would first determine whether the ground is sufficient to support the anticipated weight of hoisting equipment and associated loads. The employer then would be required to assess hazards within the work zone that would affect the safe operation of hoisting equipment, such as those of power lines and objects or personnel that would be within the work zone or swing radius of the hoisting equipment. Finally, the employer would be required to ensure that the equipment is in safe operating condition via required inspections and employees in the work zone are trained to recognize hazards associated with the use of the equipment and any related duties that they are assigned to perform.

DATES: Submit comments (including comments to the information-collection (paperwork) determination described under the section titled ''Supplementary Information'' of this document), hearing requests, and other information by December 8, 2008. All submissions must bear a postmark or provide other evidence of the submission date. (See the following section titled **ADDRESSES** for methods you can use in making submissions.)

ADDRESSES: Comments and hearing requests may be submitted as follows:

- *Electronic.* Comments may be submitted electronically to *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.
- *Facsimile:* OSHA allows facsimile transmission of comments and hearing requests that are 10 pages or fewer in length (including attachments). Send these documents to the OSHA Docket Office at (202) 693–1648; hard copies of these documents are not required. Instead of transmitting facsimile copies of attachments that supplement these documents (e.g., studies, journal articles), commenters may submit these attachments, in triplicate hard copy, to the OSHA Docket Office, Technical Data Center, Room N–2625, OSHA, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. These attachments must clearly identify the sender's name, date, subject, and Docket ID (i.e., OSHA–2007–0066) so that the Agency can attach them to the appropriate document.
- *Regular mail, express delivery, hand (courier) delivery, and messenger service:* Submit three copies of comments and any additional material (e.g., studies, journal articles) to the OSHA Docket Office, Docket ID OSHA–2007–0066 or RIN No. 1218–AC01, Technical Data Center, Room N–2625, OSHA, Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone: (202) 693–2350. (OSHA's TTY number is (877) 889–5627.) Please contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service. The hours of operation for the OSHA Docket Office are 8:15 a.m. to 4:45 p.m., e.t.
- *Instructions.* All submissions must include the Agency name and the OSHA Docket ID (i.e., OSHA–2007–0066). Comments and other material, including any personal information, are placed in the public docket without revision, and will be available online at *http://www.regulations.gov.* Therefore, the Agency cautions commenters about submitting statements they do not want made available to the public, or submitting comments that contain personal information (either about themselves or others) such as social security numbers, birth dates, and medical data.
- *Docket.* To read or download comments or other material in the docket, go to *http://www.regulations.gov* or to the OSHA Docket Office at the address above. Documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT: *General information and press inquiries.* Contact Ms. Jennifer Ashley, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1999 or fax (202) 693–1634.

- *Technical inquiries.* Contact Mr. Garvin Branch, Directorate of Construction, Room N–3468, OSHA, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2020 or fax (202) 693–1689.
- *Copies of this Federal Register notice.* Available from the OSHA Office of Publications, Room N–3101, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1888.
- *Electronic copies of this notice.* Go to OSHA's Web site (*http://www.osha.gov*), and select ''Federal Register,'' ''Date of Publication,'' and then ''2008.''
- *Additional information for submitting documents.* See section V.I. (''Public Participation'') of this notice.

SUPPLEMENTARY INFORMATION:

I. General

A. Table of Contents

The following Table of Contents identifies the major preamble sections in this notice and the order in which they are presented:

I. General
  A. Table of Contents
  B. Hearing
II. Background
  A. History
  B. The Cranes and Derricks Negotiated Rulemaking Advisory Committee (C–DAC)
  C. Hazards Associated with Cranes and Derricks in Construction Work
III. The SBREFA Process
IV. Summary and Explanation of the Proposed Standard
V. Procedural Determinations
  A. Legal Authority
  B. Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis
  C. OMB Review Under the Paperwork Reduction Act of 1995
  D. Federalism
  E. State-Plan States
  F. Unfunded Mandates Reform Act
  G. Applicability of Existing Consensus Standards
  H. Review of the Proposed Standard by the Advisory Committee for Construction Safety and Health (ACCSH)
  I. Public Participation—Comments and Hearings

B. Hearing

Requests for a hearing should be submitted to the Agency as set forth above under **DATES** and **ADDRESSES**.

II. Background

A. History

The Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C.

651–678) (the OSH Act) authorizes the Secretary of Labor to adopt safety and health standards to reduce injuries and illnesses in American workplaces. Pursuant to that authority, the Secretary has adopted, among others, a set of safety and health standards applicable to the construction industry, 29 CFR Part 1926. Initially, standards for the construction industry were adopted under the Construction Safety Act, 40 U.S.C. 333. Under the Construction Safety Act, those standards were limited to employers engaged in federally-financed or federally-assisted construction projects. The Secretary subsequently adopted them as OSHA standards pursuant to Section 6(a) of the OSH Act, 29 U.S.C. 655(a), which authorized the Secretary to adopt established federal standards as OSH Act standards within the first two years the OSH Act was effective (36 FR 25232, Dec. 30, 1971). Subpart N of 29 CFR part 1926, entitled ''Cranes, Derricks, Hoists, Elevators, and Conveyors,'' was originally adopted through this process.

The section of subpart N of 29 CFR part 1926 that applies to cranes and derricks is § 1926.550. That section relies heavily on national consensus standards that were in effect in 1971, in some cases incorporating the consensus standards by reference. For example, § 1926.550(b)(2) requires crawler, truck, and locomotive cranes to meet applicable requirements for design, inspection, construction, testing, maintenance, and operation prescribed in ANSI B30.5–1968, ''Crawler, Locomotive and Truck Cranes.'' Similarly, § 1926.550(e) requires derricks to meet applicable requirements for design, construction, installation, inspection, testing, maintenance, and operation prescribed in ANSI B30.6–1969, ''Derricks.'' Since 1971, § 1926.550 has been amended substantively only twice. In 1988, a new paragraph (g) was added to establish clearly the conditions under which employees on personnel platforms may be hoisted by cranes and derricks. 53 FR 29116 (Aug. 2, 1988). In 1993, a new paragraph § 1926.550(a)(19) was added to require that all employees be kept clear of lifted and suspended loads.

There have been considerable technological changes since the 1971 OSHA standard was issued. For example, hydraulic cranes were rare at that time but are now prevalent. Although the OSHA standard remains largely unchanged, the construction industry has updated the consensus standards on which the OSHA standard is based. For example, the industry consensus standard for derricks was most recently updated in 2003, and that for crawler, locomotive and truck cranes in 2004.

In recent years, a number of industry stakeholders asked the Agency to update Subpart N's cranes and derrick requirements. They were concerned that accidents involving cranes and derricks continued to be a significant cause of fatal and other serious injuries on construction sites and believed that an updated standard was needed to address the causes of these accidents and to reduce their numbers. They emphasized that the considerable changes in both work processes and technology have made much of Subpart N obsolete.

In response to these requests, in 1998 OSHA's Advisory Committee for Construction Safety and Health (ACCSH) established a workgroup to develop recommended changes to the Subpart N requirements for cranes and derricks. The workgroup developed recommendations on some issues and submitted them to the full committee in a draft workgroup report. (OSHA–2007–0066–0020). In December 1999, ACCSH recommended to OSHA that the agency consider using a negotiated rulemaking process as the mechanism to update Subpart N (ACCSH 1999–4, Ex. 100x, p. 112).

B. The Cranes and Derricks Negotiated Rulemaking Advisory Committee (C–DAC)

In July 2002, OSHA announced its intent to use negotiated rulemaking under the Negotiated Rulemaking Act (NRA), 5 U.S.C. 561 *et seq.*, to revise the cranes and derricks standard. The Agency made this decision in light of the stakeholder interest in updating Subpart N, the constructive discussions and work of the ACCSH workgroup, ACCSH's recommendation, a positive assessment of the criteria listed in the NRA (5 U.S.C. 563(a)) for the use of negotiated rulemaking, and the Department of Labor's policy on negotiated rulemaking (See ''Notice of Policy on Use of Negotiated Rulemaking Procedures by Agencies of the Department of Labor,'' 57 FR 61925 (Dec. 29, 1992)). The Agency issued a notice of intent to use negotiated rulemaking for this project and establish the Cranes and Derricks Negotiated Rulemaking Advisory Committee (''C–DAC'' or ''the Committee'') (67 FR 46612, July 16, 2002).

Negotiated rulemaking is a process by which a proposed rule is developed by a committee comprised of members who represent the interests that will be significantly affected by the rule. Section 562 of the NRA defines ''interest'' as follows:

> ''[I]nterest'' means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.

By bringing different viewpoints to the table and sharing views, the members of the negotiated rulemaking committee learn the reasons for different positions on the issues as well as the practical effect of various approaches. Each member of the committee participates in resolving the interests and concerns of other members. Negotiation allows interested parties, including members who represent the interests of employers who will be subject to the rule and the employees who stand to benefit from the safer workplaces the rule will produce, to become involved at an earlier stage of the rulemaking process. As a result, the rule that OSHA proposes will have already received close scrutiny by affected parties at the pre-proposal stage.

The goal of the negotiated rulemaking process is to develop a proposed rule that represents a consensus of all the interests. The NRA defines consensus as unanimous concurrence among the interests represented on a negotiated rulemaking committee unless the committee itself unanimously agrees to use a different definition of consensus. As discussed below, C–DAC agreed by unanimous vote to a different definition: a consensus was reached on an issue when not more than two non-federal members dissented on that issue.

In the July 2002 notice of intent to establish a negotiated rulemaking committee referred to above, the Agency listed key issues that OSHA expected the negotiations to address and the interests that OSHA had tentatively identified as being significantly affected by the rulemaking. Those interests were:

—Crane and derrick manufacturers, suppliers, and distributors.
—Companies that repair and maintain cranes and derricks.
—Crane and derrick leasing companies.
—Owners of cranes and derricks.
—Construction companies that use cranes and derricks.
—General contractors.
—Labor organizations representing construction employees who operate cranes and derricks.
—Labor organizations representing construction employees who work in conjunction with cranes and derricks.
—Owners of electric power distribution lines.
—Civil, structural and architectural engineering firms and engineering consultants involved with the use of cranes and derricks in construction.

—Training organizations.
—Crane and derrick operator testing organizations.
—Insurance and safety organizations, and public interest groups.
—Trade associations.
—Government entities involved with construction safety and with construction operations involving cranes and derricks.

OSHA asked for public comment on whether interests other than those listed would be significantly affected by a new rule. It also solicited requests for membership on the committee. OSHA urged interested parties to communicate with others who shared similar interests and to begin organizing coalitions to support those interests in order to identify individuals for nomination to the committee.

The Agency noted that the need to limit the committee's membership to a number that could conduct effective negotiations might mean that not all interests could be represented on the committee itself. However, OSHA further noted that interested persons had means other than committee membership available to participate in the committee's deliberations, including attending committee meetings and addressing the committee, providing written comments to the committee, and participating in committee workgroups. 67 FR at 46615.

In response to its request for public input, the Agency received broad support for using negotiated rulemaking and 55 nominations for committee membership. To keep membership to a reasonable size, OSHA tentatively listed 20 potential committee members and asked for public comment on that proposed list. 68 FR 9036 (Feb. 27, 2003). In response to the comments, OSHA added three members to the committee—individuals from the mobile crane manufacturing industry, the Specialized Carriers & Rigging Association, and the outdoor advertising industry. 68 FR 39879 (July 3, 2003).

The members of the Committee, the organizations and interests they represent, and a summary of their qualifications at the time the Committee was formed are in Table 1 as follows:

TABLE 1—THE QUALIFICATIONS OF C–DAC PANEL MEMBERS

Stephen Brown, International Union of Operating Engineers (labor).	
Title	Director of Construction Training, International Union of Operating Engineers.
Organizations/Interests represented	Organized construction employees who operate cranes and derricks, and work with such equipment.
Experience	Worked in numerous positions in the construction industry over 28 years, including Equipment Operator, Mechanic, and Training Director.
Michael Brunet, Manitowoc Cranes, Inc. (manufacturers and suppliers).	
Title	Director of Product Support for Manitowoc Cranes.
Organizations/Interests represented	Crane manufacturers, suppliers, and distributors.
Experience	Extensive engineering experience in crane engineering; participated in development of SAE and ISO standards for cranes.
Stephen P. Charman, Viacom Outdoor, Inc. (employer users).	
Title	Vice President (New York) of Viacom Outdoor Group.
Organizations/Interests represented	Billboard construction.
Experience	Over 43 years' experience with the construction industry, including specialized rigging.
Joseph Collins, Zachry Construction Corporation (employer users).	
Title	Crane Fleet Manager.
Organizations/Interests represented	Highway/Railroad Construction.
Experience	Over 30 years' experience with the construction industry in a variety of positions including crane operator, mechanic, and rigger.
Noah Connell, U.S. Department of Labor, Occupational Safety and Health Administration (government).	
Title	Director, Office of Construction Standards and Guidance.
Organization/Interests represented	Government.
Experience	22 years' experience with government programs.
Peter Juhren, Morrow Equipment Company, L.L.C. (manufacturers and suppliers).	
Title	National Service Manager.
Organization/Interests represented	Tower crane distributor/manufacturer.
Experience	22 years' experience with Morrow Equipment Company, L.L.C.
Bernie McGrew, Link-Belt Construction Equipment Corp. (manufacturers and suppliers).	
Title	Manager for Crane Testing, Product Safety, Metal Labs and Technical Computing.
Organization/Interests represented	Mobile crane manufacturers.
Experience	Extensive engineering experience in crane engineering.
Larry Means, Wire Rope Technical Board (manufacturers and suppliers).	
Title	Rope Engineer.
Organization/Interests represented	Wire rope manufacturing industry.
Experience	36 years' wire rope engineering experience.
Frank Migliaccio, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (labor organization).	
Title	Executive Director for Safety and Health.
Organization/Interests Represented	Organized construction employees who operate cranes and derricks, and work with such equipment.
Experience	31 years' experience in the ironworking industry, including ten years as Director of Safety and Health Training for the Ironworker's National Fund.

TABLE 1—THE QUALIFICATIONS OF C–DAC PANEL MEMBERS—Continued

Brian Murphy, Sundt Corporation (employer users).	
Title	Vice President and Safety Director.
Organization/Interests Represented	General contractors/crane owners/users.
Experience	Over 35 years' experience in the construction industry, most of them with Sundt.
George R. "Chip" Pocock, C.P. Buckner Steel Erection (employer users).	
Title	Safety and Risk Manager.
Organization/Interests Represented	Steel Erection crane user/employers.
Experience	Over 22 years' experience in the construction/steel erection industry.
David Ritchie, St. Paul Companies (trainer and operator testing).	
Title	Crane and Rigging Specialist.
Organization/Interests Represented	Employee Training/Evaluation.
Experience	Over 31 years' experience in the construction industry.
Emmett Russell, International Union of Operating Engineers (labor).	
Title	Director of Safety and Health.
Organization/Interests Represented	Organized construction employees who operate cranes and derricks, and work with such equipment.
Experience	Over 32 years' experience in the crane/construction industry, including ten years in the field as well as over 20 years with IUOE.
Dale Shoemaker, Carpenters International Training Center (labor).	
Organization/Interests Represented	Labor organizations representing construction employees who operate cranes and derricks and who work in conjunction with cranes and derricks.
Experience	Became a crane operator in 1973; served as a rigging trainer for labor organizations since 1986.
William Smith, Maxim Crane Works (lessors/maintenance).	
Title	Corporate Safety/Labor Relations Manager.
Organization/Interests Represented	Crane/Derrick repair and maintenance companies.
Experience	24 years' experience in the crane, rigging, and construction industry, both public and private sectors.
Craig Steele, Schuck & Sons Construction Company, Inc. (employer users).	
Title	President and CEO.
Organization/Interests Represented	Employers/users engaged in residential construction.
Experience	30 years' experience in the construction industry with Schuck & Sons Construction Company, Inc.
Darlaine Taylor, Century Steel Erectors, Inc. (employer users).	
Title	Vice President.
Organization/Interests Represented	Steel Erection/Leased Crane Users.
Experience	19 years with Century Steel Erectors, over 12 years in the construction safety field.
Wallace Vega III, Entergy Corp. (power line owners).	
Organization/Interests Represented	Power line owners.
Experience	35 years' experience in the power line industry.
William J. "Doc" Weaver, National Electrical Contractors Association (employer users).	
Organization/Interests Represented	Electrical contractors engaged in power line construction.
Experience	Over 53 years' electrical construction experience, 37 of which is spent in management positions.
Robert Weiss, Cranes, Inc. and A.J. McNulty & Company, Inc. (employer users).	
Title	Vice President and Project Manager for Safety (respectively).
Organization/Interests Represented	Employers/users engaged in precast concrete erection.
Experience	20 years' experience in the precast and steel erection industry.
Doug Williams, C.P. Buckner Steel Erection (employer users).	
Title	President.
Organization/Interests Represented	Buckner Heavy Lift Cranes.
Experience	32 years' experience in the construction industry.
Stephen Wiltshire, Sports and Public Assembly Group, Turner Construction Corp. (employer users).	
Title	National Safety Director.
Organization/Interests Represented	Employer/users of owned and leased cranes.
Experience	28 years' experience in construction safety.
Charles Yorio, Acordia (Wells Fargo) (insurance).	
Title	Assistant Vice President.
Organization/Interests Represented	Insurance.
Experience	17 years' experience in loss prevention and regulatory compliance.

C–DAC was chaired by a facilitator, Susan L. Podziba of Susan Podziba & Associates, a firm engaged in public policy mediation and consensus building. Ms. Podziba's role was to facilitate the negotiations by:

(1) Chairing the Committee's meetings in an impartial manner;

(2) impartially assisting the members of the committee in conducting discussions and negotiations; and

(3) supervising the taking of minutes and keeping of records and other relevant responsibilities, including the drafting of meeting summaries after each meeting to be reviewed and approved by C–DAC members.

C–DAC first met from July 30 to August 1, 2003. Before addressing substantive issues, the Committee developed ground rules (formally approved on September 26, 2003) that would guide its deliberations. (OSHA–S030–2006–0663–0373). In addition to procedural matters, the ground rules addressed the nature and consequences of the Committee's decision-making. C–DAC agreed that it would make every effort to reach unanimous agreement on all issues. However, if the facilitator determined that unanimous consent could not be achieved, the Committee would consider consensus to be reached when not more than two non-federal members (i.e., members other than the OSHA member) dissented. Under this definition, if OSHA dissented, there would be no consensus.

This definition of consensus reflects the non-federal members' view that Agency support of the Committee's work was essential. The non-federal members believed that, if OSHA dissented, there would be little likelihood that the Committee's work product would eventually be reflected in the final rule. These members wanted to ensure that concerns of the Agency that would prompt it to dissent were instead resolved in the negotiating process.

Under this ground rule, if C–DAC reached a final consensus agreement on some or all issues, OSHA would use the consensus-based language on those issues for which agreement was reached as its proposed standard, and C–DAC members would refrain from providing formal written negative comment on those issues in response to the proposed rule.

The ground rules provide that OSHA may only depart from this aspect of the agreement by either reopening the negotiated rulemaking process or providing to the C–DAC members a detailed statement of the reasons for altering the consensus-based language sufficiently far in advance of publication that the C–DAC members could express their concerns to OSHA. The Committee members could also provide negative or positive public comment in response to those changes. (OSHA–S030–2006–0663–0373).

A tentative list of issues for the Committee to address was published along with the final list of Committee members (68 FR at 39879–90). At its initial meeting, the Committee reviewed and revised the issue list, adding several issues. (OSHA–S030–2006–0663–0372). The Committee met 11 times between July 30, 2003 and July 9, 2004. As the meetings progressed, the Committee reached consensus agreement on various issues and, at the final meeting, reached consensus agreement on all outstanding issues. The Committee's work product, which is the Committee's recommended regulatory text for the proposed rule, is referred to here as the C–DAC Consensus Document. (OSHA–S030–2006–0663–0639). On October 12, 2006, ACCSH adopted a resolution supporting the C–DAC Consensus Document and recommending that OSHA use it as the basis for a proposed standard. (ACCSH 2006–1, Ex. 101x, pp. 248–49).

As noted earlier, OSHA's assent was needed for C–DAC to reach consensus agreement on an issue. Thus, the fact that the Committee reached consensus agreement on all issues means that this proposal reflects OSHA's agreement with the Consensus Document. In the discussion of the various sections of the proposal below, when the Committee's views or conclusions are stated, OSHA agrees with those views or conclusions unless otherwise noted.

In reviewing the Consensus Document to draft this proposed rule, OSHA identified certain problems in the Consensus Document. These range from misnumbering and other typographical/technical errors to provisions that appear to be inconsistent with the Committee's intent or that are worded in a manner that requires clarification. This proposed rule deviates from the Consensus Document where changes were clearly needed to reflect the Committee's intent, or to correct typographical/technical errors. With respect to substantive changes, the Agency has identified and explained them in the portions of this preamble that address the affected provisions.

There are instances where it appears to the Agency that other changes may be needed for several reasons: To conform to the Committee's intent; where the precise form of a change needed to conform to that intent is not clear; or where an aspect of a significant issue appears not to have been considered by C–DAC. In each such instance OSHA has retained the regulatory language used in the Consensus Document but asks for public comment on them.

Numerous Committee members had vast and varied experience in cranes and derricks in construction, which gave them a wealth of knowledge in the causes of accidents and safety issues involving such equipment. In addition, other members had substantial knowledge and experience in other types of subject areas that also related to crane and derrick safety. This is reflected in the summary of their qualifications (see list above).

The members used this knowledge to identify issues that required particular attention and to devise regulatory language that would address the causes of such accidents. Their extensive practical experience in the construction industry and the other industries represented on the Committee helped them to design improvements to the current Subpart N requirements that would be practical and workable. This preamble describes the proposed standard and the Committee's reasons for resolving the various issues in the manner it did.

In examining the causes of crane accidents and devising ways to reduce them, the Committee concluded that incorrect operation was a factor in many accidents. Operating a crane is a complex job requiring skill and knowledge. To operate a crane safely requires a thorough knowledge of the equipment and controls and a complete understanding of the factors that can affect the safety of its operation. The Committee believed that it was essential to address the issue of operator qualification so that accidents resulting from incorrect operation would be reduced.

C–DAC spent considerable time and effort determining how the proposed rule could best ensure that equipment operators are well qualified. C–DAC decided that it was necessary for crane operators to be certified or qualified through a formal process to ensure that they possessed the degree of knowledge necessary to operate their equipment safely. The Committee's reasoning and the details of the qualification/certification process are discussed below in connection with § 1926.1427, *Operator Qualification and Certification.*

Another cause of numerous fatal and serious accidents that C–DAC addressed was equipment making electrical contact with power lines. Although Subpart N currently addresses this issue by requiring equipment to maintain a minimum distance from power lines that depends on the voltage of the line, the Committee identified reasons why the current standard was not preventing the many accidents that continue to occur. The Committee concluded that simply requiring a minimum clearance

distance was not sufficient to eliminate the human error that led to most instances of power line contact and that additional requirements that would help employers identify potential power line hazards and systematic procedures to protect against those hazards were needed to prevent power line contact. See the discussion below under §§ 1926.1407–1411, which deal with the various aspects of power line safety.

As noted above, OSHA's current standard on cranes and derricks, 29 CFR 1926.550, incorporates numerous national consensus standards by reference. The Committee reviewed the most recent versions of these consensus standards. For some issues, the Committee determined that a different approach was warranted (such as in the case of protections against power lines and operator qualification/certification). In many other instances the Committee determined that concepts in the consensus standards were appropriate but that different wording was needed to improve clarity and enforceability, or to be more readable within the structure of the proposed rule.

Where the Committee incorporated consensus standards by reference, it agreed with the concepts, found the structure and wording appropriate, and determined that the incorporation of the provisions would not detract from its goal of producing a readable document. In addition, to avoid encumbering the text with too much length and technical detail that would hinder readability, C–DAC decided to incorporate by reference certain requirements from consensus standards where those requirements addressed highly technical topics, such as welding criteria.

C–DAC also determined that some categories of equipment needed to be addressed differently than others. The proposed standard contains general requirements in §§ 1926.1402–1434 that are appropriate for most types of equipment and workplaces but which contain certain specific exclusions. Sections 1926.1435–1441 each address a specific type of equipment, such as § 1926.1435, *Tower cranes.* Those sections tailor the requirements of the proposed standard to accommodate the unique characteristics of that equipment. They state which of the general provisions in §§ 1926.1402–1434 apply to that type of equipment and which do not. They also include requirements specific to that type of equipment either (as specified) as a substitute for, or in addition to, the general provisions in §§ 1926.1402–1434. In this way, C–DAC ensured that each type of equipment would be subject to requirements appropriate for that equipment.

In drafting some of the provisions in this proposal, the Committee recognized that OSHA would be requiring cranes and derricks to be equipped with operational aids that have not been mandatory in the past. For some types of these aids, the Committee believed it would be impractical to require that cranes and derricks be retrofitted with the devices. In determining whether to propose that such requirements be prospective only, the Committee considered the degree of importance of the device to safety, whether the devices are required under industry consensus standards and, if so, the date they were first required under such standards. Recognizing that manufacturers generally follow industry consensus standards, C–DAC drafted these provisions to require equipment manufactured after the date an operational aid was required by an industry consensus standard to be equipped with the device.

In situations where no industry consensus standard required that cranes or derricks be equipped with a certain operational aid or fall protection device, the Committee decided to allow sufficient lead time for manufacturers to install the aids and devices. The Committee proposed to require some aids and devices on equipment manufactured one year after the effective date of this standard. In other cases, the Committee specified that the aids and devices would be required on equipment manufactured after January 1, 2008.

It is now evident that the standard will not be finalized by that date and that keying requirements to that date will not afford employers the lead time intended by the Committee. To conform this proposed standard to the Committee's intent, and to ensure that industry has sufficient lead time to equip cranes and derricks with the required aids and devices, OSHA is substituting ''more than one year after the effective date of this standard'' for ''January 1, 2008'' wherever that date appears in the Committee's draft.

C. Hazards Associated With Cranes and Derricks in Construction Work

OSHA estimates that 89 crane-related fatalities occur per year in construction work. The causes of crane-related fatalities were recently analyzed by Beavers, *et al.* J.E. Beavers, J.R. Moore, R. Rinehart, and W.R. Schriver, ''Crane-Related Fatalities in the Construction Industry,'' 132 Journal of Construction Engineering and Management 901 (Sept. 2006) (OSHA–2007–0066–0012). The authors searched OSHA's Integrated Management Information System (IMIS) database for all fatal accidents for 1997–2003 investigated by OSHA involving cranes in the construction industry. By searching the database for cases using the key words ''crane,'' ''derrick,'' or ''boom,'' they identified 381 IMIS files for the covered years in the federal program states, which include states with about 57% of all workers throughout the country. The authors requested the case files from OSHA so that they could confirm that a crane or derrick was involved in the fatality. Of the 335 case files that OSHA provided, the authors identified 125 (involving 127 fatalities) as being crane or derrick related. From these files, they determined that the percentages of fatalities caused by various types of incident are in Table 2 as follows:

TABLE 2—THE CAUSES OF FATALITIES DURING THE PERFORMANCE OF HOISTING ACTIVITIES

	Percent
Struck by load (other than failure of boom/cable)	32
Electrocution	27
Crushed during assembly/disassembly	21
Failure of boom/cable	12
Crane tip-over	11
Struck by cab/counterweight	3
Falls	2

A study by Suruda *et al.* examined the causes of crane-related deaths for the 1984–1994 period. A. Suruda, M. Egger, & D. Liu, ''Crane-Related Deaths in the U.S. Construction Industry, 1984–94,'' The Center to Protect Workers' Rights (Oct. 1997) (OSHA–2007–0066–0013). The authors examined OSHA IMIS data to identify the number of fatal accidents involving cranes and determine their causes. For the years in question, they found 479 accidents involving 502 fatalities. In the worst year, 1990, 70 deaths occurred.

The authors noted some limitations in the data they examined: Data for California, Michigan, and Washington state were not available for 1984–1989; the proportion of fatal accidents that OSHA and the states that enforce their own state plans investigate is unknown; and some of the investigation reports were not sufficiently detailed to allow the cause of the accident or the type of crane involved to be determined.

The Suruda study determined that the number and the percentage of fatalities from various causes are in Table 3 as follows:

TABLE 3—THE CAUSES OF CRANE INCIDENTS

Electrocution	198 (39%)
Crane assembly/disassembly	58 (12%)
Boom buckling/collapse	41 (8%)
Crane upset/overturn	37 (7%)
Rigging failure	36 (7%)
Overloading	22 (4%)
Struck by moving load	22 (4%)
Accidents related to manlifts	21 (4%)
Working within swing radius of counterweight	17 (3%)
Two-blocking	11 (2%)
Hoist limitations	7 (1%)
Other causes	32 (6%)

The proposed standard addresses the major causes of the equipment related fatalities identified in the Beavers and Suruda studies. The following is a brief synopsis of the sections in this proposed standard that address them; each proposed section is explained in detail later in this preamble.

The electrocution hazard is addressed by proposed §§ 1926.1407–1411, which deal with various aspects of power line safety. These sections contain requirements designed to prevent equipment from contacting energized power lines. The proposed rule delineates systematic, reliable procedures and methods that must be used to prevent a safe clearance distance from being breached. If maintaining the safe clearance distance is infeasible, additional protections would be required, including grounding the equipment, covering the line with an insulating sleeve, and using insulating links and nonconductive tag lines.

These procedures and methods are supplemented by requirements for training the operator and crew in power line safety and the requirement for operator qualification and certification in proposed § 1926.1427. C–DAC concluded that compliance with these training and certification requirements will not only reduce the frequency of power line contact but will give the workers the knowledge they need to help avoid injury in the event such contact does occur.

Fatalities that involve employees being struck or crushed during assembly/disassembly are addressed in proposed §§ 1926.1403–1406. These sections require certain specific safe practice procedures to be followed and for the employer to address a list of specific hazards. Also, assembly/disassembly must be supervised by an individual who is well qualified to see that these requirements are properly implemented.

As the studies show and the Committee's experience confirms, many disassembly accidents occur when sections of lattice booms unexpectedly move and strike or crush an employee who is disassembling the boom. The proposal addresses this scenario in proposed § 1926.1404(f) by prohibiting employees from being under the boom when pins are removed unless special precautions are taken to protect against boom movement.

Accidents resulting from boom or cable failure are addressed in a number of provisions. For example, the proposed standard includes requirements for: Proper assembly procedures (proposed § 1926.1403); boom stops to prevent booms from being raised too far and toppling over backwards (proposed § 1926.1415, *Safety devices*); a boom hoist limiting device to prevent excessive boom travel, and an anti-two-block device, which prevents overloading the boom from two-blocking (proposed § 1926.1416, *Operational aids*). Also, the inspection requirements (proposed § 1926.1412) are designed so that a structural deficiency in a boom will be detected and addressed before an accident occurs. Cable failure will be avoided by compliance with proposed sections such as § 1926.1413, *Wire rope—inspection,* § 1926.1414, *Wire rope—selection and installation criteria,* and the provision in proposed § 1926.1416 requiring two-block protection.

Crane tip-over is caused by factors such as overloading, improper use of outriggers and insufficient ground conditions. Proposed § 1926.1417, *Operations,* includes provisions designed to prevent overloading. That section prohibits the equipment from being operated in excess of its rated capacity and includes procedures for ensuring that the weight of the load is reliably determined and within the equipment's rated capacity. Proposed § 1926.1404(q) has requirements for outrigger use designed to ensure that outriggers are properly set when they are needed to provide stability when a load is lifted. Proposed § 1926.1402 has requirements designed to ensure sufficient ground conditions.

The provisions on training and operator qualification and certification will also prevent this type of accident by ensuring that the operator is sufficiently knowledgeable and skilled to recognize situations when the crane may be overloaded and to either require that the situation be corrected or refuse to proceed in accordance with proposed § 1926.1418, *Authority to stop operation.*

Fatalities that result from workers being struck by the cab or counterweights will be avoided by compliance with proposed § 1926.1424, *Work area control.* That section would require that employees who must work near equipment with a rotating superstructure be trained in the hazards involved, that employers mark or barricade the area within the area covered by the rotating superstructure, and that the operator be alerted whenever an employee must enter that area and not rotate the superstructure until the area is clear. Protection against being struck by a counterweight during assembly/disassembly is provided by proposed § 1926.1404(h)(9), which would require the assembly/disassembly supervisor to address this hazard and take steps when necessary to protect workers against that danger.

The proposal addresses a number of types of equipment failure that can result in the load striking a worker. Such accidents are directly addressed by proposed § 1926.1425, *Keeping clear of the load,* and § 1926.1426, *Free fall/controlled load lowering.* In addition, improved requirements in proposed §§ 1926.1419–1422 for signaling will help avoid load struck-by accidents caused by miscommunication.

Improper operation, including, for example, the failure to understand and compensate for the effects of factors such as dynamic loading, can also cause employees to be struck by a load. Such incidents will be reduced by compliance with proposed § 1926.1427, *Operator qualification and certification* and proposed § 1926.1430, *Training.* Other provisions, such as those for safety devices and operational aids (proposed § 1926.1415 and § 1926.1416), and the requirement for periodic inspections in proposed § 1926.1412, will also reduce the number of this type of accident.

Protection against falling from equipment is addressed by proposed § 1926.1423, *Fall protection.* That section would require new equipment to provide safe access to the operator work station by the use of devices such as steps, handholds, and grabrails. Certain new lattice boom equipment would have to be equipped with boom walkways. There are also fall protection provisions tailored to assembly and disassembly work and to other work. Proposed § 1926.1431, *Hoisting personnel*, addresses fall protection when employees are being hoisted.

OSHA has investigated numerous equipment accidents that have resulted in fatalities from the causes listed in the Beavers and Suruda studies. Below is a discussion of examples from OSHA's IMIS accident investigation reports from recent years that illustrate some of the types of accidents that occur when using the types of equipment covered by

this proposed standard and the ways that this proposed standard would prevent such incidents. These examples illustrate the limitations of the current standard and highlight the need for a revised standard that will address the causes of the equipment accidents that continue to kill and injure construction workers.

1. February 16, 2004: 4 fatalities, 4 injuries. A launching gantry collapsed and fatally injured 4 workers and sent 4 other workers to the hospital. The launching gantry was being used to erect pre-cast concrete segments span by span. The manufacturer required that the rear legs and front legs be properly anchored to resist longitudinal and lateral forces that act on the launching gantry. The legs of the launching gantry were not properly anchored. (OSHA–2007–0066–0017).

OSHA believes that this type of accident would be prevented by compliance with the provisions of this proposed standard for assembling equipment. Proposed § 1403 requires that equipment be assembled in compliance with manufacturer procedures or with alternative employer procedures (see proposed § 1406) designed, among other things, to prevent the equipment from collapsing. In addition, under proposed § 1404, assembly must be conducted under the supervision of a person who understands the hazards associated with an improperly assembled crane and is well-qualified to understand and comply with the proper assembly procedures.

2. January 30, 2006. 1 fatality. An employee was crushed by the lower end section of the lattice boom on a truck mounted crane while working from a position underneath the boom to remove the 2nd lower pin. When the 2nd lower pin was removed the unsecured/uncribbed boom fell on the employee. (OSHA–2007–0066–0017.1)

Proposed § 1926.1404(f) would prevent this type of accident by generally prohibiting employees from being under the boom when pins are removed. In situations where site constraints require an employee to be under the boom when pins are removed, the employer must implement other procedures, such as ensuring that the boom sections are adequately supported, to prevent the sections from falling onto the employee.

3. July 23, 2001: 1 fatality. Employee failed to extend the outriggers before he extended the boom of a service truck crane to lift up some pipes. As he extended his boom, the crane tipped over on its side and an employee was struck on the head by the hook block as he stood near the rear of the truck. (OSHA–2007–0066–0017.10)

This type of accident would be prevented by compliance with proposed § 1926.1404(q), which contains several provisions designed to ensure that outriggers are deployed properly before lifting a load. In addition, the operator qualification and certification requirement of proposed § 1926.1427, which is intended to ensure that operators understand and follow the safety requirements for the equipment they are operating, would help prevent this type of accident.

4. March 8, 1999. 1 fatality. Some employees were using a mobile crane to maneuver a load of steel joists. The crane contacted a 7,200-volt overhead power line, electrocuting an employee who was signaling and guiding the load. The crane operator jumped clear and was not injured. (OSHA–2007–0066–0017.11)

Section 1926.1408 includes provisions that would prevent this type of accident. First, it would require the use of ''encroachment prevention'' measures designed to prevent the crane from breaching a safe clearance distance from the power line. Second, if tag lines are used to guide the load, they would have to be non-conductive. Third, if maintaining the normal clearance distance were infeasible, a number of additional measures would have to be used. One of those additional measures is the use of an insulating link between the end of the load line and the load.

These measures would protect the employee guiding the load in several ways, including the following: First, they would reduce the chance that the crane would come into electrical contact with the power line. Second, if the employee were using a tag line to guide the load, it would have to be non-conductive, which would protect the employee if the load became energized.

If the crane were intentionally operated closer than the normal clearance distance, and the employer complied with the additional protective measures required in that circumstance, an insulating link would be in place. In such a case, even if there was a failure of the encroachment prevention measures and electrical contact resulted, the insulating link would prevent the load from becoming energized and prevent the employee guiding the load from being electrocuted.

5. August 21, 2003. 3 fatalities. A crane operator and two co-workers were electrocuted when a truck crane's elevated boom contacted a 7,200 Volt uninsulated primary conductor 31 feet from the ground. When the operator stepped from the cab of the truck he created a conduction pathway to the ground through his right hand and right foot, causing him to be electrocuted. A co-worker attempted to revive the incapacitated crane operator with cardio-pulmonary resuscitation (''CPR'') while a third co-worker contacted 911 and returned to the incident location. When the third co-worker simultaneously touched the energized truck crane and the back of his co-worker performing CPR, the resulting pathway created a conduction pathway through the workers, electrocuting them all. (OSHA–2007–0066–0017.12).

This type of accident would be avoided by compliance with the proposed rule. First, as explained in the previous electrocution accident examples, proposed § 1926.1408 is designed to ensure that a minimum safe distance from the power line is maintained, which would prevent the equipment from becoming energized. Also, when working closer than the normal minimum clearance distance, the crane would have to be grounded; that would reduce the chance of an electrical pathway through the employees in this type of scenario.

In addition, proposed § 1926.1408(g) would require the operator to be trained to remain inside the cab unless there is imminent danger of fire or explosion. The operator must also be trained in the danger of simultaneously touching the equipment and the ground, as he did in this case, and in the safest means of evacuating the equipment. The crane's remaining crew must be trained to avoid approaching or touching the equipment. The required training would be reinforced by the electrocution warnings that must be posted in the cab and on the outside of the equipment.

6. September 28, 1999: 1 fatality. A 19-year old electrical instrument helper was at a construction site that was on a manufacturing company's property. That morning a contractor had positioned a 50-ton hydraulic crane in an open area that consisted of compacted fill material. This was the only location that the crane could be situated because the receiving area for the equipment was very close to the property border. The crane was moving large sections of piping to a new location when it overturned and struck the helper.

The crane's outriggers were set but matting was placed only under the northwest outrigger pad. At the start of the construction project, the manufacturing company cleared the site and had fill material brought in. The site was originally swamp and large amounts of fill had been brought in. (OSHA–2007–0066–0017.13).

Proposed § 1926.1402, *Ground conditions*, is designed to prevent this type of accident. Under that paragraph, care must be taken to ensure that the surface on which a crane is operating is sufficiently level and firm to support the crane in accordance with the manufacturer's specifications. A contributing factor to this accident may have been a lack of clarity regarding responsibility for adequate ground conditions due to the fact that the employer who operated the crane did not control the ground conditions on the property.

Section 1926.1402 would impose specific duties on both the entity responsible for the project (the controlling entity) and the entity operating the crane to ensure that the crane is adequately supported. It places responsibility for ensuring that the ground conditions are adequate on the controlling entity while also making the employer operating the crane responsible for calling any deficiency to the controlling entity's attention and having it corrected before using the crane.

7. June 17, 2006: 1 fatality. A crane was being used on a barge to install a dock in a waterway. Employees were preparing to move the barge. A spud pipe, which anchored the barge, was being raised by the barge-mounted crane when the hoisting cable broke, dropping the headache ball and rigging onto one of the employees. (OSHA–2007–0066–0017.3).

This type of accident can have various causes. An incorrectly selected wire rope (one that has insufficient capacity), use of a wire rope that is damaged or worn to the point where it needs to be replaced, or two-blocking, in which the headache ball is forced against the upper block, can each cause this type of failure. The provisions of proposed §§ 1926.1413 and 1414 on wire rope inspection, selection, and installation are designed to ensure that appropriate wire rope is installed, inspected and removed from service when its continued use would be unsafe. Section 1926.1416, *Operational aids*, contains provisions designed to protect against two-blocking.

8. July 13, 1999: 3 fatalities. Three employees were in a personnel basket 280 feet above the ground. They were in the process of guiding a large roof section, being lifted by another crane, into place. Winds gusting to 27 miles per hour overloaded the crane holding the roof section; that crane collapsed, striking the crane that was supporting the personnel basket, causing the boom to fall. All three employees received fatal crushing injuries. (OSHA–2007–0066–0017.4 & OSHA–2007–0066–0018).

This type of accident would be prevented by compliance with proposed § 1926.1417(n), which requires the competent person in charge of the operation to consider the effect of wind and other adverse weather conditions on the equipment's stability and rated capacity. In addition, proposed § 1926.1431, *Hoisting personnel*, requires that when wind speed (sustained or gust) exceeds 20 mph, personnel are prohibited from being hoisted by a crane unless a qualified person determines it is safe to do so.

9. November 7, 2005: 1 fatality. A construction worker was crushed between the outrigger and the rotating superstructure of a truck crane. He apparently tried to retrieve a level and a set of blueprints which were laying on the horizontal member of one of the outriggers at the same time the operator began to swing the boom. (OSHA–2007–0066–0017.5).

This type of accident would be avoided by compliance with proposed § 1926.1424, *Work area control*. That section generally requires that employers erect barriers to mark the area covered by the rotating superstructure to warn workers of that danger zone. In addition, employees who must work near equipment with a rotating superstructure must be trained in the hazards involved. If an employee must enter the marked area, the crane operator must be alerted and not rotate the superstructure until the area is clear.

10. March 19, 2005: 2 fatalities and 1 injury. During steel erection operations, a crane was lifting three steel beams to a parking garage under construction. The crane tipped over and the boom collapsed. The boom and attached beams struck concrete workers next to the structure. Two were killed and one injured. The accident apparently occurred as a result of overloading the crane. (OSHA–2007–0066–0017.6).

Overloading a crane can cause it to tip over. When it does, the load or crane structure can strike and fatally injure workers who may be some distance from the crane. Proposed § 1926.1417, *Operations*, includes provisions designed to prevent overloading. That section prohibits the equipment from being operated in excess of its rated capacity and includes procedures for ensuring that the weight of the load is reliably determined and within the equipment's rated capacity.

The provisions on operator training and certification/qualification will also help prevent this type of accident by ensuring that the operator is sufficiently knowledgeable and skilled in recognizing conditions that would overload the crane.

11. December 7, 2005. 1 fatality. Two cranes were being used to lower a concrete beam across the river. During the lowering process, the west side of the beam became lower than the east side. The consequent shifting of the load's weight to the west side crane caused that crane to tip over. The west end of the beam went into the river and the east end fell on the bank and a support mat, causing a flag person to be thrown into the beam. (OSHA–2007–0066–0017.7).

This type of accident would be prevented by compliance with proposed § 1926.1432, *Multiple crane/derrick lifts*. That section specifies that when more than one crane will be supporting a load, the operation must be performed in accordance with a plan developed by a qualified person. The plan must be designed to ensure that the requirements of this proposed standard will be met and must be reviewed with all individuals who will be involved in the process. Moreover, the lift must be supervised by an individual who qualifies as both a competent person and a qualified person as defined in this standard.

In the type of scenario involved in this accident, a plan that would comply with this requirement would, for example, include a determination of the degree of level that is needed to be maintained in order to prevent either crane from being overloaded. In addition, such a plan would include a system of communications and a means of monitoring the operation designed to ensure that the cranes' operation was properly coordinated.

12. May 7, 2004: 1 fatality. An employee, a rigger/operator-in-training, was in the upper cab of a 60-ton hydraulic boom truck crane to set up and position the crane boom prior to a lift. The crane was equipped with two hoists, a main line and auxiliary. The main hoist line had a multi-sheave block and hook and the auxiliary line had a 285 pound ball and hook. When the employee was extending the hydraulic boom, a two-block condition occurred with the auxiliary line ball striking the auxiliary sheave head, knocking the sheave and ball from the boom. The employee was struck in the head and killed by the falling ball. (OSHA–2007–0066–0017.8).

This type of accident would be prevented by compliance with proposed § 1926.1416, *Operational aids*, which requires protection against two-blocking. A hydraulic boom crane, if manufactured after February 28, 1992, would have to be equipped with a

device that automatically prevents two-blocking.

Also, the operator-in-training in this case apparently did not understand that extending a hydraulic boom would move the sheave head toward the ball and could cause two-blocking. The proposed standard, through proposed § 1926.1427(a) and (f), would avoid having inexperienced operators make this type of mistake by prohibiting an operator-in-training from operating a crane without supervision and without first having had enough training to enable the operator to perform the assigned task safely.

13. April 26, 2006: One fatality. The deceased employee was part of a framing crew which was in the process of installing sheathing for a roof. A bundle of plywood sheathing was being hoisted by a crane to a location on the roof. As the crane was positioning the bundle of sheathing above its landing location, the load hoist on the crane free spooled, causing an uncontrolled descent of the load. The employee was under the load, preparing to position it to its landing spot, when the load fell and crushed him. (OSHA–2007–0066–0017.9).

This type of accident would be prevented by compliance with § 1926.1426, *Free fall and controlled load lowering*, which prohibits free fall of the load line hoist and requires controlled load lowering when an employee is directly under the load.

As discussed below in the *Preliminary Economic Analysis*, OSHA finds that construction workers suffer 89 fatal injuries per year from the types of equipment covered by this proposed standard. Of that number, OSHA estimates that 53 would be avoided by compliance with the proposed standard. In addition, OSHA estimates that the proposed standard would prevent 155 non-fatal injuries each year. Based on all of the available evidence and on the collective expertise of the members of C–DAC, OSHA preliminarily finds that construction workers are faced with a significant risk of death and injury resulting from equipment operations and that the risk would be substantially reduced by compliance with this proposed standard.

During the SBREFA process, several Small Entity Representatives expressed concern that the C–DAC proposal was so long and complex that small businesses would have difficulty understanding it and complying with it. The SBREFA Panel recommended that OSHA solicit public comment on how the rule could be simplified and made easier to understand without creating ambiguities. OSHA welcomes public comment on this issue.

III. The SBREFA Process

Before proceeding with a proposed rule based on the C–DAC Consensus Document, OSHA was required to comply with the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.* (SBREFA). This required OSHA to draft an initial regulatory flexibility analysis that would evaluate the potential impact of the rule on small entities (defined as small businesses, small governmental units, and small nonprofit organizations) and identify the type of small entities that might be affected by the rule. In accordance with SBREFA, OSHA then convened a Small Business Advocacy Review Panel (''Panel'') composed of representatives of OSHA, the Office of Management and Budget, and the Office of Advocacy of the Small Business Administration. Individuals who were representative of affected small entities (Small Entity Representatives, or ''SERs'') were then identified for the purpose of obtaining advice and recommendations from those individuals about the potential impacts of the proposed rule.

OSHA provided the SERs with the C–DAC consensus document and the draft regulatory flexibility analysis and afforded them the opportunity to submit written comments on those documents. The Agency also drafted questions asking them their views on the specific aspects of the C–DAC document it thought would be of most concern to small entities.

The Panel conducted two conference calls with the SERs in which the SERs presented their views on various issues. After reviewing the SERs' oral and written comments, on October 17, 2006, the Panel submitted its report summarizing the requirements of the C–DAC proposal, the comments received from the SERs, and presenting its findings and recommendations. (OSHA–S030A–2006–0664–0019). In its findings and recommendations, the Panel identified issues that it believed needed particular attention and analysis in the proposal or for which it believed OSHA should explicitly solicit public comment.

In the discussion that follows, OSHA addresses each of the Panel's findings and recommendations in the section pertaining to the issue involved. Table 4 summarizes the Panel's recommendations and the portions of this preamble in which they are discussed.

TABLE 4—SBREFA PANEL RECOMMENDATIONS AND OSHA RESPONSES

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA provide full documentation for how it estimated the number of affected small entities and all other calculations and estimates provided in the PIRFA.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA reexamine its estimate of crane use in home building, the coverage of crane trucks used for loading and unloading, and the estimates of the number of jobs per crane. Changes in these estimates should be incorporated into the estimates of costs and economic impacts.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA review its estimates for the direct costs of operator certification and seek comment on these cost estimates.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA carefully examine certain types of impact that could result from an operator certification requirement, including reports of substantial increases in the wages of operators; the possibility of increased market power for firms renting out cranes; and loss of jobs for existing operators due to language, literacy, or knowledge problems; and seek comment on these types of impacts.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA consider studying the impacts of the implementation of operator certification in California.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.

TABLE 4—SBREFA PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA reexamine its estimates for the amount of time required to assess ground conditions, the number of persons involved in the assessment, and the amount of coordination involved; clarify the extent to which such assessments are currently being conducted and what OSHA estimates as new costs for this rule represent; and seek comments on OSHA's cost estimates.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA carefully review the documentation requirements of the standard, including documentation that employers may consider it prudent to maintain; estimate the costs of such requirements; seek ways of minimizing these costs consistent with the goals of the OSH Act; and solicit comment on these costs and ways of minimizing these costs.	The Agency describes the documentation requirements, along with cost estimates, in the section of this Preamble entitled ''OMB Review Under the Paperwork Reduction Act of 1995.''
The Panel recommends that OSHA examine whether the inspection requirements of the proposed rule require procedures not normally conducted currently, such as lowering and fully extending the boom before the crane can be used and removing non-hinged inspection plates during the shift inspection, estimate the costs of any such requirements, and seek comment on these issues.	As explained in the discussion of § 1926.1412, *Inspections*, OSHA's current standard at 29 CFR 1926.550 requires inspections each time the equipment is used as well as thorough annual inspections. In addition, national consensus standards that are incorporated by reference include additional inspection requirements. This proposal would list the inspection requirements in one place rather than rely on incorporated consensus standards. OSHA does not believe this proposed standard imposes significant new requirements for inspections. Section 1926.1413(a) explicitly says that booming down is not required for shift (and therefore monthly) inspections. Similarly, OSHA does not believe that inspection of any of those items would require removal of non-hinged inspection plates. In the discussion of proposed § 1926.1412, OSHA requests public comment on these points.
The Panel recommends that OSHA consider the costs of meeting the requirements for original load charts and full manuals, and solicit comments on such costs.	Currently, Subpart N, at 29 CFR 1926.550(a)(2), requires load charts, so that is not a new cost. Subpart N does not require manuals. OSHA believes that most crane owners and operators have and maintain crane manuals, which contain the load charts and other critical technical information about crane operations and maintenance. The Agency believes that the cost of obtaining a copy of a manual should be modest and solicits comment on how many owners or operators do not have full manuals for their cranes or derricks.
The Panel recommends that OSHA provide full documentation for its analysis of the benefits the proposed rule is expected to produce and assure that the benefits analysis is reproducible by others.	See the Preliminary Economic Analysis (PEA), in section V.B. of this **Federal Register** notice.
The Panel recommends that OSHA consider and solicit public comment on whether the scope language should be clarified to explicitly state whether forklifts that are modified to perform tasks similar to equipment (cranes and derricks) modified in that manner would be covered.	OSHA addresses this recommendation in the discussion of proposed § 1926.1400(c)(8) and solicits public comment on the issue.
The Panel recommends that there be a full explanation in the preamble of how responsibility for ensuring adequate ground conditions is shared between the controlling entity, and the employer of the individual supervising assembly/disassembly and/or the operator.	OSHA explains in the discussion of proposed § 1926.1402(e) how the various employers, including the controlling entity, the employer whose employees operate the equipment, and the employer of the A/D supervisor share responsibility for ensuring adequate ground conditions.
The Panel recommends that OSHA restate the applicable corrective action provisions (which are set forth in the shift inspection) in the monthly inspection section.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(e) and solicits public comment on the issue.
The Panel recommends that OSHA solicit public comment on whether, and under what circumstances, booming down should be specifically excluded as a part of the shift inspection, and whether the removal of non-hinged inspection plates should be required during the shift inspection.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(d) and solicits public comment on the issues raised in the recommendation.
The Panel recommends that OSHA solicit public comment on whether to include an exception for transportation systems in proposed § 1926.1412(a), which requires an inspection of equipment that has had modifications or additions that affect its safe operation, and, if so, what the appropriate terminology for such an exception would be.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(a) and solicits public comment on the issues raised in the recommendation.
The Panel recommends that OSHA explain in the preamble that the shift inspection does not need to be completed prior to each shift but may be completed during the shift.	In the explanation of § 1926.1412(d)(1) of the proposed rule, OSHA explains that the shift inspection may be completed during the shift.
The Panel recommends that OSHA solicit public comment about whether it is necessary to clarify the requirement of proposed § 1926.1412(d)(1)(xi) that the equipment be inspected for ''level position''.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(d)(1)(xi) and requests public comment on the issues raised in the recommendation.

TABLE 4—SBREFA PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA solicit comment on whether § 1926.1412(f)(2)(xii)(D) should be changed to require that pressure be inspected ''at the end of the line,'' as distinguished from ''at each and every line,'' and if so, what the best terminology would be to meet this purpose. (An SER indicated that proposed paragraph (f)(2)(xiv)(D) of § 1926.1412 should be modified to ''checking pressure setting,'' in part to avoid having to check the pressure at ''each and every line'' as opposed to ''at the end of the line.'').	There is no proposed requirement to check the pressure ''at each and every line.'' The provision simply states that relief valves should be checked for failure to reach correct pressure. If this can be done at one point for the entire system, then that would satisfy the requirement.
The Panel recommends that OSHA solicit public comment on whether proposed paragraph (f)(2)(xx) of § 1926.1412 should be deleted because an SER believes that it is not always appropriate to retain originally equipped steps and ladders, such as in instances where they are replaced with ''attaching dollies.''.	Proposed § 1926.1412(f)(2)(xx) does not require the corrective action to which the SER refers. If an inspection under proposed § 1926.1412(f) reveals a deficiency, a qualified person must determine whether that deficiency is a safety hazard requiring immediate correction. If the inspection reveals that original equipment, such as stairs and ladders, have been replaced with something equally safe, there would be no safety hazard and no requirement for corrective action.
The Panel recommends that OSHA solicit public comment on the extent of documentation of monthly and annual/comprehensive inspections the rule should require.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(f) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on whether the provision for monthly inspections should, like the provision for annual inspections, specify who must keep the documentation associated with monthly inspections.	OSHA addresses this recommendation in the discussion of proposed § 1926.1412(e) and requests public comment on the issue.
The Panel recommends that OSHA consider ways to account for the possibility that there may sometimes be an extended delay in obtaining the part number for an operational aid for older equipment and solicit public comment on the extent to which this is a problem.	OSHA addresses this recommendation in the discussion of proposed § 1926.1416(d) and solicits public comment on the issue.
The Panel recommends that the provision on fall protection (proposed § 1926.1423) be proposed as written and that OSHA explain in the preamble how and why the Committee arrived at this provision.	In the discussion of proposed § 1926.1423, OSHA explains the Committee's rationale underlying the proposed section.
The Panel recommends that OSHA consider the potential advantages of and solicit public comment on adding provisions to proposed § 1926.1427 that would allow an operator to be certified on a particular model of crane; allow tests to be administered by an accredited educational institution; and allow employers to use manuals that have been re-written to accommodate the literacy level and English proficiency of operators.	OSHA addresses these recommendations in the discussion of proposed § 1926.1427 and requests public comment on the issues raised by the Panel.
The Panel recommends that OSHA clarify in the preamble how the proposed rule addresses an SER's concern that his crane operator would not be able to pass a written qualification/certification exam because the operator has difficulty in taking written exams.	The issue is discussed in the explanation of the proposed rule for § 1926.1427(h).
The Panel recommends soliciting public comment on whether the phrase ''equipment capacity and type'' in proposed § 1926.1427(b)(1)(ii)(B) needs clarification, suggestions on how to accomplish this, and whether the categories represented in Figures 1 through 10 contained in ASME B30.5–2000 (i.e., commercial truck-mounted crane—telescoping boom; commercial truck-mounted crane—non-telescoping boom; crawler crane; crawler crane—telescoping boom; locomotive crane; wheel mounted crane (multiple control station); wheel mounted crane—telescoping boom (multiple control station); wheel mounted crane (single control station); wheel mounted crane—telescoping boom (single control station)) should be used.	OSHA addresses this recommendation in the discussion of proposed § 1926.1427(b)(1)(ii)(B) and requests public comment on the issue.
The Panel recommends that OSHA ask for public comment on whether the rule needs to state more clearly that proposed § 1926.1427(j)(1)(i) requires more limited training for operators of smaller capacity equipment used in less complex operations as compared with operators of higher capacity, more complex equipment used in more complex situations.	OSHA addresses this recommendation in the discussion of proposed § 1926.1430(c) and requests public comment on the issue.
The Panel recommends that OSHA consider and ask for public comment on whether a more limited training program would be appropriate for operations based on the capacity and type of equipment and nature of operations.	OSHA addresses this recommendation in the discussion of proposed § 1926.1430(c) and requests public comment on the issue.
The Panel recommends that OSHA consider and ask for public comment as to whether the supervisor responsible for oversight for an operator in the pre-qualification period (§ 1926.1427(f)) should have additional training beyond that required in the C–DAC document at proposed § 1926.1427(f)(2)(iii)(B).	OSHA addresses this recommendation in the discussion of proposed § 1926.1430(c) and requests public comment on the issue.

TABLE 4—SBREFA PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends OSHA solicit comment on whether there are qualified persons in the field with the necessary expertise to assess how the rated capacity for land cranes and derricks used on barges and other flotation devices needs to be modified as required by proposed § 1926.1437(n)(2).	OSHA addresses these recommendations in the discussion of proposed § 1926.1437(n)(2) and requests public comment on the issues.
The Panel also recommends that OSHA solicit comment on whether it is necessary, from a safety standpoint, to apply this provision to cranes used only for duty cycle work, and if so, why that is the case, and how ''duty cycle work'' should be defined.	
The Panel recommends that OSHA consider and ask for comment on whether it would be appropriate to exempt from the rule small side boom cranes incapable of lifting above the height of a truck bed and with a capacity of not more than 6,000 pounds.	OSHA addresses this recommendation in the discussion of proposed paragraph § 1926.1440(a) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on how the proposed rule could be simplified (without creating ambiguities) and made easier to understand. (Several SERs believed that the C–DAC document was so long and complex that small businesses would have difficulty understanding it and complying with it.).	The length and comprehensiveness of the standard is an issue for this rulemaking. OSHA requests comment on how and whether the proposal can be shortened or simplified—made easier to understand—and the effect of that on addressing construction hazards.
The Panel recommends that OSHA consider outlining the inspection requirements in spreadsheet form in an Appendix or developing some other means to help employers understand what inspections are needed and when they must be done.	OSHA will consider developing such an aid as a separate guidance document.
The Panel recommends that OSHA consider whether use of the words ''determine'' and ''demonstrate'' would mandate that the employer keep records of such determinations and if records would be required to make such demonstrations.	Some SERs requested clarification as to when documentation was required, believing that the document implicitly requires documentation when it states that the employer must ''determine'' or ''demonstrate'' certain things. OSHA notes that it cannot cite an employer for failing to have documentation not explicitly called for in a standard. See also the discussion under proposed § 1926.1402(e).
The Panel recommends soliciting public comment on whether the word ''days'' as used in §§ 1926.1416(d) and 1926.1416(e) should be clarified to mean calendar days or business days.	OSHA addresses this recommendation in the discussion of proposed § 1926.1416(d) and requests public comment on the issue.
The Panel recommends that OSHA carefully discuss what is included and excluded from the scope of this standard.	OSHA discusses in detail the types of machinery that are included under this proposed standard and those that are excluded in the explanation of § 1926.1400.
The Panel recommends that OSHA gather data and analyze the effects of already existing certification requirements.	OSHA has obtained and evaluated a study by the Construction Safety Association of Ontario showing that Ontario's certification requirement has led to a substantial decrease in crane-related fatalities there.
The Panel recommends that OSHA consider excluding and soliciting comment on whether equipment used solely to deliver materials to a construction site by placing/stacking the materials on the ground should be explicitly excluded from the proposed standard's scope.	OSHA addresses this recommendation in the discussion of proposed § 1926.1400(c) and requests public comment on the issue.
The Panel recommends that OSHA should consider the information and range of opinions that were presented by the SERs on the issue of operator qualification/certification when analyzing the public comments on this issue.	The information and opinions submitted by the SERs are part of the record for this rulemaking, and OSHA will consider them along with the other public comments on the proposed rule.
The Panel recommends that OSHA consider and solicit public comment on expanding the levels of certification so as to allow an operator to be certified on a specific brand's model of crane.	OSHA addresses this recommendation in the discussion of proposed § 1926.1427(j)(1) and requests public comment on the issue.
The Panel recommends that OSHA consider and solicit public comment on expanding the levels of operator qualification/certification to allow an operator to be certified for a specific, limited type of circumstance. Such a circumstance would be defined by a set of parameters that, taken together, would describe an operation characterized by simplicity and relatively low risk. The Agency should consider and solicit comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced.	OSHA addresses this recommendation in the discussion of proposed § 1926.1427(j)(1) and requests public comment on the issue.
The Panel recommends that OSHA consider and solicit public comment on allowing the written and practical tests described in Option (1) of § 1926.1427(b) to be administered by an accredited educational institution.	OSHA addresses this recommendation in the discussion of § 1926.1427(b)(3) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on making it clear that: (1) an employer is permitted to equip its cranes with manuals re-written in a way that would allow an operator with a low literacy level to understand the material (such as substituting some text with pictures and illustrations), and (2) making it clear that, when the cranes are equipped with such re-written manuals and materials, the ''manuals'' and ''materials'' referred to in these literacy provisions would be the re-written manuals.	OSHA addresses this recommendation in the discussion of proposed § 1926.1427(h)(1) and requests public comment on the issues.

TABLE 4—SBREFA PANEL RECOMMENDATIONS AND OSHA RESPONSES—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA explain in a Small Business Compliance Guide that the certification/qualification test does not need to be administered in English but can be administered in a language that the candidate can read; and that while the employee would also need to have a sufficient level of literacy to read and understand the relevant information in the equipment manual, that requirement would be satisfied if the material is written in a language that the employee can read and understand.	OSHA will issue a Small Business Compliance Guide after a final rule is issued and will explain these points in the Guide.

IV. Summary and Explanation of the Proposed Standard

The following discussion summarizes and explains each provision in the proposal and the substantive differences between the proposal and OSHA's current standard for cranes and derricks at 29 CFR 1926.550, which is located in Subpart N of OSHA's standards for construction work. In the discussion, OSHA explains corrections and clarifications it has made to the language in the C–DAC Document. The Agency also identifies other areas in the C–DAC Document it believes could benefit from modifications to the C–DAC language and asks for public comment on the need for such changes and, in some instances, the appropriateness of particular clarifying language.

Section 1400 Scope

Paragraphs (a) through (d) of proposed § 1926.1400 set forth the scope of the proposed rule. Proposed paragraphs (a) through (c) describe, respectively, what equipment is included, the application of the standard to equipment used with attachments, and specific exclusions.

Combining a Functional Description With a List of Covered Equipment

Proposed paragraph (a) provides a functional definition of the covered equipment as well as a non-exclusive list of what is covered. C–DAC considered choosing between these approaches, but ultimately decided to use a combination of the two. The Committee also agreed that equipment listed in this proposed paragraph should be defined; these definitions, among others, are set forth in § 1926.1401, *Definitions*. It should be noted that the scope of some of the listed equipment is further delineated in the section of the standard that specifically relates to that equipment (for example, § 1926.1436, *Derricks* and § 1926.1438, *Overhead & Gantry Cranes*). OSHA believes that this format strikes an appropriate balance between clarity and avoiding unintended limitations that might eliminate new and/or other existing technology that is similar to the listed examples.

The decision to propose a functional definition with a non-exclusive list of covered equipment followed considerable discussion. The Committee settled on a definition that focuses on the equipment's elemental functions—hoisting, lowering, and horizontally moving a suspended load. The goal of this definition is to cover both existing and new technologies that share those same functions. Committee members rejected using just a list of equipment because: (1) Even the most comprehensive list might inadvertently omit existing technologies, and (2) they wanted to provide leeway in the scope for applying the new standard to future technologies.

On the other hand, C–DAC decided against a functional definition alone because that might include equipment that the standard was not designed to address (for example, equipment that poses a different set of hazards than those addressed by the standard). The list provides a context in which to apply the functional definition. The Agency believes that this hybrid approach addresses C–DAC's concerns.

Dedicated Pile Drivers

The Committee quickly agreed to include most of the items on the non-exclusive list. However, several items were included only after considerable debate. For example, C–DAC's decision to include dedicated pile drivers followed much discussion, including a panel presentation. The panel was comprised of a manufacturer, represented by Ahti Knopp and Pentti Heinonen, President, of Junttan, as well as a user, represented by Pat Karinen and Dan Kuhs, of Pile Drivers Local Union 34 and 56. The focus of the discussion was whether to include machinery that fell outside what the industry traditionally considered to be a crane or derrick covered by existing Subpart N.

Although the manufacturer's representatives stated that they did not consider their equipment to be cranes, they ultimately supported the inclusion of dedicated pile drivers in the proposed standard for several reasons. Specifically, they emphasized certain mechanical similarities and the need for timely regulation. However, they requested that the standard be adjusted to address the equipment's unique characteristics.

The users on the panel, citing the similarities in functional capabilities and hazards between dedicated pile drivers and cranes, also supported their inclusion. They were particularly concerned about the need to establish required inspections for dedicated pile drivers in view of the stress placed on this type of equipment.

The Committee acknowledged the dilemma it faced in establishing the parameters of the proposed standard—including machines not typically described as cranes versus omitting machines similar in hazards and construction—but ultimately decided to include dedicated pile drivers. Prior to that decision, however, several members voiced concerns.

For example, some members were worried that including these machines might encourage their ''use as cranes,'' that is, primarily for hoisting objects. The manufacturer representatives pointed out that while these machines are designed to hoist within a very limited range and capacity, it is inappropriate to use them for hoisting beyond those restricted limits. Others were concerned that some requirements in the proposed standard might be a ''bad fit'' for these machines. In response to such concerns, the Committee included dedicated pile drivers but tailored the requirements of the standard to take into account the specific characteristics of such equipment. As a result, proposed § 1439, *Dedicated pile drivers*, provides that most provisions of the standard apply to dedicated pile drivers but excludes some that the Committee believed were inappropriate for such equipment.

OSHA believes that this approach is appropriate to propose because it

provides a workable approach that addresses the unique aspects of the equipment.

Multi-purpose Machines

The concept of ''multi-purpose machines'' was discussed in depth. This term, as used in the proposed standard, refers to a relatively new type of equipment that is designed to be configured in a variety of ways to perform a variety of different types of functions. For example, during the discussion, C–DAC members noted that this type of machinery in one configuration works as an aerial forklift, and in another configuration works as a crane.

The Agency believes that the Committee developed an appropriate approach to coverage of this equipment. Specifically, the Committee defined this category of equipment in § 1926.1401, *Definitions*, to cover only machinery ''designed to be configured in various ways'' and has included it within the proposed scope of the standard only when configured ''to hoist (by means of a winch or hook) and horizontally move a suspended load.'' In short, a multi-purpose machine would only be covered by the proposed standard when configured as a crane.

For example, a machine might be configured variously as a rough-terrain type forklift, work platform, or as a crane. Such a machine would only be covered by the proposed standard when configured as a crane. Conversely, a traditional rough-terrain forklift is originally designed solely as a forklift. Even if an employer suspends a load from its fork, it would still be configured (and can only be configured) as a rough terrain forklift. Such forklifts are not multi-purpose machines and would specifically be excluded from the standard's coverage by proposed § 1926.1400(c)(8).

For the same reason, aerial lifts that may have an incidental capacity to hoist (by means of suspending loads from the boom) are not multi-purpose machines. Even aerial lifts that are equipped with a low capacity hoisting device (usually located at basket level) are not ''designed to be configured in various ways'' and, as such, would not fall within the definition of a multi-purpose machine. Such aerial lifts are designed to be configured in only one way, that is, as an aerial lift. In fact, the provision that specifically excludes aerial lifts, proposed § 1926.1400(c)(5), emphasizes that point in its description of aerial lifts by saying ''[e]quipment originally designed as vehicle-mounted aerial devices (for lifting personnel) * * *.''

The Agency agrees with the Committee that it is appropriate to propose covering multi-purpose equipment in this proposed standard (when configured as a crane) to protect employees from the types of hazards that are associated with the other equipment included in the Scope.

Other Listed Equipment

Some members were concerned that proposing to include industrial cranes on the list would result in such cranes being covered by this proposed standard even when used in a factory/general industry setting. That is not the case—this proposed standard applies only to employers engaged in construction, and therefore would apply to such equipment only when used in construction.

The Committee decided to cover side-boom cranes, which are included in the current Subpart N.[1] Committee members noted that side-boom cranes (defined in proposed § 1926.1401, *Definitions*) share characteristics with cranes. One member also stated that the American Pipeline Association supports their inclusion.

Additional machinery that is proposed to be covered that is either not currently covered or not specifically addressed by Subpart N include cranes on a monorail, luffing tower cranes, straddle cranes, pedestal cranes and shearleg derricks (see § 1926.1436, *Derricks*). Each of these meets the functional definition in the proposed standard and presents the same types of hazards.

Attachments

Proposed § 1926.1400(b) would establish that equipment otherwise covered by proposed § 1926.1400(a) would remain within the scope of the proposed standard when used with attachments that are either ''crane-attached or suspended.'' As defined in § 1926.1401, an ''attachment'' is ''any device that expands the range of tasks that can be done by the equipment. Examples include, but are not limited to: an auger, drill, magnet, pile-driver, and boom-attached personnel platform.'' This definition reflects an inclusive approach with respect to the use of attachments.

The Committee recognized that equipment using these attachments retain their fundamental nature as cranes, including most of the hazards typically associated with crane use. For example, hazards associated with ground conditions, assembly/disassembly and operation near power lines, as well as the importance of proper signaling, work area control, and operator knowledge and skill, remain the same while an attachment is in use. Consequently, the proposed standard as a whole is well suited to the use of this equipment with attachments.

The ACCSH December 2002 work group document provided C–DAC with an initial list of possible attachments (hooks, magnets, grapples, clamshell buckets, orange peel buckets) to be covered by the new rule. (OSHA–2007–0066–0020). Committee members suggested the remaining examples.

Whether the proposed rule should apply to a personnel platform that is pinned to the boom was the subject of considerable discussion. Such a personnel platform was the subject of a presentation to C–DAC by Dan Wolff of the National Crane Corporation. Currently, Subpart N explicitly addresses suspended personnel platforms but does not specifically mention boom-attached personnel platforms. The Committee confirmed in its discussions that installing a boom-attached personnel platform does not change the nature of the equipment to the type of aerial lift that is excluded by this proposed standard (see proposed § 1926.1400(c)(5)). The Committee was concerned that a failure to specifically address this type of platform could result in confusion as to whether its use would be governed by this standard or by the aerial lift standard. C–DAC concluded that it was appropriate to explicitly include boom-attached personnel platforms in this standard.

Committee members expressed some concern as to whether the use of such an attachment involves additional hazards not addressed in this proposed standard. The Agency is asking for public comment on whether there are additional requirements that should apply when using a personnel platform that is attached directly to the boom.

Exclusions

Proposed paragraph (c) lists machinery that is specifically excluded from the scope of the proposed rule. The Committee referenced a list in the ACCSH December 2002 work group document as a starting point for discussion (OSHA–2007–0066–0020). As a result of that discussion, modifications to that list were made. As discussed below, the Agency believes that the list in the proposed standard, in combination with proposed paragraphs (a) and (b), sets appropriate limits to the proposed standard's scope.

[1] 29 CFR 1926.550(a)(18) of Subpart N requires sideboom cranes mounted on wheel or crawler tractors to meet the requirements of SAE J743a–1964.

Proposed paragraph (c)(1) states that machinery otherwise included under proposed § 1926.1400(a) but ''converted or adapted for non-hoisting use'' is excluded. Power shovels, excavators and concrete pumps are listed as nonexclusive examples of such ''conversions/adaptations'' or modified machinery.

The view of the Committee was that, in most cases, once machinery that would otherwise be included under proposed § 1926.1400(a) is converted or adapted for non-hoisting use, the configuration and nature of operation of the machinery is generally changed to the point where many of the proposed provisions would not be directly relevant to the hazards presented. In contrast, as discussed above, C–DAC believed that equipment used with ''crane-attached or suspended'' attachments typically retain many of their original characteristics and the proposed provisions remain relevant.

The Agency recognizes that there may be some instances where covered equipment used with an attachment is similar in purpose to machinery converted or adapted for non-hoisting use. For example, a crane with a drilling attachment will serve the same function as a machine converted to a dedicated drilling rig. Nonetheless, the Agency believes that the approach recommended by C–DAC and reflected in the proposed rule sets an appropriate dividing line between covered and excluded machinery. The crane's hoisting mechanisms are mostly still present while the attachment is in use, and the crane's hoisting capability will likely be called upon fully once the attachment is removed. Having the machine move in and out of coverage of the rule as attachments are put on and taken off would create significant confusion. Furthermore, most of the operational characteristics and hazards of the equipment remain the same while the attachment is in use. The Agency believes that, overall, this represents a sensible approach to setting the breadth and limits of the proposed standard.

Proposed paragraph (c)(2) contains a specific list of excluded material handling machinery. This provision reflects C–DAC's decision to name specific material handling machinery that is excluded rather than simply reference ''material handling machinery'' as a generic basis for exclusion. The Committee indicated that a generic exclusion based upon material handling would be too broad. For example, a crane, when equipped with a clamshell bucket, is used for material handling, and C–DAC believed such equipment should be covered by the proposed standard.

C–DAC also agreed to a Committee member's suggestion of specifying that the listed machinery is excluded even when used with rigging to lift suspended loads. C–DAC acknowledged that some of the hazards of using this material handling machinery in this way are similar to the hazards associated with equipment covered by the proposed rule. However, the Committee also believed the differences between the covered equipment and the material handling machinery is such that one standard could not be readily designed to suit both. It should be noted that another construction standard, 29 CFR 1926.602 in subpart O—Motor Vehicles, Mechanized Equipment, and Marine Operations, covers material handling equipment.

Proposed paragraph (c)(3) excludes automotive wreckers and tow trucks ''when used to clear wrecks and haul vehicles.'' A Committee member, citing C–DAC's focus on construction activities, questioned the need for this provision. In response, another member explained that some of these vehicles have substantial hoisting capacity. The implication of that observation is that these machines have the capability of hoisting construction material and so some construction employers may use them for that purpose. Consequently, C–DAC decided to cover them generally, but to exclude them when used for clearing wrecks and hauling vehicles. The exclusion is based on the Committee's view that, even if done as a construction activity (which would be very rare), clearing wrecks and hauling vehicles is a highly repetitious, predictable type of operation that is sufficiently distinct from typical construction crane and derrick use to justify an exclusion from the proposed rule. It should be noted that ''cranes designed for . . . automobile wreck clearance'' are excluded from the scope of ASME B30.5–2004.

Under proposed paragraph (c)(4), service trucks with mobile lifting devices for use in the power line and electric service industries, such as digger derricks, are excluded when engaged in certain listed activities for those industries. This machinery is currently covered by Subpart N, with the exception of certain provisions, by virtue of § 1926.952(c). We note that ASME B30.5–2004 excludes digger derricks and ''cranes manufactured specifically for, or when used for, energized electrical line service'' from the scope of that industry consensus standard.

C–DAC ultimately adopted this exclusion because of the narrow, specialized range of activities and circumstances in which such trucks are used. The Agency is asking for public comment as to whether such an exclusion is appropriate and whether safety problems would be created by excluding them from coverage under the proposed standard.

Proposed paragraph (c)(5) specifically excludes machinery originally designed as vehicle mounted aerial lifts and self-propelled elevating work platforms. The language of this provision reflects C–DAC's intent to differentiate between equipment with an attachment such as a personnel platform pinned to the boom, which is within the scope of the proposed rule, and machinery originally designed to be configured only as an aerial lift, which is excluded. In excluding this machinery, the Committee discussed the fact that some aerial lifts have a small capacity auxiliary winch. C–DAC decided not to include such machinery. The use of such winches is only incidental to an aerial lift's primary function. Also, another standard, § 1926.453, addresses aerial lifts.

Proposed paragraph (c)(6) excludes telescopic/hydraulic gantry systems. This machinery is also not currently covered by Subpart N or any ANSI/ASME standards. C–DAC made the decision to exclude this machinery after extensive discussion between members and a presentation by Mr. Kevin Johnston of J&R Engineering Co., Inc.

The decision was based upon several factors. One factor was the difference in design between this machinery and other equipment covered by the proposed rule. Telescopic/hydraulic gantry systems consist (in their most basic configuration) of a header beam that is supported on each side by hydraulic jacks. The load is suspended by rigging from the header beam. The load is raised and lowered by raising and lowering the jacks.

This type of design involves hazards that are unique to this type of equipment. For example, keeping the jacks plumb and closely coordinating their movements is very important. Mr. Johnston noted that because of these differences, many of the requirements in the proposed standard would not be workable or needed. Also, hazards unique to this type of machinery would not be addressed.

C–DAC was concerned that a failure to include this machinery in the proposed rule could result in there being no applicable OSHA requirements. The Committee was particularly concerned about this

because there was no industry consensus standard for telescopic/hydraulic gantry systems. Once the Specialized Carriers & Rigging Association (SC&RA) indicated its willingness to draft and complete a voluntary consensus standard for this machinery within a short time frame, the Committee was satisfied that the best approach was to exclude telescopic/hydraulic gantry systems from the proposed rule.

The Agency notes that, in the fall of 2004, SC&RA did in fact complete a voluntary consensus standard for telescopic/hydraulic gantry systems. (OSHA–2007–0066–0027). Accordingly, the Agency agrees with C–DAC that, under these circumstances, these systems should be excluded from the proposed rule.

Under proposed paragraph (c)(7), stacker cranes are excluded. This machinery, covered by ASME B30.18, was similarly excluded in the ACCSH draft. The Agency believes that these cranes are rarely used in construction, and that their configuration is too unlike other machinery covered by this proposed standard to warrant inclusion.

Proposed paragraph (c)(8) excludes powered industrial trucks (forklifts). As noted during the C–DAC meetings, this machinery is already covered by § 1926.602 of Subpart O—Motor Vehicles, Mechanized Equipment, and Marine Operations. The Agency believes that this type of machinery is mostly used in a manner that does not involve suspended loads and would often require different responses to the hazards presented than provided in this proposed standard. Therefore, the Agency agrees with C–DAC that this machinery should be excluded from the proposed standard.

During the SBREFA process, one Small Entity Representative stated that the C–DAC document does not contain a provision explicitly excluding coverage of machines that are originally designed to function primarily as forklifts but are modified to perform tasks similar to cranes and derricks that are covered under the standard. The Panel recommended that OSHA consider and solicit public comment on whether the scope language should be modified to explicitly state whether forklifts modified in such a manner are covered. OSHA welcomes comment on this issue.

Proposed paragraph (c)(9) excludes mechanic's trucks with hoisting devices when used in activities related to equipment maintenance and repair. The treatment of this machinery is similar to that of automotive wreckers and tow trucks. This exclusion reflects the Committee's conclusion that mechanic's trucks, when used in these support activities, have the capability of hoisting construction material and so some construction employers may use them for that purpose. Consequently, C–DAC decided to cover them generally, but to exclude them when used for equipment maintenance and repair activities. The exclusion is based on the Committee's view that, even if done as a construction activity (which would be very rare), the maintenance and repair activities are highly repetitious, predictable types of operations that are sufficiently distinct from typical construction crane and derrick use to justify an exclusion from the proposed rule.

In proposed paragraph (c)(10), machinery that hoists by using a come-a-long or chainfall is excluded. This exclusion reflects currently industry practice as exemplified by OSHA's steel erection standard. The definition of ''hoisting equipment'' in OSHA's steel erection standard, § 1926.751, defines ''come-a-long'' as ''a mechanical device typically consisting of a chain or cable attached at each end that is used to facilitate movement of materials through leverage'' and notes that such a device is not considered ''hoisting equipment.'' § 1926.1401 of this proposed standard sets forth the same definition of ''come-a-long'' as OSHA's steel erection standard. Committee members decided that a specific exclusion was needed because these devices, that members term ''tools of the trade,'' are not all human-powered and thus might otherwise fall within the scope of the proposed rule. C–DAC was of the view that these tools are unlike the equipment covered by the proposed rule in terms of both scale and the set of hazards associated with their use.

Proposed paragraph (c)(11) excludes dedicated drilling rigs. This exclusion was agreed upon after substantial discussion among Committee members. It should be noted that neither Subpart N nor other OSHA construction standards currently cover dedicated drilling rigs specifically.

Much of the specific information as to the nature of dedicated drilling rigs and the concerns of drill rig industry stakeholders was ascertained during a panel discussion chaired by members of the International Association of Foundation Drilling. Panel members emphasized that, in their view, a dedicated drilling rig is not a crane, but rather is designed to function as excavating equipment.

In support of that position, the panelists noted that, unlike cranes, this machinery lacks load charts and has only limited horizontal movement, radius, and hoisting capabilities. They also stated that although many are equipped with an auxiliary service winch, the primary use of this machinery is not for hoisting. Panelists suggested that accidents associated with the use of dedicated drilling rigs tend to result from improper use (that is, attempting to use them for more extensive hoisting work, beyond the narrow limits set by manufacturer specifications). Finally, the speakers emphasized that while they did not believe this machinery should be regulated as cranes under the proposed rule, if they were to be regulated, they should be under a more closely related standard, such as the excavation standard.

Several additional concerns were examined in the course of the discussion. Some members suggested that dedicated pile drivers and dedicated drilling rigs be treated in the same manner—to either cover or exclude both. Others responded that the disparate treatment is justified by the fact that dedicated pile drivers are frequently used on barges, which involves additional hazards, and the more widespread use of that machine's hoisting function. Some members expressed concern that the inclusion of dedicated drilling rigs under the proposed rule would encourage their misuse as cranes.

The Committee decided that the arguments for excluding dedicated drilling rigs outweighed those for including them. The Agency agrees; while there are certain similarities to dedicated pile drivers in that both have an auxiliary hoisting capability, the dedicated drilling rigs are not typically used on barges and there seems to be less abuse of their very limited hoisting capabilities. Specific public comment is requested on these issues.

Proposed paragraph (c)(12) contains an exclusion for gin poles used during the erection of communication towers. It is the Agency's understanding that the erection of communication towers is a specialized subset of the construction industry, and involves issues that go beyond those C–DAC was designed to address. OSHA is therefore not proposing to include gin poles used for this purpose in the proposed rule.

Proposed paragraph (c)(13) excludes tree trimming and tree removal work from the scope of the proposed rule. In correspondence to the Committee (OSHA S030–2006–0663–0534), the Tree Care Industry Association had requested that their work be excluded from the proposed rule. The Committee noted that the vast majority of the tree care industry's work does not take place

in construction and agreed that such work should be excluded. The Agency believes that, since tree trimming and tree removal work so rarely falls within construction, it is appropriate to exclude tree trimming and removal from the proposed rule.

Proposed paragraph (c)(14) excludes anchor handling with a vessel or barge using an affixed A-frame. C–DAC decided to exclude this activity after the Cranes on Barges Work Group found that there would be problems tailoring the general requirements of the C–DAC draft to address the use of these specialized devices.

Proposed paragraph (c)(15), the final item listed, excludes roustabouts. The Committee was of the view that the proposed rule is not suited to addressing these devices, which are moved about by hand.

The SBREFA Panel recommended that OSHA consider, and solicit comment on, whether equipment used solely to deliver materials to a construction site by placing/stacking the materials on the ground should be explicitly excluded from the scope of the rule. OSHA requests public comment on this issue.

Note: OSHA replaced the word ''Equipment'' used in proposed §§ 1926.1400(c)(1), (c)(5) and (c)(10) of the C–DAC Consensus Document with the word ''Machinery.'' This was done because ''equipment'' is a defined term in the proposed standard that refers to covered equipment and, thus, cannot be used to mean excluded machinery.

Unspecified Equipment

Proposed paragraph (d) is included to clarify that all provisions of the proposed rule apply to covered equipment unless otherwise noted. This paragraph was included because there are some types of equipment for which only limited requirements apply, and others where there are special requirements that supplement, rather than displace, the other requirements in the proposed rule. To avoid confusion, this proposed paragraph establishes that all parts of the proposed rule apply unless a provision specifically identifies other parts of the proposed rule as inapplicable, or identifies the only provisions of the standard that are applicable.

Controlling Entities

Proposed paragraph (e) provides that the duties of controlling entities [2] are not limited to the duties specified in §§ 1926.1402(c), (e) and 1926.1424(b). This was included to clarify that the controlling entity duties specified in the proposed rule are intended to supplement, rather than displace, controlling entity duties under OSHA's multi-employer policy.

The Agency has clear authority to include in this proposed rule the provisions in proposed §§ 1926.1402(c), (e) and 1926.1424(b), which would apply specific requirements to controlling entities. First, the plain language of the OSH Act and its underlying purpose support OSHA's authority to place requirements on employers that are necessary to protect the employees of others. Second, congressional action subsequent to passage of the OSH Act recognizes this authority. Third, OSHA has consistently interpreted its statutory authority as permitting it to impose obligations on employers that extend beyond their own employees, as evidenced by the numerous standards, including several construction standards, that OSHA has promulgated with multi-employer provisions. Finally, OSHA's authority to place obligations on employers that reach beyond an employer's own employees has been upheld by numerous courts of appeals and the Occupational Safety and Health Review Commission (OSHRC).

The purpose of the Act is to assure so far as possible safe and healthful working conditions for every working man and women in the nation. 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary to establish mandatory occupational safety and health standards. The Act broadly defines an OSHA standard as a rule that ''requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employments and places of employment.'' 29 U.S.C. 652(8). See *Building and Constr. Trades Div., AFL-CIO* v. *Brock,* 838 F.2d 1258, 1278 (DC Cir. 1988). OSHA standards must prescribe measures that are appropriate to protect ''places of employment''; nothing in the statutory language suggests that OSHA may do so only by regulating an employer's interaction with its own employees. On the contrary, the Act's broad language gives OSHA almost ''unlimited discretion'' to devise means to reach the statutory goal. See *United Steelworkers* v. *Marshall,* 647 F.2d 1189, 1230 (DC Cir. 1980), cert. denied, 453 U.S. 913 (1981).

Similarly, Section 5(a)(2) provides that each employer ''shall comply with occupational safety and health standards promulgated under this Act.'' [3] Nothing in this language suggests that compliance is required only when necessary to protect the employers' own employees, or that the employer is entitled to endanger other employers' employees at the worksite. Finally, Section 6(b)(7) of the Act authorizes the Secretary to ''prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed.'' 29 U.S.C. 655(b)(7). Again, this authority is not limited to labels that would warn the employer's own employees of the hazard. Given the distribution of potentially hazardous products in commerce, employees are predictably exposed to hazardous conditions created by other employers. Requiring employers to include hazard information needed by downstream employees is a necessary and appropriate means to ensure that the employees are apprised of all hazards to which they are exposed.

In short, the statute focuses on workplace conditions to effectuate the OSH Act's congressional mandate, and not on a particular employment relationship. The OSH Act's underlying purpose is broad—to assure safe and healthful working conditions for working men and women—and Congress made clear that it expected the Act to protect all employees. (H. Rep. No. 91–1291, 91st Cong., 2d Sess., p. 14–16 (July 9, 1970)). Numerous references in the legislative history of the Act require employers to provide a safe and healthful ''place of employment'' (see, e.g., S. Rep. No. 91–1282, 91st Cong., 2d Sess., p. 10 (October 6, 1970)). The OSH Act tasks OSHA with promulgating rules that will create safe places of employment, notwithstanding the many varied employment relationships that might exist at a worksite.

Subsequent congressional action has also recognized OSHA's authority to impose responsibilities on employers to protect employees who are not their own. For example, Congress directed OSHA to develop a chemical process safety standard (the PSM standard) requiring employers to ''ensure contractors and contract employees are provided appropriate information and training'' and to ''train and educate

[2] The definition of ''controlling entity'' is explained in the discussion of proposed § 1926.1402(c).

[3] This language is in marked contrast to the language of Section 5(a)(1) of the Act (known as the ''general duty clause''), which requires each employer to ''furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.'' 29 U.S.C. 654(a)(1) (emphases added). See *Brennan* v. *OSHRC,* 513 F.2d 1032, 1037–38 (2nd. Cir. 1975).

employees and contractors in emergency response.'' (29 U.S.C. note) (quoting Pub.L. 101–549, Title III, Sec. 304, November 15, 1990, 104 Stat. 2576). This is a clear ratification of the Agency's authority to require employers to protect the employees of others. Congress also approved of the Agency's authority when it relied on the provisions of OSHA's Hazard Communication standard in promulgating the Emergency Planning and Community Right-to-Know Act (42 U.S.C. 11001–11050) (EPCRA). OSHA's Hazard Communication standard, among other things, requires a manufacturer of a hazardous chemical to ''inform not only its own employees of the dangers posed by the chemicals, but downstream employers and employees as well.'' *Martin* v. *American Cyanamid Co.,* 5 F.3d 140, 141 (6th Cir. 1993). Congress incorporated provisions of the Hazard Communication standard in EPCRA as a basis for triggering obligations on owners or operators of facilities producing hazardous chemicals to provide local governments with information needed for emergency response. Had Congress not approved of the multi-employer provisions in the Hazard Communication standard, it would not have approved of it as a basis for obligations in the EPCRA.

Furthermore, OSHA has consistently interpreted the OSH Act as authorizing it to impose multi-employer obligations in its standards. In addition to the Hazard Communication standard and PSM standard discussed above, OSHA included multi-employer provisions in its powered platforms standard, which requires that a building owner inform employers that the building installation has been inspected and is safe to use. 29 CFR 1910.66(c)(3). OSHA has also imposed multi-employer obligations in other construction standards.

For example, in the construction asbestos standard, OSHA requires building owners/employers to perform initial monitoring for asbestos and to communicate the presence of asbestos or presumed asbestos containing materials to prospective employers whose employees reasonably can be expected to work in exposed areas. 29 CFR 1926.1101(k)(2). In the recently promulgated steel-erection standard, OSHA imposed duties on controlling contractors to ensure that site conditions are safe for steel erection. 29 CFR 1926.752(c). OSHA just recently proposed in updates to its electric-power transmission and distribution construction standard similar multi-employer communication provisions. See 70 FR 34947–48. OSHA's inclusion of multi-employer provisions in this proposed rule is fully consistent with its past practice of ensuring the safety and health of all employees at construction worksites.

Finally, OSHA's authority to impose these provisions is confirmed by the decisions of numerous courts of appeals and the Occupational Safety and Health Review Commission holding that an employer's duties and OSHA standards may extend beyond an employer's own employees. See *Universal Constr. Co.* v. *OSHRC,* 182 F.3d 726, 728 (10th Cir. 1999) (following decisions from Second, Sixth, Seventh, Eighth and Ninth Circuits); *Access Equip. Sys.,* 18 BNA OSHC 1718, 1722–24 (No. 95–1449, 1999). But see *Melerine* v. *Avondale Shipyards, Inc.,* 659 F.2d 706 (5th Cir. 1981). The DC Circuit suggested in *Anthony Crane Rental, Inc.* v. *Reich,* 70 F.3d 1298, 1306 (DC Cir. 1995), however, that 29 CFR 1910.12(a)—a rule promulgated by OSHA to adopt Construction Safety Act (CSA) standards as OSHA standards—might limit an employer's obligations under the construction standards in part 1926 to its own employees. The court did not reach the issue, noting that the parties had not briefed it. The proposed cranes and derricks in construction standard will be included in part 1926.

Paragraph 1910.12(a) is consistent with the promulgation of requirements that place obligations on employers necessary to protect the employees of others. The provision states:

> The standards prescribed in part 1926 of this chapter are adopted as occupational safety and health standards under section 6 of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in construction work. Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph.

The language of the provision supports OSHA's interpretation that an employer's responsibilities can extend beyond the employer's employees. The first sentence makes the construction standards applicable to every employment and to every ''place of employment'' of every construction employee. This is broad language that does not limit an employer's obligations to its own employees. The second sentence, by providing that each employer must protect the employment and the places of employment of each of his employees, does not limit an employer's obligations to only protecting his or her employees and does not negate the broad reach of the first sentence. The two sentences, read together, require employers to comply with standards at all sites where they are working in order to protect employees who are predictably present at those sites.

The sole purpose of the provision was to ''adopt and extend'' existing Construction Safety Act (CSA) standards applicable under the OSH Act. 29 CFR 1910.11. Under the CSA, standards applied only to employers with Federally funded contracts, and only with respect to employees engaged on those Federal projects. See 29 CFR part 1926 subpart B; *CH2M Hill, Inc.* v. *Herman,* 192 F.3d 711, 718 n.1 (7th Cir. 1999). The function of 29 CFR 1910.12(a) was to adopt the CSA standards as OSHA standards and in so doing to make it clear that neither of those limitations would apply. Thus, OSHA stressed that compliance would broadly extend to each construction employer (not just those with Federal contracts) and to every construction employee (not just those working on Federal projects). In no way did OSHA intend for the language of 29 CFR 1910.12(a) to restrict its authority to promulgate construction standards that establish obligations extending beyond an employer's own employees.

Other factors confirm that OSHA had no intention in 29 CFR 1910.12(a) to bar multi-employer responsibilities under the construction standards. OSHA issued the regulation without notice and comment under Section 6(a) of the Act. That section provided authority only to adopt established federal standards, such as the CSA standards, without making any substantive changes. *Usery* v. *Kennecott Copper Corp.,* 577 F.2d 1113 (10th Cir. 1977). The CSA regulations did not limit multi-employer responsibilities; the regulations expressly provided for them. 29 CFR 1926.16. OSHA could not have intended to limit statutory obligations in an action under Section 6(a).

In addition, concurrently with issuance of 29 CFR 1910.12(a), OSHA issued its initial Field Operations Manual, which expressly directed issuance of citations to construction employers who created a hazard endangering their own employees or those of another employer. The Agency has also consistently promulgated rules in 29 CFR Part 1926 that expressly extend employers' obligations beyond their own employees. The requirements in proposed 29 CFR 1926.1204 reflect this consistent interpretation and will ensure that all employees on construction worksites are protected from the hazards of confined spaces.

The Occupational Safety and Health Review Commission's recent decision in

Secretary of Labor v. *Summit Contractors* (OSHRC Docket No. 03–1622 (April 27, 2007), has no application to this proposed rule. In *Summit,* a divided Review Commission vacated citations issued to a controlling employer for violations of a construction standard. The two Commissioners who joined in this result issued separate opinions; each read 29 CFR 1910.12(a) as establishing a limitation on the Agency's authority to hold controlling employers accountable for violations. OSHA believes this view is mistaken, and has appealed the OSHRC decision to the U.S. Court of Appeals (8th Cir. No. 07–2191).

Moreover, *Summit* has no bearing on the duties established under the proposed rule. The *Summit* opinions interpreted OSHA's intent under then existing rules. They did not question OSHA's authority under the Act to establish multi-employer obligations through rulemaking. OSHA is exercising its authority under Section 6(b) to issue this proposed rule, and nothing in 29 CFR 1910.12(a) limits an employer's compliance obligations under the rule.

Proposed paragraph (f) would require that where a provision in the proposed rule directs an operator, crewmember or other employee to take a specified action, it would be the employer's responsibility to establish work rules to require the relevant employees to take that action, and to effectively communicate and enforce those work rules. This paragraph clarifies the employer's obligations with regard to such provisions.

Terminology

According to § 1926.1401, *Definitions,* two terms are defined as meaning all equipment covered by this subpart: ''Equipment'' and ''cranes/derricks.'' In reviewing the C–DAC document, OSHA has found that in some places it uses the word ''crane'' standing alone when C–DAC's intent was to refer to all covered equipment. To avoid any ambiguity, OSHA has modified the document where appropriate to replace ''crane'' with either ''equipment'' or ''crane/derrick.'' Where ''crane'' is used in a way that is technically correct, as in referring to ''tower cranes,'' OSHA has not changed it.

In instances where the C–DAC document uses the phrase ''crane operator,'' OSHA has deleted the word ''crane.'' By definition (in § 1926.1401) ''operator'' refers to the equipment operator and, in many locations, the C–DAC document already uses ''operator'' without a modifier to refer to the equipment operator. Therefore, use of ''crane'' to modify ''operator'' is unnecessary and potentially confusing.

Section 1401 Definitions

C–DAC included a number of definitions to clarify the meaning of terms used in the proposed standard. Many of the defined terms are commonly used in the industry, and C–DAC in most instances relied on standard industry sources or its own understanding of how terms are used in the industry to help ensure that the definitions would be readily understood by employers and employees. Industry sources on which C–DAC relied include existing OSHA standards, consensus standards, and ''A Glossary of Common Crane and Rigging Terms'' (Specialized Carriers and Rigging Foundation 1997) (''SC&RF Handbook'')(OSHA–2007–0066–0019). Some definitions were also included to ensure that certain terms used in the proposed standard have a precise, unambiguous meaning.

Where defined terms are used primarily in a single section or group of sections (such as §§ 1926.1407–1411 on power line safety), the definition will be explained in the preamble to that section or group. Definitions that are used in a number of sections will be explained in this section. Table 5 shows the section or paragraph where each definition is discussed.

TABLE 5—INDEX OF DEFINED TERMS

Term	Section or paragraph where definition is discussed in the preamble
A/D supervisor	§ 1926.1404(a)(1)
Articulating crane	§ 1926.1401
Assembly/Disassembly	§ 1926.1403
Assist crane	§ 1926.1404(h)(4)
Attachments	§ 1926.1400(b)(2)
Audible signal	§ 1926.1419(b)
Blocking	§ 1926.1404(h)(2)
Boatswain's chair	§ 1926.1431(o)
Bogie	§ 1926.1435
Boom (equipment other than tower crane)	§ 1926.1401
Boom (tower cranes)	§ 1926.1435(e)(5)(ii)
Boom angle indicator	§ 1926.1416(d)(1)(i)(A)
Boom hoist limiting device	§ 1926.1416(d)(1)
Boom length indicator	§ 1926.1416(e)(3)
Boom stop	§ 1926.1416(a)(2)
Boom suspension systems	§ 1926.1404(h)(7)
Builder	§ 1926.1436(c)(1)
Calculate	§ 1926.1401
Center of gravity	§ 1926.1404(h)(6)
Certified welder	§ 1926.1431(e)(5)
Climbing	§ 1926.1435(b)(7)
Come-a-long	§ 1926.1400(c)(10)
Competent person	§ 1926.1401
Controlled load lowering	§ 1926.1426(d)
Controlling entity	§ 1926.1402(c)
Counterweight	§ 1926.1404(h)(9)
Crane/derrick	§ 1926.1400
Crawler crane	§ 1926.1401
Crossover points	§ 1926.1413(a)(3)(iii)
Dedicated channel	§ 1926.1420(b)
Dedicated pile-driver	§ 1926.1439(a)
Dedicated spotter (power lines)	§ 1926.1407(b)

TABLE 5—INDEX OF DEFINED TERMS—Continued

Term	Section or paragraph where definition is discussed in the preamble
Directly under the load	§ 1926.1425(e)(1)
Dismantling	§ 1926.1405
Drum rotation indicator	§ 1926.1416(e)(5)
Electrical contact	§ 1926.1407–1411
Employer-made equipment	§ 1926.1437(m)(4)
Encroachment	§ 1926.1407–1411
Equipment	§ 1926.1400
Equipment criteria	§ 1926.1412(b)(1)(i)
Fall protection equipment	§ 1926.1423(d)
Fall restraint system	§ 1926.1423(d)
Fall zone	§ 1926.1425(b)
Flange points	§ 1926.1413(a)(3)(iii)
Floating cranes/derricks	§ 1926.1437
For example	§ 1926.1401
Free fall (of the load line)	§ 1926.1426(d)
Free surface effect	§ 1926.1437(m)(5)(ii)
Hoist	§ 1926.1401
Hoisting	§ 1926.1401
Include/including	§ 1926.1401
Insulating link/device	§ 1926.1408(b)(4)(v)
Jib stop	§ 1926.1415(a)(3)
Land crane/derrick	§ 1926.1437(h)
List	§ 1926.1437(e)(1)
Load	§ 1926.1401
Load moment (or rated capacity) indicator	§ 1926.1416(e)(4)
Load moment (or rated capacity) limiter	§ 1926.1416(e)(4)
Locomotive crane	§ 1926.1401
Luffing jib limiting device	§ 1926.1416(d)(2)
Marine hoisted personnel transfer device	§ 1926.1431(b)(2)(iii)
Marine worksite	§ 1926.1431(b)(2)(iii)
Mobile cranes	§ 1926.1401
Moving point-to-point	§ 1926.1423(d)(1)
Multi-purpose machine	§ 1926.1400(a)
Nationally recognized accrediting agency	§ 1926.1427(b)(1)(i)
Non-conductive	§ 1926.1407(b)(2)
Operational aids	§ 1926.1416
Operational controls	§ 1926.1417(b)(2)
Operator	§ 1926.1401
Overhead and gantry cranes	§ 1926.1438
Paragraph	§ 1926.1401
Pendants	§ 1926.1404(h)(8)
Personal fall arrest system	§ 1926.1423(f)
Portal cranes	§ 1926.1415(a)(1)
Power lines	§ 1926.1407–1411
Procedures	§ 1926.1401
Proximity alarm	§ 1926.1407(b)(3)
Qualified evaluator (not a third party)	§ 1926.1428(a)(2)
Qualified evaluator (third party)	§ 1926.1428(a)(2)
Qualified person	§ 1926.1401
Qualified rigger	§ 1926.1425(c)(3)
Range control warning device	§ 1926.1407(a)(3)
Rated capacity	§ 1926.1401
Rated capacity indicator	§ 1926.1416(e)(4)
Rated capacity limiter	§ 1926.1416(e)(4)
Repetitive pickup points	§ 1926.1413(a)(3)(iii)
Running wire rope	§ 1926.1413(a)(2)(ii)(A)
Runway	§ 1926.1431(k)(12)(ii)(A)
Section	§ 1926.1401
Side-boom crane	§ 1926.1440
Special hazard warnings	§ 1926. 1417(c)(1)
Stability (flotation device)	§ 1926.1437(m)(5)(iii)
Standard Method	§ 1926.1419(c)
Such as	§ 1926.1401
Superstructure	§ 1926.1424(a)(1)
Tag line	§ 1926.1407(b)(2)
Tender	§ 1926.1437(j)(3)
Tilt-up or tilt-down operation	§ 1926.1425(e)
Tower crane	§ 1926.1401
Travel bogie (tower cranes)	§ 1926.1435(d)(2)(iv)
Trim	§ 1926.1437(e)(1)
Two blocking	§ 1926.1416(d)(3)

TABLE 5—INDEX OF DEFINED TERMS—Continued

Term	Section or paragraph where definition is discussed in the preamble
Unavailable procedures	§ 1926.1417(b)
Up to	§ 1926.1401
Upperstructure	§ 1926.1424(a)(1)
Upperworks	§ 1926.1424(a)(1)
Wire rope	§ 1926.1413

Four terms that are defined in the C–DAC document—''alongside,'' ''appointed person,'' ''blind pick,'' and ''power down,''—were used by C–DAC in earlier drafts but are not used in the proposed standard. OSHA has therefore not included them in this section.

''A/D supervisor'' means ''an individual who meets this standard's requirements for an A/D supervisor, irrespective of the person's formal job title or whether the person is non-management or management personnel.''

''Articulating crane'' means ''a crane whose boom consists of a series of folding, pin connected structural members, typically manipulated to extend or retract by power from hydraulic cylinders.'' This definition is taken from the SC&RF Handbook definition of ''articulating boom crane.''

''Assist crane'' is ''a crane used to assist in assembling or disassembling a crane.''

''Assembly/Disassembly'' means ''the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, ''erecting and climbing'' replaces the term 'assembly,' and 'dismantling' replaces the term 'disassembly.' ''

''Attachments'' means ''any device that expands the range of tasks that can be done by the equipment. Examples include, but are not limited to: an auger, drill, magnet, pile-driver, and boom-attached personnel platform.'' This definition is discussed under paragraph 1400(b) in the explanation of this proposed standard.

''Audible signal'' means ''a signal made by a distinct sound or series of sounds. Examples include, but are not limited to, sounds made by a bell, horn, or whistle.''

''Blocking'' (also referred to as ''cribbing'') ''is wood or other material used to support equipment or a component and distribute loads to the ground. Typically used to support latticed boom sections during assembly/disassembly and under outrigger floats.''

''Boatswain's chair'' is ''a single-point adjustable suspension scaffold consisting of a seat or sling (which may be incorporated into a full body harness) designed to support one employee in a sitting position.''

''Bogie'' is synonymous with ''travel bogie,'' which is defined below.

''Boom (equipment other than tower crane)'' means ''an inclined spar, strut, or other long structural member which supports the upper hoisting tackle on a crane or derrick. Typically, the length and vertical angle of the boom can be varied to achieve increased height or height and reach when lifting loads. Booms can usually be grouped into general categories of hydraulically extendible, cantilevered type, latticed section, cable supported type or articulating type.'' This definition is taken from the SC&RF Handbook.

''Boom (tower cranes).'' On tower cranes: if the ''boom'' (i.e., principal horizontal structure) is fixed, it is referred to as a jib; if it is moveable up and down, it is referred to as a boom.

''Boom angle indicator'' is ''a device which measures the angle of the boom relative to horizontal.''

''Boom hoist limiting device'' ''includes boom hoist disengaging device, boom hoist shutoff, boom hoist disconnect, boom hoist hydraulic relief, boom hoist kick-outs, automatic boom stop device, or derricking limiter. This type of device disengages boom hoist power when the boom reaches a predetermined operating angle. It also sets brakes or closes valves to prevent the boom from lowering after power is disengaged.''

''Boom length indicator'' ''indicates the length of the permanent part of the boom (such as ruled markings on the boom) or, as in some computerized systems, the length of the boom with extensions/attachments.''

''Boom stop'' ''includes boom stops, (belly straps with struts/standoff), telescoping boom stops, attachment boom stops, and backstops. These devices restrict the boom from moving above a certain maximum angle and toppling over backward.''

''Boom suspension systems'' are ''a system of pendants, running ropes, sheaves, and other hardware which supports the boom tip and controls the boom angle.''

''Builder'' means ''an employer builder/constructor of equipment.'' This definition is discussed under § 1926.1436(c)(1) in the explanation of this proposed standard.

''Calculate'' ''includes use of a calculator.'' The Committee included this definition to make clear that persons who performed calculations under this standard may use any method, including use of a calculator, that yields accurate results.

''Center of gravity.'' ''The center of gravity of any object is the point in the object around which its weight is evenly distributed. If you could put a support under that point, you could balance the object on the support.''

''Certified welder'' is ''a welder that meets the nationally recognized certification requirements that are applicable to the task being performed.''

''Climbing'' is ''the process in which a tower crane is raised to a new working height, either by adding additional tower sections to the top of the crane (top climbing), or by a system in which the entire crane is raised inside the structure (inside climbing).''

''Come-a-long'' means ''a mechanical device typically consisting of a chain or cable attached at each end that is used to facilitate movement of materials through leverage.''

''Competent person'' is ''a person who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.'' This definition is taken from 29 CFR 1926.32(f), which defines ''competent person'' under OSHA's construction standards. Those standards assign duties to ''competent persons'' that are similar to those assigned under this proposed standard.

''Controlled load lowering'' means ''lowering a load by means of a mechanical hoist drum device that allows a hoisted load to be lowered with maximum control using the gear train or hydraulic components of the hoist mechanism. Controlled load lowering requires the use of the hoist drive motor,

rather than the load hoist brake, to lower the load.''

''Controlling entity'' is ''a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project—its planning, quality and completion.''

''Counterweight'' is a ''weight used to supplement the weight of equipment in providing stability for lifting loads by counterbalancing those loads.''

''Crane/derrick'' includes ''all equipment covered by this Subpart.''

''Crawler crane'' means ''equipment that has a type of base mounting which incorporates a continuous belt of sprocket driven track.'' This definition is based on the definition of ''crawler'' in the SC&RF Handbook. Current industry terminology refers to crawler cranes and truck cranes together as ''mobile cranes.'' See definition of ''mobile crane'' below.

''Crossover points'' are ''locations on a wire rope which is spooled on a drum where one layer of rope climbs up on and crosses over the previous layer. This takes place at each flange of the drum as the rope is spooled onto the drum, reaches the flange, and begins to wrap back in the opposite direction.''

''Dedicated channel'' is ''a line of communication assigned by the employer who controls the communication system to only one signal person and crane/derrick or to a coordinated group of cranes/derrick/signal person(s).''

''Dedicated pile-driver'' is ''a machine that is designed to function exclusively as a pile-driver. These machines typically have the ability to both hoist the material that will be pile-driven and to pile-drive that material.''

''Dedicated spotter (power lines)'' is defined as follows: ''In order to be considered a dedicated spotter, the requirements of § 1926.1428 (signal person qualifications) must be met and his/her sole responsibility is to watch the separation between the power line and: the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator, that the applicable minimum approach distance is not breached.''

''Directly under the load'' means ''a part or all of an employee is directly beneath the load.''

''Dismantling'' ''includes partial dismantling (such as dismantling to shorten a boom or substitute a different component).''

''Drum rotation indicator'' is ''a device on a crane or hoist which indicates in which direction and at what relative speed a particular hoist drum is turning.''

''Electrical contact'' refers to ''when a person, object, or equipment makes contact or comes in close proximity with an energized conductor or equipment that allows the passage of current.''

''Employer-made equipment'' means ''floating cranes/derricks designed and built by an employer for the employer's own use.''

''Encroachment'' is ''where any part of the crane, load line or load (including rigging and lifting accessories) breaches a minimum clearance distance that this subpart requires to be maintained from a power line.''

''Equipment'' means ''equipment covered by this subpart.''

''Equipment criteria'' means ''instructions, recommendations, limitations and specifications.''

''Fall protection equipment'' means ''guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.''

''Fall restraint system'' means ''a fall protection system that prevents the user from falling any distance. The system is comprised of either a body belt or body harness, along with an anchorage, connectors and other necessary equipment. The other components typically include a lanyard, and may also include a lifeline and other devices.''

''Fall zone'' means ''the area (including but not limited to the area directly beneath the load) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident.''

''Flange point'' is ''a point of contact between rope and drum flange where the rope changes layers.''

''Floating cranes/derricks'' means ''equipment designed by the manufacturer (or employer) for marine use by permanent attachment to a barge, pontoons, vessel or other means of flotation.''

''For example'' means ''one example, although there are others.'' This definition was included to demonstrate and clarify the usage of the word.

''Free fall (of the load line)'' means ''where only the brake is used to regulate the descent of the load line (the drive mechanism is not used to drive the load down faster or retard its lowering).''

''Free surface effect'' is ''the uncontrolled transverse movement of liquids in compartments which reduce a vessel's transverse stability.''

''Hoist'' is ''a mechanical device for lifting and lowering loads by winding rope onto or off a drum.'' A hoist is the primary lifting mechanism used by cranes and derricks.

''Hoisting'' is ''the act of raising, lowering or otherwise moving a load in the air with equipment covered by this standard. As used in this standard, 'hoisting' can be done by means other than wire rope/hoist drum equipment.'' This definition makes clear that ''hoisting'' is broad enough to encompass all movement of a load in the air by cranes/derricks and is not limited to movement caused by wire rope/hoist drum equipment. For example, movement resulting from booming out a hydraulic boom that is holding a load would be ''hoisting.''

''Include/including'' means ''including, but not limited to.'' This definition demonstrates and clarifies the usage of the word.

''Insulating link/device'' is ''an insulating device listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.''

''Jib stop,'' which is also referred to as a jib backstop, ''is the same type of device as a boom stop but is for a fixed or luffing jib.''

''Land crane/derrick'' is ''Equipment not originally designed by the manufacturer for marine use by permanent attachment to barges, pontoons, vessels, or other means of floatation.''

''List'' is the ''angle of inclination about the longitudinal axis of a barge, pontoon, vessel or other means of flotation.''

''Load'' refers to ''the object(s) being hoisted and/or the weight of the object(s); both uses refer to the object(s) and the load-attaching equipment, such as, the load block, ropes, slings, shackles, and any other ancillary attachment.'' This definition makes clear that in calculating the weight of the load for purposes such as making sure that the lift is within the equipment's rated capacity, the weight of all objects used to attach the load to the equipment must be included. As drafted by C–DAC, ''load'' referred to the weight of the object being lifted but not the object itself. However, ''load'' is used throughout the proposed standard to refer to the object being hoisted in addition to the weight of the load. OSHA has modified the C–DAC definition accordingly.

''Load moment (or rated capacity) indicator'' is ''a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and

indicates to the operator the percentage of capacity at which the equipment is working. Lights, bells, or buzzers may be incorporated as a warning of an approaching overload condition.''

''Load moment (or rated capacity) limiter'' is ''a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and when the rated capacity is reached, it shuts off power to those equipment functions which can increase the severity of loading on the equipment, e.g., hoisting, telescoping out, or luffing out. Typically, those functions which decrease the severity of loading on the equipment remain operational, e.g., lowering, telescoping in, or luffing in.''

''Locomotive crane'' is ''a crane mounted on a base or car equipped for travel on a railroad track.'' OSHA included this definition to remain consistent with the industry's use of the term as indicated in the SC&RF Handbook.

''Luffing jib limiting device'' ''is similar to a boom hoist limiting device, except that it limits the movement of the luffing jib.''

''Marine hoisted personnel transfer device'' is ''a device, such as a 'transfer net,' used to hoist an employee to or from a marine worksite that is designed to protect the employee during a marine transfer and that allows for rapid entry/exit from the device. Such devices do not include a boatswain's chair when hoisted by equipment covered by this standard.''

''Marine worksite'' is ''a construction worksite that is located in, on or above the water.''

''Mobile crane'' is ''a lifting device incorporating a cable suspended latticed boom or hydraulic telescopic boom designed to be moved between operating locations by transport over the road.'' This definition is derived from the SC&RF Handbook. The term ''mobile crane,'' as used in ASME B30.5–2004, ''Mobile and Locomotive Cranes,'' encompasses crawler cranes, truck cranes, and other wheel-mounted cranes. The 1968 version of ANSI B30.5, which is incorporated by reference into Subpart N, is entitled ''Crawler, Locomotive and Truck Cranes'' and also covered crawler cranes, truck cranes, and other wheel-mounted cranes (in addition to locomotive cranes). C–DAC included its definition of ''mobile cranes'' to reflect current industry terminology, which now refers to crawler cranes, truck cranes, and other wheel-mounted cranes collectively as ''mobile cranes.''

The SC&RF Handbook definition states that in Europe, ''mobile crane'' refers to a crane mounted on a truck carrier. The C–DAC draft of the definition of ''mobile crane'' included this reference to European terminology. While the European terminology describes a device that is included in this proposed rule's definition of mobile crane, OSHA has deleted the reference to the European terminology because it could be read to mean, erroneously, that only truck cranes fall within the definition of ''mobile cranes.'' As noted above, crawler cranes and wheel-mounted cranes other than truck cranes also qualify as ''mobile cranes.''

''Moving point to point'' means ''the times during which an employee is in the process of going to or from a work station.''

''Multi-purpose machine'' means ''a machine that is designed to be configured in various ways, at least one of which allows it to hoist (by means of a winch or hook) and horizontally move a suspended load. For example, a machine that can rotate and can be configured with removable tongs (for use as a forklift) or with a winch pack, jib (with a hook at the end) or jib used in conjunction with a winch. When configured with the tongs, it is not covered by this Subpart. When configured with a winch pack, jib (with a hook at the end) or jib used in conjunction with a winch, it is covered by this Subpart.''

''Nationally recognized accrediting agency'' is ''an organization that, due to its independence and expertise, is widely recognized as competent to accredit testing organizations.''

''Non-conductive'' means that, ''because of the nature and condition of the materials used, and the conditions of use (including environmental conditions and condition of the material), the object in question has the property of not becoming energized (that is, it has high dielectric properties offering a high resistance to the passage of current under the conditions of use).''

''Operational controls'' are ''levers, switches, pedals and other devices for controlling equipment operation.''

''Operational aids'' are ''devices that assist the operator in the safe operation of the crane by providing information or automatically taking control of a crane function. These include, but are not limited to, the devices listed in § 1926.1416 (''listed operational aids'').''

''Operator'' is ''a person who is operating the equipment.'' The term is therefore not restricted to job title but includes any and all persons who actually operate the equipment. The Committee included this definition to make clear that anyone operating equipment must meet all of the requirements of this subpart that apply to ''operators.''

''Overhead and gantry cranes'' is defined to include ''overhead/bridge cranes, semigantry, cantilever gantry, wall cranes, storage bridge cranes, launching gantry cranes, and similar equipment, irrespective of whether it travels on tracks, wheels, or other means.''

''Paragraph'' refers to ''a paragraph in the same section of this subpart that the word 'paragraph' is used, unless otherwise specified.'' For example, proposed paragraph 1423(a)(1) refers to ''paragraphs (b), (c)(2), and (e).'' Under this definition, it is understood that those are paragraphs in § 1423. By contrast, paragraph 1439 refers to certain paragraphs in other sections and therefore includes the section designation in the reference, for example, ''paragraph 1416(d)(3).''

''Pendants'' are defined to ''include both wire and bar types. Wire type: A fixed length of wire rope with mechanical fittings at both ends for pinning segments of wire rope together. Bar type: Instead of wire rope, a bar is used. Pendants are typically used in a latticed boom crane system to easily change the length of the boom suspension system without completely changing the rope on the drum when the boom length is increased or decreased.''

''Personal fall arrest system'' means ''a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body harness and may include a lanyard, deceleration device, lifeline, or suitable combination of these.''

''Portal cranes'' are ''a type of crane consisting of a rotating upperstructure, hoist machinery, and boom mounted on top of a structural gantry which may be fixed in one location or have travel capability. The gantry legs or columns usually have portal openings in between to allow passage of traffic beneath the gantry.''

''Power lines'' are ''electric transmission and distribution lines.''

''Procedures'' ''include, but are not limited to: instructions, diagrams, recommendations, warnings, specifications, protocols and limitations.'' Several paragraphs of this proposed standard, such as § 1926.1417(a), require employers to follow manufacturer procedures. C–DAC developed this definition to make clear that ''procedures'' in a provision such as § 1926.1417(a) is to be interpreted broadly to include all recommendations by the manufacturer

regardless of the format of those recommendations.

''Proximity alarm'' is ''a device that provides a warning of proximity to a power line that has been listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.''

''Qualified evaluator (not a third party)'' means ''a person employed by the signal person's employer who has demonstrated that he/she is competent in accurately assessing whether individuals meet the qualification requirements in this subpart for a signal person.''

''Qualified evaluator (third party)'' is an ''entity that, due to its independence and expertise, has demonstrated that it is competent in accurately assessing whether individuals meet the qualifications in this Subpart for a signal person.'' This definition is discussed under § 1926.1428(a)(2) in the explanation of this proposed standard.

''Qualified person'' means ''a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems relating to the subject matter, the work, or the project.'' This definition corresponds to the definition of ''qualified'' in 29 CFR 1926.32(m). Its use here reflects the fact that the duties assigned to ''qualified persons'' under this proposal are similar to those assigned persons with comparable qualifications under other OSHA construction standards. By defining this term in the same way it is defined under other OSHA standards, C–DAC sought to make clear that construction industry employers could continue to rely on their understanding of the qualifications for a ''qualified person'' that is applied under existing standards.

''Qualified rigger'' is ''a rigger who meets the criteria for a qualified person.''

''Range control warning device'' is ''a device that can be set by the equipment operator to warn that the boom or jib tip is at a plane or multiple planes.''

''Rated capacity'' is ''the maximum working load permitted by the manufacturer under specified working conditions. Such working conditions typically include a specific combination of factors such as equipment configuration, radii, boom length, and other parameters of use.'' The first sentence of this definition is taken from the SC&RF Handbook. The second sentence was added by C–DAC to clarify the meaning of ''working conditions.'' Many crane/derrick accidents result when the equipment's ''rated capacity'' is exceeded, and the Committee sought to provide an unambiguous definition of the term to promote compliance with provisions that use the term. In reviewing the C–DAC consensus document, OSHA noted that ''rated load'' and ''rated load capacity'' were used in various places to mean the same thing as the Committee's definition of ''rated capacity.'' For consistency and to reflect the intention of the Committee, all references to ''rated load'' and ''rated load capacity'' in the consensus document have been changed to ''rated capacity.''

''Rated capacity indicator'' is an alternative term for ''load moment indicator,'' which is defined above.

''Rated capacity limiter'' is an alternative term for ''load moment limiter,'' which is defined above.

''Repetitive pickup points'' are ''when operating on a short cycle operation, the rope being used on a single layer and being spooled repetitively over a short portion of the drum.''

''Running wire rope'' is ''a wire rope that moves over sheaves or drums.''

''Runway'' is ''a firm, level surface designed, prepared and designated as a path of travel for the weight and configuration of the crane being used to lift and travel with the crane suspended platform. This surface can be an existing surface or created for purposes of the work activity.''

''Section'' means ''a section of this subpart, unless otherwise specified.'' This definition is included to ensure that the reader understands what ''section'' means in this standard.

''Side-boom crane'' is ''a track-type or wheel-type tractor having a boom mounted on the side of the tractor, used for lifting, lowering, or transporting a load suspended on the load hook. The boom or hook can be lifted or lowered in a vertical direction only.''

''Special hazard warnings'' are ''warnings of site-specific hazards (for example, proximity of power lines).''

''Stability (flotation device)'' means ''the tendency of a barge pontoon, vessel or other means of flotation to return to an upright position after having been inclined by an external force.''

''Standard Method'' means ''the protocol in Appendices for hand signals.''

''Such as'' means ''such as, but not limited to.'' This definition was included to demonstrate and clarify the usage of the phrase.

''Superstructure'' is a synonym for ''upperstructure'' and ''upperworks,'' which is defined below.

''Tag line'' is a rope (usually fiber) attached to a lifted load for purposes of controlling load spinning and pendular motions or used to stabilize a bucket or magnet during material handling operations. This definition is included to ensure that the use of this term for the application of this proposed standard is consistent with how tag lines are commonly used to control loads during hoisting operations.

''Tender'' is ''an individual responsible for monitoring and communicating with a diver.''

''Tilt-up or tilt-down operation'' is the ''raising/lowering of a load from the horizontal to vertical or vertical to horizontal.''

''Tower crane.'' C–DAC defined a tower crane as: A type of lifting structure which utilizes a vertical mast or tower to support a working boom (jib) suspended from the working boom. While the working boom may be fixed horizontally or have luffing capability, it can always rotate about the tower center to swing loads. The tower base may be fixed in one location or ballasted and moveable between locations.''

In reviewing this language, OSHA believes that several changes are needed. First, a characteristic of tower cranes that is missing from the C–DAC definition is that the working boom is in an elevated position above the ground. Second, the working boom on some tower cranes, even of the non-luffing type, may not be at a 90-degree angle to the tower, and so the term ''fixed horizontally'' may not always be appropriate. Third, there are ''top slewing'' tower cranes—those in which the working boom rotates on the top of a fixed tower, and ''bottom slewing'' tower cranes—those in which the tower itself (with the working boom fixed to it) rotates on its base. The definition does not make clear that both types are considered tower cranes for purposes of this proposed standard.

Therefore, the Agency has modified this language for the definition in the proposed rule as follows:

> A type of lifting structure which utilizes a vertical mast or tower to support a working boom (jib) in an elevated position. Loads are suspended from the working boom. While the working boom may be of the fixed type (horizontal or angled) or have luffing capability, it can always rotate to swing loads, either by rotating on the top of the tower (top slewing) or by the rotation of the tower (bottom slewing). The tower base may be fixed in one location or ballasted and moveable between locations.

OSHA requests public comment on these changes.

''Travel bogie (tower cranes)'' is ''an assembly of two or more axles arranged to permit vertical wheel displacement

and equalize the loading on the wheels.''

''Trim'' is the ''angle of inclination about the transverse axis of a barge, pontoon, vessel or other means of flotation.''

''Two blocking'' means ''a condition in which a component that is uppermost on the hoist line such as the load block, hook block, overhaul ball, or similar component, comes in contact with the boom tip, fixed upper block or similar component. This binds the system and continued application of power can cause failure of the hoist rope or other component.''

''Unavailable procedures'' means ''procedures that are no longer available from the manufacturer, or have never been available from the manufacturer.''

''Upperstructure'' is a synonym for ''superstructure'' and ''upperworks,'' which is defined below.

''Upperworks'' means ''the revolving frame of equipment on which the engine and operating machinery are mounted along with the operator's cab. The counterweight is typically supported on the rear of the upperworks and the boom or other front end attachment is mounted on the front.''

''Superstructure'' and ''upperstructure'' are synonyms for ''upperworks.''

The second sentence of C–DAC's version of this definition stated: ''The counterweight is typically supported on the rear of the upperstructure * * *.'' OSHA has changed the word ''upperstructure'' to ''upperworks'' to avoid any confusion that could be caused by using one synonym in the definition of another.

''Up to'' means ''up to and including.'' This definition is included to make the meaning of the phrase clear.

''Wire rope.'' The C–DAC document defined this term as ''rope made of wire,'' the definition that is used in this proposed rule. However, some wire rope has a fiber core, which proposed § 1926.1414 permits to be used for purposes other than boom hoist reeving. However, the C–DAC definition indicates that such rope would not be considered ''wire rope.'' OSHA requests public comment on whether a more suitable definition would be the one used by SC&RF, which is the following:

A flexible rope constructed by laying steel wires into various patterns of multi-wired strands around a core system to produce a helically wound rope.

Section 1402 Ground Conditions

The Committee believed that the failure to have adequate ground conditions is a significant crane safety problem. Adequate ground conditions are essential for safe crane operations because the crane's capacity and stability depend on such conditions being present.

In the Committee's view, there have been several key problems regarding ground conditions. First, cranes are commonly brought on site by a subcontractor, who typically neither has control over ground conditions nor knowledge of hidden hazards. For example, an HVAC subcontractor will usually not have the contractual authority to alter site conditions and will not know about hidden conditions such as sewer lines under the area where the crane will be located. Consequently, when ground conditions are inadequate, the subcontractor is typically unable to correct those conditions itself. Attempts to get other entities at the site to correct the conditions are often unsuccessful, which has led to cranes being set up on inadequate ground conditions.

Another problem is that the entity that usually does have such authority—the controlling entity—may not have the expertise to know what changes are needed to make the ground conditions suitable for crane operations. This proposed section is designed to address these problems so that ground conditions will be made sufficient for safe crane operations.

Paragraph 1402(a) Definitions

Proposed paragraph (a) provides definitions of key terms used in this proposed section.

The term ''ground conditions'' would be defined as the ability of the ground to support the equipment (including slope, compaction and firmness). The Committee believed that slope, compaction and firmness are the key factors that are involved in the ability of the ground to support the equipment.

''Supporting materials'' would be defined as meaning blocking, mats, cribbing, marsh buggies (in marshes/wetlands), or similar supporting materials or devices. Such materials typically help to distribute the load of the crane over a broad area and/or assist in leveling the equipment. The list in the definition of examples of such materials is nonexclusive—it includes similar materials and devices that would serve the same purpose(s).

Paragraph 1402(b)

Under proposed paragraph (b), the equipment would be prohibited from being assembled or used unless ground conditions are firm, drained (except for marshes/wetlands), and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met. A crane's stability depends (in part) on the crane being level, and ''degree of level'' is a term used in the industry to describe the manufacturer's specification for how level the crane must be.

The Committee believed that crane tip-over incidents caused by inadequate ground conditions are a significant cause of injuries and fatalities. Conditions that enhance the chance of such accidents include ground that is wet or muddy, poorly graded, or that is loose fill (or otherwise disturbed soil) that has not been compacted. The Committee believed that requiring adequate ground conditions will prevent many of these accidents.

This proposed provision would not require the ground conditions alone to be sufficient to support the equipment. The Committee recognized that such a requirement would be unnecessarily restrictive, since adequate support can often be achieved with the use of supporting materials. However, supporting materials cannot compensate for all ground condition problems. As a result, the Committee found that an appropriate approach would be to require that ground conditions be sufficiently firm, drained (except for marshes/wetlands) and graded to a sufficient extent so that, in conjunction (if necessary) with supporting materials, the support and degree of level would be adequate. ''Adequate'' in this context would mean sufficient to meet the equipment manufacturer's specifications for support and degree of level of the equipment.

In practical terms, the ultimate test of whether this criterion is met is whether the equipment can be set up so that it is within the manufacturer's specifications for the needed support for the equipment and the degree of level of the equipment and whether it can remain within those specifications while in use.

The Committee considered using more specific criteria, such as specifications for slope, compaction and firmness. That approach was rejected by the Committee for two reasons. First, in its view, such specifications would be unduly burdensome since employers would need to conduct complex tests with sophisticated instruments to ensure compliance. Second, it believed that such tests are unnecessary because the person or persons supervising the equipment assembly and the crane operator would have sufficient expertise to assess the adequacy of ground conditions without the use of complex

ground assessment tests and related instruments.

The individual (or team) supervising the equipment assembly (referred to in proposed § 1926.1404(a) as the ''A/D supervisor'') would, under proposed § 1926.1404(a), individually or collectively meet the definition of both a competent and qualified person. Also, under proposed § 1926.1427 (and specifically proposed § 1926.1427(j)(1)(i)(E)(1)), the crane operator would have technical knowledge applicable to the suitability of the supporting ground and surface to handle expected loads. In view of that level of knowledge, the Committee believed that both the A/D supervisor and the crane operator would be able to assess the adequacy of ground conditions without the use of complex ground assessment tests and related instruments.

OSHA notes that proposed § 1926.1402(e) refers to the ''individual'' supervising the equipment assembly. Since the individual or individuals supervising the equipment assembly are referred to throughout this proposed rule as the ''A/D supervisor,'' [4] OSHA has, for clarity, replaced the phrase ''individual supervising the equipment assembly'' in § 1926.1402(e) with ''A/D supervisor.''

Proposed paragraph 1402(b) would require the ground to be drained except for marshes/wetlands. This exception was included because the Committee was aware that, in many instances, the draining of marshes/wetlands is prohibited or restricted by environmental laws. Since there are devices available, such as marsh buggies, that are designed to provide adequate support to cranes in such areas (a marsh buggy is a device designed to support equipment such as a crane in swampy terrain; it can cross such terrain with that equipment on board), the Committee believed that such an exception would be appropriate.

Paragraph 1402(c)

Under proposed paragraph 1402(c), the controlling entity would have several specific duties regarding ground conditions. ''Controlling entity'' is defined in proposed § 1926.1401 as ''a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project—its planning, quality and completion.'' This definition, which mirrors the definition of ''controlling contractor'' in the steel erection standard, subpart R of 29 CFR part 1926, reflects the core principle of general supervisory control over the construction site as the central theme of the concept. The Committee believed that ''controlling entity'' would be a better term for this concept than ''controlling contractor'' because some employers may mistakenly believe that ''controlling contractor'' refers only to general contractors. Since in some instances an entity other than a general contractor has general supervisory control of the worksite, such an entity would meet the terms of the definition.

Proposed paragraph 1402(c)(1) would require the controlling entity to ensure that ground preparations necessary to meet the requirements in proposed paragraph (b) of this section are provided.

Currently, Subpart N does not specify who is responsible for providing for such preparations. In effect, reliance is placed on the various parties to work out who would have such responsibility through contractual arrangements. In the experience of a number of Committee members, in many instances the parties are unable to agree on who will have (or has) that contractual responsibility, with the result that inadequate ground conditions often do not get corrected. Consequently, the Committee believed that it is necessary to specify who will have ground condition responsibility.

In the Committee's view, the crane user and operator typically do not have the equipment or authority to make such preparations. In contrast, the controlling entity, due to its control of the worksite, has the requisite authority and is in the best position to arrange for adequate ground conditions. The Committee considered the fact that some controlling entities claim to not know when a crane will arrive at the site, and would therefore be unable to timely arrange for the necessary ground condition preparations. However, the Committee found this unpersuasive. It believed that the controlling entity, by virtue of its control over the site and normal business responsibilities for the construction project itself, is fully able to be cognizant of construction schedules and information about crane use by its subcontractors.

The Committee was concerned, however, that some controlling entities may lack the expertise to recognize when ground conditions are inadequate. To address this concern, the Committee developed proposed § 1926.1402(e). Under that proposed provision, if the A/D supervisor or the operator determines that ground conditions do not meet the requirements in proposed paragraph (b) of this section, that person's employer would be required to have a discussion with the controlling entity.[5] This discussion would concern the ground preparations that are needed so that, with the use of suitable supporting materials/devices (if necessary), the requirements in proposed paragraph (b) of this section can be met. This discussion would serve as a mechanism for those with expertise regarding the ground conditions needed to meet proposed paragraph (b) of this section to convey that information to the entity responsible for making the necessary preparations.

Proposed paragraph 1402(c)(2) addresses the problem of hidden hazards beneath the equipment set-up area. Open spaces underground, such as from voids, tanks, and utilities such as sewer, water supply and drain pipes, can greatly compromise the ability of the ground above them to support the equipment. At the set-up area, there are often no readily apparent visual clues above ground that such hazards exist under the area. In the experience of members of the Committee, because of the hidden nature of these hazards, accidents have occurred when cranes have been set up above such hazards and a portion of the ground has given way.

Under proposed paragraph 1402(c)(2), the controlling entity would be required to inform the user of the equipment and the equipment operator of the location of hazards beneath the equipment set-up area (such as voids, tanks, utilities) that are identified in documents (such as site drawings, as-built drawings, and soil analyses) if they are available to the controlling entity.

In developing this proposed provision, the Committee was mindful that the controlling entity often has access to documents that may identify the location of such hazards. For example, a sewer line may be marked on a site drawing, an as-built drawing, or in a soil analysis. Under this proposed provision, if the controlling entity has such a document, whether at the site or at an off-site location, it would be required to inform the equipment user and operator of the location of the hazard as identified in it. If the

[4] ''A/D supervisor'' is defined in proposed § 1926.1401, *Definitions.*

[5] The SBREFA Panel recommended that OSHA consider whether use of the words ''determine'' and ''demonstrate'' would require employers to make and keep records to support such determinations and demonstrations. OSHA notes that records would not be required in these instances. Only where this proposal explicitly requires the employer to maintain records or documentation (see, e.g., proposed § 1926.1412(e)(3) on documentation of monthly inspections) is an employer required to create and/or maintain records.

controlling entity does not possess such a document, it would not be required to obtain it from another source.

The proposed provision would not require the controlling entity to identify hazards that are not identified in such documents. In other words, it would not require the controlling entity to arrange for tests to be done at the site to determine if such hazards are present. The Committee believed that such a requirement would be unduly burdensome on the controlling entity. In its view the proposed provision would be sufficient because such hazards are typically identified in these documents in the normal course of business.

The Committee also believed that the duty to provide this information should be limited to hazards identified in documents that are available to the controlling entity. Requiring the controlling entity to obtain such information from other sources would, in effect, require it to arrange for testing. As explained above, the Committee believed such a duty would be unduly burdensome and unnecessary.

During the SBREFA meeting an SER commented on the difficulty and time consumed in getting approval from the controlling entity to make sure ground conditions were adequate, especially since many controlling entities were resistant to checking the site themselves for adequate ground conditions. The commenter further stated that his company relies on the steel erectors to test ground conditions for the proper support and that this system seems to work fine. OSHA notes that while the proposed rule would not preclude such arrangements, the responsibility for meeting the requirements of proposed paragraph (c) would nonetheless rest with controlling entity. Moreover, OSHA believes that this comment is illustrative of the need for the standard to require the controlling entity's involvement in this phase of the project.

Another SER expressed concern that the rule could not be properly implemented due to the number of communication channels a subcontractor would have to juggle before finally getting in contact with the controlling entity. For example, a subcontractor may have to go through several other subcontractors before it reaches the controlling entity. OSHA believes that, if controlling entities had the responsibilities set out in proposed paragraph (c), controlling entities would be more likely to facilitate such communication.

Paragraph 1402(d)

In the event that no controlling entity exists, proposed paragraph 1402(d) provides that the requirement in paragraph (c)(1) of this section shall be met by the employer that has authority at the site to make or arrange for ground preparations needed to meet paragraph (b) of this section. For example, if the employer who hires the crane has the authority to get the ground prepared in the absence of a controlling entity, the responsibility for complying with proposed paragraph (b) would fall to that employer. However, that employer would not be required to comply with proposed paragraph (c)(2) of this section. This is because the information required to be disclosed under proposed paragraph (c)(2) is not likely to be available to that employer.

Paragraph 1402(e)

Proposed paragraph 1402(e) would establish a mechanism for a controlling entity to obtain information from the A/D supervisor or the equipment operator about insufficient ground conditions and the preparations needed to correct the problem. Specifically (as discussed above in the context of proposed § 1926.1402(c)(1)), if the A/D supervisor or equipment operator determines that ground conditions do not meet the criteria in proposed paragraph (b) of this section, that person's employer would be required to have a discussion with the controlling entity regarding the ground preparations needed so that, with the use of suitable supporting materials/devices (if necessary), the requirements in proposed paragraph (b) can be met.

The Committee believed that, in some instances, the controlling entity may lack the expertise needed to know what ground preparations may be needed. In such cases, it is necessary for the information it needs to be provided by the A/D supervisor or operator, who have that expertise, so that the preparations needed for safe crane operations can be made.

For example, controlling entity C, who has experience working with only relatively light, low capacity cranes, believes that the ground in set-up area Q is suitable. However, the crane that is going to be used is a high capacity crane. Because of the substantially greater weight of the high capacity crane, a greater degree of compaction of the soil in set-up area Q is needed. When the operator of the high capacity crane arrives at the site, the operator recognizes the need for more compaction. In this example, under this proposed provision, the operator's employer would then be required to have a discussion with controlling entity C regarding the need for greater compaction. As a result of the ensuing discussion, controlling entity C would have the additional information it needs so that it could then comply with proposed paragraph (c)(1) of this section by ensuring that the additional compaction needed to meet the criteria in proposed paragraph (b) of this section is performed.

Also, proposed § 1926.1402(e) would place a duty on the employer of the A/D supervisor or equipment operator irrespective of a controlling entity's lack of expertise. For example, if the controlling entity fails to ensure necessary ground condition preparations, action would be required of the A/D supervisor's or operator's employer. If either determined that ground conditions were insufficient to meet the proposed paragraph (b) criteria, that employer would be required to discuss the preparations that needed to be made with the controlling entity. The Committee believed that, in such circumstances, such a discussion would make it more likely that the requirements in proposed paragraph (b) would be met which, as discussed above, is necessary for safe crane operations.

Sections 1403–1406 Assembly and Disassembly

Proposed §§ 1926.1403 through 1926.1406 set out requirements designed to ensure the safety of employees while equipment is assembled and disassembled, which includes the erecting and dismantling of tower cranes. C–DAC members indicated that, in their experience, the failure to adequately address hazards associated with these processes is a significant cause of injuries and fatalities. Two analyses of data support their view.

A recent analysis of data published in the Journal of Construction Engineering and Management, authored by J.E. Beavers, J.R. Moore, R. Rinehart and W.R. Schriver, found that being ''crushed during assembly/disassembly'' was the third highest proximate cause of crane related fatalities during 1997 to 2003.[6] (OSHA–2007–0066–0012). Contributing physical factors included improper assembly, improper disassembly (specifically, pin removal), and improper boom support. The study indicates that these assembly/disassembly fatalities occurred while using lattice boom cranes.

A 1997 study by A. Suruda, M. Egger and D. Liu analyzed crane related

[6] This study found that being struck by a load was the number one proximate cause of crane-related fatalities, followed by electrocution. Crushed by assembly and disassembly made up 12% of the total number of crane related fatalities in this study.

fatalities from 1984 to 1994.[7] This study determined that crane assembly and disassembly was the second leading cause of crane related fatalities, comprising 12% (or 58 deaths) of the total number of crane fatalities from 1984 to 1994. More specifically, a majority of these fatalities involved lattice boom cranes and a relatively small number involved tower cranes.[8] Almost 90 percent of the fatalities involving lattice boom cranes resulted when employees were removing boom pins from underneath an unsupported boom. (A. Suruda, *et al.*, ''Crane-Related Deaths in the U.S. Construction Industry, 1984–94'' (1997) (OSHA–2007–0066–0013).[9]

The Committee also concluded that the most effective way to reduce these injuries and fatalities would be to have a standard that comprehensively addresses these hazards.

Note that the term ''procedures'' which is used in the proposed assembly/disassembly provisions is defined (see § 1926.1401) to include (but is not limited to) instructions, diagrams, recommendations, warnings, specifications, protocols and limitations. The operation of an ''assist'' crane used to help in the assembly/disassembly process is not covered by the assembly/disassembly requirements but is covered by the other sections of this proposed standard.

Section 1403 Assembly/Disassembly—Selection of Manufacturer or Employer Procedures

In § 1926.1401, ''assembly/disassembly'' is defined to mean ''the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, 'erecting and climbing' replaces the term 'assembly,' and 'dismantling' replaces the term 'disassembly.' '' C–DAC did not originally include a definition of ''assembly/disassembly,'' but OSHA added this definition to avoid any implication that §§ 1926.1403–1406 on ''assembly/disassembly'' do not apply to tower cranes because the terms ''assembly'' and ''disassembly'' are not commonly used in the industry in referring to tower cranes. Instead, the words ''erecting,'' ''climbing,'' and ''dismantling,'' are used, and the definition of ''assembly/disassembly'' makes it clear that §§ 1926.1403–1406 apply to tower cranes and, for that purpose, use tower crane terminology.

Proposed § 1926.1403 would require employers to choose among two options: Assemble and disassemble cranes and derricks by following the manufacturer's procedures, or use their own assembly/disassembly procedures (if they meet the proposed rule's criteria in § 1926.1406). Note, though, that the assembly/disassembly requirements in proposed §§ 1926.1404 and 1405 must be met regardless of which option the employer selects.

Committee members discussed whether employers should be required to comply with the manufacturer's procedures, or if deviations from those procedures should be allowed. The Committee determined, and OSHA agrees, that deviations should be allowed for two reasons. First, manufacturers' procedures are typically designed for use in ''ideal'' environments: Large, flat, dry, unencumbered open areas. However, such conditions are not typical, especially in urban areas. Consequently, employers are currently unable to implement those procedures in those situations. Second, members were of the view that there is often more than one way to safely assemble and disassemble a crane, and that it is unnecessary to mandate that in every case the manufacturer procedures be used.

The Committee also agreed that, while use of methods other than those of the manufacturer should be allowed, such employer-developed procedures need to meet certain benchmarks (see the criteria in proposed § 1926.1406) to ensure that they are adequate to protect the employees during the assembly/disassembly process.

Section 1404 Assembly/Disassembly—General Requirements (Applies to All Assembly and Disassembly Operations)

In examining the underlying causes of fatalities and injuries from assembly/disassembly accidents, the Committee determined that a systematic, proactive approach, designed to highlight the key hazards involved, was needed. C–DAC developed a list of those hazards and then considered how to deal with each one. It became apparent in that discussion that the action needed to address some of these hazards is specific and straightforward. These are addressed in paragraphs (a) through (g) and (j) through (q) of this proposed section. However, with regard to others, the wide variety of circumstances and methods that could be used to address them made specifying particular, detailed actions impractical and needlessly inflexible. For those, C–DAC decided to require that the hazard be addressed but to have an Assembly/Disassembly supervisory (A/D supervisor) determine how to deal with them; these are covered in paragraph (h). Note that the requirements in proposed § 1926.1404 would apply irrespective of whether manufacturer or employer procedures were used.

New Issue

The Agency has been investigating a March 15, 2008 collapse of a tower crane in New York City. One aspect of that investigation has focused on the use of synthetic slings in the process of attaching a bracing collar to the tower (the installation of such collars is part of the crane assembly process). This prompted the Agency to examine the existing OSHA standards applicable to the use of synthetic slings during crane assembly/disassembly.

In the course of that examination, OSHA has determined that neither Subpart N nor 29 CFR 1926.251, *Rigging equipment for material handling,* specifically addresses the hazard posed when a synthetic sling is used in a manner that can cause compression or distortion of the sling, or when the sling is in contact with a sharp edge. Consequently, the Agency is considering adding a provision to § 1926.1404 to address these hazards.[10]

One way of addressing these hazards would be to prohibit the use of synthetic slings in the assembly/disassembly of equipment covered by this proposed standard. Another way that the Agency is considering to address these hazards is to require padding or similar measures when needed to protect the slings from being damaged such as from being cut, compressed or distorted. OSHA requests public comment on this issue.

Paragraph 1404(a) Supervision—Competent—Qualified Person

Proposed paragraph (a) would require supervision of the assembly/disassembly process by an ''A/D supervisor.'' Section 1926.1401 defines ''A/D supervisor'' as ''an individual who meets this proposed paragraph's criteria for being an A/D supervisor, irrespective of the person's formal job title or whether the person is non-management or management personnel.'' C–DAC defined the term in this way to make

[7] This study was limited to crane related fatalities in the U.S. construction industry.

[8] Out of the 58 fatalities, 93% involved lattice boom cranes and 7% involved tower cranes.

[9] In contrast, a 34-year study (1969–2002) conducted by the Province of Ontario indicates that dismantling the boom is not a leading cause of mobile crane fatalities. This study concluded that dismantling the boom ranked sixth out of eight causes of mobile crane fatalities within the Province of Ontario during 1969 through 2002. Dismantling the boom comprised only 4% of the fatalities during this time period. (OSHA–2007–0066–0009).

[10] C–DAC did not consider hazards associated with the use of synthetic slings during assembly/disassembly.

clear that it is the substance of the individual's qualifications, and not his or her job title or position in the company hierarchy, that determines whether the person is qualified to act as an A/D supervisor.

The A/D supervisor would have to meet the definition of both a ''competent'' and ''qualified'' person as OSHA defines those terms.[11] The Committee believed that having an A/D supervisor overseeing the assembly/disassembly process who had both the authority to correct a hazard or stop the process and who had the expertise of a qualified person was necessary to ensure the safety of the operation.

Many of the hazards involved in the process are not obvious to those with limited knowledge and experience in assembly/disassembly. There are numerous scenarios in which there is stored kinetic energy in the equipment's component parts. The installation or removal of components in the wrong order, or using the wrong procedure, can release that energy in ways that would be unexpected to those with little knowledge of the process.

For example, failure to place blocking in the correct position under a boom can lead to unexpected movement or collapse of the boom when a pin that is in tension is removed. Workers unfamiliar with the concept of pins in tension may not recognize the dangers of removing it in that circumstance. Having a person overseeing the process that has the expertise needed to know how the process is supposed to be done, the ability to recognize dangerous situations and how to remedy them, and the authority to take corrective action, is crucial to ensuring that the assembly/disassembly process is completed safely.

The Committee agreed that the A/D supervisor did not have to be one individual since two people (one with the requisite expertise and the other with the authority to take corrective action), working as a team, would be as effective in overseeing the process as one individual.

[11] Proposed § 1926.1401, *Definitions,* defines a ''competent person'' as: One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them. Section 1401 defines a ''qualified person'' in this proposed standard as: One who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, has successfully demonstrated his ability to solve or resolve problems relating to the subject matter, the work, or the project. These definitions are essentially the same as the definitions in 29 CFR 1926.32(f) and 29 CFR 1926.32(m).

The A/D supervisor would oversee the implementation of the proposed requirements in paragraphs (a) through (g) and (j) through (q) of this proposed section, and would also address the hazards as described in paragraph (h) of this proposed section.

Paragraphs 1404(b) Knowledge of the Procedures, and 1404(c), Review of the Procedures

Proposed paragraph (b) would require that the A/D supervisor understand the assembly/disassembly procedures. In addition, proposed paragraph (c) requires the A/D supervisor to review them prior to starting the process unless experience in having used them on the same type and configuration of equipment makes their review unnecessary. One example would be an A/D supervisor who has overseen the erection of a tower crane with the same configuration for numerous jobs in the past year. If that A/D supervisor had, through that repetitive experience, developed a knowledge and understanding of the assembly procedures to the point where reviewing them prior to beginning assembly was no longer necessary, he/she would not be required to review them.

Without a thorough knowledge of these procedures, the A/D supervisor would be unable to ensure that the assembly/disassembly process is conducted safely.

Paragraph 1404(d) Crew Instructions

Under this proposed provision, before beginning assembly/disassembly operations, the A/D supervisor would have to determine that the crew members understand their tasks and the associated hazards, as well as any hazardous positions/locations that they need to avoid.

The Committee was of the view that accidents during assembly/disassembly are often caused by misunderstandings of the employees working in the assembly/disassembly crew as to their tasks and how they are to be performed, as well as a failure to recognize potentially dangerous areas in and around the equipment. The details of these tasks and, in particular, the location of danger areas from which workers need to keep themselves and their extremities clear, often vary from one machine to another. Having the A/D supervisor check to make sure that the crew members know this essential information before starting the assembly/disassembly process would be, in the Committee's view, an effective and practical means of addressing this aspect of the problem.

Paragraph 1404(e) Protecting Assembly/Disassembly Crew Members Out of Operator View

One of the hazards identified by the Committee is an operator swinging or moving the crane/derrick when assembly/disassembly personnel are in a crush/caught-in-between zone and out of the operator's view. The Committee believed that an effective and practical means of preventing these accidents would be through a communication procedure that would provide key information to, and coordination between, the operator and these workers.

This provision would therefore require that the crew member inform the operator that he/she is going to a location in, on, under, or near the equipment or load that is out of view of the operator where the movement of the equipment could injure the worker. The operator would be prohibited from moving any part of the crane/derrick or load until the operator gives a warning (the significance of which is understood by the crew member) and sufficient time for the crew member to move to a safe location, or the operator is informed through a pre-arranged means of communication that the crew member has moved to a safe location. Committee members indicated that the use of the (understood) warning coupled with sufficient time to exit, and the use of a pre-arranged means of communication, are each currently used by many employers and have proved to be effective.

One Committee member suggested that instead of requiring that the crew member directly inform the operator of his/her location, the rule should permit the crew member to provide this information to the operator through a third person. For example, the crew member would instruct his/her foreman to radio the information to the operator. Such a change could be made by changing the last phrase in proposed paragraph (e)(1) of this section to read, ''the crew member shall inform the operator directly or through someone instructed by the crew member that the crew member is going to that location.'' OSHA is asking for public comment on this suggestion. In particular, OSHA is asking for comment on whether this approach would be as protective of the crew members as the proposal, given that it would allow indirect communication between the crew members and the operator.

Paragraph 1404(f) Working Under the Boom, Jib or Other Components

The proposed provision would establish a general prohibition against employees being under the component when pins or similar devices are being removed (note that this provision is similar to section 5–3.1.3(l) of ASME B30.5–2004). An exception is provided for instances where the employer demonstrates that site constraints require being positioned under the component and the employer takes steps to minimize the risk of dangerous movement and duration and extent of exposure.

The Committee discussed the inherently hazardous nature of removing pins while being under the boom (and jib or similar components). If the wrong pins are removed while employees are under the component, it can move or collapse, posing a severe hazard to the worker. Even when pins are removed in the correct order, there may be unexpected stresses in the component which, as stored kinetic energy that may not be apparent until that energy is released upon the removal of the pin—at which time unexpected movement of the component may result. While other proposed provisions in the assembly/disassembly sections address this same hazard in other ways, these provisions in combination form a layered approach to safety.

The Committee discussed whether any exceptions should be allowed to the prohibition against workers being under the component during pin removal. It determined, after considerable discussion, that the only type of situation where it may be inappropriate to apply the prohibition involves site constraints. For example, in some circumstances there is no room to assemble/disassemble the boom horizontally using ground support, and the boom has to be assembled/disassembled ''in the air'' (that is, at an angle well above horizontal, or over an area, such as a large excavation, where there is no ground available for support). In some of those situations, one or more employees may have to be under the boom for certain periods of time in the pin removal process.

Therefore, the proposed provision includes an exception to cover such instances. However, in those instances the hazard of being under the component is still present. Because of that, the Committee believed it important to limit the application of the exception and, where it would apply, to ensure that steps would be taken to limit the risks involved. Therefore, the exception would be applicable only where the employer demonstrates that site constraints require being positioned under the component and the employer takes steps to minimize the risk of dangerous movement and duration and extent of exposure.

An example of a method for minimizing that risk and the exposure is provided in proposed Non-Mandatory Appendix D. The Committee considered making that method mandatory, but decided to include it only as an example because there may be other effective methods, which should not be excluded.

Paragraph 1404(g) Capacity Limits

This proposed provision would require that the rated capacity limits for loads imposed on the equipment, each of its components, (including rigging), lifting lugs and equipment accessories being assembled or disassembled not be exceeded. The provision would apply ''during all phases of assembly/disassembly.'' One example of the risk created by not following capacity limits is the process of installing counterweights. In some cases the crane being assembled is used to install its own counterweights. Early in this process, when few counterweights are in place, the crane's capacity will be so limited that swinging beyond a certain point, or booming out beyond a certain point, may cause it to overturn.

It should be noted that where an assist crane is being used during the assembly/disassembly of another crane/derrick, the requirements for rated capacity during operations must be met under proposed § 1926.1417(o), *Compliance with rated capacity*, with respect to the assist crane.

Paragraph 1404(h) Addressing Specific Hazards

For assembly and disassembly, this provision sets out specific hazard topics which the A/D supervisor must address. The Committee believed that requiring specific means and methods for protecting against these hazards (and, where specified goals are stated, for attaining those goals) would be too limiting. Therefore, the A/D supervisor must consider each listed hazard, determine the appropriate means of addressing it, and oversee the implementation of that method.

Paragraph 1404(h)(1) Site and Ground Bearing Conditions

This proposed provision would work in conjunction with proposed § 1926.1402, which addresses ground conditions for both assembly/disassembly and use of the equipment, including ground condition criteria. Proposed § 1926.1404(h)(1) would require the A/D supervisor to assess the ground conditions for conformance with those criteria, and to assess the site for suitability for assembly and disassembly.

Before beginning assembly/disassembly, the A/D supervisor would have to make the determination that ground bearing conditions are adequate to support the equipment during assembly/disassembly (the concept of adequate ground bearing conditions is discussed in detail above regarding proposed § 1926.1402). In addition, the A/D supervisor would have to consider the adequacy of site conditions which might affect the safety of assembly or disassembly. For example, at a construction site in an industrial facility with overhead piping carrying hazardous materials, the A/D supervisor would have to consider the potential for the equipment contacting the piping in determining where and how to conduct the assembly/disassembly operations.

Paragraph 1404(h)(2) Blocking Material and 1404(h)(3) Proper Location of Blocking

These two provisions address the hazards associated with inadequate blocking. ''Blocking'' (also referred to as ''cribbing'') is defined in § 1926.1401 as ''wood or other material used to support equipment or a component and distribute loads to the ground. Typically used to support latticed boom sections during assembly/disassembly and under outrigger floats.'' This definition is from the SC&RF Handbook.

Proper blocking plays an important role in assembly/disassembly safety. Blocking is used in a variety of circumstances to compensate for minor ground sloping and/or to enhance stability by spreading out the area over which forces from the load are transferred to the ground. It is used to help support assembled equipment (usually placed under outrigger pads) and during assembly/disassembly to support components. Blocking that is undersized, insufficient in type or number, in poor condition, and/or stacked in an unstable manner could lead to a failure of support and consequent unplanned movement or collapse of the equipment or component.

When used to support lattice booms or lattice components, the failure to place blocking in the correct location could have several dangerous consequences. For example, incorrect placement in some instances could cause a part of the lattice boom/component to bear too much force and damage it. That damage could

compromise structural integrity and, in some cases, may not be immediately noticed. If the assembly process were to continue nonetheless, the boom/component could fail.

Improper blocking location may also result in a failure to provide adequate support of the boom/component. One example is blocking used to provide support to a boom section that will need it later in the disassembly process, such as after pins are removed. If the blocking is in the wrong place, once the pins are removed, unplanned movement or collapse could result. Note that proposed § 1926.1404(h)(3) on proper blocking location is similar to section 5–3.1.3(k) of ASME B30.5–2004 (blocking to be appropriately placed to prevent inadvertent dropping of the boom).

Proposed paragraph (h)(3) (Proper location of blocking) is unchanged from the C–DAC document and its applicability is limited to lattice booms and components. However, it is the Agency's understanding that other types of booms and components (i.e., those for hydraulic cranes) also are at times assembled and disassembled in the field and may similarly need blocking. Consequently, it appears to the Agency that it may be appropriate to broaden the provision so that it would apply to all booms and components, not just lattice boom and components. OSHA is soliciting comments from the public on whether proposed paragraph (h)(3) of this section should be broadened to apply to all booms and components.

Paragraph 1404(h)(4) Verifying Assist Crane Loads

This proposed paragraph requires that, when using an assist crane, the loads that will be imposed on the assist crane at each phase of assembly/disassembly must be verified in accordance with proposed § 1926.1417(o)(3) to avoid exceeding the assist crane's rated capacity. ''Assist crane'' is defined in § 1926.1401 as ''a crane used to assist in assembling or disassembling a crane.'' When used for this purpose, an ''assist crane'' is subject to all applicable provisions of this standard, including the requirement of proposed paragraph (o) of this section that it not be used in a manner that exceeds its rated capacity.

The Committee was concerned that, at times, resulting loads on assist cranes during the assembly/disassembly process are not properly anticipated. For example, when a boom is being disassembled in a cantilevered position, an assist crane is sometimes used to help support the boom. In some instances, the load prior to pin removal is within the assist crane's rated capacity, but exceeds its rated capacity once the pins are removed, causing a collapse.

The Committee discussed having one section on capacity limits for equipment, equipment components and accessories as well as for any assist equipment used while assembling or disassembling. The Committee agreed that having a separate section on capacity limits for assist cranes was less confusing and would help highlight the hazard as it pertains to assembly/disassembly.

Paragraph 1404(h)(5) Boom and Jib Pick Points

This proposed provision would require the A/D supervisor to address the hazard of using improper boom and jib pick points. Specifically, the points of attachment of rigging to a boom/jib or boom/jib section(s) must be suitable for preventing structural damage. Such damage could compromise structural integrity and, in some cases, may not be immediately noticed. If that component were nonetheless used, the boom/component could fail.

The points of attachment also need to facilitate the safe handling of these components. Typically facilitating the safe handling of the boom/jib or boom/jib sections means using pick points that will result in the boom/section being at an intended angle (that is, 90 degrees to the load line or some other intended angle) when hoisted. For example, if the boom/section is intended to be horizontal, and only one pick point is going to be used, the pick point must coincide with the center of gravity. If the boom/section is intended to be at some other angle, a pick point would need to be identified that would generate that intended angle. Failure to use an appropriate pick point in this regard can create a situation in which there is a greater likelihood of unintended movement in connecting or disconnecting the boom/section.

Paragraph 1404(h)(6) Center of Gravity

In a variety of instances the method used for maintaining stability during assembly/disassembly depends on supporting or rigging a component (or set of components) so that it remains balanced throughout the process. In such instances the A/D supervisor would be required to identify the center of gravity of the load.

The ''center of gravity'' of an object is defined in § 1926.1401 as ''the point in the object around which its weight is evenly distributed. If you could put a support under that point, you could balance the object on the support.'' This definition is similar to the one in the SC&RF Handbook.

One example of where it would be necessary to identify the center of gravity is where the assembly/disassembly crew relies on an assist crane to suspend a component in a horizontal position. In such instances the center of gravity must be identified in order to correctly install the rigging. If the center of gravity were not identified, employees might try to compensate by riding on the section/component while it is being moved into place, which is quite dangerous. Also, in such a situation, if the component gets ''hung-up,'' it can move unexpectedly if it becomes freed.

In contrast, some methods for maintaining stability do not depend on rigging or supporting the component to attain horizontal balance. For example, if two adjoining sections of a boom are being disconnected from each other, and both sections are supported at all four end points by blocking, identifying the center of gravity of each section would not normally be necessary.

The Committee anticipated that there may be instances where the assembly/disassembly method being used necessitates the identification of the center of gravity, but the employer is unable to get sufficient information to make that identification accurately. In those instances, measures would be required to be put in place that would prevent unintended dangerous movement resulting from an inaccurate identification of the center of gravity. An example of one such method is described in the proposed Non-Mandatory Appendix D of proposed subpart CC.

Paragraph 1404(h)(7) Stability Upon Pin Removal

This proposed paragraph requires that boom sections, boom suspension systems (such as gantry A-frames and jib struts) or components must be rigged or supported to maintain stability upon the removal of the pins. ''Boom suspension systems'' are defined in § 1926.1401 as ''a system of pendants, running ropes, sheaves, and other hardware which supports the boom tip and controls the boom angle.'' This definition is the same as that for ''boom suspension'' in the SC&RF Handbook.

The Committee identified the process of pin removal as one that has proved to be particularly hazardous. Potential energy in these sections, systems and components can be released suddenly during this process, resulting in unanticipated movement, ranging from shifting to collapse. Even small movements can result in injury,

including amputations; larger movements and collapses can cause fatal injuries.

The Committee determined that the key to preventing these injuries and fatalities is through ensuring that the sections/components will remain stable upon the removal of the pins. Instability can have a variety of causes, including improper assembly/disassembly sequencing, improper rigging, incorrectly designed support, blocking failures and ground compression. Therefore, under this proposed provision, the A/D supervisor would be required to make sure that the sections/components are rigged or supported by maintaining stability once the pins are removed.

Paragraph 1404(h)(8) Snagging

This proposed paragraph requires that suspension ropes and pendants not be allowed to catch on the boom or jib connection pins or cotter pins (including keepers and locking pins). In § 1926.1401, ''pendants'' are defined to ''include both wire and bar types. Wire type: a fixed length of wire rope with mechanical fittings at both ends for pinning segments of wire rope together. Bar type: Instead of wire rope, a bar is used. Pendants are typically used in a latticed boom crane system to easily change the length of the boom suspension system without completely changing the rope on the drum when the boom length is increased or decreased.'' This definition is similar to that in the SC&RF Handbook, but with the addition of the reference to ''bar type'' pendants.

Many times the pendant cables hang alongside the boom and may get caught (snagged) on the pins, bolts, or keepers as the operator raises the boom. If this were to occur the cables could be damaged or the boom may rise then drop suddenly as a snagged cable releases from the pin. This can result in shock loading and damaging cables and components. For example, under this proposed provision, once all the boom sections are installed and the pendants are pinned together, the A/D supervisor must ensure that care is taken when raising the boom so that pendant cables and hoist cables do not snag on the pins or any other component during the boom raising process.

Paragraph 1404(h)(9) Struck by Counterweights

''Counterweight'' is defined in § 1926.1401 as a ''weight used to supplement the weight of equipment in providing stability for lifting loads by counterbalancing those loads.'' This definition is taken from the SC&RF Handbook.

Counterweights are usually large, heavy plates made of steel and/or concrete. The A/D process typically involves the installation and removal of counterweights. This proposed provision would require that the A/D supervisor address the hazard of employees being struck by them during their installation/removal. During the installation/removal process, employees typically are in close proximity to them. An employee could be struck by a counterweight or crushed between it and the crane structure if it were to sway as it was being installed or removed. The A/D supervisor would be required to address this aspect of the hazard, such as by taking steps to have the operator minimize the amount of sway and by positioning the employees to minimize their hazard exposure.

Additionally, after the counterweights are installed, the crane may have to swing to complete the boom assembly. The A/D supervisor would be required to address this aspect of the hazard as well, such as through the proper positioning of the employees and enhancing their awareness of the counterweight swing zone so that they will avoid being struck or crushed.

Paragraph 1404(h)(10) Boom Hoist Brake Failure

This proposed provision addresses a hazard that can occur both during assembly and disassembly, although it is more typically a hazard during assembly. In many older cranes the boom hoist brake mechanism has an external or internal mechanical brake band that operates by pressing against the hoist drum. As the configuration of the crane changes and, for example, more boom is added, this type of boom hoist brake may slip unless it has been adjusted to hold the extra weight. The Committee was concerned that the inability of an unadjusted brake to hold the increased load will not be evident until the additional boom section(s) has been added and the operator attempts to rely on the brake in a subsequent phase of the operation. If the operator does not first raise the boom a small amount after the section has been added (with the crew clear of the boom) to test the brake, employees could be injured later in the process when the operator manipulates the boom and finds that he/she is unable to brake it.

To address this hazard, the employer would be required to test the brake to determine if it can hold the load. In many cases, if it is insufficient, an adjustment to the brake will correct the problem. If it remains insufficient, the employer would be required to use a boom hoist pawl, other locking device, back-up braking device, or another method of preventing dangerous boom movement (such as blocking or using an assist crane to support the load) from a boom hoist brake failure.

The Agency is concerned that the text of the proposed provision may not be sufficiently clear regarding the timing of this brake test. OSHA's interpretation is that the test would need to be done immediately after each section (or group of sections) is installed, and after all sections are in place. OSHA is soliciting public comment on this issue and if it is necessary to revise the language of the provision to clarify when the test must be done.

Paragraph 1404(h)(11) Loss of Backward Stability

The Committee identified three points during the assembly/disassembly process at which there is a heightened risk of loss of backward stability; these are: when swinging the upperworks, during travel, and when attaching or removing equipment components. Therefore, under this proposed provision, before any of these occur, the A/D supervisor would be required to consider whether precautions need to be instituted to ensure that backward stability is maintained.

The illustration contained within the proposed requirements for loss of backward stability (§ 1926.1404(h)(11)) is taken from the ''Mobile Crane Manual,'' published by the Construction Safety Association of Ontario.

Paragraph 1404(h)(12) Wind Speed and Weather

Committee members believed that wind velocity and weather must be considered so that crane stability and capacity are not compromised. The Committee considered the option of establishing a maximum wind speed, as well as the option of incorporating ANSI's provisions regarding wind speed. However, it believed that selecting any one particular speed as a maximum would be arbitrary because of the variety of factors involved. For example: different cranes and crane types vary with respect to the ''sail'' area they present; an assembly process involving use of an assist crane may require lower wind speeds than one in which no assist crane is used; and assembly/disassembly operations done ''in the air'' (that is, with the boom elevated in the air, without ground support for the boom) may require lower wind speeds than a boom assembled/disassembled on the ground.

The Committee ultimately decided that a better approach would be to have the A/D supervisor determine the maximum safe wind speed under the circumstances.

Other weather conditions that can affect the safety of assembly/disassembly would include, for example, ice accumulation on crane components. Ice can both add to the weight of the components and create slippery, dangerous surfaces on which employees work. The A/D supervisor must consider if weather conditions affect the safety of the operation.

Paragraph 1404(i). [*Reserved*.] OSHA is proposing to reserve this paragraph because it can be difficult for readers to distinguish (i) from (j).

Paragraph 1404(j) Cantilevered Boom Sections

Members of the Committee believed that a common mistake in assembly/disassembly is cantilevering too much boom. When too much boom is cantilevered structural failure can occur in components such as the mast/gantry, boom sections and lifting lugs. Employees may be struck by falling components from this type of failure. To prevent accidents from cantilevering too much boom during assembly/disassembly, this provision would require manufacturer's limitations on cantilevering not to be exceeded.

If the manufacturer's limitations were not available, the employer would be required to have a registered professional engineer (RPE) determine the appropriate limitations, and to abide by those limitations. The Committee believed that in such cases there would need to be a requirement that the RPE's determination be in writing to ensure that the assessment has been done.

Paragraph 1404(k) Weight of Components

As with any load to be lifted by a crane/derrick, the weight of the components must be available to the operator so that the operator can determine if the lift can be performed within the crane/derrick's capacity. This proposed requirement would apply irrespective of whether the component is being hoisted by the crane being assembled/disassembled or by an assist crane.

Paragraph 1404(l). [*Reserved*.] OSHA is proposing to reserve this paragraph because it is inconvenient for readers to distinguish the letter ''l'' from the Arabic number ''1.''

Paragraph 1404(m) Components and Configuration

This proposed provision deals with the selection of components that will be used to comprise the crane/derrick, the configuration of the equipment, and its inspection upon completion of assembly. Proper selection of components and proper configurations are explained in the manufacturer's instructions, limitations, and specifications. Regarding component selection, the provision would address the hazards associated with use of components that the manufacturer had neither intended nor planned for incorporation into the equipment.

The Committee believes that the use of such components could adversely affect the capacity and performance of the crane/derrick, cause the manufacturer's specifications (including the load chart) and instructions to be inapplicable, and adversely affect other components on the crane/derrick.

Similar hazards are posed by configuring the crane/derrick in a manner that does not accord with the manufacturer's instructions, limitations and specifications. An example given by the Committee was trucks carrying boom sections arriving out of sequence. To save time, some employers assemble the sections in the order in which they arrive rather than waiting for the correct section. This would result in a crane/derrick configured differently than intended by the manufacturer. Because the crane/derrick is designed and tested as a unit, the failure to configure the crane/derrick as the manufacturer had intended could present the same hazards as those described above for improper component selection.

The Committee recognized that, especially in the case of very old equipment where the manufacturer no longer exists, there are instances where the employer can no longer obtain the manufacturer's instructions, limitations and specifications regarding the selection of components and configuration of the equipment. In such instances the proposed provision would require that a registered professional engineer familiar with the type of equipment involved approve, in writing, the component selection and configuration.

Another proposed section (§ 1926.1434) would allow cranes/derricks to be modified under certain circumstances. To the extent a crane/derrick were modified in accordance with that section, the employer would not be required to follow the manufacturer's original instructions, limitations and specifications regarding component selection and configuration regarding those modifications. Instead, under proposed paragraph (m)(1)(ii) of this section, the employer would be required to follow the component selection and configuration requirements approved in accordance with proposed § 1926.1434.

Finally, this proposed provision would require that the equipment be inspected after assembly has been completed to ensure that the component selection and configuration are correct.

Paragraph 1404(n) Manufacturer Prohibitions

As explained above regarding proposed § 1926.1403, an employer would be able to choose to use either manufacturer assembly/disassembly procedures or its own (as long as they met the requirements in proposed § 1926.1406). However, in either case, the Committee believed that manufacturer prohibitions regarding assembly or disassembly would need to be met. In the Committee's view, a prohibition specified by the manufacturer signals that, if not heeded, a significant hazard would likely be created.

Paragraph 1404(o) Shipping Pins

In order to properly address the hazards the Committee was concerned with, the Agency rewrote the language that C–DAC had originally agreed upon for this proposed provision. The original (C–DAC) language read as follows:

(o) Shipping pins. Reusable shipping pins, straps, links and similar equipment must be removed and stowed in accordance with manufacturer instructions.

In studying the regulatory text as it was originally drafted it appeared the language did not accurately reflect the intentions of the Committee. The provision was intended to address two hazards. The first hazard is the failure to remove items such as shipping pins, which if left in place during operation could damage the equipment. For example, if shipping pins are not removed and the boom is raised up, the boom could be damaged. The second hazard is injury to employees where items such as shipping pins are removed but not properly stowed (i.e., placed in a special hole or bracket designed to keep the item from being dislodged) or stored on the equipment (such as in an equipment box in the cab) after assembly. Where these items are left lying on the equipment and not properly stowed or stored they present a falling object hazard to employees. To better reflect the Committee's intentions the Agency has altered the C–DAC language. The proposed provision reads:

(o) Shipping pins. Reusable shipping pins, straps, links and similar equipment must be removed. Once they are removed they must either be stowed or otherwise stored so that they do not present a falling object hazard.

The Agency welcomes any comments with respect to this change.

Paragraph 1404(p) Pile Driving

This proposed provision would prohibit equipment used in pile driving operations from having a jib attached. The constant pounding of the pile driving hammer and the sometimes rapid descent of the pile causes the boom to bounce. If a jib were installed on the tip, as the boom bounces the jib could be thrown backward against its stops, which would likely cause structural damage to the boom. The damage could cause the boom to immediately fail or could diminish its capacity.

Paragraph 1404(q) Outriggers

This proposed paragraph specifies requirements regarding outrigger deployment. These requirements reflect current industry best practices in the use of outriggers. Failure to use outriggers in accordance with these practices could result in the overturning of the crane.

Section 1926.1405 Disassembly—Additional Requirements for Disassembly of Booms and Jibs (Applies to Both the Use of Manufacturer Procedures and Employer Procedures)

The Committee believed that many of the accidents associated with cranes occur during the removal of pendant, boom and jib pins. These accidents typically occur because of a failure to recognize that, in certain situations, particular pins are ''in tension.'' If removed while in that state the result will be unplanned movement of a component or the collapse of the boom or jib.

Consequently, the Committee believed that the removal of pendant, boom section and jib pins warrants heightened attention. This proposed section focuses on protecting employees from these hazards during the dismantling of booms and jibs, either when disassembling the crane/derrick or when changing the length of a boom or jib. To make clear that ''dismantling'' includes activities such as shortening a boom, proposed § 1926.1401 defines ''dismantling'' to include ''partial dismantling (such as dismantling to shorten a boom or substitute a different component).''

In this proposed section the Committee identified particular scenarios that, in the experience of many of the Committee members, pose specific hazards in disassembly if the wrong pins (that is, pins that are in tension) are partly or completely removed. The failure to follow the provisions would very likely result in unintended movement and or collapse of the components. OSHA believes that these requirements will help to prevent unintended movement or collapse of booms or jibs as they are being disassembled.

While discussing the hazards associated with disassembly, the Committee reviewed particular illustrations from the ''Mobile Crane Manual'' by Construction Safety Association of Ontario. It was agreed that including these illustrations would be an effective way of communicating the dangers and the precautions specified in this proposed section.

Section 1406 Assembly/Disassembly—Employer Procedures—General Requirements

Under proposed § 1926.1403, employers would be permitted to follow their own procedures for assembling and disassembling a crane/derrick instead of those of the manufacturer. When doing so, the employer would have to ensure that its procedures met the general requirements in proposed § 1926.1406.

The proposed general requirements would focus on a ''layered'' strategy for preventing injuries and fatalities during this process: maintaining stability of the equipment and its components and positioning employees so that their exposure to unintended dangerous movement is minimized. This reflects the Committee members' experience that maintaining stability and avoiding dangerous positions are the key elements to preventing these accidents.

In addition, under proposed paragraph (b) of this section, the employer would be required to have its procedures developed by a qualified person. The Committee believed that, due to the complexity of the factors involved and the resultant expertise needed to develop such procedures, it would be necessary for them to be developed by a qualified person.

Note that the Agency wording in proposed § 1926.1406(a)(1) includes a modification of the language in the C–DAC document. The C–DAC document stated:

(1) Prevent unintended dangerous movement, and to prevent collapse, of part or all of the equipment.

Read literally, this would mean that the employer could choose to design the procedures to prevent collapse either of part or of all of the equipment. The intent of the Committee was that the procedures must not allow unintended dangerous movement of any part of the equipment. Therefore, the Agency modified this language so that the proposed provision reads as follows:

(1) Prevent unintended dangerous movement, and to prevent collapse, of all parts of the equipment.

Sections 1407–1411 Power Lines

Introduction

Proposed §§ 1926.1407 through 1926.1411 set out proposed requirements designed to help ensure the safety of employees while cranes/derricks are being assembled, disassembled, operated, or while they travel under power lines. Section 1401 defines ''power lines'' as ''electric transmission and distribution lines.'' This definition makes it clear that these sections apply to all electric transmission and distribution lines. C–DAC defined ''power lines'' as ''electrical distribution and electric transmission lines,'' but OSHA changed the definition to make the terminology consistent with Subpart V of 29 CFR part 1926, which applies to the construction of ''electric transmission and distribution lines and equipment.'' 29 CFR 1926.950(a).

The Committee believed that there is a need to reduce the number of fatalities resulting from electrical contact with power lines. In its experience, the presence of power lines at construction sites poses a significant hazard to employees at the site. Power lines can be a hazard not only during the operation of cranes and derricks, such as lifting operations, but also during assembling and disassembling the equipment and traveling with such equipment under power lines. Employees are at risk of serious injury or death if the equipment they are in, on or near is at a construction site where there are power lines.

The Committee's perception of the significance of this problem is confirmed by data that indicate that electrocution is one of the leading causes of crane-related fatalities on construction sites. During the years 1992 to 2005, the Bureau of Labor Statistics (BLS) reported 1,153 crane-related fatalities. These statistics include fatalities across all industries and are not exclusive to construction crane-related fatalities. Of those total crane-related fatalities the second highest cause is attributed to cranes contacting overhead power lines (19% or 219 fatalities). Specifically for the year 2005, BLS reported 85 crane-

related fatalities and 12 (or 14%) of those fatalities resulted from cranes contacting overhead power lines. (OSHA–2007–0066–0026).

In addition, a recent analysis of data published by the American Society of Civil Engineers (ASCE), authored by J.E. Beavers, J.R. Moore, R. Rinehart and W.R. Schriver, found that electric shock caused by cranes and other lifting equipment contacting a power source was the second highest proximate cause (after being struck by a load) of crane-related fatalities in the construction industry from 1997 to 2003. These fatalities all involved the failure to maintain the minimum approach distances set out in the existing Subpart N, § 1926.550 provisions.[12] J.E. Beavers *et al.*, ''Crane-Related Fatalities in the Construction Industry,'' 132 Journal of Construction Engineering and Management 901, 903–04 (2006) (OSHA–2007–0066–0012).

The Construction Safety Association of Ontario conducted an extensive study which reviewed crane fatalities from 1969 through 2002 in the Province of Ontario. (OSHA–2007–0066–0009). This study showed that the number one cause of mobile crane fatalities in the Province of Ontario construction industry during these 34 years was due to power line contact, with 50 of the 115, or 43%, of the mobile crane fatalities caused by power line contact.

A 1997 study by A. Suruda, M. Egger and D. Lui, analyzed crane related fatalities in the U.S. construction industry from 1984 to 1994. This study determined that electrocution by power line contact was the leading cause of crane related fatalities in the U.S. construction industry, with 39% of the 502 fatalities caused by electrocution from power lines. In addition, the findings of this study further confirmed previous studies which indicated that power line contact contributes to a significant number of crane related fatalities.[13] A. Suruda *et al.*, ''Crane-Related Deaths in the U.S. Construction Industry, 1984–94,'' The Center to Protect Workers' Rights (Oct. 1997) (OSHA–2007–0066–0013).

Proposed § 1926.1401 defines ''electrical contact'' as follows:

> When a person, object, or equipment makes contact or comes in close proximity with an energized conductor or equipment that allows the passage of current.

[12] The authors determined that a crane's boom was generally the component which made contact with the power line.

[13] These studies include: D. MacCollum, ''Critical Hazard Analysis and Crane Design,'' Professional Safety (1980); D. Dickie, ''Crane Study Confirms Downward Trend, Underlines Importance of Training,'' The Crane Report (1993).

The Committee decided that it was necessary to define the term ''electrical contact'' to clarify that the term is not limited to a person, object, or equipment making physical contact with a power line but includes situations in which the object comes close enough to a power line for current to arc between the power line and the object and thereby energize the object.

Currently Subpart N, in 29 CFR 1926.550(a)(15)(i) and (ii), addresses power line hazards by specifying the minimum distance that must be maintained between a crane and an energized power line. For lines rated 50 kilovolts (kV) or below, the minimum distance is 10 feet; for lines over 50 kV, the minimum distance is 10 feet plus 0.4 inches for each 1 kV over 50 kV (we will refer to this Subpart N requirement in this preamble as the ''10 foot rule''). However, the existing Subpart N provisions, which instruct employers to maintain a minimum clearance distance, do little by way of requiring employers to implement measures to help prevent operators from inadvertently breaching that distance.

The only preventative measure in Subpart N is a requirement, in paragraph 1926.550(a)(15)(iv), to use a spotter ''where it is difficult for the operator to maintain the desired clearance by visual means.'' In discussing how to reduce power line fatalities, the Committee determined that a systematic, proactive approach to preventing power line contact is needed.

First, in the Committee's experience, it is difficult for the operator, from his/her position in the crane's cab, to determine if the crane or load is 10 feet (or other applicable minimum distance) from a power line. According to C–DAC, generally operators know the 10 foot rule but they have problems being able to perceive or visually determine when the part of the equipment or load closest to the power line has reached the 10 foot rule's distance. The operator might think he/she is maintaining the required minimum distance when in fact the crane or load is closer than that to the line. Except for the limited requirement to use a spotter mentioned above, the existing Subpart N standard does not require any methodology or aids to be provided in each case to help the operator identify the location of this invisible boundary or otherwise avoid it.

Second, the Committee believed that operators sometimes breach the minimum clearance distance when they forget about the presence of a power line. For example, an operator might conclude at the beginning of a shift that he/she can pick and set all necessary loads while maintaining the required minimum distance but may thereafter be called upon to pick or set a load closer to the power line than normal. Having once concluded that the power line presents no problem, the operator might not recognize that the situation has changed and that there is now a danger of breaching the minimum distance.

Another scenario is when an operator concentrates so strongly on tasks related to moving the load, particularly if the load is one that requires the crane to be operated near its capacity, that he/she forgets about the power line. By not providing encroachment prevention measures, the current standard does not help the operator maintain the 10 foot rule and therefore does not address scenarios where operators forget about the presence of a power line.

Further, the current standard's provision for a spotter does not adequately address these scenarios. By requiring a spotter only ''where it is difficult for the operator to maintain the desired clearance by visual means,'' the provision implies that typically it is not difficult for the operator to accurately judge the distance and the equipment's or load's distance from the boundary. However, a crane operator, no matter how experienced, is normally not well-positioned to judge either the boundary distance or the distance the equipment or load is from it. In most cases the power line is thin, high up, and poorly contrasted against the sky.

Adding to the operator's difficulty is a confusion of angles posed by the power lines, load line, boom, and position of the operator away from the boundary. These factors are compounded by the distorting effects of distance on depth perception. Despite these factors, the operator must be able to accurately ascertain the location of an invisible boundary and judge relatively small distances with a high degree of precision.

Even a small misjudgment can result in the minimum clearance distance being breached. In short, the current standard assumes a degree of visual acuity that experience has shown is unrealistic. The high number of fatalities that continue to result from electrocution by power lines demonstrates that the current, limited provision regarding a spotter is not effective.

Third, the Committee discussed the reality that many employers intentionally perform work closer than the 10 foot rule to energized power lines. In only two circumstances does the current standard allow the operation of cranes closer than the 10 foot rule.

The first instance is where the power lines have been deenergized and visibly grounded and the second is where insulating barriers (separate from the equipment) have been erected to prevent physical contact.

Committee members noted that typically neither of these measures is implemented. Specifically, the Committee believed that most employers elect not to use the option to deenergize and ground because of the time, expense and difficulty in making those arrangements. In addition, the Committee determined that an ''insulating barrier'' of the type that is currently available does not, by itself, adequately protect employees because these barriers are only effective for ''brush'' contact. If there is more than brush contact, they will not protect employees from electrocution because the equipment will pierce the device. In order to address the lack of compliance and the insufficient protections provided to employees who work closer than the 10 foot rule, the Committee developed new provisions that it believed would be both realistic and effective for safely working in such circumstances.

To summarize, the Committee found that the existing Subpart N provisions are inadequate. They fail to require employers to implement measures that would help prevent operators from inadvertently breaching the minimum clearance distance. The Committee determined that a systematic, proactive approach to preventing power line contact is needed. It recognized that while such an approach is necessarily more complex than the current 10 foot rule, it is essential to accomplishing the goal of reducing power line related fatalities and injuries.

Brief Overview of Proposed Requirements

The proposed standard would require the implementation of a systematic, proactive approach to dealing with the hazard of power lines. This approach would be comprised of the following steps: (1) Identify the work zone and assess it for power lines—determine how close the crane could get to them. The employer would have the option of doing this assessment for the area 360 degrees around the crane or for a more limited, demarcated area; (2) If the assessment showed that the crane could get closer than a trigger distance—20 feet for lines rated up to 350 kV (50 feet for lines rated over 350 kV)—then requirements for additional action would be triggered.

Specifically, unless the power lines were deenergized and grounded, encroachment/electrocution prevention measures would have to be implemented to prevent the crane from breaching a minimum clearance distance and protect against electrocution. The employer would be allowed to choose among several minimum clearance distance options.

For example, for lines up to 350kV, the minimum clearance distance options would be: (1) 20 feet; or (2) the distance specified in Table A for the line's voltage (Table A is the ''10 foot rule''; see discussion of Table A below); or (3) a distance closer than what is specified in Table A.

However, there are limitations to the availability of some of these options, and the number of mandatory encroachment prevention (and other) measures increases when using a clearance distance closer than Table A.

The proposed standard uses the word ''encroachment'' to describe a situation in which equipment gets closer than the minimum allowed clearance distance to a power line. Under § 1926.1401, *Definitions,* encroachment ''is where any part of the crane, load line or load (including rigging and lifting accessories) breaches a minimum clearance distance that this Subpart requires to be maintained from a power line.'' Encroachment prevention measures are critical to compliance with this proposed standard's minimum distance requirements.

A similar approach to power line safety was developed for preventing electrocutions during the assembly and disassembly of equipment. This is addressed in a separate proposed section because the assembly/disassembly process involves some different circumstances than are present during operation.

Section 1407 Power Line Safety (Up to 350 kV)—Assembly and Disassembly

The proposed requirements in § 1926.1407 address the hazards of assembling and disassembling equipment near power lines up to 350 kV. The requirements in proposed 1407 are similar in most respects to the requirements in proposed § 1926.1408, which address operations of equipment near power lines.

OSHA notes that when an assist crane is used during the assembly or disassembly of another crane/derrick, the use of the assist crane, with respect to power line safety, would be considered ''operations'' and therefore covered by proposed § 1926.1408 (or, for power lines over 350 kV, proposed § 1926.1409). This is because the assist crane has already been assembled and is being used for a crane operation. Therefore, use of the assist crane would be required to comply with proposed § 1926.1408 during the assembly/disassembly process rather than with proposed § 1926.1407.

In contrast, a crane that is not yet fully assembled is often used to complete its own assembly. For example, a crane is often used to load its own counterweights. Similarly, it may unload its counterweights in its own disassembly process. Such activities would be covered under proposed § 1926.1407 since it is being assembled/disassembled.

Paragraph 1407(a)

Under this proposed paragraph, before beginning assembly or disassembly, the employer would be required to determine if any part of the crane, load or load line (including rigging and lifting accessories) could get, in the direction or area of assembly, closer than 20 feet to a power line. In other words, the employer would use the direction or area of assembly or disassembly in evaluating whether any such part could come closer than 20 feet. If this 20 foot ''trigger'' determination is positive, then the employer would be required to take additional steps. Specifically, the employer would be required to meet the proposed requirements under either, Option (1), Option (2) or Option (3) of § 1926.1407(a). If any part of the crane, load or load line could not come within more than 20 feet of a power line the employer would not be required to take any further action under this proposed section.

Upon further review of C–DAC's § 1926.1407(a), OSHA realized there was an inadvertent omission. The C–DAC regulatory text read:

(a) Before assembling or disassembling a crane, the employer must determine if any part of the crane, load, or load line (including rigging and lifting accessories) could get, in the direction or area of ''assembly,'' within 20 feet of a power line during the assembly/disassembly process.

These provisions were intended to apply to both assembly and disassembly. The employer needs to evaluate power lines with respect to the direction or area of assembly when preparing to assemble the crane, and the direction or area of disassembly when preparing to disassemble the crane. A reference to ''disassembly'' in this regard was inadvertently omitted. Therefore, OSHA has changed the regulatory text to read:

(a) Before assembling or disassembling a crane, the employer must determine if any part of the crane, load, or load line (including rigging and lifting accessories) could get, in

the direction or area of ''assembly/disassembly,'' closer than 20 feet to a power line during the assembly/disassembly process.[14]

The phrase ''direction or area of assembly/disassembly'' is designed to address the fact that, in some cases, the assembly or disassembly of a crane takes place not just in an ''area,'' that is, a fixed portion of the work site, but also in a ''direction.'' For example, when disassembling a crane, the disassembly process takes place in an area that includes the area under and around the boom's path as it is lowered to the ground (in most, but not all cases, the boom is lowered to the ground for the disassembly process). Under this provision, the employer would be required to assess the promixity that the boom will be in to the power line in its path of travel to (and on) the ground.

In another example, when assembling a lattice boom crane, the ''area'' involved will expand as boom sections are added.[15] This area expands in the ''direction'' in which the boom sections are added. The power line assessment has to be made for the portion of the site that will be involved as these boom sections are added.

In addition, ''direction'' includes the direction that, for example, the boom will move as it rises into the air after the boom has been assembled on the ground. For example, the boom, when fully assembled on the ground, may be more than 20 feet from a power line. However, when raising it from the ground, it may get closer than 20 feet. Accordingly, under this language, the ''direction'' that the boom will travel as it is raised must also be evaluated for proximity to power lines.

Another example is the assembly of a tower crane. As tower sections are added, the assembly process may get closer to power lines than when the process began on the ground. That ''direction'' of assembly upwards must also be evaluated.

Paragraph (a)(1) Option (1)

An employer choosing Option 1 would protect against electrocution by having the power lines deenergized and visibly grounded. Where the employer elects this option, it would not have to implement any of the encroachment/electrocution prevention measures listed in proposed § 1926.1407(b). This option helps to eliminate the electrical hazards which are present with power lines.

However, some amount of time is needed to arrange for the utility owner/operator[16] to deenergize and ground the line. Also, in some instances, especially where the construction project is small, the cost of deenergizing and grounding may be a substantial portion of the cost of the project. The Committee recognized that, in practice, largely because of these factors, deenergizing and grounding has not been routinely done.

Therefore, the Committee believed that providing other safe and practical options would help to reduce unsafe practices in the industry. Those other options (Options 2 and 3 in proposed § 1926.1407(a)) combined with proposed § 1926.1407(b) are designed to be effective protection against the hazards of electrocution.

Paragraph (a)(2) Option (2)

Under Option 2 (proposed § 1926.1407(a)(2)), the employer would be required to maintain a minimum clearance distance of 20 feet. To help ensure that this distance is not breached, the employer would have to implement the encroachment prevention measures in proposed § 1926.1407(b). Under this proposed option, no part of the crane, load or load line, including rigging and lifting accessories, would be permitted closer than 20 feet to the power line.

Employers using this proposed option would, in most cases, have to stay further away from the power line than under the existing Subpart N's 10 foot rule (employers wanting to use the 10 foot rule would have to use proposed Option 3, discussed below).[17] However, an advantage of this proposed option to many employers is that they would not have to determine the exact voltage of the power line as they would if they were to apply Subpart N's 10 foot rule. They would only have to determine that the line voltage is equal to or less than 350 kV. As a practical matter, since many employers rely on the utility owner/operator to provide voltage information, this option would save them that step.

The Committee believed that, since the minimum clearance distance would be 20 feet, there would be no diminution of safety under this option since the maximum possible clearance distance under the current Subpart N's formula is 20 feet. In fact, in the Committee's experience, most power lines encountered by most employers have voltages that, under the current Subpart N formula, require a minimum clearance distance of 10 feet. Therefore, use of this option would, in most cases, result in a higher margin of safety. Employers who do not need to get closer than 20 feet in order to assemble/disassemble the crane could use this option and would be saved the step of obtaining the exact line voltage.

As noted above, in addition to maintaining a minimum clearance distance of 20 feet, employers using this option would be required to implement the encroachment prevention and other measures specified in proposed § 1926.1407(b).

Paragraph (a)(3) Option (3)

Under Option 3 (proposed paragraph § 1926.1407(a)(3)), the employer would be required to maintain a minimum clearance distance in accordance with Table A (of proposed § 1926.1408). Under Table A, depending on the voltage of the power line, the minimum approach distance ranges from 10 feet to 20 feet for lines up to 350 kV. Therefore, the minimum clearance distance would be essentially the same under Option 3 as under Subpart N's 10 foot rule. Under this option the employer would be required to determine the line's voltage.

As a practical matter, in the Committee's experience, the power lines most typically encountered by most employers would require a minimum clearance distance of 10 feet under Table A. As a result, employers could usually assemble/disassemble equipment closer to the lines under this option than under Option 2.

Table A in essence is based upon the same formula as is currently used in existing Subpart N (the 10 foot rule) and is similar to Table 1 in ASME B30.5–2004. Unlike Subpart N, which requires employers to calculate the minimum clearance distance from a formula, Table A sets forth specified clearance distances in a readily understood table and requires no calculations. The Committee believed that a table with specified clearance distances is more

[14] As explained below, OSHA is changing ''within 20 feet of a power line'' wherever it appears in the C–DAC document to ''closer than 20 feet to a power line'' to avoid potential confusion over whether ''within'' means breaching or not breaching the 20 foot distance.

[15] This also occurs with telescopic extensible boom cranes when a ''dead man section'' is added to the boom.

[16] OSHA notes that the phrase ''utility owner/operator'' reflects scenarios where utilities may not be operated by an owner but by some entity other than the owner. Therefore wherever the phrase ''utility owner/operator'' is used in the standard or in the preamble it is meant to apply to utility owners or utility operators. In addition, in various places in the original C–DAC document, the Committee had used the terms ''power line owner,'' ''power line owner/operator'' or a variation of those terms. The Agency has changed those terms to ''utility owner/operator'' or a variation of those terms. The Agency has changed those terms to ''utility owner/operator'' to be consistent throughout the proposed regulatory text.

[17] As discussed above, the 10 foot rule is a scale of voltages and distances that begins at 10 feet.

readily applied than the formula set out in the existing Subpart N requirements.

The enhanced safety that would result under this option would stem from the fact that, first, there would be an affirmative obligation on the employer to determine the power line voltage so that the correct Table A minimum clearance distance could be determined. Second, in addition to maintaining the minimum clearance distance specified in the Table, employers using this option would be required to implement the encroachment prevention and other measures specified in proposed § 1926.1407(b).

In reviewing C–DAC's draft of this provision, the Agency realized that C–DAC inadvertently failed to explicitly state that the Table A minimum clearance distance must not be breached. OSHA has modified proposed paragraph § 1926.1407(a)(3)(ii) to correct this error. Therefore, the last sentence of the C–DAC language has been expanded to read as follows:

> If so, then the employer must follow the requirements in paragraph (b) to ensure that no part of the crane, load line, or load (including rigging and lifting accessories), gets closer to the line than the minimum clearance distance.

Paragraph 1407(b) Preventing Encroachment/Electrocution

Once an employer has determined that some part of the crane, load or load line could come within the trigger distance of 20 feet of a power line (see § 1926.1407(a)), if it chooses either Option (2) or (3) of § 1926.1407(a) it would be required to implement encroachment prevention measures to help ensure that the applicable minimum clearance distance (20 feet under Option 2 or the Table A distance under Option 3) is not breached.[18]

Most of the measures in this proposed paragraph are designed to help the employer maintain the appropriate clearance distance and thereby prevent electrical contact while in the process of assembling or disassembling equipment. Some of the measures are designed to prevent electrocution in the event of electrical contact. The committee believed these proposed requirements would add layers of protection to help keep employees safe from power lines during the assembly or disassembly of the equipment.

Paragraph 1407(b)(1)

Under proposed paragraph (b)(1), the employer would be required to conduct a planning meeting with the Assembly/Disassembly Supervisor (A/D Supervisor), operator, assembly/disassembly crew and other workers who will be in the assembly/disassembly area (including the area of the load). This planning meeting must include reviewing the location of the power line(s) and the steps that will be implemented to prevent encroachment and electrocution.

As discussed below, under this proposed paragraph, certain encroachment/electrocution prevention measures would be required (they are listed in proposed paragraph (b)(1) and (2) of this section). In addition, the employer would be required to select at least one additional measure from the list in proposed § 1926.1407(b)(3). In the planning meeting, the employer would be required to make that selection and review all the measures that will be used to comply with this section.

The purpose of this proposed requirement is to ensure that the operator and other workers who will be in the area understand these measures and how they will be implemented. That understanding is important to their successful implementation. Because of the critical nature of these measures, and the seriousness of the consequences to the safety of the employees if they are not implemented correctly, the Committee believed that it is necessary for there to be a structured process by which the employer communicates this information.

Paragraph 1407(b)(2)

Proposed paragraph (b)(2) would require that where tag lines are used they must be non-conductive. This provision uses two terms that are defined in § 1401. ''Tag lines'' is defined as ''a rope (usually fiber) attached to a lifted load for purposes of controlling load spinning and pendular motions or used to stabilize a bucket or magnet during material handling operations.'' Thus, one end of a tag line is attached to the load and the other end is held by an employee who controls the load's motion by exerting force on the line.

If the equipment or load were to make electrical contact with a power line while an employee was holding a tag line that was able to conduct electricity, the employee could be electrocuted. The requirement that the tag line be non-conductive is designed to protect against such an event. Section 1926.1401 defines ''non-conductive'' as meaning that, ''because of the nature and conditions of the materials used, and the conditions of use (including environmental conditions and condition of the material), the object in question has the property of not becoming energized (that is, it has high dielectric properties offering a high resistance to the passage of current under the conditions of use).''

This definition recognizes that it is not only the inherent property of the tag line material that results in it being non-conductive but also the conditions of use. For example, if an otherwise non-conductive material were to become wet and therefore able to conduct electricity, it would no longer qualify as non-conductive under this proposed paragraph.

Paragraph 1407(b)(3)

Under this proposed paragraph the employer would be required to choose one of five encroachment prevention measures (§ 1926.1407(b)(3)(i) through (v)) to implement. The Committee concluded that the use of any one of these measures, in combination with the required measures listed elsewhere in proposed § 1926.1407(b), would be feasible and effective in protecting against encroachment. Specifically, the employer would be required to choose either: (i) The use of a dedicated spotter; (ii) a proximity alarm; (iii) a device that automatically warns the operator when to stop (i.e., a range control warning device); (iv) a device that automatically limits the range of movement of the equipment; or (v) an elevated: Warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings. Providing the ability to choose among these options would give the employer flexibility so that it could pick one that was well suited and efficient in the circumstances.

A definition of ''dedicated spotter (power lines)'' is included in proposed § 1926.1401, *Definitions.* That definition provides:

> In order to be considered a dedicated spotter, the requirements of § 1926.1428 (signal person qualifications) must be met and his/her sole responsibility is to watch the separation between the power line and: the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum distance is not breached.

When the employer uses a dedicated spotter to prevent encroachment under this section, that person has the critical responsibility of ensuring, through communication with the operator, that the equipment maintains a specified minimum clearance distance from a power line. This definition makes clear that the dedicated spotter cannot have any other responsibilities that detract him/her from this task. Also, the

[18] Alternatively, under Option (1), the employer could have the lines deenergized and grounded. If Option (1) were selected, no further action under this section would be required.

dedicated spotter must have the qualifications required of a signal person under proposed § 1926.1428, discussed below. Those qualifications will ensure that the signal person can communicate effectively with the operator. They also ensure that the signal person is knowledgeable about crane dynamics and therefore is able to recognize situations in which the minimum clearance distance may inadvertently be breached if, for example, the load is stopped quickly while it is being moved near a power line.

The devices listed in proposed §§ 1926.1407(b)(3)(ii) and (iii) are also defined in § 1401. ''Proximity alarm,'' is defined as ''a device that provides a warning of proximity to a power line that has been listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.'' [19] A Nationally Recognized Testing Laboratory is an organization that has been recognized by OSHA pursuant to 29 CFR 1910.7 as competent to evaluate equipment for conformance to appropriate safety test standards for that type of equipment. Thus, approval of a proximity alarm by a nationally recognized testing laboratory provides assurance that the device will work as intended. ''Range control warning device,'' is defined as ''a device that can be set by an equipment operator to warn that the boom or jib tip is at a plane or multiple planes.''

In reviewing this proposed provision, OSHA realized that some of the devices listed in proposed § 1926.1407(b)(3) would not be operational or effective against electrocution during certain phases of the assembly or disassembly process of certain types of cranes. For example, for lattice boom cranes, proximity alarm devices may not be able to be used when the boom is not yet fully assembled; at that point the proximity alarm typically cannot be connected and functioning. Therefore, during certain phases of assembly/disassembly, one of the other options would need to be used (such as a dedicated spotter) in order to provide the needed protection.

However, the regulatory text, as currently drafted, would permit an employer to select an option irrespective of whether it would be effective under the circumstances. In order to address this concern, OSHA requests public comment on whether proposed § 1926.1407(b)(3) should be revised to preclude the employer from selecting an option that, in the employer's situation, would be ineffective, such as by revising the provision to read:

> (3) At least one of the additional measures listed in this paragraph must be in place. The measure selected from this list must be effective in preventing encroachment. The additional measures are: * * *

In situations where an employer chooses the option of using a dedicated spotter, the employer would be required to meet the proposed requirements for spotters in proposed § 1926.1407(b)(3)(i). As specified in proposed paragraph (b)(3)(i)(A) of this section, the spotter would have to be equipped with a visual aid to assist in identifying the minimum clearance distance. The Committee concluded that a visual aid is needed for the spotter because of the difficulty in visualizing the minimum clearance distance boundary in the air (as discussed above).

In the C–DAC version of this paragraph, examples of visual aids included a line painted on the ground, a clearly visible line of stanchions or a set of line-of-sight landmarks. An example of a clearly visible set of line-of-sight landmarks would be a fence post and a building corner.

In reviewing C–DAC's draft of this provision, the Agency noted that the stanchions and landmarks would have to be ''clearly visible,'' but that this language was not used with respect to the example of a painted line on the ground. Since all such visual aids would have to be clearly visible to be effective, and that was the evident intent of C–DAC, the Agency has modified the C–DAC language so that, in the proposed provision, all the listed examples would have to be ''clearly visible.'' This revision was also made in proposed § 1926.1408(b)(4)(ii)(A).

Under proposed paragraphs (b)(3)(i)(B)–(D), the spotter would have to be positioned so that he/she can effectively gauge the clearance distance from the power line; the spotter, where necessary, would have to use equipment that enables him/her to communicate directly with the equipment operator; and the spotter would have to give timely information to the operator so that the required clearance distance can be maintained. C–DAC believed that each criterion is needed for the spotter to be able to be effective.

Paragraph 1407(c) Assembly/Disassembly Below Power Lines Prohibited

This proposed paragraph would preclude employers from assembling or disassembling cranes/derricks beneath energized power lines. The Committee agreed that assembly/disassembly below energized power lines presents an extreme risk and needs to be prohibited. The assembly/disassembly process necessarily involves moving and hoisting parts of the equipment into place. If some of this work took place beneath a power line, the risk that a part, load, load line, or other equipment would make electrical contact is very high. Also, in both assembly and disassembly, maneuvering an assembled crane out from under the power lines, or maneuvering a crane that is about to be disassembled under them, itself poses a high risk of such contact.

C–DAC's agreement on this provision indicates a belief by the Committee that, in almost all cases, the employer can plan the assembly/disassembly so that there will be no need to be beneath power lines. The Committee also concluded that, in the very few instances where this is not possible, in light of the extreme risk involved, it is essential that the lines be deenergized and visibly grounded.

Paragraph 1407(d) Assembly/Disassembly Closer Than Table A Clearance Prohibited

Assembly and disassembly of cranes/derricks closer than the minimum clearance distance in proposed Table A (of proposed § 1926.1408) to an energized power line would be prohibited. If assembly or disassembly needed to take place closer than that distance, the employer would be required to have the line deenergized and visibly grounded. The rationale for this proposed provision is similar to that discussed above for assembly/disassembly beneath power lines. Engaging in assembly/disassembly activity closer to an energized power line than the Table A distance was considered by the Committee to be too hazardous to be permitted under any circumstances.

This reflects certain inherent characteristics of the assembly/disassembly process that preclude the employer from being able to reliably maintain clearance distances closer than Table A (of proposed § 1926.1408). For example, when disassembling a lattice boom, pins that hold boom sections together are removed. Even when done properly, this can release stored kinetic energy and cause the boom section

[19] The C–DAC version of this provision defined proximity alarm as: ''a device that provides a warning of proximity to a power line that has been approved by a Nationally Recognized Testing Laboratory.'' OSHA has modified the provision to conform its language to that used in 29 CFR 1910.7, the OSHA rule governing nationally recognized testing laboratories, and to explicitly refer to § 1910.7 to make clear that the listing, labeling, or acceptance of a device under this rule must be in accord with § 1910.7.

being removed, as well as the remaining sections, to move. It is too difficult to estimate the amount of such potential movement with the precision that would be necessary when working closer than the Table A distances.

Another example is when assembling a boom, an error in the assembly process may similarly cause unanticipated movement. Using clearances closer than those in Table A would not allow sufficient room in light of the difficulty of predicting the amount such movement.[20]

Paragraph 1407(e) Voltage Information

This proposed section operates in conjunction with proposed § 1926.1407(a)(3). Under proposed § 1926.1407(a)(3), employers who elect to use Option (3) of § 1926.1407(b) must determine the line's voltage. Under proposed § 1926.1407(e), where the employer asks the utility owner/operator for that voltage information, the utility owner/operator of the line would be required to provide the voltage information within two working days of the request.

This reflects a belief of the Committee that, in the absence of such a time limitation on the utility owner/operator, in many instances Option (3) (proposed § 1926.1407(b)) would not be useful because the employer would not be able to get the voltage information in sufficient time to be able to use it. Many employers would rely on the utility owner/operator to get this information. The Committee was concerned that an extended delay in getting it would result in employers, to some extent, doing the work anyway without the information. Therefore, for Option (3) (proposed § 1926.1407(b)) to be viable, the Committee believed that a reasonable time limitation for the utility owner/operator to respond is needed.[21]

The Committee believed that two business days would be a reasonable amount of time to allow the utility owners/operator to respond and be sufficiently short to be useful to the employer requesting the information.

In reviewing this provision, the Agency noted that the C–DAC provision reads:

Voltage information. Where Option (3) is used, owner/operators of power lines must provide the requested voltage information within two working days of the employer's request.

In a different context—determining the timeliness of notices of contest to OSHA citations—OSHA defines ''working days'' to mean ''Mondays through Fridays but shall not include Saturdays, Sundays, or Federal holidays.'' 29 CFR 1903.22(c). Since the term is already defined in an OSHA regulation, the Agency would apply the same definition here unless this rule were to specify a different definition. Therefore, OSHA solicits comments on whether the phrase ''working days'' should be defined differently for purposes of this rule than it is in 29 CFR 1903.22(c).

Paragraph 1407(f) Power Lines Presumed Energized

This proposed paragraph would require that employers always assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite. This fundamental precaution is essentially the same as currently in Subpart N at § 1926.550(a)(15)(vi).

Paragraph 1407(g) Posting of Electrocution Warnings

This proposed paragraph would require the posting of electrocution warnings as follows: One inside the cab in view of the operator and (except for overhead gantry and tower cranes) at least two on the outside of the equipment. The Committee believes that these electrocution warnings are necessary to protect the operator as well as any employees working in the area around the crane by increasing their awareness of the hazard. This provision is similar to section 5–3.4.5.2(d) of ASME B30.5–2004.

Section 1408 Power Line Safety (Up to 350 kV)—Operations

As discussed above with respect to power line safety in assembly/disassembly, the proposed standard would require the implementation of a systematic approach to power line safety for crane/derrick operations. This approach would consist of two basic steps. First, the employer would need to identify the work zone, assess it for power lines, and determine how close the crane could get to them. The employer would have the option of doing this assessment for the area 360 degrees around the crane or for a more limited, demarcated area. Second, if the assessment showed that the crane could get closer than a trigger distance—20 feet for lines rated up to 350 kV (50 feet for lines rated over 350 kV)—then requirements for additional action would be triggered.

Specifically, unless the power lines were deenergized and grounded, encroachment prevention measures would have to be implemented to prevent the crane from breaching a minimum clearance distance. The employer would be allowed to choose among three minimum clearance distance options. For example, for lines up to 350kV, the minimum clearance distance options would be 20 feet, or the distance specified in Table A (of proposed § 1926.1408) for the line's voltage (Table A is the ''10 foot rule''; see discussion of Table A below), or a distance closer than what is specified in Table A.

However, there are limitations to the availability of some of these options, and the number of mandatory encroachment prevention (and other) measures increases when using a clearance distance closer than Table A.[22]

Paragraph 1408(a) Hazard Assessments and Precautions Inside the Work Zone

Before beginning crane/derrick operations, the employer would be required to determine if power lines would pose a hazard. The first step in this process would be to identify the work zone for which this hazard assessment will be made (proposed § 1926.1408(a)(1)). The employer would have two options for defining the work zone.

Under the first option (proposed § 1926.1408(a)(1)(i)), the employer would be required to define the work zone by marking boundaries and prohibiting the operator from operating the equipment past those boundaries. Examples of how to demarcate the boundaries include using flags or devices such as a range limit device or range control warning device. ''Range control warning device'' is defined in § 1926.1401 as ''a device that can be set by an equipment operator to warn that the boom or jib tip is at a plane or multiple planes.'' See the explanation

[20] In this respect this proposed provision differs from proposed § 1926.1408. As discussed below, § 1926.1408 would allow use of minimum clearance distances closer than Table A in some circumstances for crane ''operations.'' In contrast, proposed § 1926.1407(d) reflects a determination by the Committee that there are no circumstances for ''assembly/disassembly'' when it would be safe for any part of the crane, load or load line (including rigging and lifting accessories) to get closer than the Table A minimum clearance distance.

[21] As noted in the introduction, C–DAC included two members from the electric utility industry.

[22] An employer engaged in subpart V (of 29 CFR part 1926) work (power transmission and distribution) would also have to comply with most of these provisions. However, when certain prerequisites are met, it would be permitted to use the minimum clearance distances in Subpart V's Table V–1. In addition, where additional prerequisites are met, it would be permitted to work closer than the Table V–1 distances. These are explained in the discussion of proposed § 1926.1410.

below of ''range limit device'' at the end of the discussion of this section.

Employers would not be permitted to use existing landmarks to demarcate boundaries unless they are marked. For example, a line of trees would be insufficient. Without anything more the trees would not signal a reminder to the operator of there being a boundary that must be maintained. However, adding flags to those trees would be sufficient because the flags would serve as a reminder that the trees are located along a boundary that the operator must not breach.

The boundaries must mark the limits of all crane movement. For example, a work zone could be defined by demarcating boundaries: (1) To the left and right of the operator, to limit the lateral movement of the boom, and (2) in front of the operator, in a line connecting the side boundaries, limiting the boom's radius.

In identifying the work zone, the employer must consider the entire area in which the crane will need to operate. If the crane will need to be positioned in more than one spot to accomplish its work, or to travel with a load, the employer would be required to consider the total area in which it will need to operate and set the boundaries accordingly.

The second option for identifying the work zone (proposed § 1926.1408(a)(1)(ii)) would be to define the work zone as the area 360 degrees around the crane, up to the crane's maximum working radius. In other words, under this option, the work zone would be the area within a circle, with the crane at the center, and the radius defined by the maximum working radius of the crane. No boundaries would have to be marked under this option since the crane would be permitted to operate in the entire area that it could reach.

Paragraph 1408(a)(2)

Once the employer has identified the work zone according to proposed § 1926.1408(a)(1), it would then be required to make the power line hazard assessment. Specifically, it must determine if any part of the crane, load or load line (including rigging and lifting accessories) could come within a ''trigger'' distance—20 feet of a power line. This determination must be made based upon the assumption that the crane would be operated up to its maximum working radius (or, if a demarcated boundary is closer than the maximum working radius, the assessment must be made with the assumption that the crane would be operated up to that boundary).

Even if the employer has no intention of working up to the crane's maximum radius in the work zone, the assessment must still be made using this assumption. The Committee believed that this is crucial since, even if the employer's original intention was not to operate in that part of the work zone, unexpected events may occur that may lead the operator to operate the equipment there.

If this 20 foot ''trigger'' determination is positive, then the employer would be required to take additional steps. Specifically, the employer would be required to meet the proposed requirements under either, Option (1), Option (2), or Option (3) of proposed § 1926.1408(a)(2).[23]

Paragraph 1408(a)(2)(i) Option (1)

An employer choosing Option (1) would protect against electrocution by having the power lines deenergized and visibly grounded at the worksite. This option would prevent equipment that contacts the power line from becoming energized. The power line must be ''visibly grounded at the worksite'' so that the employer can verify, through observation, that the protection provided by this option remains in place for as long as the employer continues to rely on it.

Where the employer elects this option, it would not have to implement any of the encroachment/electrocution prevention measures listed in proposed § 1926.1408(b). However, some amount of time is needed to arrange for the utility owner/operator to deenergize and ground the line. Also, in some instances, especially where the construction project is small, the cost of deenergizing and grounding may be a substantial portion of the cost of the project. The Committee recognized that, in practice, largely because of these factors, deenergizing and grounding has not been routinely done.

Therefore, the committee believed that providing other safe and practical options would help to reduce unsafe practices in the industry. Those other options (Options 2 and 3 in proposed § 1926.1408(a)(2)(ii) and (iii), discussed below) combined with proposed § 1926.1408(b) are designed to afford effective protection against the hazards of electrocution.

Paragraph 1408(a)(2)(ii) Option (2)

Under Option 2 (proposed § 1926.1408(a)(2)(ii)), the employer would be required to maintain a minimum clearance distance of 20 feet. To help ensure that this distance is not breached, the employer would have to implement the encroachment prevention measures in proposed § 1926.1407(b). Under this proposed option, no part of the crane, load or load line, including rigging and lifting accessories, would be permitted closer than 20 feet to the power line.

Employers using this proposed option would, in most cases, have to stay further away from the power line than under the existing Subpart N's 10 foot rule (employers wanting to use the 10 foot rule would have to use proposed Option 3 (in § 1926.1408(a)(2)(iii)). However, proper application of the 10 foot rule, as a practical matter, necessitates determining the exact voltage of the power line.[24] An advantage of this proposed option to many employers is that they would not have to determine the exact voltage of the power line (they would only have to determine that the line is equal to or less than 350 kV). As a practical matter, since many employers rely on the utility owner/operator to provide voltage information, this option would save them that step.

The Committee believed that, since the minimum clearance distance would be 20 feet, there would be no diminution of safety under this option since the maximum possible clearance distance under the current Subpart N's formula is 20 feet. In fact, in the Committee's experience, most power lines encountered by most employers have voltages that, under the current Subpart N's formula, require a minimum clearance distance of 10 feet. Therefore, use of this option would, in most cases, result in a higher margin of safety. Employers who do not need to get closer than 20 feet in order to do their work could use this option and would be saved the step of obtaining the exact line voltage.

As noted above, in addition to maintaining a minimum clearance distance of 20 feet, employers using this option would be required to implement the encroachment prevention and other

[23] If any part of the crane, load or load line could not come closer than 20 feet to a power line the employer would not be required to take any further action under this proposed section. However, the employer may encounter a situation where it unexpectedly needs to increase the size of the work zone. This may occur, for example, as a result of an unanticipated need to change the crane's position or to have the crane operate beyond the original work zone boundaries. In such a case the employer would be required to go back to the first step under proposed § 1926.1408(a)(1), re-identify a work zone and conduct a new 20 foot ''trigger'' assessment.

[24] As discussed above, the 10 foot rule is a scale of voltages and distances that begins at 10 feet and increases to 20 feet (for line voltages up to 350kV).

measures specified in proposed § 1926.1408(b).

Paragraph 1408(a)(2)(iii) Option (3)

Under Option 3 (proposed § 1926.1408(a)(2)(iii)), the employer would be required to maintain a minimum clearance distance in accordance with Table A (of proposed § 1926.1408). Under Table A, depending on the voltage of the power line, the minimum approach distance ranges from 10 feet to 20 feet.[25] Under this option the employer would be required to determine the line's voltage.

As a practical matter, in the Committee's experience, the power lines most typically encountered by most employers have a minimum clearance distance of 10 feet under Table A. As a result, employers could usually work closer to the lines under this option than under Option 2 (proposed § 1926.1408(a)(2)(ii)). Table A in essence is based upon the same formula as is currently used in existing Subpart N. Therefore, the minimum clearance distance would be similar under Option 3 (in proposed § 1926.1408(a)(2)(iii)) as under the existing requirements.

The information in Table A (of proposed § 1926.1408) of the proposed rule is similar to information in Table 1 of ASME B30.5–2004. The Committee believed that a table with specified clearance distances is more understandable than the formula set out in the existing Subpart N requirements. Proposed Table A is intended to be a clear way of conveying the minimum clearance distances.

The enhanced safety that would result under this option would stem from the fact that, first, there would be an affirmative obligation on the employer to determine the power line voltage so that the correct Table A minimum clearance distance could be determined. Second, in addition to maintaining the minimum clearance distance specified in the Table, employers using this option would be required to implement the encroachment prevention and other measures specified in proposed § 1926.1408(b).

In reviewing C–DAC's draft of this provision, the Agency realized that C–DAC inadvertently failed to explicitly state that the Table A minimum clearance distance must not be breached. Therefore, OSHA has modified proposed § 1926.1408(a)(2) to correct this error. The last sentence of the C–DAC language has been expanded to read as follows:

If so, then the employer must follow the requirements in paragraph (b) to ensure that no part of the crane, load line, or load (including rigging and lifting accessories), gets closer to the line than the minimum clearance distance.

Paragraph 1408(b) Preventing Encroachment/Electrocution

Once the employer has determined that some part of the crane, load or load line could come within the work zone assessment trigger distance of 20 feet of a power line (see proposed § 1926.1408(a)), if it chooses either Option (2) or (3) (of proposed § 1926.1408(a)(2)(ii) and (iii)), it would be required to implement encroachment prevention measures to help ensure that the applicable minimum approach distance (20 feet under Option 2 or the Table A (of proposed § 1926.1408) distance under Option 3 is not breached.[26] Most of the measures in this proposed paragraph are designed to help the employer maintain the appropriate distance and thereby prevent electrical contact while operating the equipment. Some of the measures are designed to prevent electrocution in the event of electrical contact. The committee believed these proposed requirements would add layers of protection to help keep employees safe from energized power lines.

Paragraph 1408(b)(1)

Under proposed 1408(b)(1) the employer would be required to conduct a planning meeting with the operator and other workers who will be in the area of the crane or load. This planning meeting must include reviewing the location of the power line(s) and the steps that will be implemented to prevent encroachment and electrocution.

As discussed below, under this proposed paragraph, certain encroachment/electrocution prevention measures would be required (they are listed in proposed § 1926.1408(b)(1) through (3)). In addition, the employer would be required to select at least one additional measure from the list in proposed § 1926.1408(b)(4). In the planning meeting, the employer would be required to make that selection and review all the measures that will be used to comply with this section. The purpose of this proposed requirement is to ensure that the operator and other workers who will be in the area understand these measures and how they will be implemented. That understanding is important to their successful implementation. Because of the critical nature of these measures, and the seriousness of the consequences to the safety of the employees if they are not implemented correctly, the Committee believed that it is necessary for there to be a structured process by which the employer communicates this information.

Paragraph 1408(b)(2)

Proposed § 1926.1408(b)(2) would require that where tag lines are used they must be non-conductive. This provision would provide additional protection to those employees who would be exposed to electrical hazards in the event that the equipment, load line, tag line or load contacts a power line and the tag line they are holding becomes energized.

Paragraph 1408(b)(3)

Proposed § 1926.1408(b)(3) would require elevated: Warning lines, barricades or line of signs, in view of the crane operator equipped with flags or similar high-visibility markings, at 20 feet from the power line (if using Option (2) (of proposed § 1926.1408(a)(2)(ii)) or at the minimum approach distance under Table A (if using Option (3) (of proposed § 1926.1408(a)(2)(iii)). This provision is designed to serve as a reminder to the operator that there are power lines with associated minimum clearance distances that must be met. Warning lines, barricades or a line of signs in the operator's view equipped with high-visibility markings would also indicate to the operator where the minimum approach distance boundary is located. This would serve as one of two layers of protection (the second layer would consist of an additional means selected by the employer under proposed § 1926.1408(b)(4), discussed below).

C–DAC discussed and ultimately rejected the idea of permitting a visual line on the ground which would mark the minimum approach distance because an operator would generally not notice or see a line on the ground and because, from where the operator sits, it would be particularly difficult for the operator to extrapolate from that line the location of the boundary in the air. The committee decided that these visual reminders need to be elevated, or as the proposed definition states, sufficiently elevated from the ground level to accurately enable the operator to judge the distance between the load, load line (including rigging and lifting

[25] The range referred to here is the range in the part of the table that is applicable up to 350kV.

[26] Alternatively, under Option (1) of proposed § 1926.1408(a)(i), the employer could have the lines deenergized and grounded. If Option (1) were selected, no further action under this section would be required.

accessories) or crane and the boundary marked by the elevated warning line.

In reviewing the C–DAC draft of this provision, OSHA realized that there may be situations where the employer would not be able to place such a line so that it would be visible to the operator. In such a case, in order to have two layers of protection, it would be necessary to require that a dedicated spotter be used in addition to one of the other (non-spotter) methods described below in proposed § 1926.1408(b)(4). Therefore, OSHA is planning on modifying this proposed provision by adding the following after the last sentence in proposed § 1926.1408(b)(3):

If the operator is unable to see the elevated warning line, a dedicated spotter must be used as described in § 1926.1408(b)(4)(ii) in addition to implementing either the measure described in § 1926.1408(b)(4)(i), (iii), (iv) or (v).

The Agency requests public comment on this issue.

Paragraph 1408(b)(4)

This proposed section sets out a list of five prevention measures, from which the employer would be required to select at least one, when the employer elects to use either Option (2) or Option (3) under § 1926.1408(a)(2). In the Committee's experience, the use of any one of these measures, in combination with the required measures listed elsewhere in proposed § 1926.1408(b), would be feasible and effective in protecting against encroachment/electrocution. The first four measures are methods for encroachment prevention. The fifth measure is a method of electrocution prevention in the event of electrical contact with a power line. Specifically, the employer would be required to choose either: (i) A proximity alarm; (ii) the use of a dedicated spotter; (iii) a device that automatically warns the operator when to stop (i.e., a range control warning device); (iv) a device that automatically limits the range of movement of the equipment; or (v) an insulating link/device.

C–DAC believed that allowing the employer to choose from a variety of options for this second layer of protection would allow the employer to select a method that it believed would be suitable, would increase the likelihood of employer compliance and would be an effective approach to reducing power line related injuries and fatalities.

In situations where an employer chooses the option of using a dedicated spotter, the employer would be required to meet the proposed requirements for spotters in proposed § 1926.1408(b)(4)(ii). As specified in proposed § 1926.1408(b)(4)(ii)(A), the spotter would have to be equipped with a visual aid to assist in identifying the minimum clearance distance. The Committee concluded that a visual aid is needed for the spotter because of the difficulty in visualizing the minimum clearance distance boundary in the air (as discussed above).

In the C–DAC version of this paragraph, examples of visual aids included a line painted on the ground, a clearly visible line of stanchions or a set of line-of-sight landmarks. An example of a clearly visible set of line-of-sight landmarks would be a fence post positioned behind the dedicated spotter and a building corner ahead of the spotter.

In reviewing C–DAC's draft of this provision, the Agency noted that that the stanchions and landmarks would have to be ''clearly visible,'' but that this language was not used with respect to the example of a painted line on the ground. Since all such visual aids would have to be clearly visible to be effective, and that was the evident intent of C–DAC, the Agency has modified the C–DAC language so that, in the proposed provision, all the listed examples would have to be ''clearly visible.'' This revision was also made in proposed § 1926.1407(b)(3)(i)(A).

Under proposed § 1926.1408(b)(4)(ii)(B)–(D), the spotter would have to be positioned so that he/she can effectively gauge the clearance distance from the power line; the spotter, where necessary, must use equipment that enables him/her to communicate directly with the equipment operator; and the spotter must give timely information to the operator so that the required clearance distance can be maintained. C–DAC believed that each criterion is needed for the spotter to be able to be effective.

Proposed § 1926.1408(b)(4)(iii) would give the employer the option of using a device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment. ''Range control warning device''defined in § 1926.1401 as ''a device that can be set by an equipment operator to warn that the boom or jib tip is at a plane or multiple planes.'' For example: an employer has chosen the option of maintaining a 20 foot distance from the power line. Under proposed § 1926.1408(b)(4), it has chosen to use a range control warning device to help maintain that distance. The device would have to be set to alert the operator in time to prevent the boom, load line or load (which ever is closest to the line) from breaching that 20 foot distance. As a practical matter, the device would have to be set to sound the warning more than 20 feet from the line, since the operator will need some time to react and to account for the momentum of the equipment, load line and load.

Proposed § 1926.1408 (b)(4)(iv) would give the employer the option of using a device that automatically limits the equipment's range of motion and is set to prevent encroachment. Such a device could be particularly suitable for tower cranes, for which the swing angle can be programmed so that the operator cannot move the boom or jib past a certain range. The Committee recognized that it may be more technically difficult to apply swing limitation devices for use in mobile cranes but believed that the technology may develop so that they could be used in such cranes.

As noted above, the insulating link option that would be available under proposed § 1926.1408(b)(4)(v) would not protect against encroachment but would provide protection to employees handling the load against electrocution in the event encroachment did occur. Such a device would have to be installed between the end of the load line and the load. When so installed, it prevents the load from becoming energized in the event the load line or other part of the equipment makes electrical contact with a power line. Preventing the load from becoming energized helps protect riggers, who often guide crane loads manually and who are therefore at high risk of being electrocuted if a load becomes energized.

As stated in proposed § 1926.1401, ''Insulating link/device'' would be defined as ''an insulating device that has been listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.'' This proposed definition reflects the Committee's concern that there be some assurance that the insulating link/device would work as intended. That assurance would be accomplished by requiring that such link/device be approved by a Nationally Recognized Testing Laboratory.

Paragraph 1408(b)(5)

Employers engaged in construction of electric transmission and distribution lines, which is regulated by 29 CFR part 1926 subpart V (§§ 1926.950 through 960), would also have to meet the requirements in proposed § 1926.1408, with several exceptions. First, in accordance with proposed § 1926.1408(b)(5), work involving

cranes/derricks that is covered by Subpart V would not be required to comply with the proposed requirements in § 1926.1408(b)(4). Subpart V applies to the construction of electric transmission and distribution lines and equipment, which includes the alteration, conversion, and improvement of existing lines and equipment. Thus, when employees are engaged in Subpart V work near energized lines, by the nature of the job, their full attention is on the power lines.

Subpart V contains additional requirements to protect those employees against making electrical contact with the lines. These include requirements in § 1926.950(c) for guarding the line or using insulation (such as insulating gloves) to prevent electrical contact. Non-Subpart V workers, by contrast, do not work directly with the lines, and their attention is primarily directed elsewhere. In view of these differences, the Committee believed that the protective measures listed in proposed § 1926.1408(b)(4) were not necessary for Subpart V work.

Second, as explained below in the discussion of proposed § 1926.1410, when certain prerequisites are met, the employer would be permitted to use the minimum clearance distances in Subpart V's Table V–1. Also explained in that discussion is that where additional prerequisites are met, work would be permitted closer than the Table V–1 distances.

Third, an employer engaged in Subpart V work would not be subject to the restrictions regarding operations below power lines, as explained in the discussion below of proposed § 1926.1408(d).

Paragraph 1408(c) Voltage Information

This proposed section operates in conjunction with proposed § 1926.1408(a)(2)(iii) (Option 3—Table A clearance). Where an employer elects to use Option (3) (of proposed § 1926.1408(a)(2)(iii)), it would be required under proposed § 1926.1408(a)(2)(iii)(A) to determine the voltage of the power lines. Under proposed § 1926.1408(c), utility owners/operators of these lines must provide the requested voltage information within two working days of the request.

The Committee believed that for Option (3) (of proposed § 1926.1408(a)(2)(iii)) to be viable, a reasonable time limit for the utility owner/operator to respond is needed. Employers must generally rely on the utility owner/operator to provide the voltage of the power line. The Committee was concerned that an extended delay in obtaining the information would lead some employers to do the work anyway without the information. The committee believed that two business days would be a reasonable amount of time to allow the utility owners/operator to respond and be sufficiently short to be useful to the employer requesting the information.[27]

As discussed above with respect to proposed § 1926.1407(e), the Agency would interpret ''working days'' to mean Monday through Friday, excluding federal holidays, unless this rule contains a different definition, and is asking for comment on whether a different definition should be included in the rule.

Paragraph 1408(d) Operations Below Power Lines

The Committee believed that there is a substantially enhanced likelihood of breaching the applicable minimum clearance distance when a crane operates below a power line. This is due to several factors, including the greater difficulty of judging the distance to the line when the line is above the equipment and the fact that in most such situations the operator has to purposely look up to see the line (and therefore is more likely to forget its location or that it is there).

This proposed section addresses this problem by prohibiting any part of a crane, load or load line (including rigging and lifting accessories) from being below a power line unless the employer has confirmed with the utility owner/operator that the power line is deenergized and visibly grounded at the worksite or unless the employer can demonstrate that it meets one of the four exceptions in proposed § 1926.1408(d)(2).

The first exception, § 1926.1408(d)(2)(i), is that the work the employer is doing is covered by 29 CFR part 1926 subpart V. Subpart V work involves work on the power line itself and commonly requires equipment to operate below a power line. As explained above with respect to proposed paragraph § 1926.1408(b)(5), Subpart V work does not require all of the precautions required of other work because the full attention of the workers is directed at the power line. The Committee believed that the other precautions required during Subpart V work would provide adequate protection when equipment operates below power lines during Subpart V work.

The second exception, § 1926.1408(d)(2)(ii), would be for equipment with non-extensible booms and the third exception, § 1926.1408(d)(2)(iii), would be for equipment with articulating or extensible booms. These exceptions would apply when the boom, either at its most vertical point (for non-extensible booms) or at its fullest extension (for extensible booms), will be more than 20 feet below the plane of the power line or more than the Table A (of proposed § 1926.1408) minimum clearance distance below the plane of the power line. Where this criterion is met, it is not possible for the minimum clearance distance to be breached.

The last exception, § 1926.1408(d)(2)(iv), is where the employer can demonstrate that it is infeasible to comply with proposed § 1926.1408(d)(1), which prohibits any part of a crane, load or load line from being below a power line unless the line is deenergized and visibly grounded. Under this proposed exception, the employer must not only show that compliance with § 1926.1408(d)(1) is infeasible, it must also comply with the requirements in proposed § 1926.1410. Proposed § 1926.1410 governs equipment operations closer than the Table A (of proposed § 1926.1408) minimum approach distances. The Committee believed that in such instances those additional protective measures are needed to prevent the minimum clearance distance established under proposed § 1926.1410(c) from being breached and to protect the employees in the event of electrical contact with the power line.

Paragraph 1408(e) Power Lines Presumed Energized

This proposed paragraph would require employers to assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite. This fundamental precaution is essentially the same as currently in Subpart N at § 1926.550(a)(15)(vi).

Paragraph 1408(f)

Proposed paragraph (f) addresses the danger that employees could receive electrical shock from equipment that is operating near a transmission or communication tower. During such operation, the equipment could act as an antenna and become energized by the electromagnetic signal emitted by the tower. When the equipment is close enough for an electrical charge to be induced in the equipment or load, proposed § 1926.1408(f) would require the transmitter to be deenergized or the following precautions taken: the

[27] As noted in the introduction, C–DAC included a member from the electric utility industry.

equipment must be grounded, and non-conductive rigging or an insulating link/device must be used.

Currently, Subpart N, at § 1926.550(a)(15)(vii), requires that when equipment is close enough to a transmission tower for an electrical charge to be induced, the equipment must be grounded and a ground jumper cable must connect the load to the equipment. In addition, nonconductive poles having large alligator clips or other similar protection must be used to connect the ground jumper cable to the load. By connecting the load to the grounded equipment, any electrical charge induced in the load will be dissipated. In the Committee's experience, this precaution is neither necessary nor commonly taken. The Committee believed that the proposal's requirement for nonconductive rigging or an insulating link reflects current safe industry practice.

OSHA notes that the requirement for nonconductive rigging or an insulating link in proposed § 1926.1408(f) is a fundamentally different approach than requiring a ground jumper cable to be used as specified in current § 1926.550(a)(15)(vii). The latter connects the load to the equipment and grounds the load, while proposed paragraph (f) would insulate the load from the equipment. It appears that only an employee who is contacting the load would be affected by this provision. The Agency requests public comment on the following questions: (1) Is it necessary to take special precautions to ground the equipment to protect an employee who contacts the equipment? (2) Are employees best protected by proposed paragraph (f), by current Subpart N, or by some other means, such as requiring that they only handle the load with an insulated tag line or other means of insulation?

Paragraph 1408(g) Training

During C–DAC discussions, members stressed the importance of providing appropriate training to operators and their crew regarding power line safety. The Committee believed that training is a necessary component in reducing crane related fatalities.

The training topics listed are designed to ensure that both the operator and the other crew members have the information they need to protect themselves from power line hazards.

The Committee believed that training for power line safety should not be limited to operators because any crew member who is near the equipment is potentially at risk of electrocution.

The Agency notes that proposed § 1926.1408(g) does not address the timing and frequency of this training. OSHA requests public comment on whether and, if so, how the standard should address training timing and frequency.

In addition, proposed § 1926.1408(g)(1)(i)(E) would requiring training in the need to avoid approaching or touching ''the equipment.'' OSHA believes that C–DAC inadvertently failed to add the phrase ''and the load'' to this provision, since whenever the equipment is in electrical contact with a power line, the load may also be energized. OSHA requests public comment on whether this provision should be modified to correct this omission.

Paragraph 1408(h)

This proposed provision would require that where devices originally designed by the manufacturer for use as safety devices, operational aids, or a means to prevent power line contact or electrocution are used to comply with proposed § 1926.1408, they must meet the manufacturer's procedures for use and conditions of use. The Committee believed that this provision is necessary to ensure that the devices will work as intended.

OSHA notes that § 1926.1408 uses the term ''range limit device'' in § 1926.1408(a)(1)(i) but that no definition of this term is provided in § 1926.1401. OSHA believes that C–DAC understood a range limit device to be a device that physically limits how far a crane can boom out and the angle within which the boom can swing. OSHA requests public comment on whether a definition of ''range limit device'' should be added to § 1926.1401 and, if so, whether the definition in this paragraph is appropriate.

Section 1409 Power Line Safety (Over 350 kV)

Under this proposed section, the requirements in proposed §§ 1926.1407 and 1926.1408 would apply to power lines rated over 350 kV in all respects except one: wherever the regulatory text states ''20 feet,'' ''50 feet'' is substituted. Therefore, the ''trigger'' distance that would be used when assessing the work zone would be 50 feet. In addition, an employer engaged in assembly/disassembly that is using Option 2 of proposed § 1926.1407 (a)(2), or an employer engaged in crane operations that is using Option 2 of proposed § 1926.1408(a)(2)(ii), would be required to maintain a minimum clearance distance of 50 feet. This would apply to all power lines rated over 350 kV, including power lines over 1,000 kV.

For power lines over 1,000 kilovolts, employers electing to use Table A (of proposed § 1926.1408 in either assembly/disassembly (Option 3 in proposed § 1926.1407(a)(3)) or crane operations (Option 3 in proposed § 1926.1408 (a)(2)(iii) would be required, pursuant to instructions in the Table, to maintain a minimum clearance distance determined by the utility owner/operator or a registered professional engineer who is a qualified person with respect to electrical power transmission and distribution.

In reviewing this regulatory language, OSHA recognized that a minimum clearance distance of 50 feet may be inadequate for the open-ended category of ''over 1,000 kV.'' In fact, at some point in that range, a utility owner/operator or a registered professional engineer may well specify a minimum clearance distance of more than 50 feet. However, as currently drafted, employers using Option 2 (in both proposed § 1926.1407(a)(2) and § 1926.1408(a)(2)(ii)) would only have to maintain a minimum clearance distance of 50 feet. OSHA requests public comment on whether Option 2 is insufficiently protective for power lines rated over 1,000 kV.

Section 1410 Power Line Safety (All Voltages)—Crane Operations Closer Than the Table A Zone

The existing Subpart N requirements do not permit work closer than the 10 foot rule.[28] The only exceptions to the 10 foot rule are where the lines are deenergized and visibly grounded or where insulating barriers, separate from the equipment, have been erected. However, the Committee recognized that many employers, without meeting the exceptions, nonetheless work closer than the 10 foot rule.

Specifically, the Committee believed that most employers do not use the option to deenergize and ground because of the time, expense and difficulty in making those arrangements. In addition, the Committee concluded that an ''insulating barrier'' of the type that is currently available does not, by itself, adequately protect employees because these barriers are only effective for ''brush'' contact. If there is more than brush contact, they will not protect employees from electrocution because the equipment will pierce the device.

[28] As described earlier, the ''10 foot rule'' is shorthand for the formula in existing 29 CFR 1926, Subpart N for minimum clearance distances. Under the 10 foot rule, for lines rated 50 kV or less, work is not permitted closer than 10 feet to an energized power line. For lines rated more than 50 kV, a clearance of 10 feet plus .4 inch for each 1 kV over 50 kV is required.

In order to address the insufficient protections provided to employees who work closer than the 10 foot rule, the Committee developed a new approach, which is contained in proposed § 1926.1410. It consists of prerequisites and criteria that would apply when work must be conducted closer than the minimum clearance distance specified in Table A (of proposed § 1926.1408). The Committee believed that these provisions would be both realistic and effective for safely working in these circumstances.

This proposed section starts out by explicitly prohibiting equipment from operating closer than the distances specified in Table A (of proposed § 1926.1408) of an energized power line except where the employer demonstrates compliance with the requirements in proposed § 1926.1410.

Note that, in the discussion below of proposed § 1926.1410, references to a ''registered professional engineer'' are, in accordance with proposed § 1926.1410(c)(1), references to a registered professional engineer who is a qualified person with respect to electrical power transmission and distribution.

Paragraphs 1410(a) and (b)

These proposed paragraphs set forth prerequisites that must be met for the employer to be permitted to operate equipment closer to a power line than the applicable Table A (of proposed § 1926.1408) distance. Proposed § 1926.1410(a) would require the employer to determine that it is infeasible to do the work without breaching the minimum approach distance under Table A. If the employer determines it is infeasible to maintain the Table A distance, under proposed § 1926.1410(b) it would also have to determine, after consulting with the utility owner/operator, that deenergizing and grounding the power line, as well as relocating the line, are infeasible.

Paragraph 1410(c) Minimum Clearance Distance

After the employer makes the infeasibility determinations required by proposed § 1926.1410(a) and (b), a minimum clearance distance would have to be established. Under proposed § 1926.1410(c)(1), the employer can establish this distance by either having the utility owner/operator determine the minimum clearance distance that must be maintained or by having a registered professional engineer who is a qualified person with respect to electrical transmission and distribution determine the minimum clearance distance that must be maintained. The Committee believed that either of these sources of this information has sufficient expertise to accurately apply the factors discussed below in setting an appropriate minimum clearance distance.

Under proposed § 1926.1410(c)(1), regardless of whether it is the utility owner/operator or a registered professional engineer that makes this determination, several factors must be considered when establishing the minimum clearance distance. These factors include, but are not limited to: Conditions affecting atmospheric conductivity; time necessary to bring the equipment, load and load line (including rigging and lifting accessories) to a complete stop; wind conditions; degree of sway in the power line; lighting conditions, and other conditions affecting the ability to prevent electrical contact.

Under proposed § 1926.1410(c)(2), the proposed requirement in § 1926.1410(c)(1) described above would not apply to work covered by part 1926 subpart V. Instead, the minimum clearance distance specified in § 1926.950 Table V–1 would apply. This proposed paragraph, along with the other proposed provisions affecting work covered by Subpart V, are discussed below at the end of the portion of this preamble addressing proposed § 1926.1410.

Paragraph 1410(d)

Once a minimum clearance distance has been established, under proposed § 1926.1410(b) the employer would be required to have a planning meeting with either the owner/operator of the power line or the registered professional engineer to determine what procedures will be implemented to prevent electrical contact and electrocution. In accordance with proposed § 1926.1410(e), these procedures would have to be documented and immediately available on-site. In addition, in accordance with proposed § 1926.1410(f) and (g), these procedures would have to be reviewed with the operator and other workers who will be in the area of the equipment and the procedures must be implemented (proposed § 1926.1410(e)–(g) are discussed below).

Proposed § 1926.1410(d) sets out the minimum protective measures which would have to be included in the procedures set by the employer and utility owner/operator (or registered professional engineer). The committee believed that these procedures need to include more stringent protective measures than those set out in proposed § 1926.1408, because equipment will be in closer proximity to power lines and there would otherwise be a greater risk of contacting a power line and causing electrocution. Therefore, these procedures would have to include, at the minimum, the following:

Paragraph 1410(d)(1)

Under proposed paragraph (d)(1), for power lines that are equipped with a device that automatically reenergizes the circuit in the event of a power line contact, the automatic reclosing feature of the circuit interrupting device must be made inoperative prior to beginning work. This would help ensure that, in the event of a power line contact and activation of the automatic reclosing feature, the line would not be automatically re-energized.

Paragraph 1410(d)(2)

Under proposed paragraph (d)(2), a dedicated spotter who is in continuous contact with the operator would have to be used. In addition, the dedicated spotter must be equipped with a visual aid to assist in identifying the minimum clearance distance, must be positioned to effectively gauge the clearance distance, where necessary must use equipment that enables him or her to communicate directly with the operator, and the spotter must give timely information to the operator so the required clearance distance can be maintained. The need for a spotter meeting this criteria is explained above in the discussion of proposed § 1926.1408(b)(4)(ii).

Paragraph 1410(d)(3)

Under proposed paragraph (d)(3), an elevated warning line, or barricade that is not attached to the equipment, positioned to prevent electrical contact, would have to be used. This warning line or barricade must be in view of the operator either directly or by use of video equipment and must be equipped with flags or similar high-visibility markings. The need for an elevated warning line or barricade is explained above in the discussion of proposed § 1926.1408(b)(3).

As discussed above in relation to proposed § 1926.1408(b)(3), there may be situations where the operator is not able to see an elevated warning line or barricade. To address such situations, under proposed § 1926.1408 or § 1926.1409, OSHA is planning to change the regulatory text so that the employer would be required to use both a dedicated spotter and one of the other (non-spotter) measures listed in proposed § 1926.1408(b)(4). Here, when working closer than the Table A (of proposed § 1926.1408) clearance

distance, C–DAC believed it is necessary to provide an additional layer of protection by requiring the use of video equipment to enable the operator to see the warning line or barricade. Therefore, in all cases when working closer than the Table A clearance distance, the operator will have ''two sets of eyes'' (in addition to other protection required under this proposed section) to ensure that the equipment maintains the minimum clearance distance established under proposed § 1926.1410(c).

As explained in, *Subpart V-working closer than Table A*, that follows the discussion of § 1926.1410(k), this provision would not apply to subpart V work.

Paragraph 1410(d)(4) Insulating Link/ Device

Under proposed paragraph (d)(4), an insulating link/device would have to be installed at a point between the end of the load line (or below) and the load. An insulating link is a barrier to the passage of electrical current. When used on a crane, it prevents the load from becoming energized if the boom or the load line makes electrical contact with a power line. In such situations it protects employees who make contact with the load or are holding a tag line.

As explained in, *Subpart V-working closer than Table A*, that follows the discussion of § 1926.1410(k), this requirement to install an insulating link/device would only apply when working closer than the § 1926.950 Table V–1 clearance distances.

Paragraph 1410(d)(5)

Under proposed paragraph (d)(5), if the rigging may be closer than the Table A (of proposed § 1926.1408) distance during the operation, it would be required to be non-conductive rigging. This would provide protection to those employees who would be exposed to electrical hazards in the event that the rigging contacts a power line, which otherwise could energize the rigging and the load.

Paragraph 1410(d)(6)

Under proposed paragraph (d)(6), if the crane is equipped with a device that automatically limits range of movement, it would have to be used and set to prevent any part of the crane, load or load line (including rigging and lifting accessories) from breaching the minimum approach distance established under proposed paragraph (c) of § 1926.1410.

Paragraph 1410(d)(7)

Under proposed paragraph (d)(7), if a tag line is used it would have to be non-conductive. This requirement would provide additional protection to those employees who would be exposed to electrical hazards in the event that the equipment contacts a power line and the tag line they are holding becomes energized, or in the event that the tag line makes contact with the power line.

Paragraph 1410(d)(8)

Under proposed paragraph (d)(8), barricades would have to be used to form a perimeter at least 10 feet away from the equipment to prevent unauthorized personnel from entering the work area. In areas where obstacles prevent the barricade from being at least 10 feet away, the barricade would be required to be as far from the equipment as feasible. This provision, along with proposed § 1926.1410(d)(9) and (d)(10), would minimize the likelihood that any more employees than are absolutely necessary to the operation would be near the equipment in the event the equipment, load or load line makes electrical contact with the power line.

Paragraph 1410(d)(9)

Under proposed paragraph (d)(9), employees other than the operator would be prohibited from touching the load line above the insulating link/ device and equipment. It is the Agency's understanding that the Committee's rationale for not extending this prohibition to the operator is that the operator, by being in the cab, is going to be in electrical contact with both the equipment and load line. However, this assumes that the operator is in fact standing or sitting on the equipment. There may be some situations where this is not the case. For example, some equipment may be operated by pendant control or wireless control; in such cases the operator need not be on the equipment to control it. OSHA requests public comment on this issue.

Paragraph 1410(d)(10)

Under proposed paragraph (d)(10), only personnel essential to the operation would be permitted to be in the area of the equipment and the load. In conjunction with proposed § 1926.1410(d)(8) and (d)(9), this would minimize the likelihood that any more employees than are absolutely necessary to the operation would be near the equipment in the event the equipment, load or load line makes electrical contact with the power line.

Paragraph 1410(d)(11)

Under proposed paragraph (d)(11), the equipment would be required to be properly grounded. In the event the equipment inadvertently makes electrical contact with the power line, proper grounding would protect employees in two ways. First, if the line is equipped with a circuit interrupting device, the grounding will result in a current surge that will trip the device and deenergize the line. Second, in the event an employee on the ground is touching the equipment when it contacts the power line, proper grounding will reduce the danger to the employee by providing an alternative, low resistance path to ground for the electric current.

In reviewing this proposed paragraph, OSHA has identified what appears to be a conflict between this proposed provision and a provision in Subpart V's § 1926.952(c)(2)(iii) regarding grounding of equipment. This issue is explained under the heading, *Subpart V work—working closer than Table V–1*, that follows the discussion of § 1926.1410(k).

Paragraph 1410(d)(12)

Under proposed paragraph (d)(12), insulating line hoses or cover-ups would be required to be installed by the utility owner/operator except where such devices are unavailable for the line voltages involved. The Committee noted that Subpart N, at § 1926.550(a)(15), currently allows such insulating barriers to be used as a complete alternative to deenergizing and grounding or to maintaining the applicable minimum clearance distance from the power line. However, the Committee believed that such insulating devices do not provide complete protection because they can be pierced if the equipment makes more than brushing contact with the device. However, the Committee believed that these insulating devices do provide protection if there is brushing contact and that such devices are useful to supplement the other protective measures provided by the requirements of this proposed § 1926.1410(d).

Paragraph 1410(e)

Under proposed paragraph (e), the procedures that are developed to comply with proposed § 1926.1410(d) would have to be documented and immediately available on-site. This would ensure that these procedures are available to be used as a reference while the work is in progress.

Paragraph 1410(f)

Under proposed paragraph (f), the equipment user and utility owner/ operator would be required to meet with

the equipment operator and the other employees who will be in the area of the equipment or load to review the procedures that are developed under proposed § 1926.1410(d) to prevent a breach of the minimum clearance distance established under proposed § 1926.1410(c). The Committee believed that it is important that this review take place so that the operator and other employees understand this critical information and have the opportunity to discuss the procedures with the utility owner/operator, who has a high level of expertise regarding the power lines.

Paragraphs 1410(g) and (h)

Under proposed paragraphs (g) and (h), the employer would be required to implement the procedures developed in accordance with proposed § 1926.1410(d). The utility owner/operator and all employers of the employees involved in the work would have to identify one person who will direct the implementation of the procedures. This person would have to direct the implementation of the procedures and have the authority to stop work at any time to ensure safety.

The Committee believed that, in view of the fact that more than one employer is typically involved in these situations, coordination among the employers of these employees is needed for the protective measures to be effectively implemented. Once the operation is underway, safety-related orders typically need to be given and followed without delay. Since an employee of one employer typically would not immediately follow an instruction from another employer, it is necessary that, before these operations begin, all employees understand that the one designated person will have this authority. For these reasons, the Committee believed that there needs to be one person who all involved in the operation recognize as having this role and authority.

Paragraph 1410(i). [*Reserved.*] This paragraph would be reserved because it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1410(j)

This proposed provision would require the employer to safely stop operations if a problem occurs with implementing the procedures in paragraph (d) or if there is an indication that those procedures are inadequate to prevent electrocution. In addition, this proposed provision would require that the employer either develop new procedures which comply with paragraph (d) or contact the utility owner/operator and have them deenergize and visibly ground or relocate the power line(s) before resuming operations.

Paragraph 1410(k)

This proposed provision would require that where a device originally designed by the manufacturer for use as a safety device, operational aid, or a means to prevent power line contact or electrocution is used to comply with proposed § 1926.1410 it must meet the manufacturer's procedures for use and conditions of use. The Committee believed that this provision is necessary to ensure that the devices will work as intended.

Subpart V Work—Working Closer Than Table A

In considering the circumstances under which work closer than the Table A (of proposed § 1926.1408) distances would be permitted, C–DAC recognized that it was necessary to address the special circumstances of power line work covered by 29 CFR 1926 subpart V. That subpart applies to the erection of new electric transmission and distribution lines and equipment, and the alteration, conversion, and improvement of existing transmission and distribution lines and equipment.

Currently, under subparts V and N of part 1926, employers engaged in subpart V work are not required to comply with the ''10 foot rule.'' Instead, with some exceptions, they are required to maintain the minimum clearance distances specified in subpart V's Table V–1.[29] Table V–1 has minimum clearance distances that are less than the ''10 foot rule'' (and, therefore, less than the proposed rule's Table A distances). As discussed below, under this proposed standard, employers engaged in subpart V work would continue to be permitted to use the Table V–1 minimum clearance distances. However, C–DAC believed that additional protection is needed for these workers. Therefore, this proposed rule includes new prerequisites and criteria that must be met before the Table V–1 minimum clearance distances could be used.[30] The Committee believed that it is appropriate for employers using equipment for subpart V of part 1926 activities to work closer than the Table A (of proposed § 1926.1408) distances only where the prerequisites and criteria for doing so set out in proposed § 1926.1410, which are applicable to all employers, are met. Therefore, for subpart V work, the employer would be required to maintain the clearance distances in Table A except where the employer demonstrates infeasibility.

In addition, it would be required to implement most of the protective measures required by this proposed standard. As discussed above, Subpart V work would not be subject to the requirement for an additional protective measure from the list in proposed § 1926.1408(b)(4). The Committee believed that, with certain exceptions explained below, such additional measure would not be necessary for such work. Also, subpart V work would not be subject to the prohibition in proposed § 1926.1408(d)(1) against equipment operating under power lines (see discussion above of proposed paragraph 1408(d)(2)(i)).

However, when, as will often be the case, it is not feasible to maintain the Table A (of proposed § 1926.1408) distances for subpart V work, under proposed § 1926.1410(c)(2), the clearance distances in Table V–1 would normally apply. The Committee concluded that it was not necessary to require employers engaged in subpart V work to undertake the process in proposed § 1926.1410(c)(1) for establishing a minimum clearance distance when it is infeasible to comply with the Table A (of proposed § 1926.1408) clearances. The existing clearance distances for subpart V work found in Table V–1 recognize that such work often requires that equipment get closer to the lines than the clearance distances specified in Table A and were specifically drafted to address subpart V work. Therefore, proposed § 1926.1410 (c)(2) would exempt subpart V work from proposed § 1926.1410(c)(1) and would state instead that the minimum clearance distances specified in § 1926.950 Table V–1 would apply.

Furthermore, under proposed § 1926.1410(d)(3), an employer engaged in subpart V work closer than the Table A distance would not be required to use an elevated warning line or barricade. It is the Agency's understanding that the

[29] Since C–DAC developed its consensus document, OSHA has proposed t amend part 1926 subpart V by, among other things, replacing Table V–1. 70 FR 34821 (June 15, 2005). If OSHA issues a final rule modifying Subpart V before issuing a final rule based on this proposal, OSHA will take into account any modifications to Subpart V, including Table V–1, in drafting this final rule.

[30] The only exceptions to the application of this proposed rule to subpart V of part 1926 V of part 1926 work are those contained in §§ 1926.1407–1411; all other aspects of the proposed rule would apply. This is consistent with the current Subpart V, for § 1926.952(c) of Subpart V requires equipment operating near power lines to comply with the current cranes and derricks standard in Subpart N. Therefore, the portion of the current § 1926.952(c) that requires equipment operating near power lines to comply with the cranes and derricks standard would be retained.

Committee's rationale for this exclusion was that when subpart V work takes place closer than the Table A distances, a warning line would interfere with the tools, cables, and other material used in subpart V work. However, it is unclear to the Agency why this would also be the case if a barricade were used. The Agency requests public comment on this issue.

The provisions of this proposed standard would necessitate certain conforming amendments to the subpart V provisions dealing with lifting equipment to eliminate obsolete requirements and promote clarity. Currently, § 1926.952(c)(1) reads as follows

(c) *Derrick trucks, cranes and other lifting equipment.* (1) All derrick trucks, cranes, and other lifting equipment shall comply with subpart N and O of this part except:

(i) As stated in § 1926.550(a)(15)(i) and (ii) relating to clearance (for clearances in this subpart see Table V–1) and

(ii) Derrick truck (electric line trucks) shall not be required to comply with § 1926.550(a)(7)(vi), (a)(17), (b)(2), and (e).

These subpart V provisions would need to be modified in several respects. First, service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, such as digger derricks (radial boom derricks), when used in these industries for auguring holes to set power and utility poles, or handling associated materials to be installed or removed from utility poles, are excluded from the scope of this proposed standard. They would, however, continue to be covered by subpart V when used in this manner. Specifically, subpart V's current requirement that the minimum clearance distances of Table V–1 be met when using such equipment would be retained when such equipment is used outside the coverage of the new cranes and derricks standard.

Since these trucks, when used in the manner described, would be outside the scope of the new cranes and derricks standard, subpart V's provision in § 1926.952(c)(1)(ii) stating that derrick trucks need not comply with §§ 1926.550(a)(7)(vi), (a)(17), (b)(2), and (e), which incorporate the requirements of certain industry consensus standards, would no longer be necessary.

Second, the subpart V provisions would be changed to reflect the terminology used in the scope section of this proposed standard and its new subpart designation (Subpart CC). With respect to ''cranes and other lifting equipment,'' § 1926.952(c)(1)(i) would be unnecessary since proposed §§ 1926.1407 through 1926.1411 of this proposed standard address the applicable minimum clearance distances, including the circumstances under which the clearance distances in Table V–1 would apply.

Accordingly, § 1926.952(c)(1) would be amended to read:

(c) *Cranes and other lifting equipment.* (1) All equipment covered by Subpart CC that is used for work covered by this standard [Subpart V], including cranes and other lifting equipment, shall comply with subparts CC and O of this part.

(2) Service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, such as digger derricks (radial boom derricks), when used in these industries for auguring holes to set power and utility poles, or handling associated materials to be installed or removed from utility poles, must meet the applicable minimum clearance distance in Table V–1.

Subpart V Work—Working Closer Than Table V–1

Currently, § 1926.952(c)(2) recognizes that there are circumstances when the Table V–1 clearance distances cannot be maintained during Subpart V work and lists requirements that must be met when this is the case. OSHA believes that C–DAC intended to permit Subpart V work closer than the Table V–1 clearances when the precautions in § 1926.952(c)(2), as well as additional precautions contained in proposed § 1926.1410(d), are followed.

To make this clear, OSHA is proposing to add the following language to proposed § 1926.1410(c)(2): ''Employers engaged in Subpart V work are permitted to work closer than the distances in § 1926.950 Table V–1 where both the requirements of this section and § 1926.950(c)(2)(i) and (ii) are met.'' [Note that subsections (i) and (ii) are currently subsections (iii) and (iv) but would be renumbered under the proposed amended language of § 1926.950(c)(2) discussed below]. OSHA requests public comment on this proposed addition.

This proposed change would require conforming amendments to § 1926.952(c)(2), which currently reads as follows:

(2) With the exception of equipment certified for work on the proper voltage, mechanical equipment shall not be operated closer to any energized line or equipment than the clearances set forth in § 1926.950(c) unless:

(i) An insulated barrier is installed between the energized part and the mechanical equipment, or

(ii) The mechanical equipment is grounded, or

(iii) The mechanical equipment is insulated, or

(iv) The mechanical equipment is considered as energized.

Under this proposed section, the precautions specified in paragraphs § 1926.952(c)(2)(i) and (ii) would be required under proposed § 1926.1410(d) when equipment used in Subpart V work is operated closer than the Table V–1 clearances. Since these precautions would now be required by proposed § 1926.1410(d), OSHA is proposing to delete them from Subpart V as redundant. OSHA is therefore proposing to amend § 1926.952(c)(2) to read as follows:

(2) With the exception of equipment certified for work on the proper voltage, mechanical equipment shall not be operated closer to any energized line or equipment than the clearances set forth in § 1926.950(c) unless, in addition to the requirements in § 1926.1410:

(i) The mechanical equipment is insulated, or

(ii) The mechanical equipment is considered as energized.

OSHA requests public comment on the proposed amendments to § 1926.950(c)(1) and (2) of Subpart V described above.

In addition, OSHA notes that, under the current 29 CFR Part 1926 Subpart V requirement in § 1926.952(c)(2), when doing Subpart V work closer than the Table V–1 distances, the equipment must be insulated or considered energized.[31] However, proposed § 1926.1410 does not have a similar requirement. Therefore, an employer engaged in Subpart V work that was closer than the Table V–1 distances would continue to be required (under § 1926.952(c)(2)) to insulate or consider the equipment energized, but an employer engaged in non-Subpart V work at the same distance would not. The Agency requests public comment on whether such requirements should also apply to non-Subpart V work when working closer than the Table V–1 distances.

Finally, OSHA notes that in this zone, one of the options that an employer engaged in Subpart V currently has under § 1926.952(c)(2)(iii) is to insulate the equipment. Under proposed § 1926.1410(d)(11), that employer would also have to ground the equipment. The Agency's understanding of how equipment can be simultaneously

[31] In Subpart V, when equipment is considered energized, a number of Subpart V requirements are triggered. See, for example, § 1926.951(c)(1) (restricting use of metal or conductive ladders near energized equipment); § 1926.951(f)(3) (hydraulic tools used on or around energized equipment shall use nonconducting hoses); § 1926.953(c) (materials or equipment shall not be stored near energized equipment if it is practical to store them elsewhere).

insulated and grounded is illustrated by the following example: Equipment that has a boom constructed of an insulating material (such as fiberglass) is typically mounted on a carrier (the ''truck'' portion of the equipment), which is constructed mostly of conductive material (i.e., steel). Because the boom (and the linkages, pneumatic and hydraulic lines, and other associated parts on the boom) is insulated, the equipment is considered insulated under (§ 1926.952(c)(2)(iii)). If the employer were to ground the carrier, the parts of the equipment that could form an electrical path to ground (the carrier and the conducting parts of the equipment forming an electrical path to the carrier, such as the load line and hoist) would be grounded. Therefore, the equipment would meet both the insulating option in § 1926.952(c)(2)(iii) and the proposed grounding requirement in proposed § 1926.1410(d)(11).

Subpart V Work—Summary

The differences between how the proposed requirements for power line safety would apply generally to crane operations and how they would apply to an employer engaged in work covered by Subpart V are summarized in the following table:

Non-Subpart V Work	Subpart V Work
When Using Table A Distances	
§ 1926.1408:	
Must pick one additional prevention measure from list in § 1926.1408(b)(4).	Additional measure not required (§ 1926.1408(b)(5)).
§ 1926.1408(d): Operations below power lines generally precluded.	Operations below power lines permitted (§ 1926.1408(d)(2)(i)).
(All other requirements in § 1926.1408 would apply equally to both Non-Subpart V work and Subpart V)	
Working Closer Than Table A Distances	
§ 1926.1410:	
§ 1926.1410(c)(1) (utility or registered professional engineer sets minimum clearance distance).	Instead, use Subpart V's Table V–1 minimum clearance distance (§ 1926.1410(c)(2)).
§ 1926.1410(d)(3) (warning line or barricade)	Not required.
§ 1926.1410(d)(4) (insulating link)	Only required if working closer than Table V–1 (§ 1926.1410(d)(4)(ii)); see below.
Working Closer Than Table V–1	
[The proposed § 1926.1410 requirements would apply to all distances closer than those specified in Table A; there are no additional proposed requirements for working closer than the Table V–1 distances for non-Subpart V work].	(Under both § 1926.1410 and current § 1926.952(c)(2)).
(Insulating link required under § 1926.1410(d)(4))	Must use insulating link (§ 1926.1410(d)(4)(ii)).
Not required	Equipment must be insulated or considered energized (§ 1926.952(c)(2)).
(All other requirements in § 1926.1410 would apply equally to both Non-Subpart V work and Subpart V work)	

Section 1411 Power Line Safety -While Traveling

This proposed section is designed to protect against electrical hazards while equipment is traveling with no load under power lines on construction sites. These proposed requirements would apply only to cranes/derricks while traveling on a construction site under power lines; they would not apply to equipment while traveling on roads (or in areas) that are not part of a construction site.

The following scenario is an example of the parameters of the scope of this provision: A crane travels on a public road to the entrance of a new residential tract development. While traveling on the public road it passes under powerlines. No construction is taking place on the public road. The tract, including a road that runs through the development, is open to construction traffic but is otherwise closed to the public. In the development, homes are in various stages of construction. The crane enters the development and travels along the development road to the area where the crane is going to be operated. The crane will pass under power lines as it travels along this development road.

In this scenario, proposed § 1926.1411 would not apply with respect to the crane traveling along the public road to the entrance of the development, since that road is not part of a construction site. However, it would apply with respect to traveling under power lines on the development road since the development road is part of a construction site.

It was the intention of the Committee that the requirements of proposed § 1926.1411 apply only with respect to such equipment when traveling with no load. Power line hazards regarding equipment traveling on a construction site with a load would be governed by the proposed provisions in §§ 1926.1408, 1926.1409 and 1926.1410.

The C–DAC draft of § 1926.1411(a) stated:

(a) This section applies to equipment while traveling under a power line on the construction site with no load and the boom/mast and boom/mast support system lowered sufficiently to meet the requirements of paragraph (b).

In reviewing that draft, the Agency realized that it could be misconstrued to mean that the requirements of § 1926.1411 would only apply once the crane was traveling under a power line; in other words, that no action would be required of an employer prior to the equipment being under the power line. To make it clear that there are certain proposed provisions in this section that would require the employer to make determinations and take action before the equipment is actually under the power line, the Agency has revised the Committee's original language in § 1926.1411(a) to read:

(a) This section establishes procedures and criteria that must be met for equipment traveling under a power line on the construction site with no load.

This change clarifies that the employer would be required to make determinations and take certain actions prior to the equipment traveling under the power line. For example, under proposed § 1926.1411(b)(4), if any part of the equipment while traveling would get closer than 20 feet to the power line, the employer would be required to have a dedicated spotter who is in continuous contact with the operator. If this requirement were to only apply at the moment the equipment was under the power line, it would not serve the purpose of providing the operator with someone to assist in gauging the clearance distance while the equipment is traveling under the power line.

In addition, the C–DAC draft of § 1926.1411(a) included a reference to the boom/mast and boom/mast support system being lowered to meet the criteria specified in proposed § 1926.1411(b). The Agency was concerned that inclusion of that reference could be misconstrued as meaning that the section is inapplicable where the boom/mast and boom/mast support system had not been sufficiently lowered. Therefore, the Agency has modified the paragraph by moving that reference to proposed 1926.1411(b) to explicitly make it part of the required criteria for traveling under powerlines without a load. The C–DAC's draft of 1926.1411(b)(1) stated:

(b) The employer shall ensure that:
(1) The clearances specified in paragraph (c), Table T, are maintained.

This has been changed so that the proposed § 1926.1411(b)(1) and (b)(2) now state:

(b) The employer shall ensure that:
(1) The boom/mast and boom/mast support system are lowered sufficiently to meet the requirements of this paragraph.
(2) The clearances specified in Table T of this section are maintained.

Therefore, under these proposed provisions, the employer would be required to ensure that equipment traveling with no load on a construction site under a power line has the boom/mast and boom/mast support system lowered sufficiently so that the clearances specified in Table T are maintained.

In addition to maintaining the Table T minimum clearance distances, proposed § 1926. § 1926.1411(b)(3) would require the employer to ensure that the effects of speed and terrain are considered so that those effects do not cause the minimum clearance distances specified in Table T to be breached. OSHA is modifying the C–DAC language as follows to clarify this requirement.

(b)(3) The effects of speed and terrain on equipment movement (including movement of the boom/mast) are considered so that those effects do not cause the minimum clearance distances specified in Table T of this section to be breached.

Proposed paragraph (b)(4) would require the employer to use a dedicated spotter if any part of the equipment while traveling will get closer than 20 feet to a power line. This provision would also require that the dedicated spotter be in continuous contact with the crane operator; be positioned to effectively gauge the clearance distance; where necessary, use equipment that enables the spotter to communicate directly with the crane operator; and give timely information to the crane operator so that the required clearance distance can be maintained. The Committee believed that each of these measures is necessary for the spotter to be effective.

In reviewing proposed § 1926.1411(b)(4), OSHA noted that the language ''crane operator'' was used rather than ''driver.'' For example, proposed § 1926.1411(b)(4) reads:

(4) Dedicated spotter. If any part of the equipment while traveling will get within 20 feet of the power line, the employer shall ensure that a dedicated spotter who is in continuous contact with the crane operator is used * * *

Because proposed § 1926.1411 deals with power line safety while equipment is traveling without a load, OSHA recognizes that the language ''crane operator'' may not be appropriate in all situations. In some cases a crane operator may not be the driver of such equipment on the construction site. Therefore, OSHA is soliciting comments on whether the language ''crane operator'' used in proposed § 1926.1411(b)(4) should be changed to ''driver'' or ''driver/operator.''

The Committee members were also concerned about equipment traveling underneath power lines in low visibility situations, such as at night, in the rain or fog. The electrical hazards posed by power lines are exacerbated when the driver's ability to see the power line is reduced. The Committee believed that additional precautions are necessary in light of this heightened danger. Therefore, proposed § 1926.1411(b)(5) would require the employer to ensure the power lines are either illuminated or another means of identifying them is used and a safe path of travel is identified.

In reviewing the C–DAC draft of this provision, OSHA recognized that § 1926.1411(b)(5)(ii) did not clearly state the Committee's intentions. The committee intended for employers to both identify a safe path of travel and also use the identified safe path of travel. However, the C–DAC draft stated only that a safe path be ''identified,'' which only implicitly means that it be used. Therefore OSHA has revised the language in § 1926.1411(b)(5)(ii) from:

(ii) A safe path of travel is identified.

to read:

(ii) A safe path of travel is identified and used.

The proposed requirements of this section are similar to section 5–3.4.5.5 of ASME B30.5–2004. The values in proposed Table T of proposed § 1926.1411, which provides the minimum clearance distances while traveling with no load and a lowered boom, are substantially similar to the values used by ASME. The distinction between these proposed requirements and those requirements in ASME are that the proposed requirements govern equipment while traveling under a power line and the ASME provisions govern mobile cranes while in transit. ASME defined ''transit'' as the moving or transporting of a crane from one jobsite to another.

The Agency notes that ASME B30.5–2004 calls for equipment in transit to maintain a specific clearance distance to power lines in accordance with Table 1 of ASME B30.5. While proposed § 1926.1411 governs equipment traveling without a load directly under power lines, it does not otherwise address the potential hazards associated with equipment traveling without a load near power lines. Further, as stated earlier, equipment traveling with a load, whether or not under a power line, would be considered ''operations'' and employers would have to comply with the proposed requirements in § 1926.1408, 1926.1409, or 1926.1410 in such instances.

However, equipment traveling without a load is not covered by either proposed § 1926.1410 (operations) or § 1926.1411 (traveling under power lines). Therefore, OSHA requests public comment on whether it is necessary to establish requirements for equipment traveling on a construction site without a load near power lines.

Additional Changes to the Regulatory Text In Proposed §§ 1926.1407–1411

In the C–DAC draft of provisions dealing with the ''trigger'' distance for further action, the draft referred to situations in which the crane, load or load line could get ''within'' the trigger distance. Because of the potential for confusion as to whether ''within'' means breaching or not breaching that

distance, the Agency has changed ''within'' to ''closer than.'' For example, the C–DAC draft of 1926.1407(a) read:

Before assembling or disassembling a crane, the employer must determine if any part of the crane, load line or load (including rigging and lifting accessories) could get, in the direction or area of assembly, within 20 feet of a power line during the assembly/disassembly process. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of, as follows: * * *

This provision now reads:

Before assembling or disassembling a crane, the employer must determine if any part of the crane, load line or load (including rigging and lifting accessories) could get, in the direction or area of assembly, closer than 20 feet to a power line during the assembly/disassembly process. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) of § 1926.1407(a), as follows:

Section 1412 Inspections

The purpose of this proposed section is to prevent injuries and fatalities caused by equipment failures. A key method of accomplishing this goal is through the use of an inspection process that identifies and addresses safety concerns.

Currently, Subpart N requires the employer to designate a competent person to inspect all machinery and equipment prior to each use, and during use, to make sure it is in safe operating condition. Any deficiencies shall be repaired, or defective parts replaced, before continued use. 29 CFR 1926.550(a)(5). In addition, Subpart N requires a thorough annual inspection of the hoisting machinery by a competent person or by a government or private agency recognized by the U.S. Department of Labor. 29 CFR 1926.550(a)(6).

Subpart N also contains inspection requirements for specific types of equipment that incorporate national consensus standards or manufacturer recommendations by reference. Section 1926.550(b)(2) requires crawler, locomotive, and truck cranes to meet the inspection requirements of ANSI B30.5–1968, ''Crawler, Locomotive and Truck Cranes'' (with a modified version of the ANSI standard's monthly inspection documentation requirement). Overhead and gantry cranes, under § 1926.550(d)(4), must be inspected pursuant to ANSI B30.2.0–1967, ''Overhead and Gantry Cranes.'' For derricks, § 1926.550(e) requires compliance with the inspection requirements of ANSI B30.6–1969, ''Derricks.'' Hammerhead tower cranes must be inspected (§ 1926.550(c)(5)) and floating cranes and derricks must be tested (§ 1926.550(f)(2)(iii)) in accordance with manufacturer specifications.

The Committee believed it would avoid confusion and promote compliance to establish, as far as possible, uniform inspection schedules and requirements applicable to all types of equipment. At the same time, it recognized that the wide variety of equipment covered by this proposed standard necessitated some equipment-specific inspection provisions. Thus, proposed paragraphs (a) through (j) of this section would set inspection requirements for all covered equipment that would be supplemented by other sections of this proposed standard relative to specific equipment. The proposed section is structured so that the inspection requirements would be triggered by activity (e.g., equipment modification, repair/adjustment, assembly, severe service or equipment not in regular use) and the passage of time (e.g., shift, monthly and annual/comprehensive).

Note that for each of these inspections, as discussed in detail below, this proposed standard specifies a requisite level of qualification of the person conducting the inspection (for certain inspections, a competent person; for others a qualified person). However, like Subpart N, the proposed rule does not include a testing/evaluation requirement for such employees for assessing their ability to conduct the inspections.

Since the C–DAC document was completed, crane accidents have occurred that have raised concerns regarding the level of expertise needed by those who inspect the equipment covered by this proposed standard. In § 1926.1428, this proposed rule specifies a protocol for ensuring that signal persons have adequate expertise to perform their duties. The Agency requests public comment on whether a similar approach is needed for those who inspect equipment as required by this proposed standard.

Paragraph 1412(a) Modified Equipment

Proposed paragraph (a) would require an inspection (that includes functional testing) to be performed by a qualified person for equipment that has been modified or has additions that affect the safe operation of the equipment prior to initial use after that modification/addition. In essence, the proposed provision would require assurance that such modifications or additions are performed in accordance with the approval obtained in proposed § 1926.1434, *Equipment modifications*. Proposed § 1926.1412(a)(2) would prohibit the use of the equipment until that requirement was met. The purpose is to prevent modification-related equipment failure.

This proposed paragraph is generally similar to consensus and government standards, including ANSI B30.5–1968, ASME B30.5–2004, COE (Corps of Engineers)—EM 385–1–1 (3–Nov–03), and DOE (Department of Energy)—STD–1090–2004 in that each require an inspection and some degree of functional testing prior to using equipment that has been modified/altered. However, the inspection in the proposed paragraph differs from these in that it is limited to equipment that has modifications/additions that affect the safe operation of the equipment and is limited to confirming compliance with modifications or additions that are approved by the manufacturer or a registered professional engineer pursuant to § 1434. Further, this proposed paragraph does not contain a documentation requirement.

The Committee was of the view that many changes made to equipment do not implicate safe operation, and application of an inspection requirement to such changes would be unnecessary and unduly burdensome. The proposed paragraph reflects this concern and is tailored to require this inspection only when the modification is of the type that could affect safety. As such, the inspection would only be required for modifications that affect ''safe operation'' as illustrated by a non-exclusive list of examples (''modifications or additions involving a safety device or operator aid, critical part of a control system, power plant, braking system, load sustaining structural components, load hook, or in-use operating mechanisms'').

The first criterion to be used in conducting the inspection (proposed § 1926.1412(a)(1)(i)) is the modification approval obtained under proposed § 1926.1434. This would ensure that the modification was accomplished as intended under that approval.

The second criterion (proposed § 1926.1412(a)(1)(ii)) is functional testing. This reflects the Committee's view that functional testing is essential to ensuring that the modification was completed correctly. Such testing can reveal faults that often would not otherwise be apparent.

As drafted, § 1926.1412(a)(1)(ii) would not limit the functional testing requirement to only those components that are or may be affected by the modification or addition but would require testing of the entire equipment. OSHA requests public comment on

whether the provision should be modified to limit the functional testing requirement to those components that are or may be affected by the modification or addition.

During the SBREFA process, a Small Entity Representative suggested adding an exception to proposed § 1926.1412(a) for ''transportation systems,'' by which the SER meant any system dispersing the weight of the crane for movement on the highways. The Panel recommended that OSHA solicit public comment on whether to include such an exception and, if so, what the appropriate terminology for such an exception would be. OSHA welcomes public comment on whether an explicit exception for such transportation systems should be included in § 1926.1412(a).

Paragraph 1412(b) Repaired/Adjusted Equipment

Proposed paragraph (b) provides that equipment that has had a repair or adjustment that affects the safe operation of the equipment must be inspected (including functional testing) by a qualified person prior to initial use after the repair/adjustment. In summary, the qualified person would be required to determine if such repairs and adjustments have been performed in accordance with manufacturer equipment criteria.

As defined in § 1926.1401, ''equipment criteria'' include ''instructions, recommendations, limitations and specifications.'' This definition is included to make clear that ''equipment criteria'' is to be broadly construed to include the full range of information regarding the equipment's functions and operation provided by the manufacturer. If those criteria were unavailable or inapplicable, the qualified person would be required to determine whether a registered professional engineer (RPE) is needed to develop criteria. If an RPE were not needed, a qualified person would be required to develop them. Use of the equipment would be prohibited until the inspection demonstrates that the repairs and adjustments met the criteria. The purpose of this provision is to avoid the failure of equipment due to improper repairs and adjustments.

The Committee was of the view that many repairs and adjustments made to equipment do not implicate safe operation, and application of an inspection requirement to all repairs and adjustments would be unnecessary and unduly burdensome. The proposed paragraph reflects this concern by limiting this proposed inspection requirement to those repairs and adjustments that are of the type that could affect safety. A non-exclusive list of examples of repairs and adjustments that would trigger the inspection is included in the provision.

The Committee believed that functional testing is essential to ensuring that a repair or adjustment has been completed correctly. Such testing can reveal faults that may not otherwise be apparent.

As discussed above in relation to proposed § 1926.1412(a)(1)(ii), the functional testing requirement is not limited to those components that are or may be affected by the repair or adjustment. OSHA requests public comment on whether the provision should be modified to add such a limitation.

The Agency believes that this inspection provision is needed to prevent injuries and fatalities from accidents caused by faulty repairs and adjustments. As evidenced by similar provisions in other standards (see COE—EM 385–1–1 (3–Nov–03), and DOE—STD–1090–2004; see also the consensus standard ASME B30.5–2004), the industry has recognized the hazards associated with improperly repaired and adjusted equipment and the importance of this type of inspection.

Paragraph 1412(c) Post-Assembly

Proposed paragraph (c) would require a post-assembly inspection of equipment by a qualified person prior to its use. In sum, the provision would require the qualified person to assure that the equipment is configured in accordance with the manufacturer's equipment criteria. Where those criteria are unavailable, the equipment would have to meet criteria developed by either the qualified person or an RPE familiar with the equipment (if the qualified person decides that an RPE is needed). Equipment use would be prohibited until the inspection demonstrates that the criteria have been met.

ANSI B30.5–1968, and ASME B30.5–2004 do not call for this type of inspection. COE in EM 385–1–1 (3 Nov 03), Appendix H, does include a post-assembly inspection.

The Committee was of the view that a post-assembly inspection is needed because of the dangers associated with incorrectly assembled equipment. For example, the equipment's load chart may overstate the equipment's capacity if the equipment has been incorrectly assembled. Also, a component may be stressed beyond its design capacity if incorrectly assembled.

The Committee considered whether to recommend requiring that this inspection be conducted by a person who is not only qualified but is also a ''competent person,'' i.e., a person with the authority to take corrective action. The Committee ultimately decided that this would not be necessary because proposed § 1926.1412(c)(3) would prohibit the use of equipment until the post-assembly inspection demonstrates that the equipment is configured in accordance with the applicable criteria. Therefore, if the qualified person were to find that the equipment was incorrectly assembled, it could not be used until the error was corrected.

Also discussed was whether a registered professional engineer (RPE), as opposed to a qualified person, is needed to develop the criteria for the equipment configuration where the manufacturer criteria are unavailable. The Committee agreed that an RPE would typically not be needed for, as one member stated, ''a basic machine that goes together in a basic manner,'' but that an RPE would be needed for some of the more complex types of equipment. As a result, the Committee found that it would be appropriate to have the qualified person determine if an RPE were needed to develop the criteria.

Paragraph 1412(d) Each Shift

Proposed paragraph (d) would require a shift inspection, the first of three regularly scheduled equipment inspections that would be required. Specifically, 1926.1412(d)(1) sets forth the frequency of this inspection, the degree of scrutiny required and the level of expertise required of the person performing this inspection. The proposed paragraph lists the items that would be required to be included in this inspection and specifies the corrective action that would be required. The purpose of this provision is to identify and address safety hazards before they cause accidents.

This inspection (which would begin prior to each shift and be completed before or during that shift) is broadly similar to the current requirement in 29 CFR 1926.550(a)(5) of Subpart N to conduct an inspection ''prior to each use, and during use * * *'' Similarly, several other current standards, including 29 CFR part 1926 subpart R (Steel Erection) and COE—EM 385–1–1 (3–Nov–03) require some type of shift inspection for cranes. In contrast, ANSI B30.5–1968 as well as the more current ASME B30.5–2004, call for a ''Frequent Inspection'' at ''daily to monthly'' intervals. The ''Frequent Inspection'' in the ANSI/ASME standards, though, includes a reference to ''observation during operation.''

The ''each shift'' inspection in the proposed rule is designed to ensure that the equipment will be removed from service if there is a visually apparent deficiency that constitutes a safety hazard. The Committee considered adopting the ''daily to monthly'' inspection interval that is in the ANSI/ASME B30.5 consensus standard, but determined that that approach was too vague for use as a mandatory OSHA requirement. Instead, the Committee found that, in accordance with long-standing, common industry practice, an inspection of the items listed in the proposed paragraph each shift is an appropriate means of ensuring that the equipment's condition will be sufficient for safe operation.

The Committee also discussed whether the shift inspection should be required to be completed before a shift's crane operations begin. It determined that it is not necessary to complete the inspection in that short of a time frame. The Agency believes that this determination is reasonable for several reasons. First, this would be an inspection that would be done for every shift, and therefore would be done quite frequently. This would substantially diminish the likelihood that a critical problem would suddenly occur, since symptoms of such a problem developing would likely have been detected in prior shift inspections.

Second, as discussed below, one of the purposes of the annual/comprehensive inspection is to detect developing deficiencies that, while not yet safety hazards, need to be monitored. In such cases the employer under the annual/comprehensive requirements in proposed § 1926.1412(f)(4) would be required to monitor them in the monthly inspections. Finally, the competent person that conducts the shift inspection would be required to reassess his or her determinations in light of observations made during the equipment's operation. The Committee designed these proposed requirements to work together, and in light of that combined approach, the Agency believes that it would be sufficient for the shift inspection to be completed during the shift.

The Committee also discussed the degree of scrutiny that would be required during the shift inspection. Specifically, it considered whether the shift inspection should involve any disassembly of the equipment. It determined that disassembly should not normally be needed for this type of inspection since its purpose is not to duplicate the annual/comprehensive inspection (which is where the equipment would be subjected to a level of scrutiny that would necessarily involve disassembly). Instead, disassembly would only be required where ''the results of the visual inspection or trial operation indicate that further inspection necessitating disassembly is needed.''

Finally, a competent person would be required to perform the shift inspection. The Committee believed that a person that meets the definition of a competent person (see the definition discussion above) is needed to perform the shift inspection for two reasons. First, such a person would have the capability to identify apparent deficiencies, determine if any disassembly was needed, and determine if the deficiency constitutes a safety hazard. Second, a competent person would have the authority necessary to take corrective action in the event a deficiency was such a hazard.

OSHA anticipates that the equipment operator will often be used by the employer as the competent person who conducts the shift inspection. The operator will be at the site and, in most cases, by virtue of his or her qualification or certification under proposed §§ 1926.1427 and 1926.1430 and experience and familiarity with the equipment, would meet the requirements for a competent person. However, the employer would have the flexibility to use someone else to conduct the shift inspection as long as that person met the definition of competent person.

Proposed paragraphs (d)(1)(i) through (xiv) sets forth the list of items that, at a minimum, would be required to be inspected each shift. The Committee believes that this is an appropriate list for ensuring safety and builds on well established industry practice in terms of what needs to be inspected in this type of inspection. For example, the list is similar to the one for pre-shift inspections in 29 CFR Part 1926 subpart R, the list in ASME B30.5–2004 for its Frequent Inspection, and with the exception of a few additional items, to the list for Frequent Inspections in ANSI B30.5–1968.

Overall, except as noted below in the discussion of the particular items on this list, the concerns of C–DAC members relative to this list focused on whether items not listed as ''daily'' inspection items but included instead in the ''Frequent Inspection'' list in ASME B30.5a–2002 (which are identical to those in the more recent ASME B30.5–2004 standard) should be inspected each shift. A concern was raised in the Committee meetings about the nature of the visual inspection and whether including all of the listed items in ANSI/ASME would be too burdensome. To address this concern, the Committee decided to include these items (and a few others) but to also include the language discussed above limiting the circumstances in which disassembly would be required.

The following discussion addresses only those items for which the Committee recommended inspection descriptions that vary in some significant way from past or current consensus standards (apart from their being designated for inspection each shift).

Proposed paragraph (d)(1)(ii) lists ''[c]ontrol and drive mechanisms for apparent excessive wear of components and contamination by lubricants, water or other foreign matter.'' Though similar to the requirement in ANSI B30.5–1968 and ASME B30.5–2004 (on the ''Frequent'' list), and in 29 CFR part 1926 subpart R, this provision reflects some differences. For example, unlike the ANSI/ASME standards (but similar to Subpart R), it adds ''drive'' mechanisms, which the Committee believed more accurately reflects the type of mechanisms that need to be inspected. In addition, ''excessive'' was added to account for the fact that some wear in these mechanisms is normal and not unsafe. The extent of wear needed to trigger further evaluation of the item is that which is apparently excessive.

Proposed paragraph (d)(1)(iii) addresses ''[a]ir, hydraulic, and other pressurized lines for deterioration or leakage, particularly those which flex in normal operation.'' This paragraph is similar to an item listed in ANSI B30.5—1968 and in ASME B30.5–2004, with the difference being the reference to ''air'' and ''other pressurized lines.'' These additions reflect the Committee's belief that it is necessary to check all types of pressurized lines.

Proposed paragraph (d)(1)(v) lists ''[h]ooks and latches for deformation, cracks, excessive wear, or damage such as from chemicals or heat.'' This substantially mirrors Subpart R, and is similar to ANSI B30.5–1968 and ASME B30.5–2004, but also differs in certain ways. First, the Committee believed that latches can be damaged by causes other than the examples listed. The proposed paragraph therefore adds the words ''such as'' so that the examples listed would be a non-exclusive list. Second, the Committee believed that ''heat'' should be added as another example of a cause of damage to highlight this as an area of concern (since, for example, welding is sometimes done near a hook or latch). Finally, the proposed

provision would require the competent person to inspect for ''excessive wear,'' as opposed to ''wear.'' This change was made because the Committee believed that hooks and latches are designed to withstand a degree of wear, and it is only when the wear is excessive that it is of concern.

Proposed paragraph (d)(1)(vii) lists ''[w]ire rope, in accordance with § 1926.1413(a).'' This item references the *Shift Inspection* provision of § 1926.1413, *Wire rope—inspection*, which specifies how the wire rope would be required to be inspected in the shift inspection. As discussed below in the section of this Preamble on that proposed provision, the timing, degree of scrutiny, and level of expertise required of the person conducting the wire rope inspection essentially mirror those for proposed § 1926.1412(d)(1). This was done to ensure consistency with the wire rope inspections and the other general items inspected each shift.

Proposed paragraph (d)(1)(viii) lists ''[e]lectrical apparatus for malfunctioning signs of apparent excessive deterioration, dirt or moisture accumulation.'' This essentially mirrors provisions in ANSI B30.5–1968 and ASME B30.5–2004 (for Frequent Inspection) and Subpart R except for the insertion of the word ''apparent.'' That word was added to be consistent with proposed § 1926.1412(d)(1)'s reference to ''apparent deficiencies.''

Proposed paragraph (d)(1)(ix) lists ''[t]ires (when in use) for proper inflation and condition.'' ASME B30.5–2004 calls for tires be checked for ''inflation pressure'' and Subpart R contains a similar provision, although it does not contain the ''when in use'' limitation. The Committee believed that it is unnecessary to check tires for proper inflation on equipment that is not in use. In addition, it decided to not include the word ''pressure'' because it believed that checking pressure each shift with a gauge is unnecessary and inconsistent with the visual nature of the shift inspection.

Proposed paragraph (d)(1)(x) lists ''[g]round conditions around the equipment for proper support, including ground settling under and around outriggers and supporting foundations, ground water accumulation, or similar conditions.'' This item is new, in that it is not included in 29 CFR part 1926 subpart N or the ANSI/ASME standards. The Committee believed that ground conditions can change from shift to shift, and in light of the critical importance of sufficient ground support, included this item in the C–DAC document.

A nearly identical provision is included in 29 CFR part 1926 subpart R. However, the C–DAC provision differs from the Subpart R provision in that the language ''and supporting foundations'' was added by C–DAC to reflect that some cranes (particularly towers cranes) are set on surfaces other than ''ground'' (e.g., concrete) and that ground settling could occur ''under and around'' those foundations. As such, the Agency believes that the C–DAC language is appropriate in the proposed rule. It should also be noted that a separate provision, § 1926.1402, *Ground conditions*, is included in this proposed rule, which more specifically addresses responsibility for and adequacy of ground conditions.

Proposed paragraph (d)(1)(xi) lists ''[t]he equipment for level position, both shift and after each move and setup.'' This item is not included in the ANSI/ASME standards; however, it mirrors the language of the similar pre-shift inspection in Subpart R. The Committee found that, as with ground conditions, maintaining the equipment's level position is essential for its safe operation. Since factors affecting the equipment's angle of inclination can change from shift to shift (such as compression of dunnage, ground settling from freeze/thaw conditions and ground compression), the Committee believed that it is necessary to include this in the shift inspection.

The SBREFA Panel recommended that OSHA solicit public comment about whether it is necessary to clarify the requirement of proposed § 1926.1412(d)(1)(xi) that the equipment be inspected for ''level position'' by clarifying the amount of tolerance that would be allowed for the equipment to be considered ''level.'' The Agency requests public comment on this issue.

Proposed paragraph (d)(1)(xii) lists ''[o]perator cab windows for significant cracks, breaks, or other deficiencies that would hamper the operator's view.'' [32] The purpose of this proposed provision is to ensure adequate visibility. The Committee believed that it is important to ensure that the windows' condition does not hamper the operator's view. Since a significant crack, break or other defect hampering the operator's view may occur during a shift, it believed that this item needs to be included in the shift inspection. The inclusion of the words ''significant'' and ''hamper the operator's view'' were to clarify that minor deficiencies that do not materially impair the operator's view are not considered safety hazards.

Proposed paragraph (d)(1)(xiii) lists ''[r]ails, rail stops, rail clamps and supporting surfaces when the equipment has rail traveling.'' This item is not specifically listed as an inspection item in the pre-shift inspections of Subpart R or in the Frequent Inspections of the 1968 or 2004 ANSI/ASME B30.5 standards. However, they are included because of the essential role they play in the holding and emergency stopping of rail mounted equipment. Their importance to safe operation is similarly recognized by their inclusion in proposed § 1926.1415, *Safety Devices,* as safety devices that must be working properly for crane operations to continue.

Proposed paragraph (d)(1)(xiv) lists ''[s]afety devices and operational aids for proper operation.'' Subpart N, through its incorporation by reference of ANSI B30.5–1968, includes a daily inspection of safety devices for malfunction for the equipment it covers, while ASME B30.5–2004 requires a daily inspection of operational aids for malfunction. Finally, Subpart R includes a nonexclusive list of safety devices in its pre-shift inspection. The equipment's safety devices and operational aids would be included because of their important role in assisting the operator in the safe operation of equipment.

Concern was raised in Committee about including this item because the industry did not have clear, consistent definitions for terms ''safety devices'' and ''operational aids.'' This concern was addressed by referencing the lists of devices for each of these terms in proposed § 1926.1415, *Safety devices* and § 1926.1416, *Operational aids.*

The language also reflects the Committee's view that the inspection of these devices and aids is more accurately described as an inspection for ''proper operation'' rather than for ''malfunction.'' The Committee considered this a more accurate description because the person conducting the inspection does so by checking the safety device or operational aid for proper operation. If it is found to be working properly, the inspection is finished.

Another concern was including both safety devices and operational aids in this provision, since many members were of the view that these two categories of devices necessitate different levels and types of action when a deficiency is found. That concern was addressed by specifying in proposed § 1926.1412(d)(3) that if a deficiency is found, the action that

[32] Currently, 29 CFR Part 1926 Subpart N contains a requirement specifying that the type of glazing in cabs must not cause ''a visible distortion.''

would be required in response would be the actions delineated in proposed § 1926.1415, *Safety devices* and § 1926.1416, *Operational aids,* which address these two categories differently. See additional discussions of these procedures in §§ 1926.1415 and 1926.1416 of this explanation of the rule.

Proposed paragraph (d)(2) would establish the follow-up actions to the identification of apparent deficiencies during the shift inspection that would be required. Specifically, under proposed 1926.1412(d)(2), immediately following the discovery of any deficiency identified pursuant to proposed § 1926.1412(d)(1)(i) through (xiii), or pursuant to other equipment-specific inspections (e.g., see proposed § 1926.1436(p) (inspection of derricks), the competent person must determine whether the deficiency is a safety hazard. If so, equipment operations must cease until it has been corrected. The correction procedure described in proposed § 1926.1412(d)(2) is similar to that in ANSI B30.5–1968 and ASME B30.5–2004 for their Frequent Inspections.

This approach reflects the Committee's determination that not all deficiencies constitute safety hazards. The proposed language in § 1926.1412(d)(2) reflects that approach by linking the requirement for removing the equipment from service to deficiencies that constitute safety hazards. The provision is designed to ensure that this determination is made appropriately by requiring that it be made by a competent person. The competent person would have the capability necessary to make an accurate determination. In addition, requiring a competent person to make the determination would ensure that his or her findings were implemented; i.e., the competent person would have the authority to order the equipment out of service if the deficiency constituted a hazard. The Agency believes that this would be an appropriate means of protecting employees from equipment with deficiencies that constitute safety hazards.

The SBREFA Panel recommended that OSHA solicit public comment on whether, and under what circumstances, booming down should be specifically excluded as a part of the shift inspection, and whether the removal of non-hinged inspection plates should be required during the shift inspection. Proposed § 1926.1413(a)(1), discussed below, explicitly states that booming down is not required as part of the shift inspection for wire rope. It is the Agency's understanding that C–DAC did not include a similar provision in the general shift inspection provision in proposed § 1926.1412(d) because booming down would not be required to observe a deficiency in any of the items requiring inspection under that paragraph. Similarly, OSHA does not believe that inspection for a deficiency in any of those items would require removal of non-hinged inspection plates. However, OSHA welcomes public comment on these points.

Paragraph 1412(e) Monthly

Proposed paragraph (e) would require a monthly inspection of the equipment, the second of the three regularly scheduled general inspections that would be required by this proposed standard. The monthly inspection is identical in coverage and manner to the shift inspection required by proposed § 1926.1412(d), with one addition discussed below. Thus, the monthly inspection would be a visual inspection of the items listed in the shift inspection for apparent deficiencies, conducted by a competent person. However, unlike a shift inspection, a written record of the monthly inspection is proposed to be kept and retained for at least 3 months.

In addition, under the annual/comprehensive inspection in proposed § 1926.1412(f)(4), the employer would be required to identify developing deficiencies that, while not yet safety hazards, need to be monitored. In such cases the employer under proposed § 1926.1412(f)(4) and (f)(6) would be required to monitor them in the monthly inspections.

This provision differs in some ways from the current requirement in 29 CFR part 1926 Subpart N that incorporates by reference ANSI B30.5–1968 and from ASME B30.5–2004. For example, rather than a monthly inspection, these industry standards call for a ''Frequent'' inspection to be done at ''daily to monthly'' intervals. The Committee believed that the proposed approach is an improvement over the ANSI/ASME approach by eliminating ambiguity over the frequency of inspections. Also, the consensus standards do not call for the monitoring of developing deficiencies, a change the Committee believed would lead to the elimination of hazards before they develop. However, many of the items listed in those consensus standards for frequent inspections are similar to those listed in the shift and monthly inspections of the proposed rule (See discussion of items inspected under proposed paragraphs (d)(1)(i) through (xiv) for comparison).

Proposed paragraph (e)(3) would establish a documentation requirement for this monthly inspection. Specifically, proposed § 1926.1412(e)(3)(i) would require that the inspection ''be documented by the employer that conducts the inspection'' and indicate the items checked with results, the name and signature of the person of the inspector, and the date. In these respects this proposed requirement is similar to that currently in effect under § 1926.550(b)(2) of 29 CFR part 1926 Subpart N for crawler, locomotive, and truck cranes. Proposed § 1926.1412(e)(3)(ii) would establish a minimum three-month retention period for the monthly inspection documentation.

These two proposed provisions have several purposes. The Committee believed that, on a monthly basis, it is necessary to record the items checked and the results of an inspection that for the most part parallels a shift inspection. It believed that the documentation of this inspection, signed by the person who conducted the inspection and retained for three months, would have several effects. First, it would increase the likelihood that more employers would implement systems for conducting and responding to inspections. The failure to do so would be more readily apparent if a record were not made, and the signature of the person who conducted the inspection would be an inducement to that person to ensure that the inspection was done correctly. Second, it would create a record that the employer could use to help track developing problems so that they could be corrected in time to assure continued safe operation of the equipment.

The Agency notes that the proposed three month retention period also reflects a desire of the Committee to have a retention period that is consistent with Department of Transportation (''DOT'') truck inspection documentation requirements. Also, proposed § 1926.1412(e)(3) parallels the monthly inspection for wire rope in proposed paragraph 1413(b) in terms of timing, level of scrutiny, expertise of the inspector, and documentation.

The SBREFA Panel recommended that OSHA solicit public comment on whether the provision for monthly inspections should, like the provision for annual inspections, specify who must keep the documentation associated with monthly inspections. (The provision for annual inspections states that the documentation must be ''maintained by the employer who conducts the inspection.'') OSHA requests public comment on the issue raised by the Panel's recommendation.

The SBREFA Panel also recommended that OSHA restate the corrective action provisions from the shift inspection (proposed § 1926.1412(d)(2) and (3)) in proposed § 1926.1412(e). Under proposed § 1926.1412(e)(1), the monthly inspection must be conducted in accordance with proposed § 1926.1412(d) on shift inspections, and this means that the corrective action provisions in proposed § 1926.1412(d)(2) and (3) must also be followed in the monthly inspections. OSHA requests comment on whether the language in proposed § 1926.1412(d)(2) and (3) should be repeated under proposed § 1926.1412(e).

Paragraph (f) Annual/Comprehensive

Proposed paragraph (f) would require an annual (i.e., once every twelve months), general inspection of the equipment, the third of the three regularly scheduled general inspections that would be required by this proposed standard. It would promote safety by ensuring that a thorough, comprehensive inspection of the equipment is performed to detect and address deficiencies that might not be detected in the proposed shift and monthly inspections.

Proposed paragraph (f)(1) would require that a qualified person inspect the equipment, at least every 12 months, in accordance with § 1926.1412(d) (shift inspections). The Committee's intent was to have the items specified in the shift inspection examined more thoroughly, by a qualified person, on an annual basis. This would ensure that deficiencies necessitating a greater degree of scrutiny than what would be required in the shift inspection (such as a deficiency that is not apparent in a visual inspection but is detectable through disassembly), and a greater degree of expertise to detect, would be discovered.

The Committee believed that, in light of this need for greater scrutiny, a higher level of expertise is needed of the person conducting the inspection than is currently required for the annual inspection in 29 CFR part 1926 Subpart N (Subpart N, at § 1926.550(a)(6), requires that it be conducted by a competent person). The Committee's view is similar to that reflected in COE–EM 385–1–1 (3 Nov 03) and ASME B30.5–2004, both of which call for a qualified person to perform those standards' ''periodic'' inspections. The Agency believes that, to effectuate the purpose of the proposed annual/comprehensive inspection, a qualified person would be needed to conduct this inspection.

The Agency notes that neither this paragraph nor the subsequent paragraphs under proposed § 1926.1412(f) specify the level of scrutiny that would be required for the annual/comprehensive inspection. As it is the Agency's understanding that it was the Committee's belief that this inspection needs to be more thorough than a visual inspection for apparent deficiencies, OSHA solicits comments from the public as to whether language specifying a higher level of scrutiny (for example, ''thorough, including disassembly when necessary'') should be added.

In terms of timing, this proposed annual/comprehensive inspection is essentially the same as currently specified in Subpart N, which requires an ''annual'' inspection.

The requirement that the inspection be conducted at least every 12 months means that an inspection must be conducted on or before the anniversary date of the last annual inspection. A situation that may arise is where the equipment is not in service on the anniversary date. In that situation, since the equipment is not in service, the annual inspection would not have to be done at that point. However, the equipment could not be put back into service until the annual inspection had been done.[33]

As discussed below, proposed § 1926.1412(f)(4)–(f)(6) contain specific proposed responsive actions in the event a deficiency is discovered in the annual/comprehensive inspection. C–DAC recommended that proposed § 1926.1412(f)(1) state that '' * * * the equipment shall be inspected * * * in accordance with paragraph (d) (shift inspections).'' Read literally, the C–DAC language would have required the employer to comply with the responsive actions specified for the shift inspections in proposed § 1926.1412(d). However, the specified responsive actions for the proposed shift inspection differ from those proposed for the annual/comprehensive inspection. Therefore, the Agency modified the C–DAC language for proposed § 1926.1412(f)(1) to make it clear that the responsive actions that would be required if a deficiency were found under § 1926.1412(f)(1) are those specified in proposed § 1926.1412(f)(4)–(f)(6). This has been done by adding the following language to the C–DAC (f)(1) provision:

> At least every 12 months the equipment shall be inspected by a qualified person in accordance with paragraph (d) (shift inspections) of this section, except that the corrective action set forth in Paragraph (f) Annual/comprehensive, of this section shall apply.

The difference is that while both require that the equipment be removed from service if safety hazards are identified, paragraphs (f)(4) through (f)(6) also provide that a deficiency that might, but has not yet, reached the safety hazard stage must be monitored on a monthly basis. (Also, the determinations in § 1926.1412(f)(4) through (f)(6) are made by a qualified person, whereas the determinations in the shift inspection are made by a competent person.)

Proposed paragraphs (f)(2)(i) through (xxi) supplement the list of inspection items in proposed § 1926.1412(f)(1) that would be required to be inspected in the annual/comprehensive inspection. The Committee developed this list based on the members' experience and current industry practice as reflected in current consensus standards for annual/periodic inspections. The Committee believed that each item plays an important role in the safe operation of equipment.

The list in proposed paragraphs (f)(2)(i) through (xxi) differs somewhat from those in consensus standards. Among other differences, the list in these proposed paragraphs is more user-friendly to the employer and qualified person because the item inspected is at the beginning of each sentence. Also, some items not in consensus standards are included because, as discussed below, in the view of the Committee, they also have a significant effect on the safe operation of equipment.

Proposed paragraph (f)(2)(i) lists ''[e]quipment structure (including the boom and, if equipped, the jib),'' including ''(A) Structural members: deformed, cracked, or significantly corroded. (B) Bolts, rivets and other fasteners: loose, failed or significantly corroded. (C) Welds for cracks.'' Differences with similar items listed in ANSI B30.5–1968, ASME B30.5–2004 and COE–EM 385–1–1 (3 Nov 03) are as follows: ''Welds for cracks'' was added to better ensure that the equipment is structurally sound; ''Other fasteners'' was added to ''bolts and rivets'' (referenced in the ANSI/ASME standards) because there are now other types of fasteners which also need to be inspected to ensure they are not loose, failed or significantly corroded; and ''significantly'' was added to describe

[33] Note that, under proposed § 1926.1412(h), discussed below, equipment that has been out of regular service for three months or more must receive a monthly inspection before being returned to service. However, if the equipment had been out of regular service for more than three months but it was due for its annual inspection, the annual inspection would have to be done and there would therefore be no need to also do the § 1926.1412(h) (out of regular service) inspection.

the degree of corrosion on a structural member or fastener needed to trigger further examination because some corrosion on those items is normal and has no effect on safety.

Proposed paragraphs (f)(2)(ii) through (iv) list: ''[s]heaves and drums for cracks or significant wear;'' ''[p]arts such as pins, bearings, shafts, gears, rollers and locking devices for distortion, cracks or significant wear;'' and ''[b]rake and clutch system parts, linings, pawls and ratchets for excessive wear.'' These items are similar to the items currently listed in the Periodic Inspection (monthly to twelve month intervals) in ANSI B30.5–1968 and ASME B30.5–2004. The Committee believed that these items, as reflected in their inclusion in current consensus standards, need to be checked in an annual inspection to ensure the safe operation of the equipment.

Proposed paragraph (f)(2)(v) lists ''[s]afety devices and operational aids for proper operation (including significant inaccuracies).'' The Committee included the term ''significant inaccuracies'' in recognition of the fact that such devices normally operate within a tolerance range. Corrective action would not be required if the inaccuracy is so small as to be irrelevant with regards to the safe operation of the equipment. In contrast, significant inaccuracies in these devices could mislead the operator and contribute to actions that could result in the equipment being inadvertently used in an unsafe manner. Consequently, the Committee believed that these devices and aids need to be inspected for both proper operation and significant inaccuracies.

This provision is broader than similar provisions in the ANSI and ANSI/ASME standards. Specifically, ANSI B30.5–1968 only addresses ''safety devices for malfunction'' (the Periodic Inspection includes the items listed in the Frequent Inspection) while the Periodic Inspection for ASME B30.5–2004 only includes operational aids.

Another significant difference between this paragraph and the ASME standard is the follow-up action required subsequent to the discovery of a deficiency involving operational aids. Under this paragraph, the discovery of such a deficiency that is determined to be a safety hazard would require the equipment to be removed from service until the safety hazard is corrected. In contrast, under the 2004 ASME standard, alternatives to the removal of equipment from service are available.[34]

Proposed § 1926.1416 would permit equipment with operational aids that are not functioning properly to continue to be used with specified alternative measures in place. Proposed § 1926.1416(d) and (e) would set time limits for such use. It is the Agency's understanding that the Committee intended that this same approach should apply with respect to the follow-up action required when an operational aid is found in the annual inspection to be not working properly. In other words, the equipment could be returned to service but the time limits in proposed § 1926.1416(d) and (e) would apply, as would the alternative measures requirements.

Proposed § 1926.1412(f) does not explicitly describe how the follow-up measures in proposed § 1926.1412(f)(4)–(f)(6) would apply to operational aids. As explained below in the discussion of proposed § 1926.1412(f)(4)–(f)(6), the Agency believes that it would be appropriate to add language to clarify that the follow-up action required when an operational aid is found in the annual inspection to be not working properly is the action specified in proposed § 1926.1416(d) and (e).

Proposed paragraph (f)(2)(vi) lists ''[g]asoline, diesel, electric, or other power plants for safety-related problems (such as leaking exhaust and emergency shut-down feature), conditions and proper operation.'' This proposed provision was derived from ANSI B30.5–1968 and ASME B30.5–2004 and reworded to emphasize and limit its application to safety related issues, and to include examples to better communicate those concepts. Leaking exhaust was included as an example because it could asphyxiate an employee. The emergency shut-down feature was added as an example because a failure of this feature could result in an employee being struck by a suspended load.

Proposed paragraphs (f)(2)(vii), (viii) and (ix) list ''[c]hains and chain drive sprockets for excessive wear of sprockets and excessive chain stretch,'' ''[t]ravel steering, brakes, and locking devices, for proper operation,'' and ''[t]ires for damage or excessive wear.'' These proposed provisions were derived from ANSI B30.5–1968 and ASME B30.5–2004. The Committee believed that these items, as their presence in these industry standards reflects, play a significant role in the safe operation of equipment.

Proposed paragraph (f)(2)(x) lists ''[h]ydraulic, pneumatic and other pressurized hoses, fittings and tubing, as follows: (A) Flexible hose or its junction with the fittings for indications of leaks. (B) Threaded or clamped joints for leaks. (C) Outer covering of the hose for blistering, abnormal deformation or other signs of failure/impending failure. (D) Outer surface of a hose, rigid tube, or fitting for indications of excessive abrasion or scrubbing.'' The purpose of this proposed paragraph, as noted during C–DAC meetings, is to ''call attention to specific parts of these hoses'' and thus prevent the failure of mechanisms, such as the brakes, hoist mechanisms and limit switches, that are powered or affected by the movement of fluids or air through the equipment's system of hoses.

Neither the general provisions in 29 CFR part 1926 Subpart N nor the provisions in ANSI B30.5–1968 that are incorporated by reference in Subpart N contain a specific requirement for an inspection of these hoses, fittings and tubing. However, several more recent consensus and government standards do contain similar items in their annual/Periodic inspections. ASME B30.5–2004, COE–EM 385–1–1 (3 Nov 03) and DOE STD 1090–2004 all contain some form of this item in their Periodic inspection provisions.

The Committee's discussion of this item focused on whether language used in ASME B30.5–2004 should be adopted. For example, the meaning of the reference in the ASME standard to ''metal and couplings'' as one of the points of concern on a hose for leakage was questioned. The Committee sought to be clearer by referencing ''fittings'' instead in proposed § 1926.1412(f)(2)(x)(A).

Also, members questioned the appropriateness of the ASME language on inspecting for hose leakage that specifies leakage from threaded or clamped joints that is not eliminated by ''recommended procedures.'' Since the use of such procedures to correct a leak is in the nature of a repair, the concept of limiting the inspection item in this manner was rejected.

Proposed paragraphs (f)(2)(xi)–(xiii) list a series of items that, like (f)(2)(x), focus on specific parts of hydraulic and pneumatic power systems. They would be included for the same reason—to better ensure that those parts of the equipment driven by hydraulic and pneumatic power do not fail. These provisions address: ''(xi) [h]ydraulic and pneumatic pumps and motors, as follows: (A) Performance indicators:

[34] Section 5–3.2.1.2 of the ASME standard allows the employer to follow the recommendations of the manufacturer of the equipment or device for continued operation or shutdown of the equipment. The same section of the ASME standard also sets forth alternative precautions, which may be taken unless the manufacturer specifies otherwise, when specific operational aids malfunction.

unusual noises or vibration, low operating speed, excessive heating of the fluid, low pressure. (B) Loose bolts or fasteners. (C) Shaft seals and joints between pump sections for leaks''; (xii) ''[h]ydraulic and pneumatic valves, as follows: (A) Spools: sticking, improper return to neutral, and leaks. (B) Leaks. (C) Valve housing cracks. (D) Relief valves: failure to reach correct pressure (if there is a manufacturer procedure for checking pressure, it must be followed)''; and (xiii) ''[h]ydraulic and pneumatic cylinders, as follows: (A) Drifting caused by fluid leaking across the piston. (B) Rod seals and welded joints for leaks. (C) Cylinder rods for scores, nicks or dents. (D) Case (barrel) for significant dents. (E) Rod eyes and connecting joints: loose or deformed.''

As with proposed paragraph (f)(2)(x), these items are not explicitly mentioned in Subpart N. Neither the Subpart itself nor the incorporated ''Periodic'' inspection in ANSI B30.5–1968 specifically references these items. However, ASME B30.5–2004, COE–EM 385–1–1 (3 Nov 03) and DOE STD 1090–2004 each require inspection of these items by language with varying degrees of specificity.

While discussing these items, C–DAC members decided not to include the inspection of hydraulic filters that are included in ASME B30.5–2004 because, as a Committee member who works for a manufacturer noted, the condition of these filters is a maintenance rather than a safety issue. Other discussion related to several of the items in this list. In proposed § 1926.1412(f)(2)(xi)(C), ''pump'' was inserted to clarify which joints must be inspected for leaks. Further, ''significant'' was added to describe the dents subject to inspection under proposed § 1926.1412(f)(2)(xiii)(D) because some dents on cases do not affect operation.

The Committee believed that these items, as their presence in these government and consensus standards reflects, play a significant role in the safe operation of equipment.

Proposed paragraph (f)(2)(xiv) lists ''[o]utrigger pads/floats'' for excessive wear or cracks.'' The purpose of the inspection of outrigger pads/floats is to make certain that these pads (which are attached to the outrigger and used to distribute the weight of the load to the ground) will not fail and leave the outrigger without proper support.

This item is not included in the annual inspection of Subpart N for cranes and derricks, the periodic inspections of ANSI B30.5–1968 or ASME B30.5–2004. However, the Periodic (yearly) inspection in COE–EM 385–1–1 (3 Nov 03) may cover ''outrigger pads/floats'' with its general provision regarding ''foundation or supports.'' The Committee similarly included this item because it believed that it plays a significant role in the safe operation of equipment.

Paragraph (f)(2)(xv) lists ''slider pads for excessive wear or cracks.'' Slider pads (which are used to guide sections of equipment such as the boom extension on a hydraulic crane) are included because excessive wear may cause the equipment to fail. The Committee was aware that some disassembly may be required to inspect slider pads.

This item is not included in the annual inspection of Subpart N for cranes and derricks or the periodic inspections of ANSI B30.5–1968 or ASME B30.5–2004. However, the Committee included this item because of its role in the safe operation of the equipment.

Proposed paragraph (f)(2)(xvi) lists ''[e]lectrical components and wiring for cracked or split insulation and loose or corroded terminations.'' Wires are not listed in the annual/Periodic inspection in Subpart N, ANSI B30.5–1968, ASME B30.5—2004 or COE–EM 385–1–1 (3 Nov 03). The purpose of this proposed provision is to prevent hazards related to deficiencies in electrical components and wiring. Since such deficiencies may cause a fire or the malfunction of safety related systems, the Agency believes that the inclusion of electrical components as well as wiring in the inspection list is necessary.

Proposed paragraph (f)(2)(xvii) lists ''[w]arning labels and decals originally supplied with the equipment by the manufacturer or otherwise required under this standard: missing or unreadable.'' The annual/Periodic inspection in COE–EM 385–1–1 (3–NovJan 03) contains a similar requirement relative to ''safety and function labels for legibility and replacement.'' However, this item is not included in the annual/Periodic inspections included in Subpart N, ANSI B30.5–1968 or ASME B30.5–2004.

The Committee believed that warning decals that would be required under this proposed standard (either by virtue of a specific provision in this proposed standard, e.g., paragraph 1407(g), or because they were originally supplied by the manufacturer with the equipment, see § 1926.1433(e)(5), Posted warnings) provide important safety reminders and information. As such, it was of the view that they need to be maintained in order for them to continue to alert users to those safety concerns. The Agency modified the C–DAC language for proposed paragraph (f)(2)(xvii) so that it would cover warning labels and decals originally supplied by the manufacturer and thus better reflect the Committee's intent as indicated by proposed § 1926.1433(e)(5).

Proposed paragraphs (f)(2)(xviii–xxi) list: ''Originally equipped operator seat: missing;'' ''Operator seat: unusable;'' [35] ''Originally equipped steps, ladders, handrails, guards: missing;'' and ''Steps, ladders, handrails, guards: in unusable/unsafe condition.'' These are not included in the annual/periodic inspections of ANSI B30.5–1968, ASME B30.5–2004, or COE–EM 385–1–1 (3 Nov 03).

The Committee believed that these are safety related items that need to be inspected. For example, if the operator seat is unusable, the likelihood of the operator manipulating a control in an inadvertent manner or being unable to reach a control is increased. The other items relate to preventing falls and contact with exposed parts that are moving or otherwise dangerous. It should be noted that, among others, proposed § 1926.1433, *Design, construction and testing*, and § 1926.1426, *Fall protection*, would include requirements related to several of these items.

Proposed paragraph (f)(3) would require functional testing as part of the annual/comprehensive inspection. A general functional testing requirement is not included in the annual/periodic inspection in COE–EM 385–1–1 (3 Nov 03), although it does require functional testing for certain items, such as ''crane function operating mechanisms,'' and ''operator aids (safety devices) and indicating devices.'' Similarly, the annual/periodic inspection provisions of ANSI B30.5–1968 (incorporated by reference into Subpart N) and ASME B30.5–2004, imply a functional testing requirement with regard to several specific items (e.g., in B30.5–1968 and in B30.5–2004), ''[t]ravel steering, braking, and locking devices, for malfunction'').

The purpose of this testing is to ensure that the equipment as configured in the inspection is functioning properly. It was the Committee's belief that, without functional testing, the inspection may not reveal some safety problems.

The proposed provision reflects the Committee's belief that functional testing should be limited to the equipment ''as configured in the

[35] The original C–DAC language provided: ''Operator seat: missing or unusable.'' OSHA modified this language to avoid the implication that equipment that did not include an operator seat as original equipment would, contrary to C–DAC's intent, nevertheless need to have a seat installed.

inspection.'' In its view, functional testing in all possible configurations, with all possible attachments, is unnecessary and would be unduly burdensome. In light of the comprehensive nature of the inspection that would result from compliance with the proposed annual/comprehensive inspection provision, the Agency believes that this limitation would not adversely affect safety.

Proposed paragraphs (f)(4) through (6) delineate the follow-up procedures that would apply when a deficiency is identified during the annual/ comprehensive inspection. The purpose of these provisions is to ensure that a deficiency that is not yet a safety hazard but may develop into one is monitored on a monthly basis, and that a deficiency that is a safety hazard is corrected before the equipment is returned to service.

Specifically, proposed paragraph (f)(4) provides that immediately following the identification of a deficiency, the qualified person must determine ''whether the deficiency constitutes a safety hazard, or though not yet a safety hazard, needs to be monitored in the monthly inspections.'' Proposed paragraph (f)(5) would require that equipment with a deficiency identified as a safety hazard by the qualified person be removed from service until the deficiency is corrected. Proposed paragraph (f)(6) would require the employer to check in the monthly inspections the deficiencies that the qualified person had identified as needing monitoring.

The corrective procedures in proposed paragraphs (f)(4) through (f)(6) are similar to those in ANSI B30.5–1968 and ASME B30.5–2004 in that the ANSI/ASME provisions also call for equipment operation to cease upon discovery of a safety hazard. They differ in that the ANSI/ASME provisions have no procedures for monitoring deficiencies that are not yet safety hazards.

The Committee believed that this would be an effective means of ensuring that employers respond appropriately to deficiencies identified in the annual/ comprehensive inspection. In addition, the Committee's addition of a mechanism for monthly monitoring, where needed, of deficiencies that have not yet developed into safety hazards would ensure that developing hazards are caught before they endanger employees.

Upon reviewing these proposed provisions, OSHA believes that C–DAC inadvertently omitted a reference in the proposed provisions for annual/ comprehensive inspections to special corrective action procedures for operational aids. This issue is explained below.

Proposed § 1926.1416, *Operational aids*, sets out requirements that would apply where an operational aid is not working properly. Specifically, it would allow equipment with an operational aid that is not working to continue to be operated for a limited time as long as certain temporary protective measures are used.

In a shift or monthly inspection, as reflected in proposed § 1926.1412(d)(3), if a deficiency in an operational aid is identified, the corrective action described in proposed § 1926.1416 would apply. In contrast, in the proposed paragraph on annual/ comprehensive inspections (§ 1926.1412(f)), C–DAC did not include a similar reference.

If the corrective actions described in proposed § 1926.1416 did not apply and an operational aid were found to be not working properly in an annual/ comprehensive inspection, the qualified person would have to determine if that constituted a safety hazard. If he or she concluded that it was a safety hazard, the equipment would have to be removed from service immediately until the aid was repaired. OSHA believes that such a result would be contrary to C–DAC's intent, since the issue of the extent to which an operational aid needed to be repaired was comprehensively dealt with in proposed § 1926.1416.

In sum, the Agency believes that proposed § 1926.1412(f) should be modified to specifically make the corrective actions in proposed § 1926.1416 applicable. OSHA requests public comment on this issue.

The Committee considered whether the monitoring aspect of this proposed requirement would unduly add to the employer's paperwork burden. The Committee determined that it would not, since all that would be involved would be a notation on the employer's monthly inspection form to pay special attention to the item and then note its condition.

Proposed paragraph (f)(7), *Documentation of annual/ comprehensive inspection*, would require the employer that conducts the inspection to complete and maintain, for a minimum of twelve months, documentation that contains ''[t]he items checked and the results of the inspection,'' and ''[t]he name and signature of the person who conducted the inspection and the date.'' Note that proposed § 1926.1413(c)(4), which pertains to the annual/comprehensive wire rope inspection, contains a similar documentation requirement.

This proposed documentation requirement differs in several respects from Subpart N and other current consensus standards. For example, Subpart N at 29 CFR 1926.550(a)(6), has an open-ended retention period and does not include a signature requirement or a requirement that the inspector be named. It also differs from the periodic inspection in ASME B30.5–2004 that only calls for ''dated records'' for specific, critical items, does not specify that the inspector's name be listed, and does not specify a retention period.

The Committee believed that the proposed provision would promote safety by ensuring that the items checked and the inspection results are documented and maintained for at least 12 months. This would ensure that past deficiencies and potential hazards associated with the equipment can be tracked. In the Committee's view this information would help the qualified person assess the equipment in the subsequent annual/ comprehensive inspection.

The Committee believed that the documentation of this inspection, signed by the person who conducted the inspection and retained for 12 months, would have several effects. First, it would increase the likelihood that more employers would implement systems for conducting and responding to inspections. The failure to do so would be more readily apparent if a record was not made, and the signature of the person who conducted the inspection would be an inducement to that person to ensure that the inspection was done correctly.

The Committee determined that it would not be necessary for this documentation to be available on site. The information in the document is not routinely needed at the site to ensure safe operation. Rather, it would be sufficient to maintain it in a centralized location (such as a corporate office) and made available as necessary.

During the SBREFA process, several Small Entity Representatives objected to the requirement for documentation of monthly and annual inspections, stating that such documentation would be unduly burdensome and would not, in their opinions, add to worker safety. The Panel recommended that OSHA solicit public comment on the extent of inspection documentation the rule should require. OSHA requests comment on this issue.

Paragraph 1412(g) Severe Service

Proposed paragraph (g) would require the employer to inspect the equipment when the severity of use/conditions—''such as loading that may have exceeded rated capacity, shock loading that may have exceeded rated capacity, [or] prolonged exposure to a corrosive atmosphere''—creates a ''reasonable probability of damage or excessive wear.'' In such instances, the employer would be required to stop using the equipment and have a qualified person ''inspect the equipment for structural damage''; determine whether, in light of the use/conditions of the severe service, any items listed in the *Annual/comprehensive* inspection need to be inspected and if so, inspect them; and if a deficiency is found, follow the correction/monitoring procedures set forth in proposed § 1926.1412(f)(4)–(f)(6).

Neither ANSI B30.5–1968 nor ASME B30.5–2004 has a specific inspection provision for severe service. Rather, those standards reference ''severity of service'' as a factor to be considered when determining how frequently to conduct a Periodic Inspection. COE–EM 385–1–1 (1 Jan 03) references severe service under its periodic inspection as a basis for requiring that inspection to be performed quarterly as opposed to ''Yearly.''

The Committee believed that there are certain events and circumstances that, because they may cause damage (i.e., structural damage or significant wear), should trigger a close inspection to check for such damage, rather than waiting for the next annual inspection.

The Committee considered using ''heavy service'' as a trigger for such an inspection. In the course of that discussion, the Committee considered triggering the inspection based on specific rated load capacities (such as 85 to 100% of the rated load capacity) or on a particular number of cycles (such as in excess of 10 lift cycles per hour). These were rejected because members believed that, as long as the use is within the equipment's rated capacity, such use would not be expected to necessitate a special inspection.

Instead, the Committee agreed that a trigger based on use or conditions in which there is a reasonable probability of damage or excessive wear would be an effective means of ensuring that equipment was not operated with such damage/wear. Examples were provided in the proposed provision to add clarity to the concept.

Paragraph 1412(h) Equipment Not in Regular Use

Proposed paragraph (h) would require that equipment that sits idle for three months or more be inspected by a qualified person in accordance with the monthly inspection provisions of proposed § 1926.1412(e) before being used.

This would ensure that deficiencies that may arise as a result of the equipment standing idle are checked before its subsequent use. The Committee believed that this inspection would need to be done by a qualified person because some of the deficiencies that may arise from sitting idle require the qualified person's higher level of ability to detect and assess. For example, equipment that is idle for a period of time is often subject to variations in weather (e.g., temperature and humidity) that cause contraction and expansion of parts and fluids, which can cause damage. In addition, idle equipment is also more likely to have corroded pins and corrosion on the boom. Such conditions need to be assessed by a qualified person to determine if there is a deficiency that constitutes a hazard.

This proposed requirement differs from the ANSI/ASME standards in several respects, most significantly in terms of the time frame that triggers the inspection and the type of inspection required. Both ANSI B30.5–1968 and ASME B30.5–2004 subject cranes that are idle for one or more months, but less than six months, to a frequent inspection, and cranes that are idle for six or more months to a periodic inspection. It should be noted that under the proposed provision and the ANSI/ASME standards, an inspection of wire rope is included. A qualified person would conduct this inspection of wire rope (as well as the rest of the items included in this inspection of equipment not in regular use).

The Committee considered the ANSI/ASME approach to inspecting idle equipment. It determined that a one month trigger was too short, because problems that may arise from the equipment sitting idle, such as drying/hardening seals, take longer than that to occur. It believed that a three month trigger was more appropriate to use for this purpose.

Paragraph 1412(i). [*Reserved.*] This paragraph is reserved because it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1412(j)

Proposed paragraph (j) would require that any part of a manufacturer's inspection procedures relating to safe operation that is more comprehensive or has a more frequent schedule than that required by this proposed section must be followed. However, the proposed paragraph notes that additional manufacturer documentation requirements need not be followed. Examples are provided in the proposed provision of the types of items that would be considered to relate to safe operation (''a safety device or operator aid, critical part of a control system, power plant, braking system, load-sustaining structural components, load hook, or in-use operating mechanism'').

Neither the general provisions of 29 CFR part 1926 Subpart N nor ANSI B30.5–1968 contains a similar provision. However, § 1926.550(c)(5) of Subpart N relative to hammerhead tower cranes and § 1926.550(f)(2)(iii) relative to floating cranes and floating derricks require that inspections meet the manufacturer's requirements. COE–EM 385–1–1–1 (3 Nov 03) states that ''[c]ranes and derricks shall be * * * inspected * * * in accordance with the manufacturer's operating manual for the crane and the applicable ANSI/ASME codes or OSHA requirements, whichever is more stringent.''

The Committee believed that, to the extent a more comprehensive or frequent inspection is specified by the manufacturer, it is necessary for that to be done to ensure the safe operation of the equipment. In the Committee's view, the expertise of the manufacturer with respect to the equipment in this regard needs to be recognized and acted upon.

Summary of Significant Differences From the Current 29 CFR Part 1926 Subpart N

This proposed section differs in several respects from Subpart N. Unlike Subpart N, the proposed standard does not include an initial inspection for new equipment or inspections for standby cranes, nor does it include a requirement for preventive maintenance.

The Committee concluded that manufacturers' quality control and inspection practices are generally effective in ensuring that new equipment does not have deficiencies that constitute safety hazards. The Committee believed that, to the extent those practices do not identify and correct all such hazards, the shift inspection would be adequate to identify and address them.

The Committee concluded that a special inspection for ''standby'' cranes is not needed since the proposed section includes proposed requirements for equipment ''not in regular use'' (see the

discussion of proposed § 1926.1412(h), above).

The Committee also concluded that a general requirement for preventive maintenance is not needed because the proposed inspection requirements are designed to ensure that deficiencies constituting safety hazards will be identified quickly and equipment with such a safety hazard would be prohibited from being returned to service until the hazard is corrected.

As discussed above, the proposed section would add requirements for a post-assembly inspection and a severe service inspection, and varies from Subpart N to some extent with respect to some of the items to be inspected. In addition, the specific proposed requirements for inspecting operational aids and for a qualified person to perform the modified equipment and annual inspections would be new requirements. Finally, rather than providing for ''daily to monthly'' inspections, the proposed standard would require shift inspections and monthly inspections.

Section 1413 Wire Rope—Inspection

Cranes/derricks use wire rope to lift and support their loads and parts of the equipment. If the rope is worn or damaged, it can break, causing a failure of the equipment and/or a falling load, which can kill or injure workers below. Approximately 3% of crane fatalities in construction work result from wire ropes snapping. J.E. Beavers *et al.*, ''Crane-Related Fatalities in the Construction Industry,'' 132 Journal of Construction Engineering and Management 901, 903 (Sept. 2006). (OSHA–2007–0066–0011).

Subpart N, in § 1926.550(a), contains several inspection requirements applicable to wire ropes. Other requirements are found in ANSI B30.5–1968, which is incorporated by reference in Subpart N through § 1926.550(b)(2). In addition, the employer currently must look to both § 1926.550 and to the ANSI standard to learn the content of the required inspections, the qualifications of the inspector, and the requirements for addressing deficiencies found in ropes. The Committee believed that placing all of the required inspections and remedies in this subpart without reference to outside resources would make it easier for employers to find and become familiar with the steps they are required to take and so facilitate compliance. This is particularly true for small businesses, which bear a disproportionate cost when they must access outside resources.

The proposal would require wire rope inspections at the same frequency—shift, monthly, and annually—that would apply for other crane components. Also, like inspections of other components, the shift and monthly inspections must be conducted by a ''competent person,'' and the annual inspection by a ''qualified person.''

Paragraph 1413(a) Shift Inspection

Proposed paragraph (a) would require a shift inspection, the first of the three types of wire rope inspections that would be required under this subpart. The timing, degree of scrutiny, and the level of expertise required of the person conducting this inspection and the other two inspections (monthly and annual) essentially mirror those in proposed § 1926.1412, *Inspections*, for general equipment inspections.

Paragraph 1413(a)(1)

Proposed paragraph (a)(1) describes who conducts the shift inspection, the timing of the inspection, and the degree of scrutiny required.

The shift inspection would be conducted by a ''competent person,'' a defined term in this subpart.[36] C–DAC believed that a ''competent person'' would be the appropriate person to perform the shift inspection. OSHA standards typically assign comparable inspection duties to ''competent persons.'' See, for example, § 1926.753(c) (competent person must conduct pre-shift visual inspection of cranes used in steel erection) and § 1926.451(d)(3)(i) (competent person must inspect suspension scaffold before use to ensure it is able to support intended load). Moreover, a ''competent person'' would conduct other aspects of the shift inspections under this proposed standard. Some C–DAC members questioned using a ''competent person'' for shift and monthly inspections on the basis that the individual most likely to perform such an inspection, the operator, may not have the authority to take corrective action, as is required of a ''competent person'' by definition. In response, OSHA notes that the employer would be required to ensure that the person assigned to perform the shift inspections has the requisite authority.

This proposed paragraph also would require that this inspection be started before each shift and be completed before or during that shift. As with the general shift inspection, the Committee concluded that it was appropriate to allow the wire rope inspection to be completed during the shift instead of requiring it to be completed before the shift begins (see the discussion above of proposed § 1926.1412(d)(1), which explains the Committee's reasons for allowing the general shift inspection to be completed during the shift).

Accordingly, the competent person would be required to inspect all wire rope that is reasonably likely to be used during the shift. In cases where some of the rope that is likely to be used is not readily visible before the shift begins, as discussed above, that portion may be inspected during the shift.

Proposed § 1926.1413(a)(1) would require the competent person to conduct a ''visual inspection * * * for apparent deficiencies.'' As discussed below, the purpose of this inspection is to ensure that deficiencies are identified and that, depending on the competent person's evaluation of those deficiencies, appropriate action is taken. The Committee wanted to make clear, however, that the inspection was not to be so comprehensive and time-consuming that it would be unrealistic to conduct it for each shift. To clarify that the inspection was one that was reasonable for a shift inspection, the provision states that neither ''untwisting (opening of wire rope)'' nor ''booming down'' would be required during this inspection. It believed that keeping the level of inspection realistic will encourage compliance that ultimately will serve to reduce accidents.

Paragraph 1413(a)(2) Apparent Deficiencies

Proposed § 1926.1413(a)(1) (discussed above) would require the competent person to look for ''apparent deficiencies, including those listed in paragraph (a)(2).'' Proposed § 1926.1413(a)(2) would establish three categories (I, II, and III) of apparent wire rope deficiencies. The likelihood that a deficiency is hazardous increases as the number of the category increases from I to III. As discussed further below, the category determines the options or ''next steps'' available to or required of the employer under § 1926.1413(a)(4), *Removal from service.*

C–DAC's goal in this paragraph is to establish clear and appropriate requirements setting out the steps employers must take when inspections reveal deficiencies.

Category I: Proposed § 1926.1413(a)(2)(i) lists ''Category I'' apparent deficiencies. These are similar to the types of wire rope deterioration noted in the inspection provisions of

[36] As discussed below under paragraph 1926.1413(a)(4), *Removal from service*, in certain instances tasks relative to alternative measures for certain (Category II) deficiencies would be done by a ''qualified person,'' also a defined term.

section 5–2.4.1 of ANSI B30.5–1968 and section 5–2.4.2 of ASME B30.5–2004. As further indicated below in the discussion of § 1926.1413(a)(4)(i) under *Removal from service*, these items are grouped together because they reflect damage that may or may not be severe enough to constitute a hazard. Proposed § 1926.1413(a)(4)(i) sets forth the steps the employer would be required to take once a Category I apparent deficiency has been identified.

Proposed § 1926.1413(a)(2)(i)(A) begins the list with the ''significant distortion'' of wire rope, such as ''kinking, crushing, unstranding, birdcaging, signs of core failure or steel core protrusion between the strands.'' These apparent deficiencies were selected because, as indicated by their inclusion in consensus standards, such as section 5–2.4.2 of ASME B30.5–2004, they may constitute or indicate the presence of a hazard. The Committee considered whether the reference in this paragraph to core failure should be limited to rotation resistant rope. However, the Committee decided not to limit ''signs of core failure'' to rotation resistant rope.

The word ''significant'' was included in this and other provisions in § 1926.1413(a)(2)(i) to make clear that minimal defects of these types do not rise to the level of Category I deficiencies. Only those that may pose genuine safety concerns are included.

Proposed § 1926.1413 (a)(2)(i)(B) lists ''significant corrosion'' as a Category I apparent deficiency. This type of damage was included because severe corrosion can weaken wire rope and cause it to break. The Committee used the descriptive term ''significant'' to limit further action to situations in which the degree of corrosion could realistically suggest a hazard.

Proposed paragraph (a)(2)(i)(C) lists ''electric arc (from a source other than power lines) or heat damage'' as a Category I apparent deficiency. These deficiencies were derived from SAE (Society of Automotive Engineers) and COE (Army Corps of Engineers) standards and are included because such damage can weaken the wire rope. In discussing these types of damage, some Committee members expressed concern that ''heat damage'' would include instances where the rope had been cut to size by flame cutting. However, flame cutting would occur at the end of the newly cut rope, not at a load-bearing part of the rope. Heat damage is only a concern if it weakens a load-bearing part of the rope. Flame cutting done at the end of the rope, not in a load-bearing part, would not cause a hazard.

Proposed paragraph (a)(2)(i)(D) lists ''improperly applied end connections'' as another apparent deficiency. In the Committee's experience, one type of error that occurs is when somebody between shifts cuts the cable and puts the end connection back the wrong way.[37] An improper connection is weaker than a proper one and can result in the connection failing.

Proposed paragraph (a)(2)(i)(E) lists ''[s]ignificantly corroded, cracked, bent, or worn end connections (such as from severe service)'' as the last type of Category I apparent deficiency. Each of these may constitute a hazard.

Category II: Proposed paragraph (a)(2)(ii) contains two types of Category II apparent deficiencies—visible broken wires (§ 1926.1413(a)(2)(ii)(A)) and wire rope diameter reduction (§ 1926.1413(a)(2)(ii)(B)). In the experience of the Committee, these more typically signal the presence of a safety hazard than Category I apparent deficiencies. Proposed § 1926.1413(a)(4)(ii), under *Removal from service*, sets forth the steps the employer would be required to take once a Category II apparent deficiency has been identified.

Proposed paragraph (a)(2)(ii)(A) lists separate criteria for visible broken wires for running wire ropes (six randomly distributed broken wires in one rope lay or three broken wires in one strand in one rope lay), rotation resistant ropes (two randomly distributed broken wires in six rope diameters or four randomly distributed broken wires in 30 rope diameters), and pendant or standing wire ropes (more than two broken wires in one rope lay located in rope beyond end connections and/or more than one broken wire in a rope lay located at an end connection).

A ''running wire rope'' is a wire rope that moves over sheaves or drums. This definition is included in § 1926.1401 of this proposed standard to make clear the nature of the wire rope that is subject to this inspection provision. These criteria are the same as those contained in section 5–2.4.3 of ASME B30.5–2004, and those for running wire ropes and pendant or standing wire ropes are also contained in section 5–2.4.2 of ANSI B30.5–1968, which is incorporated by reference in 29 CFR Part 1926 subpart N. One issue that was left unanswered during the Committee discussions is whether these broken wire criteria are equally applicable when using plastic sheaves. The Agency requests public comment on this issue.

[37] An example would be when the person installs a U-bolt clip with the ''U'' on the live end of the wire rope.

The reference in proposed paragraph (a)(2)(ii)(B) to ''a diameter reduction of more than 5% from nominal diameter'' reflects a change in the manner of expressing essentially the same criteria currently set forth in fractions in Subpart N (§ 1926.550(a)(7)(iv)) and section 5–2.4.3(b)(6) of ASME B30.5–2004. OSHA notes that the ''reduction in diameter'' fractions set forth currently in § 1926.550(a)(7)(iv) are in each case equal to or greater than 5%, so the proposed across the board 5% criterion is equally or more protective than the current standard for each rope diameter. C–DAC used the percentage reduction criterion because it is consistent with the criterion now being set by rope manufacturers and used in the industry. The industry uses the percentage reduction criterion because it is easier to remember than the fractional reductions in Subpart N.

Category III: Proposed paragraph (a)(2)(iii) lists apparent Category III deficiencies. The Committee believed that these are of such significance that they require the rope's immediate removal from service. For some Category III deficiencies, the undamaged part of the rope may be returned to service if the damaged part is severed (the actions required in response to identifying these deficiencies are discussed below with respect to proposed § 1926.1413(a)(4)(iv)).

Under proposed paragraph (a)(2)(iii)(A), ''core protrusion or other distortion indicating core failure'' in rotation resistant rope would be a Category III apparent deficiency. As described by a C–DAC member, this visible indicator is present when there is core protrusion between the outer strands or, in other words, ''the metal core is coming out.'' Core protrusion is a late-stage indicator that the rope has already suffered significant damage and, in the Committee's judgment, necessitates the rope's immediate removal from service.

Under proposed paragraph (a)(2)(iii)(B), ''[e]lectrical contact with a power line'' would be a Category III apparent deficiency. Contact with a power line could cause the rope to carry a high electrical current that could result in internal damage that significantly reduces the rope's strength. The Committee believed that, in view of the difficulty in confirming such internal damage and the likelihood that significant damage has occurred in such instances, it is imperative that the entire rope be replaced.

The rope would have to be removed from service under this provision if the load, rigging, or the rope itself makes electrical contact with a power line. In

addition, electrical contact under this provision would occur if the boom or other part of the crane contacts a power line and the wire rope is in contact with the ground through the hook or some other means.

Proposed paragraph (a)(2)(iii)(C) also lists ''a broken strand'' as a Category III apparent deficiency. A strand is a ''group'' of wires. In the Committee's view, that degree of damage clearly compromises the rope's capacity and continued use would be dangerous.

Paragraph 1413(a)(3) Critical Review Items

Under proposed paragraph (a)(3), the competent person must give particular attention to certain ''Critical Review Items'' during the shift inspection (as well as, as discussed below, in the monthly and annual inspections).

Under proposed paragraph (a)(3)(i), rotation resistant wire rope that is in use would be a critical review item. As indicated earlier, the construction of rotation resistant rope makes it more susceptible to damage and more difficult to detect damage to the inner wires and/or strands.

Under proposed paragraph (a)(3)(ii), ''wire rope being used for boom hoists and luffing hoists, particularly at reverse bends'' would be included in the list because of the critical nature of these ropes and, with respect to reverse bends, because these areas are subjected to more stress and are more prone to damage.

Proposed paragraph (a)(3)(iii) lists ''wire rope at flange points, crossover points and repetitive pickup points on drums'' because these points of the rope are subject to additional wear. These terms are defined in § 1926.1401, *Definitions*, as follows:

Flange point: A point of contact between rope and drum flange where the rope changes layers.

Crossover points: Locations on a wire rope which is spooled on a drum where one layer of rope climbs up and crosses over the previous layer. This takes place at each flange of the drum as the rope is spooled onto the drum, reaches the flange, and begins to wrap back in the opposite direction.

Repetitive pickup points: When operating on a short cycle operation, the rope being used on a single layer and being spooled repetitively over a short portion of the drum.

Proposed paragraph (a)(3)(iv) lists ''wire rope adjacent to end connections'' because such rope is prone to corrosion and/or breakage due to the localized stresses placed on these areas.

Proposed paragraph (a)(3)(v) lists ''wire rope at and on equalizer sheaves'' because the limited travel of such rope and added stress make it more prone to wear.

Paragraph 1413(a)(4) Removal From Service

Remedial steps upon identification of apparent deficiency: Proposed paragraph (a)(4) would set out the required next steps to be taken once the competent person performing the inspection has identified an apparent deficiency. Those steps depend upon whether, under § 1926.1413(a)(2), the apparent deficiency falls under Category I, II or III. Under this approach, immediate removal from service would be required for certain deficiencies, while continued use under prescribed circumstances would be allowed for others. This approach was adopted by C–DAC because, in the Committee's collective experience, different types of deficiencies warrant different responses.

As described below, this approach differs somewhat from Subpart N, with its incorporation by reference of ANSI B30.5–1968, as well as ASME B30.5–2004. In addition, certain apparent deficiencies addressed in this proposed rule are not addressed by those consensus standards.

Category I remedial steps: Proposed paragraph (a)(4)(i) sets forth the follow-up to the discovery of a Category I apparent deficiency that would be required. Immediately upon the discovery of such a deficiency, the competent person must determine whether the deficiency is a safety hazard. If it is determined to be a hazard, operations involving the use of the wire rope would be prohibited until one of two responses is taken—the rope is replaced or the deficiency, if localized (and not due to power line contact), is removed by severing the rope in two so that the undamaged portion can be used. The provision also would prohibit joining lengths of rope by splicing.

The Committee found that the likelihood of significant damage from power line contact is so great that, after such contact, it is imperative that the rope be removed from service. Also, it determined that splicing is not a safe practice and should therefore be prohibited.

The Category I deficiencies, except for damage from significant corrosion or an electric arc, are currently addressed by Subpart N through incorporation by reference of section 5–2.4 of ASME B30.5–1968. That ANSI standard requires the deficiencies to be evaluated (by an ''appointed or authorized person'') and a determination made as to whether continued use of the rope would constitute a safety hazard. A similar provision is contained in ASME B30.5–2004. These provisions imply, but do not explicitly state, that a rope constituting a safety hazard must not be used. The proposed standard would explicitly state this prohibition.

Category II remedial steps: Proposed paragraphs (a)(4)(ii) and (iii) establish the procedures to be followed once Category II apparent deficiencies have been identified. This category of deficiencies includes wire rope that has diameter reduction and/or visible broken wires as described in proposed § 1926.1413(a)(2)(ii). Proposed § 1926.1413(a)(4)(ii) sets forth two alternative options for the employer—Option A or B—when such a deficiency is identified.

Under Option A, an employer must consider the wire rope to be a safety hazard where the deficiency meets the wire rope manufacturer's established criterion for removal or ''meets a different criterion that the wire rope manufacturer has approved in writing for that specific wire rope.'' In such instances, operations involving the use of the wire rope in question are prohibited until it is replaced or severed as provided in § 1926.1413(a)(4)(i)(B).

Option B would allow limited continued use of the wire rope with an identified Category II apparent deficiency provided the employer ensures the procedures specified in § 1926.1413(a)(4)(iii) are met. Under 1926.1413(a)(4)(iii), a qualified person first assesses the deficiencies in light of the load and other conditions of use and determines that continued use is safe as long as the conditions established in this paragraph are met.

These conditions include (as established by the qualified person) the parameters for use of the rope, including a reduced maximum rated load, the number of broken wires and/or the diameter reduction that will require the rope to be taken out of service (or repaired in accordance with proposed 1926.1413(4)(i)(A) or (B)), and a specific time limit, not to exceed 30 days from the date the deficiency was first identified, to replace the rope or sever the damaged portion in accordance with 1926.1413(a)(4)(i)(B).

The C–DAC draft, at paragraph (a)(4)(iii)(C), would also have allowed the qualified person to specify the number of broken strands that would require the equipment to be taken out of service. However, as discussed above, under 1926.1413(a)(2)(iii)(C), a single broken strand is a Category III apparent deficiency that requires the equipment to be immediately removed from service until the rope is replaced or the deficiency severed, in which case the undamaged part of the rope may continue to be used. Because the proposed rule prohibits any use of a

wire rope with a broken strand, OSHA has deleted the words ''broken strands'' from 1926.1413(a)(4)(iii)(C).

Once the qualified person has established the conditions for continued use of the rope, the workers who are to conduct the shift inspections must be notified of the qualified person's determinations. In addition, the qualified person's procedures and findings must be documented. The Committee included this documentation provision because the person conducting the shift inspections would need to be able to refer to the parameters set by the qualified person.

29 CFR Part 1926 subpart N, in § 1926.550(a)(7), currently requires that ropes with the same deficiencies that would fall under the proposed rule's Category II (as well as heat damage, which would be a Category I deficiency) be removed from service. Section 2.4.3(a) of ASME B30.5–2004 allows the rope to be used to the end of the work shift based on the judgment of a qualified person.

The Committee determined that the alternative measures specified in Option B are sufficiently comprehensive and specific to ensure that the rope's continued use for up to 30 days would be safe.

OSHA notes that the remedial steps for Category II apparent deficiencies do not, unlike those for Category I and III apparent deficiencies, state explicitly that splicing of wire rope is prohibited. Instead, § 1926.1413(a)(4)(ii)(A) states that, if a Category II apparent deficiency is a safety hazard, continued use of the rope is prohibited unless ''the damage is removed in accordance with § 1926.1413(4)(i)(B),'' which applies to Category I deficiencies. Proposed § 1926.1413(a)(4)(i)(B) includes a prohibition against splicing that C–DAC intended to apply to Category II deficiencies, but the language ''damage is removed'' in proposed § 1926.1413(a)(4)(ii)(A) could, in the absence of an explicit prohibition against splicing in that paragraph, arguably be read to mean that the rope could be severed and the undamaged portions spliced. To make clear C–DAC's intent that the anti-splicing provision of § 1926.1413(a)(4)(i)(B) applies to Category II, OSHA has modified the C–DAC language for proposed § 1926.1413(a)(4)(ii)(B) as follows:

(ii) If a deficiency in Category II is identified, the employer shall comply with *Option A* of this section or *Option B* of this section, as follows:

(A) *Option A.* Consider the deficiency to constitute a safety hazard where it meets the wire rope manufacturer's established criterion for removal from service or meets a different criterion that the wire rope manufacturer has approved in writing for that specific wire rope. If the deficiency is considered a safety hazard, operations involving use of the wire rope in question shall be prohibited until the wire rope is replaced, or the damage is removed in accordance with all of the requirements and restrictions in paragraph (4)(i)(B) of this section.

OSHA has made similar changes to proposed § 1926.1413(a)(4)(iii)(C) & (D).

Category III remedial steps: Proposed paragraph (a)(4)(iv) would establish the procedure for dealing with identified apparent deficiencies that fall within Category III. These deficiencies include a broken strand, electrical contact with a power line, and core protrusion or other distortion in rotation resistant rope indicating core failure. This proposed paragraph would prohibit operations involving the use of the wire rope until either the wire rope is replaced or (except where there has been power line contact) severed in two, so that the undamaged portion can be used. Joining lengths of wire rope by splicing would be prohibited (see discussion above of proposed § 1926.1413(a)(4)(i)(B)).

Neither Subpart N nor ANSI B30.5–1968 addresses these apparent deficiencies. However, the Committee noted that section 5–2.4.2(a) of ASME B30.5–2000 lists ''broken or cut strands'' and ''core failure in rotation resistant ropes'' as deficiencies that may be an immediate hazard. (ASME B30.5–2004 contains the same characterization of these deficiencies as the 2000 version). The Committee believed that ropes with Category III deficiencies must not be used because of the high potential for rope failure.

Proposed paragraph (a)(4)(v) would require that where a wire rope is required to be removed from service under this proposed section, the equipment (as a whole) or the hoist with that wire rope shall be tagged-out as provided in proposed § 1926.1417(f)(1) until the wire rope is replaced or repaired. Neither Subpart N, with its incorporated reference to ASME B30.5–1968, nor ASME B30.5–2004 contains a similar tag-out provision specific to wire rope. The Committee believed that this would be an efficient and effective way of preventing employees from activating equipment (or the affected hoist) that has a wire rope with an identified hazard.

Paragraph 1413(b) Monthly Inspection

Proposed paragraph (b) would require a monthly inspection of wire rope. The monthly inspection would be, as explained below, a documented shift inspection. C–DAC decided to keep the timing of this inspection (as well as the level of scrutiny required and the expertise required of the inspector) parallel with the general inspection requirements in § 1926.1412 to provide for an efficient inspection process and thus enhance compliance. A monthly wire rope inspection is currently required by Subpart N's incorporation by reference of ASME B30.5–1968.

Proposed paragraphs (b)(1) and (b)(2) would require the monthly inspection to be conducted in the same manner as the shift inspection under § 1926.1413(a). Thus, the monthly inspection would be a visual inspection conducted by a competent person for the same types of apparent deficiencies noted in the wire rope shift inspection.

It should be noted that the reference in proposed § 1926.1413(b)(2) of the C–DAC Consensus Document to ''paragraph 1413(a)(3)'' has been corrected in the proposed rule to refer to § 1926.1413(a)(4), which contains the relevant provisions governing corrective actions.

Proposed paragraph (b)(3) would require the monthly inspection to be documented in the same manner as required by paragraph § 1926.1412(e)(3) for the monthly general inspection. C–DAC wanted to keep this requirement parallel with the monthly general inspection provision in order to reduce paperwork and confusion, and facilitate compliance.

Specifically, for the general monthly inspection, § 1926.1412(e)(3) provides that the ''employer that conducts the inspection'' must provide documentation that reflects the items checked with results, the name and signature of the inspector, and the date. Similar requirements are set forth in ASME B30.5–1968.

Proposed paragraph 1412(e)(3) also specifies that the documentation be retained for not less than three-months. The Committee believed that the proposed three-month retention period would provide sufficient overlap to avoid gaps in information and thus provide a tracking mechanism for developing problem areas.

Paragraph 1413(c) Annual/Comprehensive

Proposed paragraph 1413(c) would require an annual inspection (at least every 12 months) for wire rope, conducted by a qualified person. The annual inspection would be considerably more thorough and comprehensive than the shift and monthly inspections required by proposed § 1926.1413(a) and (b). In

addition, it would be conducted by a ''qualified person,'' who would have greater expertise than the ''competent person'' who must conduct the shift and monthly inspections.

The timing and inspector qualifications for the annual wire rope inspection coincide with those for the general equipment annual/ comprehensive inspection. C–DAC believed that the use of corresponding timeframes and personnel will allow inspections to be conducted efficiently and thereby promote effectiveness and compliance.

Under proposed paragraph (c)(1), all apparent deficiencies and critical review items required to be checked in a shift inspection would have to be checked in the annual/comprehensive inspection (see § 1926.1413(a)(2) and (a)(3)). In addition, under proposed § 1926.1413(c)(2), a complete and thorough inspection, covering the surface of the entire length of the wire ropes, would be required. In addition to inspecting in this manner for the types of deficiencies listed in § 1926.1413(a)(2), under proposed § 1926.1413(c)(2)(ii)(A), the qualified person would be required to give particular attention to the critical review items listed in § 1926.1413(a)(3). Note that the C–DAC document's § 1926.1413(c)(2)(ii)(A) referred to the ''critical review items listed in paragraph (a)(2)'' instead of § 1926.1413(a)(3). That reference to § 1926.1413(a)(2) was a typographical error, which has been corrected in the proposed rule.

Under proposed paragraph (c)(2)(ii)(B), particular attention must be given to those sections of wire rope that are normally hidden during shift and monthly inspections. For example, such sections would include parts of the rope that form the lower wraps on the boom hoist drum and which would not be visible unless the drum is in a very low angle position. The parts of the rope that are normally inside a cowling or covered area would be another example of such sections.

Similarly, proposed paragraphs (c)(2)(ii)(C) through (F) require particular attention to wire rope in contact with saddles, equalizer sheaves or other sheaves where rope travel is limited, wire rope subject to reverse bends, wire rope passing over sheaves and wire rope at or near terminal ends, since these areas are more prone to wear.

Unlike the shift and monthly inspections, in which booming down would not be required, booming down would be necessary in order for the inspection to be ''complete and thorough, covering the surface of the entire length of the wire rope.''

OSHA notes that the items listed in § 1926.1413(c)(2)(ii)(C) and (F) (''Wire rope in contact with saddles, equalizer sheaves or other sheaves where rope travel is limited'' and ''Wire rope at or near terminal ends'') are similar to the critical review items listed for shift inspections in proposed § 1926.1413(a)(3)(iv) and (a)(3)(v)(''Wire rope adjacent to end connections'' and ''Wire rope at and on equalizer sheaves''). Consequently, the Agency is planning to revise the language in proposed § 1926.1413(a)(3)(iv) and (a)(3)(v) to match the language in § 1926.1413(c)(2)(ii)(C) and (c)(2)(ii)(F). OSHA then could delete proposed § 1926.1413(c)(2)(ii)(C) and (c)(2)(ii)(F) because proposed § 1926.1413(c)(2)(ii)(A) incorporates by reference the critical review items listed in § 1926.1413(a)(3)(iv) and (a)(3)(v), thereby making the items listed in proposed paragraphs § 1926.1413(c)(2)(ii)(C) and (c)(2)(ii)(F) redundant and unnecessary. The Agency asks the public for comments on this proposed action.

Proposed paragraph (c)(2)(iii) would establish an exception to the timing of the annual/ comprehensive inspection where that inspection is infeasible due to ''existing set-up and configuration of the equipment (such as where an assist crane is needed) or due to site conditions (such as a dense urban setting).'' The provision sets a timetable for annual/comprehensive inspections in such cases that requires the inspection to be performed ''as soon as it becomes feasible, but no longer than an additional 6 months for running ropes and, for standing ropes, at the time of disassembly.''

This provision reflects the Committee's concern that, particularly in densely developed urban settings, the inability to boom down would prevent the employer from completing a comprehensive wire rope inspection. The Committee considered requiring employers anticipating such situations to provide rope that is new or ''like new'' when the crane is set-up at the site. Also considered was requiring that an annual inspection be required in such instances before the start of the job. The Committee found these proposals to be impractical because it is difficult for employers to forecast completion timeframes with sufficient accuracy.

The proposed provision is intended to ensure that, under the circumstances where the exception would apply, the required inspection would occur within an appropriate period. The Committee considered a maximum of an additional 6 months appropriate for running ropes in these circumstances. A longer period, up to the time of disassembly, was considered appropriate for standing ropes because these ropes, in the Committee's experience, are less subject to deterioration and wear.

These provisions of the annual/ comprehensive inspection differ in various ways from Subpart N annual inspection provisions at § 1926.550(a)(6). The current annual inspection in Subpart N is a ''thorough'' inspection conducted by a ''competent person or by a government or private agency recognized by the U.S. Department of Labor.'' Under this proposal, the annual/comprehensive inspection would be conducted by a qualified person and includes a number of specific items the inspection must encompass. The Committee believed that these changes are needed to reduce the likelihood of injuries and fatalities from wire rope failure.

Proposed paragraph (c)(3) identifies the next steps that would have to be taken once the qualified person performing the annual/comprehensive inspection discovers a deficiency. The qualified person must immediately determine whether the deficiency constitutes a safety hazard. If it does, under proposed § 1926.1413(c)(3)(i), the rope would either have to be replaced or, if the deficiency is localized, the damaged part may be severed and the undamaged portion may continue to be used. As discussed with respect to proposed § 1926.1413(a)(4)(i)(B), joining lengths of wire rope by splicing would be prohibited.

The proposed standard does not include a prohibition in § 1926.1413(c)(3)(i)(B) against repair of wire rope that contacted an energized power line, although such a prohibition is included in the context of a shift inspection in proposed § 1926.1413(a)(4)(i)(B). The Agency's understanding is that the Committee decided to not include that prohibition in the annual/comprehensive inspection provision because, if an energized power line contact had occurred, the rope would have been removed from service immediately in accordance with proposed § 1926.1413(a)(4)(i)(B).

If the qualified person determines that the deficiency is not currently a safety hazard but needs to be monitored, under proposed § 1926.1413(c)(3)(ii) the employer would be required to ensure that the deficiency is checked in the monthly inspections. This would ensure that, as the deficiency continues to develop, the competent person would pay particular attention to it in the monthly inspections. Once it became a

safety hazard, it would be identified promptly and the appropriate corrective action would be taken.

Under proposed paragraph (c)(4), the annual/comprehensive inspection would be required to be documented according to proposed § 1926.1412(f)(7), which is the documentation provision for the annual general inspection. As with other parallel requirements in this section, the C–DAC intended to ensure consistency with other recordkeeping requirements and thus facilitate compliance.

Proposed paragraph 1412(f)(7), which is incorporated by reference here, would require the employer that is conducting the inspection to document and retain for 12 months, ''the items checked and the results of that inspection'' and ''the name and signature of the person who conducted the inspection and the date.'' This documentation requirement differs from 29 CFR Part 1926 subpart N's annual inspection in that Subpart N does not specify the period of time the documentation must be kept and has neither a signature requirement nor a requirement that the inspector be named. The Committee believed that a 12 month retention period would ensure that the employer would be able to refer to the last annual/comprehensive inspection to help track the rate of progression of a deficiency that has not yet developed into a safety hazard. The Committee also believed that it would increase the likelihood of compliance with the annual/comprehensive inspection requirements.

Finally, proposed paragraph 1413(d) would prohibit the use of the type of rope lubricants that hinder inspection. For example, rope lubricants that are opaque or so dark that they mask the wire rope inside them would be of this type. This prohibition is necessary to ensure that the rope lubricant does not hide potential deficiencies.

Section 1414 Wire Rope—Selection and Installation Criteria

This proposed section sets forth requirements for selecting and installing wire rope. It addresses safety concerns related to wire rope selection and installation. In addition, it would provide greater flexibility in the selection process than current requirements under Subpart N. This flexibility reflects and takes advantage of new developments in wire rope technology.

Currently, paragraph 1926.550(a)(7)(vi) of Subpart N prescribes that wire rope safety factors accord with ANSI B30.5–1968 or SAE J959–1966. By contrast, this proposed section would not refer to external standards for wire rope safety factors or other requirements (with a single exception discussed below) and would give greater flexibility in selecting wire rope, particularly rotation resistant wire rope. Specific differences between this proposal and Subpart N are examined in the discussion of the paragraph where the difference arises.

The Agency notes that, in developing the C–DAC consensus document, the Committee appears to have made an inadvertent omission. The wire rope safety factors in section 5–1.7.1 of ANSI B30.5–1968 (which, as noted above, are incorporated by reference in Subpart N) apply irrespective of whether the rope is of the standard type (i.e., rope that is not rotation-resistant) or rotation resistant. However, the C–DAC document contains safety factor (now ''design'' factor) requirements only for rotation resistant rope [38]; it has no provisions on design factors for standard rope.

Currently, under Subpart N's incorporation of section 5–1.7.1 of ANSI B30.5–1968, the factors for standard rope vary from a minimum of 2.5 to 3.5 depending on how the rope is used. The 2004 version of section 5–1.7.1 of ASME B30.5 contains similar provisions and the same range of design factors.[39] Given the importance of design factors in the selection of wire rope, OSHA believes that the omission of design factors for standard rope from the C–DAC document was an oversight. OSHA is unaware of any reason to omit design factors for standard rope and plans to include factors for standard rope similar to those in section 5–1.7.1 of ASME B30.5–2004. OSHA requests public comment on this issue.

Paragraph 1414(a)

Proposed paragraph (a) would require the selection of replacement wire rope to be in accordance with the requirements of this section and the recommendations of the wire rope manufacturer, the equipment manufacturer, or a qualified person. Currently, Subpart N (through section 5–1.7.2e of ANSI B30.5–1968) limits the employer to using replacement rope of the same size, grade and construction as the rope originally furnished by the crane manufacturer unless otherwise approved by the rope manufacturer. The 2004 version of ASME B30.5, in section 5–2.4.3(d), specifies that replacement rope shall have a strength rating at least as great as the original rope unless a deviation is approved by the equipment manufacturer, the rope manufacturer, or a qualified person.

A number of concerns about the current 29 CFR part 1926 subpart N provision were raised during the C–DAC negotiations. Some members were concerned about delays in obtaining approval from the equipment manufacturer. With respect to older equipment, the manufacturer may no longer be in business. In such cases the employer is unable to get original equipment wire rope information or obtain approval for use of a different specification of rope. Even where the original manufacturer was purchased by another company, the current company may no longer have the original equipment information. Another concern was that the wire rope manufacturer may be unduly conservative in recommending a replacement rope.

The Committee concluded that it would be appropriate to allow a qualified person to determine the replacement rope specifications. The Committee believed that the criteria for being a qualified person are sufficiently rigorous to ensure that such a person's recommendation in this regard would be authoritative with respect to safety.

OSHA notes that proposed paragraph (a)'s mention of only ''replacement rope'' could mislead some readers to conclude that all of § 1926.1414 applies only to replacement rope. The Committee clearly intended that the remainder of § 1926.1414 apply to both original equipment rope and replacement rope. Rewording § 1926.1414(a) to read as follows would, OSHA believes, make clear the Committee's intent: ''Original equipment wire rope and replacement wire rope shall be selected and installed in accordance with the requirements of this section. Selection of replacement wire rope shall be in accordance with the recommendations of the wire rope manufacturer, the equipment manufacturer, or a qualified person.'' OSHA requests public comment on such a revision.

[38] As discussed below under proposed paragraph (c), C–DAC drew from the current 2004 ASME document in proposing design factors for rotation resistant rope.

[39] The provisions for standard rope in section 5–1.7.1 of B30.5–2004 read as follows:

5–1.7.1 Rope Design Factors

(a) For supporting rated loads and for supporting the boom and working attachments at recommended travel or transit positions and boom lengths,

(1) the design factor for live or running ropes that wind on drums or travel over sheaves shall not be less than 3.5.

(2) the design factor for boom pendants or standing ropes shall not be less than 3.0.

(b) For supporting the boom under recommended boom erection conditions,

(1) the design factor for live or running ropes shall not be less than 3.0.

(2) the design factor for boom pendants or standing ropes shall not be less than 2.5.

Paragraph 1414(b) Boom Hoist Reeving

Proposed paragraph (b) sets forth two provisions regarding the use of wire rope for boom hoist reeving.

Proposed paragraph (b)(1) would prohibit using fiber core ropes for boom hoist reeving, except for derricks. In the Committee's view, the composition of such ropes makes them prone to degradation that is not completely detectable by normal inspection techniques. The Committee believed that fiber core ropes can be used safely for boom hoist reeving on derricks because the sheaves on derricks are smaller than on cranes, and because they are more pliable, fiber core ropes can accommodate reverse bending. In addition, but less significant, derrick booms are typically shorter in length and have less capacity.

Currently, Subpart N does not contain an express prohibition against the use of fiber core wire ropes for boom hoist reeving. ANSI B30.5–1968, incorporated by reference into Subpart N, only references the effect of temperature on fiber core wire rope.

The 2004 version of ASME B30.5, in section 5.1.7.2(b), prohibits the use of fiber core wire ropes for boom hoist reeving for mobile and locomotive cranes. By contrast, the standard in the ASME B30 series that applies to derricks, ASME B30.6–2003, does not prohibit the use of fiber core wire rope for boom hoist reeving. Thus, the distinction in proposed § 1926.1414(b) between cranes and derricks in this regard is consistent with current national consensus standards.

Proposed paragraph (b)(2) would prohibit rotation resistant rope from being used for boom hoist reeving except where the requirements of § 1926.1414(c) are met. The Committee believed that only where these provisions are met would the use of rotation resistant rope for this purpose be safe. The particulars of paragraph (c) are discussed next.

Paragraph 1414(c) Rotation Resistant Ropes

Paragraph (c)(1)

Proposed paragraph (c)(1) would classify rotation resistant ropes into three ''Types'' (''Type I,'' ''Type II,'' and ''Type III'').[40] Proposed § 1926.1414(c)(2) specifies use limitations and requirements for each ''Type'' of wire rope. This approach differs from Subpart N, ANSI B30.5–1968 and ASME B30.5–2004, which do not distinguish between types of rotation resistant rope.

Technological advances have resulted in different types of what in the past had been referred to as ''rotation resistant rope.'' The different kinds, which are distinguished in this proposed section as Types I, II and III, have different capabilities, which are described in the definitions in proposed § 1926.1414(c)(1). This proposed section tailors the requirements and limitations to each Type. The Committee believed that this approach would enable the industry to take advantage of technological advances and improve safety.

Paragraph (c)(2) Requirements

Proposed paragraphs (c)(2)(i) through (iv) set forth use requirements of the three ''Types'' of rotation resistant rope in terms of operating design factors (and in some instances activity). The purpose of these provisions is to ensure that the selection of the Type of rotation resistant rope is suitable, in terms of safety, to its use.

The specifics of each paragraph are discussed below. This approach generally differs from Subpart N. The safety factors in ANSI B30.5–1968 and SAE J959–1966 that are incorporated by reference in 29 CFR part 1926 subpart N are applicable to wire rope generally; those industry consensus standards do not separately address rotation resistant rope with respect to design factors.

However, sections 5–5–1.7.1(c) and 5–3.2.1.1(d) of ASME B30.5–2004 generally designate a design factor of 5 for the use of rotation resistant rope, reflecting the advances in technology that led the Committee to adopt a similar approach. Further, the 2004 ASME standard allows for deviation from the design factor of 5, but in no case lower than 3.5, when certain specified procedures that are similar to procedures in proposed § 1926.1414(c)(2)(iv) and further described in § 1926.1414(c)(3) are followed.

Proposed paragraphs (c)(2)(i)–(iv) use the phrase ''operating design factor.'' ''Operating'' has been included in this phrase to show that the factors specified in these proposed paragraphs are to reflect how the rope is installed on the specific piece of equipment in which it is used. In other words, the operating design factor is calculated based on numerous considerations associated with both the rope's design and how it is installed on the equipment in which it will be used.

The Committee recognized that limiting the use of a particular Type of rotation resistant rope by operating design factors (and, in some instances, by activity) is a new approach. However, the technological developments that have occurred since Subpart N was promulgated have led to a need to tailor use requirements and parameters to the different Types of rotation resistant rope.

Proposed paragraph (c)(2)(i) would prohibit Types II and III rotation resistant rope with an operating design factor of less than 5 from being used for duty cycle or repetitive lifts. The Committee believed that such ropes are inappropriate for this type of use, which subjects the rope to high levels of stress generally and/or concentrates wear in particular sections of the rope.[41]

While not addressed in the current Subpart N, a similar limitation applies to rotation resistant rope (though not limited by Type) in section 5–3.2.1.1(d)(3) of ASME B30.5–2004.

This prohibition would not apply to Type I rotation resistant rope because the Committee believed that it is significantly more resistant to rotation or torque compared with Types II and III. This reduces Type I's potential for internal wear during use and moves degradation from the inner wires to the outer wires, where damage is more easily detected during wire rope inspections. Accordingly, the Committee concluded that Type I rope can safely be used for duty cycle and repetitive lifts at an operating design factor below 5 (but no less than 3.5), as specified in proposed 1926.1414(c)(2)(ii).

The Committee's understanding of ''duty cycle'' in this context is a continuous operation in which approximately the same type and weight of load is handled. For example, dredging with a clamshell is duty cycle work. ''Repetitive lifts'' refers to a continuous operation with loads that may vary in size and weight. For example, steel erection work typically involves repetitive lifts of various size and configurations of structural steel members. It is the Agency's understanding that these definitions are widely understood in the industry. However, OSHA believes it is appropriate to include them in § 1926.1401, *Definitions,* to avoid any misunderstanding as to their meaning in this standard. OSHA requests public comment on this issue.

Proposed paragraph (c)(2)(ii) would require that all rotation resistant ropes

[40] ASTM A 1023/A 1023M–02 has a similar classification system, although it divides rotation resistant ropes into ''categories.''

[41] In contrast, where the operating design factor is 5 or greater, the Committee believed that core damage (which is difficult to detect) would not occur prior to the development of outer core damage. Consequently, its use for duty cycle or repetitive lifts would be safe.

have an operating design factor of no less than 3.5. As discussed above, some rotation resistant ropes—Types II and III—would have to have an operating design factor of no less than 5 when used for duty cycle or repetitive lifts. Apart from those uses, under proposed § 1926.1414(c)(2)(ii), the lowest operating design factor that would be allowed for both Types II and III, as well as Type I, would be 3.5.

This provision recognizes that the use of rotation resistant rope at operating design factors below 5 (but in no case below 3.5) is permissible, although proposed paragraphs (c)(2)(i) (discussed above), (iii) and (iv) would set limitations and conditions. The Committee was cognizant of the fact that section 5–3.2.1.1(d) of ASME B30.5–2004 also allows rotation resistant rope to be used at a design factor as low as 3.5 under similarly restricted circumstances.

Proposed paragraph (c)(2)(iii) would require the operating design factor for Type I rotation resistant rope to be no less than 5 except where the wire rope manufacturer and the equipment manufacturer approve a different design factor in writing. (Note that, under proposed paragraph (c)(2)(ii), the operating design factor would be prohibited from being less than 3.5.) The Committee believed that, in light of the design of Type I rope, where there is approval for the operating design factor by both the wire rope manufacturer and equipment manufacturer, the use of the rope would be safe.

The Committee considered concerns about the fact that, in the future, there may be many new Type I ropes on the market, and the manufacturer may not have tested them; this could lead to difficulty in obtaining manufacturer approval for an operating design factor less than 5. However, in the Committee's judgment, the manufacturer's expertise regarding the particular equipment is essential in this instance to ensure that use of such rope would be safe.

Under proposed paragraph (c)(2)(iv), Types II and III rotation resistant rope would be required to have an operating design factor of no less than 5 except when used for non-duty cycle and non-repetitive lifts, and where the requirements of § 1926.1414(c)(3)(i)—(iii) are met. When these exceptions apply, proposed § 1926.1414(c)(2)(ii) would prohibit the operating design factor from being less than 3.5.

This proposed paragraph reflects the Committee's belief that there is a greater likelihood of internal damage in Type II and Type III rotation resistant rope when used with an operating design factor lower than 5. However, the Committee's view is that where the additional precautions in proposed § 1926.1414(c)(3) are met, its use would be safe.

As stated above, 29 CFR part 1926 subpart N is dissimilar from this paragraph in that it does not contain a specific operating design factor for rotation resistant rope and does not otherwise differentiate between rotation resistant wire ropes. This provision is, however, similar to section 5–3.2.1.1(d) in ASME B30.5–2004 which, while not differentiating by ''Type,'' does allow the use of rotation resistant rope with an operating design factor of less than 5 where conditions similar to those included in proposed § 1926.1414(c)(3) are instituted.

Paragraph (c)(3)

This proposed paragraph specifies additional requirements that must be met when Types II and III are used with an operating design factor of between 3.5 and 5 (for non-duty cycle, non-repetitive lifts). The Committee believed that these additional requirements are needed to ensure that use of such ropes would be safe.

Specifically, under proposed § 1926.1414(c)(3)(i), an inspection of the rope by a qualified person in accordance with § 1926.1413(a) would be required, with its use allowed only if that person determines there are no deficiencies constituting a hazard (with the presence of more than one broken wire in any one rope lay considered a hazard). Because of the lower operating design factor of these ropes, the Committee believed that the expertise of a qualified person is needed to ensure that there are no deficiencies that constitute a hazard. Similarly, even one broken wire in any one rope lay would be considered a hazard.

Under proposed paragraph (c)(3)(ii), operations would have to be conducted in a manner and at speeds that minimize dynamic effects. Dynamic effects are the additional forces exerted on the rope due to dynamics like acceleration and deceleration. Such effects need to be minimized because they increase the stress on the rope.

Under proposed paragraph (c)(3)(iii), each lift would have to be documented in the monthly and annual inspection records, with such use to be considered by the qualified person in allowing subsequent use of the rope. The Committee considered this an important step because the more times the rope is used, the greater the likelihood that degradation would have occurred. Requiring each such lift to be documented in the monthly and annual inspection records would ensure that this information is available to the qualified person when that person makes his or her inspections and assessments under proposed § 1926.1414(c)(3)(i) and (ii).

Paragraph (c)(4) Additional Requirements for Rotation Resistant Rope for Boom Hoist Reeving

Proposed paragraph (c)(4)(i) would prohibit rotation resistant rope from being used for boom hoist reeving except where the requirements of proposed § 1926.1414(c)(4)(ii) are met. Currently, Subpart N, through its incorporation by reference of section 5–1.7.2 of ANSI B30.5–1968, prohibits the use of rotation resistant rope for boom hoist reeving under all circumstances. This prohibition reflects the fact that rotation resistant rope used for boom hoist reeving tends to twist and thereby suffer internal damage when it passes over sheaves that are close together.

In reviewing this prohibition, the Committee noted that this problem is reduced when load hoists using rotation resistant rope are used as boom hoists for attachments such as luffing attachments or boom and mast attachment systems because the sheaves are not as close together in these applications and the twisting forces are therefore lower.

The Committee concluded that safety would not be compromised in such circumstances as long as the conditions in proposed § 1926.1414(c)(4)(ii) were met. The Committee also believed that the exception would serve a practical purpose, especially when using attachments such as luffing jibs. The auxiliary hoist is typically used as a boom hoist for such attachments, and is normally rigged with rotation resistant rope. The exception enables the employer to avoid the need to change the rope when using such attachments when safety could be assured by meeting the specified conditions for its use. Note that section 5–1.7.2 of ASME B30.5–2004 also allows rotation resistant rope to be used for boom hoist reeving when conditions similar to those in proposed § 1926.1414(c)(4)(ii) are met.

Under proposed paragraph (c)(4)(ii)(A), the drum must have a first layer rope pitch diameter of not less than 18 times the nominal diameter of the rope used. A first layer rope pitch diameter less than that could damage the rope.

Under proposed paragraph (c)(4)(ii)(B), the requirements of § 1926.1426(a) and (b) would have to be

met.[42] Section 1926.1426(a) prohibits boom free fall for equipment manufactured prior to October 31, 1984 and restricts the circumstances under which a free falling boom may be used for equipment manufactured before that date. By saying that paragraph 1426(a) applies ''irrespective of the date of manufacture,'' proposed § 1926.1414(c)(4)(ii)(B) makes clear that, when rotation resistant rope is used for boom hoist reeving, boom free fall is prohibited for all equipment under all circumstances. The reference to § 1926.1426(b) requires the boom hoist to have a secondary mechanism to prevent free fall in the event the primary system fails. These provisions would prevent the rope from being subjected to the shock load forces that would occur in a boom free fall when the rope arrests the fall.

The C–DAC draft of proposed paragraph (c)(4)(ii)(C) incorporated by reference the provisions in ASME B30.5–2004 at sections 5–1.3.2(a), (a)(2) through (a)(4), and (b) through (d).[43] (Note that, at the time the C–DAC document was completed, the most current version of ANSI/ASME B30.5 was the 2000 version. Since that time the 2004 version has been issued. The referenced provisions are identical in both versions).

These provisions of section 5–1.3.2 (load hoist mechanisms) of the ASME standard provide:

* * * * *

(a) *Load Hoist Drums.* The load hoist drum assemblies shall have power and operational characteristics sufficient to perform all load lifting and lowering functions required in crane service when operated under recommended conditions.

* * * * *

(2) Load hoist drums shall have rope capacity with the recommended rope size and reeving to perform crane service within the range of boom lengths, operating radii, and vertical lifts specified by the manufacturer.

(a) No less than two full wraps of rope shall remain on the drum when the hook is in the extreme low position.

(b) The drum end of the rope shall be anchored to the drum by an arrangement specified by the crane or rope manufacturer.

(c) The drum flange shall extend a minimum of 1/2 inch (13 mm) over the top layer of rope at all times.

(3) The load hoist drums shall provide a first layer rope pitch diameter of not less than 18 times the nominal diameter of the rope used.

(4) A means controllable from the operator's station shall be provided to hold the drum from rotating in the lowering direction and be capable of holding the rated load without further action by the operator. Foot-operated brakes having a continuous mechanical linkage between the actuating and braking means, capable of transmitting full braking force and equipped with a positive mechanical means to hold the linkage in the applied position, meet this requirement.

* * * * *

(b) *Load Hoist Brakes.*

(1) When power-operated brakes having no continuous mechanical linkage between the actuating and braking means are used for controlling loads, an automatic means shall be provided to set the brake, to prevent the load from falling in the event of loss of brake control power.

(2) Foot-operated brake pedals shall be constructed so that the operator's feet, when in proper position, will not slip off, and a means shall be provided for holding the brakes in the applied position without further action by the operator.

(c) *Power Controlled Lowering.* When provided, a power-controlled lowering system shall be capable of handling rated loads and speeds as specified by the manufacturer. Such a system is recommended to assist in precision lowering and to reduce demand on the load brake.

(d) *Cylinders with Rope Reeving.* Cranes using a load hoist mechanism with hydraulic cylinder(s) and rope reeving shall have power and operational characteristics sufficient to perform all load lifting and lowering functions required in crane service when operated under recommended conditions. Sheaves used in multiple rope reeving shall have a pitch diameter not less than 16 times the nominal diameter of the rope and shall comply with para. 5–1.7.4.

Upon reviewing these provisions, OSHA believes that two changes need to be made to the incorporation recommended by C–DAC. First, the second sentence of section 5–1.3.2(c) is stated as a recommendation rather than a mandatory requirement. OSHA believes it would be confusing to incorporate a non-mandatory recommendation into this standard. Therefore, rather than incorporating that provision by reference, OSHA is adding a new paragraph (G) to § 1926.1414(c)(4)(ii) that incorporates only the mandatory first sentence of section 5–1.3.2(c) of ASME B30.5: ''When provided, a power-controlled lowering system shall be capable of handling rated loads and speeds as specified by the manufacturer.''

The second change pertains to the final sentence of section 5–1.3.2(d) of ASME B30.5. That sentence's requirement of a minimum pitch diameter of 16 times the nominal diameter of the rope varies from the requirement of proposed § 1926.1414(c)(4)(ii)(D), discussed next, that the minimum pitch diameter be 18 times the rope's nominal diameter. The variation is due to the fact that section 1.3.2(d) of ASME B30.5 does not apply solely to rotation resistant rope, as does this paragraph. Although it is possible to comply with a minimum pitch diameter of both 16 and 18 times the nominal diameter of the rope by adhering to the value of 18, OSHA believes it would be confusing to include requirements giving both values. Accordingly, OSHA is modifying the incorporation by reference recommended by C–DAC so that, in this proposed rule, § 1926.1414(c)(4)(ii)(C) reads as follows:

The requirements in ASME B30.5–2004 Section 5–1.3.2 (a), (a)(2)–(a)(4), (b), and (d), except that the minimum pitch diameter for sheaves used in multiple rope reeving is 18 times the nominal diameter of the rope used instead of the value of 16 specified in section 5–1.3.2(d).

Proposed paragraph (c)(4)(ii)(D) provides that all sheaves used in the boom hoist reeving system shall have a rope pitch diameter of not less than 18 times the nominal diameter of the rope used.

Proposed paragraph (c)(4)(ii)(E) provides that the operating design factor of the boom hoist reeving system shall be not less than five. In this paragraph and the next one as well, OSHA has changed the C–DAC term ''design factor'' to ''operating design factor.'' OSHA made this change so that the terminology in these two paragraphs would be consistent with that in proposed paragraphs (c)(2) and (3) of this section. OSHA requests public comment on whether there is any reason for using different terminology in proposed § 1926.1414(c)(4)(ii)(E) and (F) than in proposed § 1926.1414(c)(2) and (3).

Proposed paragraph (c)(4)(ii)(F) provides that the operating design factor for these ropes shall be the total minimum breaking force of all parts of rope in the system divided by the load imposed on the rope system when supporting the static weights of the structure and the crane rated load. The purpose of this provision is to ensure that the methodology for computing the operating design factors is clear and the operating design factor requirements specified in the proposed standard achieve their intended effect.

Paragraph 1414(d)

Proposed paragraph (d) would require that wire rope clips used with wedge sockets be attached to the unloaded dead end of the rope; however, the provision also permits the use of

[42] The C–DAC Document referred to § 1926.1426(b) and (c). C–DAC's intent clearly was to refer to § 1926.1426(a) and (b), and OSHA has corrected the text accordingly.

[43] The Committee determined that the incorporated provisions were sufficiently clear and enforceable for use as OSHA requirements.

devices specifically designed for dead-ending rope in a wedge socket. The Committee believed that this provision is necessary to ensure attachment strength, reliability and prevention of cable damage.

Paragraph 1414(e)

Proposed paragraph (e) states that socketing shall be done in the manner specified by the manufacturer of the wire rope or fitting. This is a clearer version of the provision in section 5–1.7.2b of ANSI B30.5–1968, which refers to the manner specified by the manufacturer of the assembly.

Paragraph 1414(f)

Proposed paragraph (f) specifies that prior to cutting wire rope, seizings must be placed on each side of the point to be cut, with the length and number of seizings determined in accordance with the wire rope manufacturer's instructions. Seizings are needed to hold the wire in the strands and the strands in place during handling while cutting. This keeps the rope beyond the area of the cut intact. This provision differs from both section 5.2.4.3(c) of ANSI B30.5–1968 (incorporated by reference into 29 CFR part 1926 Subpart N) and from section 5–2.4.4(c) of ASME B30.5–2004, which set forth specific seizing requirements based upon whether the rope is preformed and the rope's diameter.

In Committee's experience, the instructions and procedures for seizing differ among various wire rope manufacturers. It concluded that the most appropriate approach would be to require that, beyond specifying that seizings be placed on each side of the point to be cut, which is always necessary, the length and number of seizings be in accordance with the manufacturer's instructions. The Committee decided to require employers to follow the manufacturer's instructions because it believed that wire rope manufacturers have the knowledge and expertise to best determine the length and number of seizings that are needed to maintain the integrity of their wire ropes during cutting.

Section 1415 Safety Devices

This section sets forth the proposed requirements for equipping cranes and derricks with certain safety devices.

The safety devices addressed by this section are devices that C–DAC believed are essential for the safe operation of cranes and derricks and therefore, required to be present and in proper working order during all equipment operations with no alternative measures permitted. Those devices considered less critical to equipment safety are designated as operational aids and are governed by proposed § 1926.1416. That section allows for equipment to continue operating if the operational aid fails or malfunctions but requires certain temporary alternative protective measures in such cases. Those devices designated as safety devices in this section are so essential and integral to safe equipment operation that C–DAC determined that there is no acceptable alternative to having them in proper working order.

Paragraph 1415(a) Safety Devices

Proposed paragraph (a) lists the safety devices that would be required on all equipment covered by this Subpart and any specifications and conditions applicable to those devices (including the exemption of certain equipment from the requirements of the listed devices).

Crane Level Indicator: Proposed paragraph (a)(1) would require that a crane level indicator be on all equipment covered under this subpart. The Agency is proposing this requirement based upon the Committee's belief that level equipment is a key factor in ensuring crane and derrick safety. Using a crane level indicator is necessary because it has the requisite accuracy for leveling the equipment. C–DAC members stressed the need to use a crane level indicator because, if the equipment is not properly leveled, it will not have all the capacities indicated in the load charts. Reliance on the charts in such situations could cause the equipment to overturn or otherwise fail.

C–DAC discussions also raised two significant issues in applying the (a)(1) requirement. First, as stated in § 1926.1415(a)(1)(i), the proposal specifies that a crane level indicator must either be built into the equipment or available on it. The Committee believed that either option accomplishes the purpose of enabling the employer to determine if the equipment is level. Second, as covered in § 1926.1415(a)(1)(ii), the Committee believed that tagging out or removing deficient built-in crane level indicators is necessary. This provision addresses the hazard posed by false readings.

Proposed paragraph (a)(1)(iii) would exempt portal cranes,[44] derricks, floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels, or other means of flotation from the requirements of § 1926.1415(a)(1). C–DAC members indicated that these types of equipment are leveled upon installation and then fixed in place, precluding the need for a crane level indicator.[45]

Boom Stops: Proposed paragraph (a)(2) requires boom stops on all equipment except for derricks and hydraulic booms. ''Boom stop'' is defined in proposed § 1926.1401 as a device that restricts the boom from moving above a certain maximum angle and toppling over backwards. This definition is derived from the SC&RF Handbook. The term includes all devices that meet the definition, including boom stops, (belly straps with struts/standoff), telescoping boom stops, attachment boom stops, and backstops. As the definition indicates, a boom stop is needed to prevent a boom from tipping backwards past its designed range during equipment operations. Several Committee members suggested exempting certain older equipment from being retrofitted with boom stops. However, C–DAC concluded that the significant safety issue at stake and the fact that installing boom stops is not technically difficult justify requiring them on older equipment.

As noted above, the Agency proposes to exempt derricks and hydraulic cranes from the requirements of 1926.1415(a)(2). The derrick boom overturn issue is covered in proposed 1926.1436(f)(2). Hydraulic cranes are exempted because these cranes contain the equivalent function of boom stops in that the hydraulic cylinder physically prevents the boom from moving backward past its designed range.

Jib Stops: ''Jib stop'' is defined in § 1926.1401 as the same type of device as a boom stop but used for a fixed or luffing jib. The definition notes that the device is also referred to as a ''jib backstop.'' Proposed § 1926.1415(a)(3) would require jib stops on all equipment where a jib is attached, except for derricks. Jib stops perform the same function for jibs as boom stops perform for booms, and are similarly necessary. The proposal exempts derricks from this requirement because jibs are not installed on derricks.

Foot Pedal Brake Locks: Proposed paragraph (a)(4) would require that equipment with foot pedal brakes have

[44] Proposed § 1926.1401 defines ''portal cranes'' as a type of crane consisting of a rotating upperstructure, hoist machinery, and boom mounted on top of a structural gantry which may be fixed in one location or have travel capability. The gantry legs or columns usually have portal openings in between to allow passage of traffic beneath the gantry.

[45] Note that, under proposed § 1926.1437(e), a pontoon or barge/vessel list and trim device would be required for floating cranes/derricks and land cranes/derricks.

locks, except for portal cranes and floating cranes. Such locks are needed to prevent the unintentional disengagement of a foot pedal brake, which could lead to unintended equipment movement and consequent injuries and fatalities. Due to the physical effort needed to keep the pedal engaged, this is particularly important where the brake is applied for long periods of time.

The rationale for exempting portal cranes and floating cranes from this requirement discussed by the Committee was that there are instances in which, due to the pitching of a floating crane and the pitching of the vessel or object in the water with which a portal crane works, the operator may have to immediately release the brake. The concern is that, if the foot pedal brake lock had been activated, the operator may not be able to release the brake quickly enough in such a situation to prevent the equipment from being overloaded or to prevent unintended movement of the load.

Upon review of the exemption in the provision, the Agency has realized that C–DAC assumed that the locking device would in all cases be of the type that is located on the brake pedal. That type of device can be difficult to disengage, thereby delaying the operator's ability to release the brake. However, it is OSHA's understanding that there are other types of brake locking mechanisms that do not present this problem (for example, a brake lock that is hand-actuated). It therefore appears that the exemption may not be needed.[46] The Agency requests public comment on changing proposed paragraph § 1926.1415(a)(4) by deleting the exemption and requiring a hoist brake locking mechanism for all cranes.

Integral Holding Device/Check Valve: Proposed paragraph (a)(5) would require that hydraulic outrigger jacks have an integral holding device/check valve. Such a device is necessary to prevent the outrigger jack from collapsing in the event of a hydraulic failure.

Rail Clamps and Rail Stops: Proposed paragraph (a)(6) specifies that equipment on rails have rail clamps and rail stops, except for portal cranes. A rail clamp restricts the equipment from lifting off the rails. The rail stop prevents the equipment from moving further than a specific point on the rails. Portal cranes are exempt from the requirements of § 1926.1415(a)(6) because these cranes typically are equipped with a parking brake that provides the equivalent function of preventing the crane from unintentionally moving along the rails.

Paragraph 1415(b) Proper Operation Required

Proposed paragraph (b) would prohibit the operation of the equipment if any of the safety devices listed in this section are not in proper working order. This paragraph reflects the Committee's belief, discussed above, that proper operation of these devices is critical to safe use of the equipment.

Section 1416 Operational Aids

This section sets forth the proposed requirements for equipping cranes and derricks with certain operational aids. ''Operational aids'' are defined in § 1926.1401 as ''devices that assist the operator in the safe operation of the crane by providing information or automatically taking control of a crane function. These include, but are not limited to, the devices listed in § 1926.1416 ('listed operational aids').'' This definition is similar to that in section 5–0.2.2 of ASME B30.5–2004.

As discussed above in regard to proposed § 1926.1415, the Committee believed that the devices addressed in § 1926.1416 enhance safety. However, they are less essential to the safe operation of equipment than the safety devices addressed by § 1926.1415 because of the availability of alternatives that are sufficient on a temporary basis. The temporary alternative measures are precautions that were historically used prior to the widespread availability and use of these operational aids.

Paragraphs 1416(a) and (b)

Under proposed paragraphs (a) and (b), operational aids would be required on all equipment unless otherwise specified, and would have to be in proper working order unless the employer uses specified temporary alternative protection. Section 1926.1416(b) provides that if the crane/derrick manufacturer specifies more protective alternative measures than those listed in the standard, the employer would be required to follow them.

Committee discussions of these provisions primarily focused on the use of manufacturer procedures as temporary alternative measures. The Committee considered recommending that the Agency require employers to follow any temporary alternative measures specified by the equipment manufacturer in addition to those required by this proposal. However, instead of requiring additional measures, the Committee decided that employers should be required to rely solely on measures specified by the manufacturer but only if those measures are more protective than those specified in the standard.

Paragraph 1416(c)

Proposed paragraph (c) states that if a listed operational aid stops working properly during operations, the operator shall safely stop operations until the temporary alternative measures are implemented or the device is again working properly. It further provides that, if a replacement part is no longer available, a substitute device that performs the same type of function may be used, and the use of such a device is not considered a modification under proposed § 1926.1434, *Equipment modifications.* Section 1926.1434 applies to modifications or additions which affect the capacity or safe operation of the equipment unless certain steps are taken to have the modifications or additions approved.

The Committee believed that it is unnecessary to apply § 1926.1434 to the use of a substitute operational aid because, as long as the substitute device works properly, its use will not affect the capacity or safe operation of the equipment.

Paragraph 1416(d) Category I Operational Aids and Alternative Measures

The proposal splits operational aids into two categories, with different amounts of time permitted for temporary alternative measures to be used in place of the listed operational aids. Category I operational aids, which are addressed by proposed paragraph (d), would set a 7-day time limit for repairing the deficient aid, and Category II, addressed below under proposed paragraph (e), has a 30-day time limit. The allowance of a 30-day time period for Category II operational aids reflects the Committee's belief that these aids are less critical to equipment safety than those in Category I.

Both Category I and II would have an exception to the repair time limits. For Category I, if the employer documents that it has ordered the necessary part within 7 days of the occurrence of the deficiency, the repair would have to be completed within 7 days of receipt of the part. For Category II, if the employer documents that it has ordered the necessary part within 7 days of the occurrence of the deficiency and the part is not received in time to complete the repair in 30 days, the repair shall be completed within 7 days of receipt of

[46] OSHA notes that ASME B30.8–2004, ''Floating Cranes and Floating Derricks,'' section 8–1.6.2(l), applies to load hoists and reads as follows: ''Foot-operated brake pedals * * * shall be equipped with a means for latching in the applied position.''

the part. The Committee believed that these time frames set limitations that are both feasible and reflective of the amount of time that it is appropriate to rely on the alternative measures in each category.

During the SBREFA Panel process, one Small Entity Representative stated that an extended period of time might be required to determine the appropriate part number for older equipment and that it might therefore not be possible to order a replacement within 7 days. OSHA solicits public comment on the extent to which this is a problem. OSHA further seeks comment on how to accommodate a situation in which ordering a replacement part is hindered because the part number is not readily available. For example, would a parts supplier be able to furnish the correct part if the type of device (e.g., boom hoist limiting device) and the model of the crane are provided?

The SBREFA Panel also questioned whether the number of ''days'' for ordering parts and completing repairs for operational aids refers to calendar days or business days. Absent a different definition in the standard, OSHA interprets the word ''days'' to mean ''working days'' which, as discussed above in relation to proposed § 1926.1407(e), would mean Mondays through Fridays, excluding federal holidays. OSHA solicits public comment on whether a different definition of ''days'' should apply under this section.

Proposed paragraph (d) lists the required Category I operational aids and the acceptable temporary alternative measures for these aids.

Boom Hoist Limiting Device: Proposed paragraph (d)(1) would require that all equipment manufactured after December 16, 1969 have a boom hoist limiting device. As defined in § 1926.1401, a boom hoist limiting device disengages boom hoist power when the boom reaches a predetermined operating angle and also sets brakes or closes valves to prevent the boom from lowering after power is disengaged. This definition is taken from the SC&RF Handbook. Section 1926.1401 also explains that the term ''boom hoist limiting device'' includes boom hoist disengaging device, boom hoist shutoff, boom hoist disconnect, boom hoist hydraulic relief, boom hoist kick-outs, automatic boom stop device, or derricking limiter. A boom hoist limiting device automatically prevents the boom hoist from pulling the boom past the minimum allowable radius (maximum boom angle). If the boom were to be pulled past that point, a failure is likely (for example, the boom could buckle from being forced against the boom stop).

The December 16, 1969 date reflects the effective date of ANSI B30.5–1968. This was the first national consensus standard to require a boom hoist limiting device, and the Committee regarded that date as a reasonable indicator of when the industry began widely manufacturing or equipping cranes and derricks with such devices. Although the ANSI standard was only applicable to crawler, locomotive, and truck cranes, the Committee recommended extending this provision to all equipment based on prevailing industry practice.

The Agency is also proposing three temporary alternative measures [§ 1926.1416(d)(1)(A)–(C)], of which the employer must use at least one upon malfunction of the boom hoist limiting device. These are: Use of a boom angle indicator; clearly marking the boom hoist cable at a point that will give the operator sufficient time to stop the hoist to keep the boom within the minimum allowable radius; and, if a spotter is used, clearly marking the boom hoist cable at a point that will give the spotter sufficient time to signal the operator and have the operator stop the hoist to keep the boom within the minimum allowable radius. C–DAC recommended these measures because historically they were used by employers prior to the development of the boom hoist limiting device. This paragraph further proposes requiring these measures on a permanent basis for those employers operating equipment manufactured on or before December 16, 1969 and not originally equipped with a boom hoist limiting device.

Luffing Jib Limiting Device: Proposed paragraph (d)(2) would require that equipment with a luffing jib have a luffing jib limiting device. As defined in § 1926.1401, a luffing jib limiting device is similar to a boom hoist limiting device, except that it limits the movement of the luffing jib. C–DAC indicated that these two devices function similarly and are distinguished only as to the type of crane extension each is automatically designed to limit: The jib versus the boom. The temporary alternative measures for a luffing jib limiting device are the same as those proposed for a boom hoist limiting device in § 1926.1416(d)(1)(i)(A)–(C).

Anti Two-Blocking Device: Proposed paragraph (d)(3) sets forth the requirements for anti two-blocking devices. ''Two blocking'' is defined in § 1926.1401 as ''a condition in which a component that is uppermost on the hoist line such as the load block, hook block, overhaul ball, or similar component, comes in contact with the boom tip, fixed upper block or similar component. This binds the system and continued application of power can cause failure of the hoist rope or other component.'' This definition is derived from the SC&RF Handbook. As the definition indicates, two-blocking can result in the crane dropping the load, the headache ball, or another component, creating an extreme hazard to employees below. An anti two-blocking device has been required by § 1926.550(g)(3)(ii)(C) when hoisting personnel since October 3, 1988 but is not otherwise required under 29 CFR part 1926 subpart N. The Committee believed that expanding the use of anti two-blocking devices beyond hoisting personnel is needed to help reduce the number of crane-related injuries and fatalities.

Anti two-block devices are manufactured in two forms: As an automatic prevention device or as a warning device. The automatic prevention device automatically stops two blocking from occurring. The warning device warns the operator when two blocking is about to occur. C–DAC members agreed that the automatic prevention anti two-block device provides better protection for employees, since it automatically stops two-blocking. As discussed below, the proposed standard would ultimately require automatic prevention devices on all equipment under a phase-in schedule. In drafting the schedule, C–DAC took account of the date the national consensus standard, ANSI B30.5, began to require such devices for telescopic boom cranes and the fact that B30.5 has continued to allow lattice boom cranes to be equipped with either prevention devices or warning devices.

Effective February 28, 1992, ASME B30.5 required automatic prevention devices on telescopic boom cranes. At the same time, for lattice boom cranes, ASME B30.5 required two-block protection but allowed greater flexibility, requiring them to be equipped with either automatic prevention devices or warning devices. The additional protection required for telescopic boom cranes in the ASME standard reflects the fact that such cranes are more likely to two-block because telescoping the boom out (an action that does not occur with lattice boom cranes) moves the boom's block closer to the load end of the hoist cable, which can cause two-blocking.

Because February 28, 1992, is the date that ASME B30.5 first required anti two-block devices on telescopic boom cranes and the industry first began widely manufacturing or equipping such cranes

with such devices, proposed § 1926.1416(d)(3)(i) would require automatic prevention devices on all telescopic boom cranes manufactured after February 28, 1992. However, because ASME B30.5 has allowed lattice boom cranes to have either a warning device or an automatic prevention device since February 28, 1992, proposed § 1926.1416(d)(3)(ii)(A) similarly would give employers the option of using either device on lattice boom cranes manufactured between February 28, 1992 and one year after the effective date of this standard.

As noted above, C–DAC believed that the automatic prevention device offers better protection than the warning device. Therefore, to ensure that future cranes are equipped with the preferable automatic prevention device, the proposal would require lattice boom cranes manufactured more than one year after the effective date of this standard to be equipped with an automatic prevention device.

Proposed paragraph (d)(3)(ii)(C) excludes lattice boom equipment used during certain activities from the anti two-block requirements of § 1926.1416(d)(3)(A) and (B). The provision would exempt lattice boom equipment when used for dragline, clamshell (grapple), magnet, drop ball, concrete bucket, and pile driving work because these operations involve heavy repetitive motion, and currently manufactured anti-two block devices used during these activities consistently malfunction (that is, the device ''trips'' even though a two-block has not occurred) and are frequently damaged.

Lattice boom equipment used during marine operations generally would be exempt because the constant movement of the barge tends to damage the device. Similarly, lattice boom equipment used during container handling work in construction would be exempted because this activity typically involves hoisting containers to and from ships.[47]

However, note that proposed paragraph 1437(f)(1) would require anti two-block devices on floating cranes/derricks and land cranes/derricks on barges when hoisting personnel or hoisting over an occupied coffer dam or shaft. In those situations the exemption would not apply. The Agency believes that the need for anti two-block devices in such situations to prevent employees from being dropped, and to prevent a load from striking employees in the confined work environment of a coffer dam or shaft, outweighs any propensity for damage to the device or unnecessary ''tripping'' during marine operations.

For lattice boom cranes and derricks, the temporary alternative measure required when an anti two-block device malfunctions is to clearly mark the cable so that it can easily be seen by the operator at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter to warn the operator to stop the hoist.

For telescopic boom cranes, the temporary alternative measure required would be to clearly mark the cable so that it can easily be seen by the operator at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking and use a spotter when extending the boom. The Committee believed that the alternative measure for telescopic boom cranes needs to have the additional precaution of a spotter when extending the boom because in those cranes two-blocking can occur even when the cable hoist is not being operated. As noted above, telescoping the boom out moves the boom's block closer to the load end of the hoist cable, which can cause two-blocking. A mark on the hoist cable in such instances would not warn the operator that two-blocking is about to occur. Therefore, when extending the boom, a spotter would also have to be used.

Paragraph 1416(e) Category II Operational Aids and Alternative Measures

Proposed paragraph (e) lists the required Category II operational aids and the acceptable temporary alternative measures for these aids. If these aids were to malfunction there would be a 30-day time limit for repair. If the employer documents it has ordered the necessary parts within 7 days of the occurrence of the deficiency and the part is not received in time to complete the repair within 30 days, the repair would be required to be completed within 7 days of receipt of the part.

Boom Angle or Radius Indicator: Proposed paragraph (e)(1) would require a boom angle or radius indicator readable from the operator's station on all equipment. ''Boom angle indicator'' is defined in § 1926.1401 as ''a device which measures the angle of the boom relative to the horizontal.'' This definition is taken from the SC&RF Handbook. Knowing the boom angle is necessary to accurately determine the crane's capacity from its load chart. The temporary alternative would be to measure the radii or boom angle with a measuring device.

Jib Angle Indicator: Proposed paragraph (e)(2) would require a jib angle indicator on all equipment with a luffing jib. The temporary alternative would be to measure the radii or jib angle with a measuring device.

Boom Length Indicator: Proposed paragraph (e)(3) would require a boom length indicator on all equipment equipped with a telescopic boom. As defined in § 1926.1401, a boom length indicator ''indicates the length of the permanent part of the boom (such as ruled markings on the boom) or, as in some computerized systems, the length of the boom with extensions/attachments.'' The length of the boom must be known because it affects the crane's capacity as shown on the load chart. The temporary alternative would be one of the following: mark the boom with measured marks to calculate boom length; calculate boom length from boom angle and radius measurements; or measure the boom with a measuring device.

Load Weighing and Similar Devices: Proposed paragraph (e)(4) would require load weighing and similar devices on all equipment with a rated capacity over 6,000 pounds and manufactured after March 29, 2003, except derricks. (A comparable provision for derricks is in proposed § 1926.1436(f)(3), discussed below.) The framework of this proposed paragraph is similar to the approach taken in section 5–1.9.9.2 of ASME B30.5–2004 with respect to these aids. The framework permits employers to choose to outfit its equipment with either a load weighing device; load moment or rated capacity indicator; or a load moment or rated capacity limiter.

Load moment (or rated capacity) indicator is defined in § 1926.1401 as ''a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and indicates to the operator the percentage of capacity at which the equipment is working. Lights, bells, or buzzers may be incorporated as a warning of an approaching overload condition.'' This definition is derived from the SC&RF Handbook.

Load moment (or rated capacity) limiter is defined in § 1926.1401 as ''a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and when the rated

[47] In most situations hoisting containers would be regulated under 29 CFR part 1918; the proposed standard would apply to hoisting containers only where that activity is considered construction work. For example, hoisting a container of construction material from a ship onto a concrete pier that is part of a bridge construction project would be a construction activity and covered by this proposed standard.

capacity is reached, it shuts off power to those equipment functions which can increase the severity of loading on the equipment, e.g., hoisting, telescoping out, or luffing out. Typically, those functions which decrease the severity of loading on the equipment remain operational, e.g., lowering, telescoping in, or luffing in.'' The proposal permits employers flexibility in choosing which device to employ because the Committee believed that all three devices will help ensure that the equipment does not exceed its capacity and tip over.

This provision would be limited to equipment (other than derricks) manufactured after March 29, 2003. That was the date when ASME B30.5 first called for all mobile cranes with a rated capacity over 6,000 pounds to be equipped with load weighing devices. It therefore reflects when the industry first began widely manufacturing or equipping cranes with load weighing or load moment devices.

Each of these indicators makes it easier for the operator to ensure that the equipment is operated within its capacity. The proposed provision would therefore reduce the likelihood of injuries and fatalities from tip-over and other incidents resulting from operating equipment beyond its capacity.

Proposed paragraph (e)(5) would require two future operational aids—an outrigger position sensor/monitor and a hoist drum rotation indicator—on all equipment manufactured after January 1, 2008. ''Drum rotation indicator'' is defined in § 1926.1401 as ''a device on a crane or hoist which indicates in which direction and at what relative speed a particular hoist drum is turning.'' This definition is taken from the SC&RF Handbook. C–DAC believed that these aids will help ensure the safe operation of cranes but found that additional time is needed for the industry to develop them.

The Committee also considered whether a third future operational aid—counterweight sensors—should be required on all equipment manufactured after January 1, 2008. Several Committee members representing crane manufacturers expressed concern as to the difficulty in developing a reliable counterweight sensor presently or in the near future. In light of these technological problems, the Committee did not include these.

Section 1417 Operation

Proposed § 1926.1417 addresses hazards associated with general operation of equipment covered by this standard. Currently, 29 CFR part 1926 subpart N primarily addresses safe operation by incorporating national consensus standards and manufacturer recommendations. For example, § 1926.550(b)(2) requires crawler, truck, and locomotive cranes to comply with the operation requirements of ANSI B30.5–1968. The provisions in this proposed section are designed to update such requirements, make them more comprehensive, and state them in a way that is clear and enforceable.

Paragraph 1417(a)

Currently, Subpart N requires employers to comply with manufacturers' operational requirements for hammerhead tower cranes (§ 1926.550(c)(5)) and for floating cranes/derricks (§ 1926.550(f)(2)(iii)) but not for other types of equipment. Proposed § 1926.1417(a) would require employers to comply with the manufacturer procedures applicable to the operational functions of all equipment covered by this proposed standard, including the use of equipment with attachments.

The Committee believed that the manufacturer has a high degree of expertise with respect to the capabilities and limitations of the equipment it has designed and built. Accidents can therefore be prevented by ensuring that the equipment is operated in a manner that is consistent with the manufacturer's procedures. As noted in the discussion of the proposed definition of ''procedures'' in § 1926.1401, the phrase ''manufacturer procedures'' is to be interpreted broadly to include all recommendations by the manufacturer regardless of the format of those recommendations.

Paragraph 1417(b) Unavailable Operation Procedures

Paragraphs (b)(1) through (b)(3). Currently, Subpart N has no provision for developing operational procedures where manufacturer procedures are not available. C–DAC believed that setting requirements to address these situations would help improve safety with respect to the operation of such equipment.

''Unavailable procedures'' is defined in proposed § 1926.1401 as meaning procedures that are no longer available from the manufacturer, or have never been available from the manufacturer. C–DAC provided this definition so that employers would understand what constitutes unavailable procedures. For instance, procedures that are in the employer's possession but are not on the job site, would not be considered unavailable under proposed §§ 1926.1417(b) and 1926.1441(c)(2), where the term is used.

Under proposed paragraph (b)(1), in the event that the manufacturer procedures for operation are not available, the employer would be required to develop procedures necessary for the safe operation of the equipment and its attachments. The employer would also be required to ensure compliance with such procedures.

For example, the manufacturers of some old equipment are no longer in business; procedures for that equipment are typically unavailable. Even where the original manufacturer became a part of another company that is still in business, in some cases the successor company no longer has the original manufacturers' procedures for that equipment. In such instances the employer would be required to develop and follow substitute procedures.

Proposed paragraphs (b)(2) and (b)(3) would specify qualifications criteria for those who develop two aspects of the substitute procedures. Specifically, under proposed § 1926.1417(b)(2), procedures for the operational controls would have to be developed by a qualified person. As defined in § 1926.1401 of this proposed standard, ''operational controls'' are levers, switches, pedals and other devices for controlling equipment operation. The Committee believed that a high level of expertise is needed to develop such procedures in light of both the complexity of the factors that must be considered in developing such procedures and the critical nature of the operational controls.

Under proposed paragraph (b)(3), operational procedures related to equipment capacity would have to be developed and signed by a registered professional engineer familiar with the equipment. The Committee believed that the type and complexity of engineering analysis that is needed to develop safe procedures related to capacity necessitates that this work be done by a registered professional engineer (RPE). In addition, because capacity is so critical to safe operation, the Committee believed that a signature by the RPE is needed to ensure that this work is done with the requisite care.

Paragraph 1417(c) Accessibility of Procedures

Paragraph (c)(1). This proposed paragraph would require employers to provide the operator with ready access in the cab to the procedures applicable to the operation of the equipment, including the following: Rated capacities (load charts), recommended operating speeds, special hazard

warnings, and the instructions and operator's manual.

For the purposes of this proposed standard, ''special hazard warnings'' are warnings of site-specific hazards (for example, proximity of power lines). C–DAC defines this term in proposed § 1926.1401 to differentiate these site-specific warnings from all other general hazard warnings which are common to typical construction worksites.

Currently, § 1926.550(a)(2) of Subpart N requires rated capacities, recommended operating speeds, and special hazard warnings to be posted on the equipment, and instructions and warnings to be visible at the operator's station. Unlike § 1926.1417(c)(1) of this proposed standard, it does not require the operator's manual to be accessible to the operator.

The Committee believed that the information in these materials, including the operator's manual, is essential for safe crane operation. It is needed to help the operator avoid performing operations beyond a crane's capacity and recommended operating speed, and by increasing operator awareness of special hazards related to a specific piece of equipment.

In addition, the Committee believed that this information needs to be available to the equipment operator in the cab so that the operator can obtain the information as the need arises. If the information were not available in the cab, operations would have to be delayed in order for the operator to leave the cab and obtain the information elsewhere (or for someone else to obtain them and bring them to the operator). The prospect of such a delay would serve as a disincentive to obtaining the information and increase the chance that operations would proceed without it, which could result in injuries or fatalities.

Paragraph (c)(2). Subpart N does not address the issue of load capacities that are available only in electronic form. With the advancement of technology since 29 CFR part 1926 subpart N was promulgated, it has become increasingly common for equipment to be supplied by manufacturers with load capacities in electronic form. Because of the potential for an electronic or other failure to occur that would make that information inaccessible, C–DAC determined that it is necessary to establish requirements to address that problem. Proposed § 1926.1417(c)(2) establishes requirements to address a situation in which electronic or other failure makes such information unavailable.

The Committee agreed that having the load capacities accessible to the operator in the cab is so important, due to this information's direct relationship to preventing overloading, that operations need to shut down without them. Therefore, where load capacities are available in the cab only in electronic form and a failure makes the load capacities inaccessible, this proposed paragraph would require that the operator immediately cease operations or follow safe shut-down procedures until the load capacities become available again (in electronic or other form).

Paragraph 1417(d)

This proposed paragraph would require that operators refrain from engaging in any practice that would divert his or her attention while operating the crane. This would include the use of cell phones except when cell phones are used for signal communications. Operating a crane is a complex task that requires an operator's full attention to be performed safely. This proposed paragraph addresses the risk that an accident can occur if the operator's full attention is not directed toward that task. A similar provision is found in section 5–3.1.2 of ANSI B30.5–1968, which is incorporated by reference in Subpart N, although it does not specifically reference the use of cell phones.

Paragraph 1417(e) Leaving Equipment Unattended

Paragraph (e)(1). Currently, under 29 CFR part 1926 subpart N, the operator of a crawler, locomotive, or truck crane is prohibited from leaving the controls while a load is suspended.[48] It is important for the operator to be at the controls for a variety of safety-related reasons. These include making necessary adjustments to keep the load in a safe position, moving the load where necessary for reasons of safety (such as for the safety of employees working with or near the load), and responding to emergencies that may arise during lifting operations.

In the Committee's experience, this requirement is routinely breached when the load is ''held suspended,'' that is, without need for adjustment of the load's or the equipment's position—for an extended period. In such circumstances, the operator does not manipulate the controls.

In this type of circumstance, the Committee believed that greater safety could be achieved by developing criteria that allow the operator to leave the controls when it is safe to do so rather than to simply continue the existing rule unchanged. (Note that the suspension of working gear, such as slings, spreader bars, ladders, and welding machines, is addressed separately in proposed § 1926.1417(e)(2)).

This proposed paragraph would require that the operator not leave the controls while the load is suspended except when four conditions, outlined in proposed § 1926.1417(e)(1)(i) through (e)(1)(iv), are met. The conditions are as follows:

Paragraph (e)(1)(i). The operator would be required to remain adjacent to the equipment and not engage in any other duties. This paragraph will not only prevent unauthorized use of the crane by persons who are not competent crane operators but also allow the operator to quickly access the controls in case the equipment or load inadvertently moves.

Paragraph (e)(1)(ii). The load is to be held suspended for a period of time exceeding normal lifting operations. As explained above, these are instances when the load is ''held suspended,'' that is, without need for adjustment of the load's or the equipment's position—for an extended period. These are circumstances in which the operator will not need to manipulate the controls. Such circumstances must be for a period of time in excess of the periods that occur during normal lifting operations.

For example, during the construction of a structure, a large subassembly is being attached to another part of the structure. After the subassembly has been initially connected, it is held suspended (that is, without need for adjustment of position) for support for a protracted period while the final connections are made. This period exceeds normal lifting operations. In this example, the criterion of proposed § 1926.1417(e)(1)(ii) would be met.

Another, contrasting example is the following: A steel structure is being erected. When installing the steel beams, the operator holds the beam suspended (typically for several minutes) while it is initially connected. Holding the beam suspended in such instances is a normal part of the steel erection process. In this example the criterion in proposed § 1926.1417(e)(1)(ii) would not be met and the operator can not leave the controls.

Paragraph (e)(1)(iii). The competent person would have to determine that it is safe for the operator to leave the controls and implement measures

[48] Section 5–3.2.4a. of ANSI B 30.5–1968, incorporated by reference in 29 CFR part 1926 Subpart N at § 1926.550(b)(2), states, ''The operator shall not leave his position at the controls while the load is suspended.''

necessary to restrain the boom hoist and telescoping, load, swing, and outrigger functions. This proposed provision addresses the hazard of inadvertent movement while the controls are unattended.

Paragraph (e)(1)(iv). Barricades or caution lines, and notices would have to be erected to prevent all employees from entering the fall zone. Furthermore, under this proposed paragraph no employees would be permitted in the fall zone, including those listed in proposed § 1926.1425(b)(1) through (3), (d), or (e). The Committee concluded that this is necessary because the added margin of safety that results from the operator being at the controls would not be present in these circumstances.

Paragraph (e)(2). As drafted, proposed § 1926.1417(e)(2) reads:

> The provisions in paragraph (e) of this section do not apply to working gear (such as slings, spreader bars, ladders, and welding machines) where the load is not suspended over an entrance or exit.

The Agency notes that the reference to ''§ 1926.1417(e)'' is a drafting error and that the appropriate reference is to paragraph ''§ 1926.1417(e)(1).'' In addition, the provision currently contains two incidences of the word ''not'' which could lead to confusion. Therefore, the Agency is considering changing the language to read as follows and requests comment on such a change:

> The provisions in § 1926.1417(e)(1) do not apply to working gear (such as slings, spreader bars, ladders, and welding machines) where the working gear is suspended over an area other than an entrance or exit.

The Committee agreed on this paragraph with the understanding that employers frequently leave lightweight items such as slings, ladders, spreader bars, and welding machines suspended in the air overnight in order to prevent theft. These are items whose weight is negligible relative to the capacity of the equipment and whose size is small (the small size means that there will not be a significant sail effect and the rigging needed to attach the item to the hook is not complex).

The Committee recognized that this practice is a safe practice as long as the working gear items are not suspended over an entrance or exit where employees could be exposed to falling object hazards. Thus, this paragraph would allow such items to be held suspended, without the operator at the controls, and without establishing the four conditions set forth in § 1926.1417(e)(1)(i) through (iv), so long as the gear is not suspended over an entrance or exit.

Paragraph 1417(f) Tag-Out

Paragraph 1417(f)(1). *Tagging out of service equipment/functions.* Where the employer has taken the equipment out of service, this proposed paragraph would require that the employer place a tag in the cab stating that the equipment is out of service and not to be used. Where the equipment remains in service but the employer has taken a function out of service, this proposed paragraph would require that the employer place a tag in a conspicuous position stating that that function is out of service and not to be used. This proposed paragraph is designed to prevent hazards associated with workers inadvertently attempting to use out-of-service equipment or a function that is out of service.

Currently, section 5–2.3.2 of ANSI B30.5–1968, which is incorporated by reference in Subpart N, requires ''out of order'' signs on crawler, locomotive and truck cranes undergoing maintenance. Unlike proposed 1926.1417(f)(1), 29 CFR part 1926 subpart N does not address the situation where the equipment itself is in service but a function is out of service.

Paragraph 1417(f)(2) Response to ''Do Not Operate''/Tag-Out Signs

Paragraph 1417(f)(2)(i). If there is a warning sign on the equipment or starting control, proposed paragraph (f)(2)(i) would prohibit the operator from activating the switch or starting the equipment until the sign is removed by someone authorized to remove it or until the operator can verify that (A) no one is servicing, working on, or otherwise in a dangerous position on the machine, and (B) the equipment has been repaired and is working properly. Similarly, under proposed § 1926.1417(f)(2)(ii), when there is a warning sign on any other switch or control, the operator would be prohibited from activating that switch or control until the sign has been removed by an individual authorized to remove it, or until the operator meets the two requirements of paragraph § 1926.1417(f)(2)(i), described above.

These provisions would prevent two types of hazards. First, since the machine is out of service, there is a risk that an employee servicing, working on, or otherwise in a dangerous position on it is not expecting it to be activated and would be injured if it were activated. Second, if an employee does not know that the equipment is malfunctioning or has a function that is not working properly, an employee could inadvertently try to operate it with the result that the equipment will not work as intended, causing unintended movement or a collapse.

Subpart N addresses this issue through section 5–3.1.3g of ANSI B30.5–1968, which states: ''If there is a warning sign on the switch or engine starting controls, the operator shall not close the switch or start the engine until the warning sign has been removed by the person placing it there.'' Instead of requiring that the sign be removed by the person who placed it, proposed § 1926.1417(f)(2) would permit it to be removed by an authorized person and, as an alternative, permit the operator to start the equipment after verifying that no worker is in a dangerous area and that the equipment has been repaired and is working properly. C–DAC believed that either alternative would achieve the safety purpose of the tag-out because it would ensure that a knowledgeable and responsible person, either the operator or another authorized person, verifies that repairs are complete and all workers are in a safe position before the equipment can be started.

As discussed above, the operator would be permitted to start equipment that is tagged out or activate a tagged-out switch if the procedures specified in proposed § 1926.1417(f)(2)(i) are met. In reviewing this provision, the Agency noted that these procedures are not as comprehensive as those in the general industry standard for the control of hazardous energy (lockout/tagout), which are listed in § 1910.147(e)(3)(i) through (iii).[49] The Agency requests public comment on whether procedures similar to those in paragraphs 1910.147(e)(3)(i) through (iii)[50] would be feasible and appropriate for cranes/derricks used in construction.

Paragraph 1417(g). Before starting the engine, this proposed paragraph would require the operator to verify that all controls are in the proper starting position and that all personnel are in the clear. The Committee agreed that requiring operators to check that all controls are in their proper starting positions would prevent unintended movement of the equipment when the

[49] Section 1910.147 is not applicable to construction (see § 1910.147(a)(ii)(A)).

[50] These general industry provisions state:

(i) Verification by the employer that the authorized employee who applied the device is not at the factory;

(ii) Making all reasonable efforts to contact the authorized employee to inform him/her that his/her lockout or tagout device has been removed; and

(iii) Ensuring that the authorized employee has this knowledge before he/she resumes work at that facility.

Section 1910.147(e)(3)(i) through (iii).

engine is initially started. Similarly, requiring operators to ensure that all personnel are in the clear is designed to prevent personnel from being injured in the event that some aspect of the equipment moves upon start-up. Currently, section 5–3.1.3h of ANSI B30.5–1968, incorporated by reference in 29 CFR part 1926 subpart N, contains a comparable requirement.

Paragraph 1417(h). *Storm warning.* When a local storm warning has been issued, this proposed paragraph would require the competent person to determine whether it is necessary to implement manufacturer recommendations for securing the equipment. This provision was designed to prevent hazards that could arise from severe weather including inadvertent movement and crane collapse. High-speed winds in particular can affect both the crane and the load, reducing the rated capacity of the crane and affecting boom strength. Subpart N does not contain a corresponding requirement.

Paragraph 1417(i). [*Reserved.*] This proposed paragraph is reserved because it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1417(j)

This proposed paragraph would require that operators be familiar with the equipment and its proper operation. Furthermore, if adjustments/repairs are necessary, then the operator would have to promptly inform the individual designated by the employer to receive such information as well as inform the next operator in cases where there are successive shifts.

This paragraph addresses the need to identify problems that may develop with the equipment during operations. Early recognition of such problems by the operator would help prevent accidents that could result from continued operation of equipment that needs adjustment and/or repair. Operators who are familiar with the equipment and its proper operation can recognize such equipment anomalies and problems. By requiring that information about needed adjustments and/or repairs be provided to the individual designated by the employer to receive it, this proposed paragraph will facilitate the correction of those problems.

C–DAC did not specify any particular job title for the person to whom the operator would be required to provide this information because different employers may assign the responsibility of receiving such information to different job classifications.

Providing this information to the next operator in cases where there are successive shifts (that is, shifts that have no break between them) would ensure that the next operator is aware of this information and will be able to take appropriate action.

This provision is comparable to section 5–3.1.3j of ANSI B30.5–1968, incorporated by reference in Subpart N, which requires operators of crawler, locomotive and truck cranes to familiarize themselves with the equipment and its proper care, to report any needed adjustments/repairs or defects to a responsible person, and to notify the next operator of any such problems when changing shifts.

Paragraph 1417(k)

This proposed paragraph would prohibit safety devices and operational aids from being used as a substitute for the exercise of professional judgment by the operator. The Committee agreed that such devices and aids do not displace the need for operators to apply their professional judgment because the devices and aids can malfunction and lead to the types of safety hazards they are designed to prevent. Subpart N contains no corresponding provision.

Paragraph (l). [*Reserved.*] This proposed paragraph is reserved because it is inconvenient for readers to distinguish the letter ''l'' from the number ''1.''

Paragraph 1417(m)

If the competent person determines that there is a slack rope condition requiring re-spooling of the rope, this proposed paragraph would require that before starting the lift, it shall be verified that the rope is seated on the drum and in the sheaves as the slack is removed. This would prevent a loose coil of rope from becoming cross-coiled on the drum, a portion of the rope coming off the drum altogether, or the rope being pulled alongside (instead of seating in) a sheave. Each of these conditions can lead to sudden failure of the rope.

Section 5–3.2.3a.4 of ANSI B30.5–1968, incorporated by reference in Subpart N, has a provision stating: ''If there is a slack rope condition, it should be determined that the rope is properly seated on the drum and in the sheaves.'' The term ''should'' has been interpreted by the courts of appeals as meaning that the provision is non-mandatory. The provision in paragraph (m) of this section uses language making clear that the provision is mandatory.

Paragraph 1417(n)

This proposed paragraph addresses the hazards posed by wind, ice and snow on equipment capacity and stability. Wind can reduce capacity by imposing loads on the equipment, which can also reduce stability. Ice and snow can also reduce capacity and stability when it accumulates on the equipment. There are numerous variables involved in determining the effects of wind, ice and snow in any particular circumstance, (for example, the extent to which the crane is operating below its rated capacity, the sail effect presented by the load, the rate at which ice or snow is accumulating, and whether the snow is wet or light). C–DAC concluded that the most effective approach would be to require the competent person to consider their effect on equipment stability and rated capacity. 29 CFR part 1926 subpart N currently has no similar provision.

Paragraph 1417(o) Compliance With Rated Capacity

Paragraph 1417(o)(1). This proposed paragraph would require employers to ensure that equipment is not operated beyond its rated capacity. Overloading a crane or derrick can cause it to collapse, with potentially catastrophic consequences. This basic safeguard has long been recognized in the industry as crucial and is designed to prevent such accidents. A comparable requirement is contained in 29 CFR part 1926 subpart N through incorporation by reference of section 5–3.2.1a of ANSI B30.5–1968.

Paragraph 1417(o)(2). This proposed paragraph would require employers to ensure that operators are not required to operate the equipment in a manner that would exceed its rated capacity, in violation of proposed § 1926.1417(o)(1) above. This proposed provision reinforces the general prohibition of proposed § 1926.1417(o)(1) by making it a separate violation for an employer to expressly require an operator to exceed the equipment's rated capacity. 29 CFR part 1926 subpart N currently has no provision comparable to proposed paragraph (o)(2) of this section.

In the Committee's experience, a significant problem in the construction industry is that some employers pressure operators to conduct lifts that exceed the equipment's rated capacity. Such employers seek to avoid the time and expense associated with bringing in larger capacity equipment.[51]

[51] In some instances the overcapacity problem can be avoided by repositioning the crane (for example, by moving the crane so that the lift can be performed at a higher boom angle). However, even in those instances some time (and associated expense) is involved.

The Committee believed that in many of these instances the employer knows that the load exceeds the crane's rated capacity but acts on the belief that the rated capacity is sufficiently conservative to perform the lift. In some such cases the exact weight of the load is unknown, and the employer pressures the crane operator in the belief that even if the operator is right about the weight exceeding the capacity rating, the safety factor that the employer assumes is built into the capacity rating will enable the crane to perform the lift anyway.

In the C–DAC discussions of this issue, members explained that while equipment capacity ratings are developed with consideration of a safety factor, that safety factor is not intended by the manufacturer to be treated as excess capacity. There are numerous, complex considerations used by manufacturers in setting the capacity rating. Employers cannot safely assume that, in any particular situation, they will not need the benefits conferred by the safety factor.

There continue to be a significant number of injuries and fatalities resulting from equipment overturning. Although it has long been a requirement not to exceed the equipment's rated capacity, in the Committee's experience, a significant number of overturning incidents are caused by exceeding rated capacity. A study of fatal accidents involving cranes in the U.S. construction industry for 1984–1994, based on investigations of reported accidents conducted by OSHA and states with OSHA-approved safety and health programs, showed that 22 deaths resulted from overloaded cranes. A. Suruda, M. Egger, & D. Liu, ''Crane-Related Deaths in the U.S. Construction Industry, 1984–94,'' p. 12, Table 9, The Center to Protect Workers' Rights (Oct. 1997). (OSHA–2007–0066–0013).

The Committee believed that there are several root causes of this problem, including lack of operator qualification/certification requirements, insufficient ground conditions, reliance on unreliable information regarding load weight, and operators being pressured into exceeding rated capacity. The Committee concluded that this additional measure is needed to help counteract the persistent problem of operators being pressured into exceeding rated capacity.

Paragraph 1417(o)(3). *Load weight.* As discussed above, another cause of injuries and fatalities from overturning equipment is the use of unreliable information on load weight. The Committee concluded that one of the ways these incidents can be reduced is to require that load weight be verified by a reliable means.

Under this proposed paragraph, the operator would be required to verify that the load is within the rated capacity of the equipment by using the procedures in either proposed § 1926.1417(o)(3)(i) or (ii). Under § 1926.1417(o)(3)(i), the weight of the load would have to be determined in one of three ways: From a reliable source, from a reliable calculation method, or by other equally reliable means. An example of verifying the load weight from a reliable source would be where the load is mechanical equipment and the weight is obtained from its manufacturer.

An example of a reliable calculation method would be the following: The load is a steel I–beam. After measuring the thickness of the steel and the I–beam's other dimensions, the operator uses an industry table that shows weight per linear foot for a beam of these dimensions. The operator then calculates the beam's weight using that information. If the weight of the load is determined under proposed § 1926.1417(o)(3)(i), the information about how the load weight was determined must be provided to the operator, prior to the lift, upon the operator's request. This provision is included to help ensure that the operator has the information necessary to verify that the load is within the rated capacity of the equipment.

Under proposed paragraph (o)(3)(ii), the operator would have to begin hoisting the load to determine if it exceeds 75 percent of the maximum rated capacity at the longest radius that will be used during the lift operation, using a load weighing device, load moment indicator, rated capacity indicator, or rated capacity limiter. If the load does exceed 75 percent of the maximum rated capacity, then the operator would be prohibited from proceeding with the lift until he/she verifies the weight of the load in accordance with proposed § 1926.1417(o)(3)(i).

The Committee concluded that as long as one of these devices shows that the load does not exceed 75% of the rated capacity (at the longest radius that will be used), it is not necessary to determine the actual weight of the load. Its conclusion is based on the belief that this verification procedure [52] incorporates a sufficient margin of error and would be adequate to ensure that the crane's rated capacity would not be exceeded.

In contrast, the Committee believed that if the device shows that the load exceeds 75%, there is an insufficient margin of error to proceed without a more accurate determination. In such instances a verified determination of the actual weight, in accordance with proposed § 1926.1417(o)(3)(i), is needed to ensure safety.

Currently, the only Subpart N requirement for determining or verifying the weight of the load is found in section 5–3.2.1b of ANSI B30.5–1968, which states: ''When loads which are limited by structural competence rather than by stability are to be handled, the person responsible for the job shall ascertain that the weight of the load has been determined within plus or minus 10 percent before it is lifted.'' The Committee believed that the more detailed procedures in proposed § 1926.1417(o)(3) and the greater margin of safety provided by the 75% limit are needed to prevent the crane's capacity from being exceeded.

Paragraph 1417(p)

This proposed paragraph would require that the boom or other parts of the equipment not contact any obstruction. The Committee agreed on this provision because of its understanding that boom contact with an obstruction can deform, misalign or otherwise damage the equipment. Such damage can cause unintended movement, prevent intended movement, or a collapse. 29 CFR part 1926 subpart N currently has no similar provision.

Paragraph 1417(q)

This proposed paragraph would require that the equipment not be used to drag or pull loads sideways. The Committee intended this provision to prevent the sideloading that occurs when a load is dragged or pulled sideways. Sideloading can buckle the boom, damage the swing mechanism, or overturn the crane (such as when the boom is at a high angle). Currently, section 5–3.2.3c.2 of ANSI B30.5–1968 contains a similar requirement, providing: ''Side loading of booms shall

[52] The operator would still be required to use his or her professional judgment in determining whether the load exceeds the capacity of the equipment. As discussed above, proposed § 1926.1417(k) would prohibit sole reliance by the operator on an operational aid, such as a load weight device, for ensuring that the equipment's capacity will not be exceeded. The procedure in proposed § 1926.1417(o)(3)(ii) is a verification procedure—it would verify that the operator's estimate is at least correct in terms of not exceeding 75% of the equipment's rated capacity (at the longest radius that will be used). If, for example, the load weight device yields a figure that is significantly below what the operator estimates to be the true weight, the operator would need to reliably determine the weight of the load before proceeding with the lift.

be limited to freely suspended loads. Cranes shall not be used for dragging loads sideways.'' (As discussed below, proposed paragraph (v) addresses sideloading of freely suspended loads by restricting the speed of rotation).

Paragraph 1417(r)

On wheel-mounted equipment, this proposed provision would require that no loads be lifted over the front area, except as permitted by the manufacturer. The Committee agreed on this provision because wheel-mounted equipment typically is not designed to lift loads over the front area without tipping over unless it is specifically designed to do so (such as where equipped with a front outrigger for support and stabilization for this purpose). Equipment that is not so designed will likely tip over or otherwise fail when lifting loads over the front area. This proposed paragraph continues the requirement of section 5–3.2.3g of ANSI B30.5–1968, which is incorporated by reference in Subpart N.

Paragraph 1417(s)

In many circumstances an operator may use equipment that has not recently been used to handle a load that is 90% or more of the maximum line pull. The condition and adjustment of the brakes may be sufficient to handle lesser loads, but insufficient to handle loads closer to their design capacity. Consequently, the operator may not know that the brakes are insufficient until after the load is hoisted. In such a case the load could be dropped, posing a struck-by hazard.

This proposed paragraph would address that hazard by requiring that the operator test the brakes each time a load that is 90% or more of the maximum line pull is handled by lifting the load a few inches and applying the brakes. In duty cycle and repetitive lifts where each lift is 90% or more of the maximum line pull, this requirement would apply to the first but not to successive lifts, since the operator would have already determined from the initial test that the brakes are sufficient.

Currently, 29 CFR part 1926 subpart N contains a similar requirement through section 5–3.2.3h of ANSI B30.5–1968, which states: ''The operator shall test the brakes each time a load approaching the rated load is handled by raising it a few inches and applying the brakes.'' C–DAC believed that additional clarity than that found in the ANSI provision is needed to give employers notice of when a brake test was required and therefore proposed in § 1926.1417(s) to require testing when the load is 90% or more of the maximum line pull.

Paragraph 1417(t)

This proposed paragraph would require that neither the load nor the boom be lowered below the point where less than two full wraps of rope remain on their respective drums. This provision is designed to ensure that the rope is not unspooled to the point where the rope would become disconnected from the drum. It continues the current Subpart N requirement found in section 5–3.2.3j of ANSI B30.5–1968.

Paragraph 1417(u) Traveling With a Load

Paragraph 1417(u)(1). This proposed paragraph would prohibit traveling with a load if the practice is prohibited by the manufacturer. If the manufacturer does not prohibit this practice, the equipment may travel with a load, but only if the requirements of proposed § 1926.1417(u)(2) are met. 29 CFR part 1926 subpart N does not prohibit traveling with a load if the practice is prohibited by the manufacturer but, through incorporation of section 5–3.2.3n of ANSI B30.5–1968, permits traveling with a load whenever conditions similar to those in proposed § 1926.1417(u)(2)(i) are satisfied.

The dynamic effects of traveling with a load impose additional and/or increased forces on crane components. Unless the crane has been designed to handle these types of forces and force levels, they can cause component failure, collapse, instability or overturning. The Committee believed that the manufacturer has the expertise to ascertain its equipment's capabilities. Therefore, the Committee believed that where the manufacturer has prohibited traveling with the load, such a determination needs to be complied with to ensure safety.

Paragraph 1417(u)(2). If the manufacturer does not prohibit traveling with a load, the equipment may travel with a load if the requirements of proposed § 1926.1417(u)(2) are met. This proposed paragraph sets forth three procedures that employers would have to follow when traveling with a load.

Paragraph 1417(u)(2)(i). Pursuant to this proposed paragraph, a competent person would have to supervise the operation, determine if it is necessary to reduce crane ratings, and make determinations regarding load position, boom location, ground support, travel route, overhead obstructions, and speed of movement necessary to ensure safety. Under proposed § 1926.1417(u)(2)(ii), the determinations of the competent person must be implemented. These provisions are similar to section 5–3.2.3n of ANSI B30.5–1968, which is incorporated in 29 CFR part 1926 subpart N.

As discussed above, traveling with a load imposes types and levels of forces on the equipment that are not present when the equipment is stationary, and conditions such as load position and boom location can affect the magnitude of those forces. Some of the criteria in proposed § 1926.1417(u)(2)(i) address this type of effect. Other criteria in this paragraph are intended to ensure that other hazards—those posed by the crane being in changing locations (such as ground support, travel route and overhead obstructions)—are addressed by the competent person. When traveling with a load, a crane may encounter hazards such as power lines, insufficient ground support, uneven or slippery ground conditions, and obstructions that the equipment could strike.

A competent person must address these issues before the equipment begins to travel with a load. The competent person must also supervise the operation as it proceeds so that problems that arise that were not foreseen at the outset can be properly addressed. In sum, the Committee designed these provisions to ensure that the employer plans and implements a travel operation so that the various effects and changeable conditions associated with travel are properly identified, assessed and addressed.

Paragraph 1417(u)(2)(iii). For equipment with pressurized tires, this proposed paragraph would require that tire pressure specified by the manufacturer be maintained. Subpart N currently has no corresponding provision.

The Committee agreed on this provision to address the hazards posed by improper tire pressure when traveling with a load. Where pressure varies among the tires, the equipment may be out of level, reducing capacity and causing instability. Uniform but improper pressure can reduce capacity or lead to tire failure. Each of these circumstances can lead to unintended movement, loss of the load, overturning and/or collapse.

Paragraph 1417(v)

This proposed paragraph would require that rotational speed of the equipment be such that the load does not swing out beyond the radius at which it can be controlled. As noted above in relation to proposed § 1926.1417(q), 29 CFR part 1926 subpart N currently permits sideloading

of freely suspended loads with no restriction comparable to that in proposed § 1926.1417(v).

The Committee intended this provision to prevent the hazard of sideloading, which occurs when the load swings to either side of the boom tip, rather than its appropriate position directly beneath the boom tip. When the load is not directly under the boom tip, sideloading occurs and decreases capacity. This hazard can lead to tip-over or boom failure.

Paragraph 1417(w)

This proposed paragraph would require that a tag or restraint line be used if necessary to prevent rotation of the load that would be hazardous. The Committee agreed on this provision in order to prevent the hazard of an unstable or uncontrolled load which could in turn destabilize other parts of the crane or the crane itself. This condition can also result in the load posing a struck-by hazard. Section 5–3.2.3p of ANSI B30.5–1968 contains a comparable requirement.

Paragraph 1417(x)

This proposed paragraph would require that the brakes be adjusted in accordance with manufacturer procedures to prevent unintended movement. This requirement would apply to all brakes on equipment covered by this standard, including brakes used to control the lowering of the load and those used to stop the equipment while it is traveling. Improper adjustment can cause a delay in the onset of braking after the operator attempts to activate the brake and can also diminish the brake's capacity. Brakes are critical to the safe operation of the equipment and must be properly adjusted to serve their safety function.

Currently, 29 CFR part 1926 subpart N does not specifically address brake adjustment. However, section 5–2.3.1a of ANSI B30.5–1968 requires a preventive maintenance program based on the manufacturer's recommendations, and section 5–2.3.3b requires that all components and operating mechanisms be adjusted to ensure their correct functioning. In light of the critical role that brakes play in ensuring equipment safety, these provisions of ANSI B30.5–1968 can be read to include brake adjustments. The Committee concluded that the more explicit approach to this issue taken in proposed § 1926.1417(x) requirement would help enhance employee safety.

Paragraph 1417(y)

This proposed paragraph would require that the operator obey a stop or emergency stop signal, regardless of who gives the signal. Any person on a worksite may observe a hazardous condition that is not visible to or recognized by the crane operator and that can only be avoided if the equipment stops immediately. Therefore, the operator must obey a stop signal given by anybody on the worksite. Section 5–3.1.3c of ANSI B30.5–1968 contains a comparable requirement.

Paragraph 1417(z) Swinging Locomotive Cranes

Pursuant to this proposed paragraph, a locomotive crane shall not be swung into a position where it is reasonably foreseeable that railway cars on an adjacent track could strike it, until it is determined that cars are not being moved on the adjacent track and that proper flag protection has been established. A comparable requirement is contained in section 5–3.4.4 of ANSI B30.5–1968.

Paragraph 1417(aa) Counterweight/ Ballast

Paragraph 1417(aa)(1). This proposed paragraph contains counterweight/ ballast requirements that would apply to equipment other than tower cranes. Pursuant to proposed § 1926.1417(aa)(2), requirements regarding counterweight/ballast for tower cranes are found in proposed § 1926.1435(b)(7).

Paragraph 1417(aa)(1)(i). This proposed paragraph would require that equipment not be operated without the counterweight or ballast in place as specified by the manufacturer. Failure to follow the manufacturer's specifications for use of counterweights and ballast could result in a tipover or collapse.

Paragraph 1417(aa)(1)(ii). Under this proposed provision, the employer would be prohibited from exceeding the maximum counterweight or ballast specified by the manufacturer for the equipment. Exceeding that maximum could result in component failure, which could cause unintended movement, tipover or collapse.

Requirements similar to those in § 1926.1417(aa)(1)(i) and (ii) are currently contained in Subpart N through incorporation by reference of section 5–3.4.2 of ANSI B30.5–1968.

The C–DAC draft of this provision stated that the maximum counterweight or ballast ''approved'' by the manufacturer shall not be exceeded. Upon reviewing the draft, OSHA determined that a term that more accurately reflects the Committee's intent in this regard is ''specified.'' Therefore, the Agency has modified the C–DAC language so that proposed § 1926.1417(aa)(1)(ii) reads:

> The maximum counterweight or ballast specified by the manufacturer for the equipment shall not be exceeded.

Paragraph 1417(aa)(2). This proposed paragraph complements proposed § 1926.1417(aa)(1) by noting that the counterweight and ballast requirements for tower cranes are found in proposed § 1926.1435(b)(8).

Section 1418 Authority To Stop Operation

This proposed section provides: ''Whenever there is a concern as to safety, the operator shall have the authority to stop and refuse to handle loads until a qualified person has determined that safety has been assured.'' Subpart N incorporates pre-1971 industry consensus standards that require operators to have comparable authority, and current industry consensus standards contain similar provisions. An appropriately capable equipment operator is highly knowledgeable in matters affecting equipment safety and is well qualified to determine whether an operation presents a safety concern. C–DAC believed that it continues to be necessary for the employer to provide this authority to the operator.

Current consensus standards specify that an operator with a safety concern must raise that concern with a supervisor before proceeding with a lift. For example, section 5–3.1.3(d) of ANSI B30.5–2004, ''Mobile and Locomotive Cranes,'' provides: ''Whenever there is any doubt as to safety, the operator shall consult with the supervisor before handling the loads.'' Similar provisions are included in section 2–3.1.7 of ASME B30.2–2001, ''Overhead and Gantry Cranes,'' section 3–3.1.3(d) of ASME B30.3–1996, ''Construction Tower Cranes,'' section 6–3.2.3 of ASME B30.6–2003, ''Derricks,'' and other standards in the ASME B30 series.

The proposed section reflects C–DAC's belief that it is necessary to clearly delineate the circumstances under which it would be permissible to resume operations after the operator has exercised this authority. Under the proposed provision, operations would be prohibited from resuming ''until a qualified person had determined that safety has been assured.''

In accordance with the proposed definition of a qualified person (see the discussion above of this term in proposed § 1926.1401), that person would, ''by possession of a recognized degree, certificate, or professional

standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems relating to the subject matter, the work or the project.'' For example, operations could resume only after the qualified person either: (1) Assesses the factors that led the operator to stop and refuse to handle the load and determines that there is not, in fact, a safety hazard, or (2) after corrective action has been taken, determines that there is no longer a safety hazard.

An illustrative example of this is the following: A large steel cylinder, which is lying lengthwise on the ground, is to be lifted into the vertical position and then up to the top of a structure. As the crane operator prepares to lift the cylinder into the vertical position, the operator sees that the rigging is attached at a point that is more than halfway down from the top of the cylinder. This indicates to the operator that the rigging has been attached below the cylinder's center of gravity. Rigging such a load below the center of gravity could cause it to flip over when it is lifted. As a result of this concern, the operator exercises his/her authority to stop and refuse to handle the load.

After the operator explains his/her concern to the employer, the employer consults with an individual who is a qualified person with respect to the rigging of the load. The qualified person finds that the wall of the steel cylinder is much thicker near its base than at the top. After calculating the cylinder's center of gravity, the qualified person determines that it is well below the midpoint of the cylinder. The qualified person then determines that the rigging is, in fact, attached above the cylinder's center of gravity, and that safety is assured. The lifting operation is then resumed.

In this example the operator appropriately exercised his/her authority to stop and refuse to handle the load, since there were indications of an unsafe condition. A qualified person then appropriately found that safety was assured after examining those indications, assessing the relevant factors, and determining that the load was in fact rigged in a safe manner.

Signals

Proposed §§ 1926.1419 through 1926.1422 address the circumstances under which a signal person must be provided, the type of signals that may be used, criteria for how signals are transmitted, and other criteria associated with the use of signals.

Section 1419 Signals—General Requirements

This proposed section would set requirements regarding signals when using equipment covered by this proposed standard.

Currently, § 1926.550(a)(4) provides: ''Hand signals to crane and derrick operators shall be those prescribed by the applicable ANSI standard for the type of crane in use. An illustration of the signals shall be posted at the job site.'' C–DAC believed that the current rule is insufficient in several respects. First, the current rule does not establish the circumstances in which there is a need to have a signal person. Second, the current standard refers only to hand signals. C–DAC believed that other means of signaling need to be addressed as well to provide necessary flexibility and reduce the potential for miscommunication (requirements regarding other signaling methods are addressed in proposed §§ 1926.1420 and 1926.1421).

Finally, C–DAC found that hazardous situations arise as a result of signal persons not understanding safety-related aspects of crane operations and dynamics and not knowing how to give appropriate signals. Consequently, it determined that there is a need to establish requirements regarding the qualifications of the signal person; these are addressed in proposed § 1926.1428. In short, C–DAC believed that addressing these issues is one of the means by which the number of injuries and fatalities caused by ''struck-by'' incidents, in which the equipment or load strikes an employee, can be reduced.

Paragraph 1419(a)

Proposed paragraphs (a)(1) through (a)(3) address the circumstances that would require the provision of a signal person: When the point of operation, meaning the load travel or the area near or at load placement, is not in full view of the operator (§ 1926.1419(a)(1)); when the equipment is traveling and the operator's view in the direction of travel is obstructed (§ 1926.1419(a)(2)); and when, due to site specific safety concerns, either the operator or the person handling the load determines it is necessary (§ 1926.1419(a)(3)). The first two of these circumstances involve an obvious hazard—limited operator visibility.

With respect to the third circumstance, C–DAC believed that other situations arise that, from a safety standpoint, necessitate the use of a signal person. For example, the operator may recognize that the load at one point will move alongside and very close to a structure. Even though the load in this example will remain in view of the operator as it travels, because of the tight tolerances involved, the operator determines that a signal person is needed to help ensure that the load does not come in contact with the structure (which could cause the load to fall).

Another example is where a heavy load, such as a large HVAC unit, has to be placed very precisely on a concrete pad. In this example, as in the previous one, the load remains within the view of the operator at all times. However, the employee handling the load determines that signals need to be given to the operator so that the load handler's work and the operator's movement of the load are properly coordinated. Because of the weight of the load, the employee handling it will have to use both hands to help position it as it is placed on the pad and will not be able to give signals. In such an instance the person handling the load could determine that a signal person is necessary.

Paragraph 1419(b) Types of Signals

Under proposed paragraph (b), signals to crane operators would have to be by hand, voice, audible, or ''new'' signals. As used in this proposed standard, these terms refer to the type of signal, not the means by which the signal is transmitted. For example, signaling by voice refers to oral communication, not whether the oral communication is done with or without amplification or with or without electronic transmission. The manner of transmission of the signal is addressed separately.

''Audible signal'' is defined in § 1926.1401 as ''a signal made by a distinct sound or series of sounds. Examples include, but are not limited to, sounds made by a bell, horn, or whistle.'' Under some circumstances, audible signals are effective means of communicating with an operator, and C–DAC defined the term to make clear the types of sounds that would be permissible.

The criteria for the use of these signal types are set out in proposed § 1926.1419(c)–(m) (additional voice signal requirements are in proposed § 1926.1421, *Signals—voice signals—additional requirements*). The Committee's intent was to reduce the potential for miscommunication, which can lead to injuries and fatalities, particularly from ''struck-by'' and ''crushed-by'' incidents. In setting parameters for the use of the various types of existing signal methods, and for signal methods that may be developed in the future, the Committee sought to

promote a degree of standardization while still allowing appropriate flexibility. In addition, the proposed provisions are designed to ensure that the selection of signal type and means of sending the signals are appropriate under the circumstances and reliable.

Paragraph 1419(c) Hand Signals

Proposed paragraph (c) addresses the use of hand signals. The industry has long recognized the need for consistent, universal hand signals to minimize the potential for miscommunication between signal persons and operators. ANSI B30.5–1968, ''Crawler, Locomotive and Truck Cranes,'' contains illustrations of hand signals that are the same as the current 2004 edition of ASME B30.5 and that are consistent with hand signals for other types of cranes in ASME B30 standards. Subpart N currently requires that hand signals to crane and derrick operators ''be those prescribed by the applicable ANSI standard for the type of crane in use'' and that ''an illustration of the signals shall be posted at the job site'' (§ 1926.550(a)(4)).

Because of the industry's long familiarity with these standard hand signals, C–DAC determined that, when using hand signals, the standardized version of the signals should continue to be required. These signals are referred to as the ''Standard Method,'' which is defined in proposed § 1926.1401 as ''the protocol in Appendix A for hand signals.'' The ''Standard Method'' signals are located in Appendix A. However, the Committee recognized that there are instances when use of the Standard Method is either infeasible or where there is no Standard Method signal applicable to the work being done.

For example, the Standard Method signal for raising the boom is: arm extended, thumb pointing upward and other fingers closed. The signal for lowering the boom is the same except the thumb points down. There are circumstances where back-lighting conditions make it difficult for the operator to see the signal person's thumb and therefore cannot discern whether it is pointing up or down. In such circumstances use of the standard signal would be infeasible.

In such instances, under this proposed paragraph, non-standard signals (examples of which are provided in Appendix B of this proposed rule) may be used. To avoid confusion when non-standard signals are used, proposed § 1926.1419(c)(2) would require that the signal person, crane operator, and lift supervisor (where there is one) meet prior to the operation to agree upon the signals that will be used.

Paragraph 1419(d) New Signals

Proposed paragraph (d) would allow signals other than hand, voice, or audible signals to be used if certain criteria are met. As discussed above under proposed § 1926.1419(b), C–DAC include § 1926.1419(d) to allow for the development of new signals in the future. To ensure that any new signals are as effective as hand, voice, or audible signals, proposed 1926.1419(d)(1) and (d)(2) would require the employer to demonstrate either that the new signals are as effective as existing signals for communicating, or that there is a national consensus standard for the new signals.[53] C–DAC believed it was appropriate to allow reliance on signals in a national consensus standard because their inclusion in such a standard shows a high degree of standardization and widespread acceptance by persons who are affected by the signals, thereby ensuring that the signals can be used safely to control equipment operations.

Paragraph 1419(e) Suitability

Under proposed paragraph (e), the type of signal (hand, voice, audible, or new) and the transmission method used would have to be suitable for the site conditions. For example, hand signals would not be suitable if site conditions do not allow for the signal person to be within the operator's line of sight. Radio signals would not be suitable if electronic interference on the site prohibits the signals from being readily understood.

Paragraph 1419(f)

Proposed paragraph (f) would require the ability to transmit signals between the operator and signal person to be maintained. If that ability is interrupted, the operator would be required to safely stop operations until signal transmission is reestablished and a proper signal is given and understood.

Paragraph 1419(g)

Proposed paragraph (g) would require the operator to stop operations if the operator becomes aware of a safety problem and needs to communicate with the signal person. Operations may only be resumed after the operator and signal person agree that the problem has been resolved.

[53] The C–DAC draft refers to an ''industry consensus standard.'' OSHA hasd changed this to ''national consensus standard'' to conform to the terminology used in the OSH Act.

Most signal systems permit only one-way communication, from the signal person to the operator. In addition, most two-way systems, such as a typical two-way radio system, only permit one person to speak at a time. When using such systems, circumstances may arise in which the operator, while receiving signals, becomes aware of a safety problem that is of a nature that necessitates that the operator communicate with the signal person. For example, the signal person signals to the operator to lower the load. However, the operator sees that an employee has moved under the load in an area that is out of the view of the signal person. Under this proposed provision the operator would have to safely stop lowering the load and communicate the problem to the signal person.

Another example is where the signal person gives a hand signal but it appears to the operator that the signal person is using the wrong signal. The operator would be required to safely stop operations and communicate with the signal person to resolve the problem.

Paragraph 1419(h) and (j)

Proposed paragraph (h) would require that only one person at a time signal the operator. C–DAC believed this provision was needed to prevent confusion with respect to which signals the operator is supposed to follow. An exception is provided when, as provided in proposed § 1926.1419(j), somebody becomes aware of a safety problem and gives an emergency stop signal. Under proposed § 1926.1417(y), the operator would be required to obey such a signal.

Paragraph 1419(i) [*Reserved*.] Paragraph (i) is reserved because it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1419(k)

Proposed paragraph (k) would require that all directions given to the operator by the signal person be given from the operator's direction perspective. In the Committee's experience, the operator will tend to react to a directional signal, such as ''forward,'' by acting on the signal from the operator's perspective. This provision would ensure that the signal that is given will be consistent with that natural tendency.

Paragraph 1419(l) [*Reserved*.] Paragraph (l) is reserved because it is inconvenient for readers to whether ''l'' is being used as a letter or a number.

Paragraph 1419(m) Communication With Multiple Cranes/Derricks

Proposed paragraph (m) addresses a situation where the signal person is in communication with more than one crane or derrick. It would require the signal person to use an effective means of identifying the crane or derrick the signal is for before giving the signal. Proposed § 1926.1419(m)(i) and (ii) set out alternate means of complying with this requirement. Under proposed § 1926.1419(m)(i), for each signal, prior to giving the function/direction, the signal person must identify the crane/derrick for which the signal is intended. Alternatively, under proposed § 1926.1419(m)(ii), the employer could implement a method of identifying which crane/derrick for which the signal is intended that is as effective as the system in proposed § 1926.1419(m)(i). Because of the potential for confusion, it is essential that an alternative system under proposed § 1926.1419(m)(ii) be equally effective as § 1926.1419(m)(i) in clearly conveying, on a consistent basis, the crane/derrick to which each signal is directed.

Section 1420 Signals—Radio, Telephone, or Other Electronic Transmission of Signals

C–DAC concluded that certain criteria are needed to ensure the reliability and clarity of electronically transmitted signals; these criteria are listed in proposed paragraphs § 1926.1420(a) through (c). Proposed paragraph (a) would require the testing of the transmission devices prior to the start of operations to ensure that the signals are clear and that the devices are reliable. This will help ensure that the operator receives and can understand the signals that are given and will prevent accidents caused by miscommunication.

Proposed paragraph (b) would require that such signals be transmitted through a dedicated channel. As defined in § 1926.1401, a ''dedicated channel'' is ''a line of communication assigned by the employer who controls the communication system to only one signal person and crane/derrick or to a coordinated group of cranes/derricks/signal person(s).'' Use of a dedicated channel would ensure that the operator and signal person are not interrupted by users performing other tasks or confused by instructions not intended for them.

An exception to § 1926.1419(b) would allow more than one signal person and more than one crane/derrick operator to share a dedicated channel in multiple crane/derrick situations for coordinating operations. The Committee believed that this exception is needed because, in those situations, it may be advantageous to share a single dedicated channel. For example, in some situations several cranes may be operating in an area in which their booms, loads or load lines could come in contact with each other. In such cases it is crucial that the movements of each crane be properly coordinated. By sharing a single channel, each operator can hear what each crane is being asked to do, which can facilitate that coordination.

Proposed paragraph (c) would require that the operator's reception be by a hands-free system. In other words, the operator must not have to depress a button, manipulate a switch, or take any action in order for the incoming signal to be received. C–DAC believed that this provision is needed because the operator must have both hands free to manipulate the equipment's controls.

Paragraph 1421 Signals—Voice Signals—Additional Requirements

C–DAC considered whether the proposed rule should include a standardized set of voice signals. Unlike hand signals, which have become standardized to a large extent within the industry, in the Committee members' experience there is significant variation in the phrases used to convey the same instructions. Consequently, words or phrases that the Committee might choose to propose to be required as voice signals could be unfamiliar to many employees in the industry or contrary to common usage in some parts of the country. In light of this, the Committee determined that it would be better to use a different approach to address the problem of miscommunication when using voice signals. This approach, which establishes criteria for whatever voice signals are used, is set out in proposed § 1926.1421(a)–(c).

Under proposed paragraph (a), prior to beginning operations, the personnel involved with signals—the crane operator, signal person and lift supervisor (if there is one)—would be required to meet and agree on the voice signals that will be used. Because of the lack of standardization and the variety of languages that are in use in the construction industry, the Committee concluded that it is essential that the persons who give and/or receive voice signals agree in advance on the signals that will be used in order to avoid miscommunication. Once the parties have met and agreed on the voice signals, another meeting is not required to discuss them unless another worker is substituted, there is some confusion about the signals, or a signal needs to be changed.

In reviewing the C–DAC draft of this provision, the Agency realized that the adjective ''voice'' was inadvertently left out when referring to signals. To avoid ambiguity, the Agency has added the term ''voice'' to clarify that this proposed provision applies to the use of voice signals.

Proposed paragraph (b) would require that each voice signal contain the following three elements, given in the following order: function (such as hoist, boom, etc.), direction; distance and/or speed; Function, stop command. For example: hoist up; 10 feet; hoist stop. As discussed above, the Committee considered it impractical to attempt to standardize the voice signals themselves (that is, to require the use of particular words to represent particular functions, directions or other instructions). However, the Committee concluded that the chance of miscommunication could nonetheless be reduced if certain parameters were established for the type of information and order of information that would be given.

Proposed paragraph (c) would require the crane operator, signal person, and lift supervisor (if there is one) to be able to effectively communicate in the language used. Voice signals will not serve their intended purpose if they cannot be understood, or can be misinterpreted. The inability of these workers to understand each other could lead to accidents caused, for example, by the crane operator moving a load in a different direction than the signal person intends.

Section 1422 Signals—Hand Signal Chart

This proposed paragraph would require that hand signal charts be either posted on the equipment or be readily available at the site. The purpose of this proposed provision is to serve as a reference for operators and signal persons of the mandatory hand signals and thereby help avoid miscommunication.

Section 1423 Fall Protection

This proposed section contains provisions designed to protect workers on equipment covered by this Subpart from fall hazards. (See proposed § 1926.1431, *Hoisting Personnel,* for fall protection provisions that would apply when equipment is used to hoist personnel). Currently, 29 CFR part 1926 subpart N contains certain fall protection requirements but does not address fall protection for cranes and derricks comprehensively. Where Subpart N does not specifically address

a fall protection issue, the general fall protection provisions of 29 CFR part 1926 subpart M apply. As OSHA explained when it issued subpart M, ''while Subpart N contains requirements for fall protection when certain cranes are used, it does not address other equipment or working conditions otherwise covered by subpart N which may also expose employees to a fall hazard.''59 FR 40672, 40675 (Aug. 9, 1994).[54]

The fall protection requirements in Subpart M apply where an employee is on a ''walking/working surface.'' 29 CFR 1926.501. In § 1926.500(b), the definition of walking/working surface excludes ''vehicles.'' That definition effectively excludes many cranes (for example, mobile cranes would be considered ''vehicles'').

The Committee believed that safety would be enhanced by addressing the problem of fall hazards associated with cranes and derricks comprehensively. In addition, it believed that putting all such requirements under the cranes and derricks standard would make it easier for employers to readily determine the applicable fall protection requirements. Accordingly, under this proposed standard, Subpart M would not apply to equipment covered by this proposed subpart except where it incorporates requirements of Subpart M by reference. In this regard, note that the Agency is proposing to amend Subpart M at § 1926.500(a)(2)(ii) to remove the word ''certain.''

Definition of Fall Protection Equipment

''Fall protection equipment'' is defined in proposed § 1926.1401 as ''guardrail systems, safety net systems, personal fall arrest systems, positioning device systems, or fall restraint systems.'' The first four listed systems are described, and their specifications listed, in 29 CFR Part 1926. Subpart M of this part, OSHA's general fall protection standard for construction work. See § 1926.502(b) (guardrail systems); § 1926.502(c) (safety net systems); § 1926.502(d) (personal fall arrest systems); and § 1926.502(e) (positioning device systems).

The fifth category of fall protection equipment, ''fall restraint system,'' is defined in § 1926.1401 as ''a fall protection system that prevents the user from falling any distance. The system is comprised of either a body belt or body harness, along with an anchorage, connectors and other necessary equipment. The other components typically include a lanyard, and may also include a lifeline and other devices.'' This definition is found in 29 CFR part 1926. Subpart R of this part, OSHA's steel erection standard.

By defining ''fall protection equipment'' to include the same types of fall protection equipment required under other OSHA standards, C–DAC sought to ensure that employers would be familiar with the types of fall protection required under this standard and thereby promote compliance.

Paragraph 1423(a) Application

Falls have traditionally been the leading cause of deaths among construction workers. BLS data for 2004 and 2005, the latest years for which complete figures are available, shows 445 fatalities from falls in 2004 (OSHA–2007–0066–0023), and 394 in 2005 (OSHA–2007–0066–0024). In 2004, 20 fatalities resulted from falls from nonmoving vehicles and in 2005, such falls caused 18 deaths. A recent study of crane-related fatalities in the U.S. construction industry found that 2% resulted from falls. J.E. Beavers, J.R. Moore, R. Rinehart, and W.R. Schriver, ''Crane-Related Fatalities in the Construction Industry,'' 132 Journal of Construction Engineering and Management 901 (Sept. 2006) (OSHA–2007–0066–0012). Falls from cranes, particularly when the operator is entering or leaving the crane, also cause numerous non-fatal injuries to construction workers. (OSHA–S030–2006–0663–0422).

Under proposed paragraph (a), certain proposed provisions in this section (proposed § 1926.1423(c)(1), (f) and (h)) would apply to all equipment, including tower cranes; certain provisions (proposed § 1926.1423(b), (c)(2), (d) and (e)) would apply to all equipment except tower cranes; and certain provisions (proposed paragraph (g) would apply only to tower cranes).

Paragraph 1423(b) Boom Walkways

Proposed paragraph (b) would establish when walkways must be incorporated into lattice booms and the criteria for such walkways. Boom walkways are not currently required by subpart N of this part.

Proposed paragraph (b)(1) would require that equipment manufactured more than one year after the effective date of this standard with a lattice boom be equipped with walkways on the boom if the vertical profile of the boom (from cord centerline to cord centerline) is 6 or more feet. C–DAC believed that the installation of walkways on booms would decrease the number of falls which occur during assembly/disassembly, inspection, and maintenance of booms and attached devices. Without a walkway, employees walking the boom must step from lattice to lattice. C–DAC believed it is safer to walk the boom if the boom is equipped with a walkway.

C–DAC considered the technical difficulty of equipping a boom with a vertical profile of less than 6 feet. Such booms would not accommodate the addition of a walkway into their design because the added weight of the walkway would significantly compromise their hoisting capacity. For that reason, C–DAC limited the requirement for boom walkways to equipment with lattice booms where the vertical profile of the boom is 6 feet or more.

Proposed paragraph (b)(2), *Boom walkway criteria,* would establish a minimum width for boom walkways and address safety issues associated with guardrails, railings and other attachments.[55] Proposed § 1926.1423(b)(2)(i) would require that walkways on booms be at least 12 inches wide. C–DAC considered requiring boom walkways to be at least 18 inches wide to remain consistent with § 1926.451(b)(2) of the scaffold standard (Subpart L). However, C–DAC determined that there are engineering limitations applicable to booms that are not applicable to scaffolds. Specifically, the Committee found that an 18 inch requirement would present feasibility problems, especially on smaller booms. In such cases an 18 inch walkway's added weight would unduly impinge upon the equipment's capacity.

C–DAC believed that a walkway with a 12 inch width, while not as easy to use as an 18 inch walkway, would provide enough space for an employee to maintain his/her balance while walking from point to point on the boom when the boom is positioned horizontally. This would be a significant improvement over having to step across the open space between the boom's lattice-work and onto the lattice. In sum, the Committee concluded that the benefits obtained by providing a walkway on booms outweigh any drawbacks associated with a minimum width of 12 inches. Note that, in many circumstances, the safety benefits afforded by this walkway would be supplemented by fall protection equipment (see the discussion below of proposed paragraphs (d) and (e)).

[54] In Subpart M, § 1926.500(a)(2) states: ''Section 1926.501 sets forth those workplaces, conditions, operations, and circumstances for which fall protection shall be provided except as follows: * * * (ii) Requirements relating to fall protection for employees working on certain cranes and derricks are provided in Subpart N of this part.''

[55] These criteria would apply to all boom walkways, not just those on lattice booms.

Proposed paragraph (b)(2)(ii) would address the use of guardrails, railings and other permanent fall protection attachments along walkways. The general fall protection standard for construction work at § 1926.501(b)(6) requires that walkways be equipped with guardrail systems to protect workers against falling 6 feet or more. This proposed section would retain the general requirement for fall protection at or above 6 feet for certain work (see discussion below of § 1926.1423(d)), but C–DAC believed that guardrails should not be a required form of fall protection on boom walkways because of the feasibility constraints discussed below.

Proposed paragraph (b)(2)(ii)(A) states that guardrails, railings and other permanent fall protection attachments along boom walkways would not be required. For some equipment, the added weight of fixed railings, combined with the walkway's weight, would unduly impinge upon the lift capacity of the boom. In addition, as discussed in relation to § 1926.1423(b)(2)(ii)(B) below, in some boom designs pendant ropes and bars (where present) could become snagged on such railings.

Proposed paragraph (b)(2)(ii)(B) would prohibit guardrails, railings and other permanent fall protection attachments along walkways on booms supported by pendant ropes or bars if the guardrails, railings or attachments could be snagged by the ropes or bars. Such snagging could cause instability or a collapse. Whether the potential for snagging is present on a boom supported by pendant ropes or bars would depend on the design of the equipment.

Proposed paragraph (b)(2)(ii)(C) would prohibit removable-type guardrails, railings, and other permanent fall protection along walkways. For purposes of this paragraph, ''removable-type'' means designed to be installed and removed each time the boom is assembled/disassembled. One of the Committee's concerns was that such devices may be left installed by mistake, which could damage the equipment and cause unexpected movement or a failure during its operation.

Under proposed paragraph (b)(2)(ii)(D), where guardrails or railings are not prohibited, they would be permitted to be of any height up to, but not more than, 45 inches. C–DAC believed that requiring all guardrails and handrails to comply with the height criteria in Subpart M of this part, which generally requires them to be 39 to 45 inches high, could deter manufacturers from equipping their products with guardrails and handrails. That is because meeting Subpart M's height criteria could make the device incompatible with the design and operation of the boom. For boom walkway applications, C–DAC concluded that using guardrails lower than 39 inches when higher guardrails are infeasible was preferable to not having any guardrails at all.

Paragraph 1423(c) Steps, Handholds, Grabrails, Guardrails and Railings

Proposed paragraph (c) would specify criteria for the use and maintenance of steps, handholds, grabrails, guardrails and railings.

Proposed paragraph (c)(1) would require that the employer maintain originally-equipped steps, handholds, ladders and guardrails/railings/grabrails in good condition. The failure to properly maintain such devices could pose dangers to the employees who use them. For example, a grabrail that has become weakened from rust could fail when an employee uses it, which could cause the employee to fall. Another example is a missing railing. A manufacturer that integrated a railing into its design may have provided a walking surface that would otherwise be too narrow to be safe.

Proposed paragraph (c)(2) would require that equipment manufactured more than one year after the effective date of this standard be equipped to provide safe access and egress between the ground and the operator work station(s), including the forward and rear operator positions, by the provision of devices such as steps, handholds, ladders, and guardrails/railings/grabrails. As discussed below, proposed § 1926.1423(c)(2)(i) would require these devices to meet updated design criteria.

Currently, § 1926.550(a)(13)(i) in Subpart N requires that guardrails, handholds, and steps be provided on cranes for easy access to the car and cab and specifies that these devices conform to ANSI B30.5. The 1968 version of ANSI B30.5, which was in effect at the time Subpart N was issued, specifies that the construction of these devices must conform to the 1946 U.S. Safety Appliance Standard. C–DAC recognized that many pieces of equipment now in use would have been manufactured with handholds and steps but was concerned that the handholds and steps may have been designed to meet outdated criteria.

The Committee believed that it would be unduly burdensome to require all equipment to be retrofitted with new steps, handholds, and railings simply because the existing design may vary from what would be required under this proposal. Accordingly, the proposal would allow one year from the date of the published final rule for equipment to be manufactured with devices that conform to proposed 1926.1423(c)(2)(i), discussed next. This would give equipment manufacturers adequate time to incorporate the requirements of § 1926.1423(c)(2)(i) into their products.

Proposed paragraph (c)(2)(i) would require that steps, ladders and guardrails/railings/ grabrails meet the requirements of SAE J185 (May 2003) or ISO 11660–2 (1994). OSHA's construction standards contain specifications for stairways and ladders in 29 CFR Part 1926 subpart X, but C–DAC believed that the Subpart X requirements do not take into account the characteristics of the equipment covered by this proposed standard. The specifications in SAE J185 are referenced in industry consensus standards, such as ASME B30.5–2004, ''Mobile and Locomotive Cranes,'' and crane manufacturers are familiar with those requirements. C–DAC recommended alternatively allowing compliance with ISO 11660–2 since employers also use equipment built by foreign manufacturers who have been following that standard.

Under proposed paragraph (a) of this section, the requirements in proposed paragraph § 1926.1423(c)(2) do not apply to tower cranes. It is the Agency's understanding that C–DAC excluded tower cranes from these requirements because the SAE and ISO standards referenced in § 1926.1423(c)(2)(i) are designed for, and only address, mobile cranes. The Agency also believes that the lack of a similar provision in the C–DAC document designed for tower cranes was an oversight; tower cranes also need to be equipped with safe stairways and ladders to enable the operator to ascend to the cab and descend safely.[56] Accordingly, OSHA plans to include a requirement similar to § 1926.1423(c)(2) that would be applicable to, and designed for, tower cranes, and requests public comment on this issue.

Proposed paragraph (c)(2)(ii) would require that walking/stepping surfaces, except for crawler treads, have slip-resistant features/properties (such as diamond plate metal, strategically placed grip tape, expanded metal, or slip-resistant paint). Section 1926.550(a)(13)(iii) of Subpart N of this part requires platforms and walkways to have anti-skid surfaces. C–DAC

[56] Note that section 3–1.17.2 of both the 1996 and 2004 versions of ASME B30.3, ''Construction Tower Cranes,'' calls for access ladders to the cab, machinery platform, and tower to conform to ANSI A14.3 or to SAE J185.

recommended that OSHA retain this requirement as a complement to the use of guardrails, handholds, grabrails, ladders and other engineered safety features that would be required by this proposed section. OSHA continues to believe that compliance with this provision would minimize the number of slips and falls for employees who must travel point to point to access the operator workstations on equipment covered by this proposed section.

Paragraph 1423(d) Fall Protection Requirements for Non-Assembly/Disassembly Work

Proposed paragraph (d) addresses fall protection requirements for employees engaged in work other than assembly/disassembly work (''non-A/D'' work). For such work, in certain circumstances, employers would be required to provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 6 feet above a lower level.

C–DAC discussed different trigger heights for fall protection requirements for particular types of cranes and derricks. Ultimately, C–DAC concluded that the requirements for fall protection should remain consistent with 29 CFR Part subpart M, which generally requires fall protection at heights at and above 6 feet, as much as possible. (As discussed below, for A/D work, the Committee recommended fall protection beginning at 15 feet). C–DAC also believed that, in its view, operators do not need to be tied off while moving to and from their cabs, and the proposal would make this clear by requiring fall protection equipment only when employees are moving point-to-point on booms or while at a work station (with certain exceptions). The Committee believed that the steps, handholds, and railings required under proposed § 1926.1423(c) would protect operators moving to and from their workstations and eliminate the need for additional fall protection equipment.

Paragraph 1423(d)(1) Non-Assembly/Disassembly: Moving Point to Point

Proposed paragraph (d)(1)(i) would require employers to provide and ensure the use of fall protection equipment at 6 feet and above when an employee is moving point to point on non-lattice booms (whether horizontal or not horizontal). As defined in § 1926.1401, ''moving point to point'' means ''the times during which an employee is in the process of going to or from a work station.''

C–DAC believed that non-lattice booms generally present more hazards to workers who must walk them to reach other work areas, devices, and equipment attached to it than lattice booms. Non-lattice booms are typically of the extensible type. As a result, as members noted, the walking/working surfaces on these types of booms are often oily (from the hydraulic mechanisms). Also, since the boom sections extend and retract, it is typically infeasible to provide boom walkways and other safety features. Because they tend to be slippery from oil, the Committee concluded that they are especially hazardous to move across even when horizontal. Therefore, where an employee is required to move point to point on a non-lattice boom, the proposal would require fall protection above 6 feet in height.

Proposed paragraph (d)(1)(ii) would require employers to provide and ensure the use of fall protection, beginning at 6 feet, when employees must move point to point on lattice booms that are not in a horizontal position. In non-A/D work, an employee may, for example, need to move point-to-point on a lattice boom to inspect a part that is suspected to need repair, or to make a repair (such as replacing a broken or missing cotter pin). In many of these situations, the boom will not be horizontal, since space limitations often make it difficult to lower the boom to do this work.

The Committee believed that it is both necessary and feasible for fall protection to be used in such instances. Typically, the fall protection that would be used would consist of a double-lanyard or similar personal fall arrest system. Since the boom in these instances would be elevated, there would usually be a point on the boom above the level of the employee's feet to which the lanyard could be attached.

It is the Agency's understanding that, in contrast, it is uncommon for an employee to need to move point-to-point on a horizontal lattice boom for non-A/D work. If work does need to be done, such as making an inspection or repair as discussed above, the employee would usually get access to their work station with a ladder. In those instances when the employee must traverse the boom itself, the Committee concluded that it would be inappropriate to require fall protection for the reasons discussed below.

The key difficulty in providing fall protection in such instances stems from the lack of a tie-off point above the level of the employee's feet. Most lattice booms when horizontal would be less than 15 feet above the next lower level. At heights below 15 feet, a personal fall arrest system tied off at the level of the employee's feet, with a lanyard long enough to afford the employee the range of movement necessary for this work, might not prevent the employee from falling to the next lower level. In construction work the problem of providing personal fall protection in this height range, when there is no higher tie-off point, is usually solved in one of three ways (apart from the use of ladders, scaffolds, aerial lifts, and similar devices). One way is to use a restraint system, which is anchored at a point that prevents the employee from moving past an edge. This type of system could not be used while on a boom because the boom is too narrow.

Another method is to set up a personal fall arrest system that would arrest the employee's fall before hitting the next lower level by using stanchions to support an elevated, horizontal life-line. However, such stanchions must be securely fastened and whatever they are fastened to must be able to withstand considerable forces in an arrested fall. On a crane's lattice boom, the stanchions would have to be attached either to the chords or the lacings.

The chords and lacings are engineered to be as light as possible, and an engineering analysis would be needed in each case to determine if the attachment point was sufficiently strong to withstand those forces. Also, the Agency believes that manufacturers would be unlikely to approve clamp-on type systems because of the likelihood of the clamping forces damaging these critical structural components. Similarly, the Agency believes that manufacturers would not approve the repeated weld/removal/re-weld cycles that would be involved in attaching and removing stanchions because this could adversely affect the boom's structural components.

The third method commonly used in construction work is a temporary guardrail system, but that also would require attaching stanchions to the boom, which would be infeasible for these same reasons.

The Committee concluded that, in light of such factors, it would not be appropriate to require fall protection when an employee moves point-to-point on horizontal lattice booms. However, the Agency notes that, although it may rarely be necessary for an employee moving point-to-point on a horizontal lattice boom to be 15 feet or more above the next lower level, there is the possibility of such an occurrence, such as where a horizontal boom spans a large gap in the ground surface. At such heights a personal fall arrest system tied off at the level of the employee's feet would allow sufficient room for the arrest system to operate without

allowing the employee to strike the next lower level. Therefore, the Agency requests public comment on whether proposed § 1926.1423(d)(1)(ii) should be expanded to require fall protection when an employee, engaged in non-A/D work, is moving point-to-point on a boom that is horizontal and the fall distance is 15 feet or more.

Paragraph 1423(d)(2) Non-Assembly/Disassembly: While at a Work Station

Proposed paragraph (d)(2) would require employers to provide and ensure the use of fall protection while an employee is at a work station on any part of the equipment (including the boom, of any type), except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck. An example of being at a work station is the following: An employee is assigned to replace a cotter pin for a sheave at the end of a boom. The employee's ''work station'' on the boom for this task will be the point where, after the employee has traversed the boom or climbed on from a ladder, the employee performs that task. Because the employee is using one or both hands to perform the task, there is a heightened risk of falling.

Since the work is typically done while the employee is sitting or lying on or inside the boom and is stationary while doing the task, there is normally no difficulty in setting up the personal fall protection system so that it would prevent the worker from contacting the next lower level. Therefore, this proposed provision does not distinguish between work stations based on boom type or whether the boom is horizontal or elevated. For work stations on other parts of the equipment, the Committee concluded that there is normally some suitable point available to which a personal fall arrest system can be anchored.

Fall protection would not be required near draw-works when the equipment is running because of the danger that moving parts could catch a safety lanyard and pull the worker into moving machinery. This danger is present when parts in the draw works are moving. It is also present when the equipment is running and the draw works parts are not moving because of the potential that someone will activate those parts.

Fall protection would not be required when the employee is in a cab because the employee is not exposed to a fall hazard in that instance. Fall protection would also not be required for employees on decks, since the Committee believed that equipment is typically designed so that employees on the deck are not exposed to a fall hazard.

As discussed earlier, C–DAC was convinced that the steps and railings required by this proposed standard would provide adequate fall protection to operators going to and from their workstations. Therefore, fall protection (apart from those devices) would not be required for operators while moving point-to-point between the ground and the operator work station(s).

Paragraph 1423(e) Assembly/Disassembly

Proposed paragraph (e) would require the employer to provide and ensure the use of fall protection equipment during A/D work for employees who are on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level, except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

The principal problem with the use of fall protection during assembly/disassembly below 15 feet is the difficulty in setting up a personal fall protection system that allows a significant degree of movement on a boom in this height range (which is usually of the lattice type) and also prevents the employee from contacting the next lower level. Unlike employees who work at a stationary work station, employees engaged in assembly/disassembly work typically have to move a significant amount to accomplish the work.

Consequently, the degree of movement that the protection system needs to provide to the employee is more similar to what is needed when moving point-to-point on a boom than working at a work station. As discussed above, the characteristics of lattice booms make it more difficult to set up such systems than in other situations.

The exception to the requirement for fall protection when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck is based on the same considerations discussed above with respect to proposed § 1926.1423(d)(2).

Paragraph 1423(f) Anchorage Criteria

Proposed paragraph (f) would specify criteria for anchorage points used in personal fall protection systems.[57]

Proposed paragraph (f)(1), *Anchorages for fall arrest and positioning device systems,* contains requirements for anchorage points used in fall arrest and positioning device systems. Proposed § 1926.1423(f)(1)(i) would permit personal fall arrest systems and positioning systems to be anchored to any apparently substantial part of the equipment unless a competent person, from a visual inspection, without an engineering analysis, would conclude that the applicable criteria in § 1926.502 of Subpart M of this part would not be met. The Subpart M criteria include, for personal fall arrest systems, 5,000 pounds per employee or twice the potential impact load of an employee's fall (in addition to other requirements) (§ 1926.502(d)(15)); for a positioning device, 3,000 pounds or twice the potential impact load of an employee's fall, whichever is greater (in addition to other requirements) (§ 1926.502(e)(2)).

Most of the equipment covered by the proposed standard are designed to lift and support weights much heavier than these. Apparently substantial parts of the equipment are, therefore, typically capable of meeting the Subpart M capacities. Consequently, C–DAC believed that the proposed § 1926.1423(f)(1)(i) criteria was appropriate and would avoid burdening employers with what it considered to be the unnecessary expense of obtaining engineering analyses for each part that would serve as an anchor.

Proposed paragraph (f)(1)(ii) would require that attachable anchor devices (portable anchor devices that are attached to the equipment) meet the applicable anchorage criteria in § 1926.502. These criteria are the same as those discussed in the previous paragraph for fall arrest and fall positioning systems.

Proposed paragraph (f)(2), *Anchorages for restraint systems,* would require restraint systems to be anchored to any part of the equipment that is capable of withstanding twice the maximum load that a worker may impose on it during reasonably anticipated conditions of use. Since restraint systems do not arrest a worker's fall (instead they prevent a fall from occurring), the anchorage does not need to be able to support the significantly greater force generated during an arrested fall. C–DAC believed that having the anchorage support twice the maximum anticipated load will provide an adequate margin of safety when a restraint system is used.

[57] ''Personal fall arrest system'' is defined in § 1926.1401 of this proposed standard as ''a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body harness and may include a lanyard, deceleration device, lifeline, or suitable combination of these.'' This definition is taken from § 1926.500(b) of Subpart M. As with other definitions applicable to this section, C–DAC used terminology that is familiar to the industry to provide clear notice of the standard's requirements and promote compliance.

Paragraph 1423(g) Tower Cranes

Proposed paragraph (g) would specify fall protection requirements specific to tower cranes. Note that the terminology ''erecting'' and ''dismantling'' is used with regard to tower cranes rather than ''assembly'' and ''disassembly''; this terminology reflects the industry's use of these terms.

Paragraph 1423(g)(1) Non-Erecting/Dismantling

Proposed paragraph (g)(1) addresses fall protection requirements for non-erecting/dismantling work. The employer would be required to provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 6 feet above a lower level. The exceptions to this requirement would be when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

As discussed above, for equipment other than tower cranes, there were various factors that prompted C–DAC to agree on different requirements for moving point-to-point than when working at a work station. Those factors, however, are not present in tower cranes.

For example, when moving point-to-point on the jib (or boom) or on the tower, there are no feasibility constraints to being protected. There are numerous areas on the jib to which an employee can anchor personal fall arrest equipment as the employee walks out and back on the jib (or boom) on a tower crane. Also, by standard industry practice, the counter-jib [58] is usually equipped with a walkway and railings. If the employee needs to traverse in an area that is off the walkway, other fall protection can be used, such as a personal fall arrest system. Since the jib (or boom) once erected is much higher than 6 feet from the next lower level, there is plenty of room for the arrest system to operate without allowing the employee to strike the next lower level.

Moving point-to-point on the tower is typically done either using the ladder or stair system provided within the tower, or (in some situations) moving on a tower section. When moving on a tower section, because the sections are vertical, there is always a point above the employee's feet to which the arrest system can be anchored. There is therefore no need for stanchions or other equipment to set up the system to prevent the employee from striking the next lower level.

The exception to the proposed provision for fall protection when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck is based on the same considerations discussed above with respect to proposed § 1926.1423(d)(2). The Agency notes that its understanding of the location of ''the deck'' on a tower crane is the walking/working area on the counter-jib.

Paragraph 1423(g)(2) Erecting/Dismantling

This proposed paragraph specifies that, for erecting/dismantling work, employers must provide, and ensure use of, fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level.

On tower cranes, almost all of the erecting/dismantling work that takes place below 15 feet occurs in connection with erecting or dismantling the sections of the jib (or boom), which is usually done on the ground. In this respect the erecting/dismantling process is similar to the assembly/disassembly of other types of cranes. Therefore, the same reasons for setting a 15–foot threshold for requiring fall protection for assembling/disassembling non-tower cranes (see discussion of proposed paragraph (e) above) are also the basis for proposing to require fall protection beginning at 15 feet for erecting and dismantling tower cranes.

The Agency notes that C–DAC did not include the exceptions that were included in proposed § 1926.1423(g)(1) for when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck. OSHA is unaware of any reason why these exceptions would not be equally applicable here, and asks for public comment on whether they should be added to proposed § 1926.1423(g)(2).

Paragraph 1423(h) Anchoring to the Load Line

Proposed paragraph (h) would permit an employer, under prescribed conditions, to anchor a fall arrest system to the hook or other part of a load line of a crane or derrick. Currently, in Subpart M of this part, § 1926.502(d)(23) prohibits personal fall arrest systems to be attached to ''hoists except as specified in other subparts of this part.'' Subpart N does not contain any provisions specifically addressing this issue. Therefore, since the hook or other part of a load line is connected to a hoist in the crane or for the derrick, attaching a personal fall arrest system in this manner is currently prohibited by Subpart M.

OSHA has received a number of inquiries asking whether a crane's hook or load line may be used as an anchorage point for fall protection. Using a crane for such purpose would be particularly useful in many situations, especially where establishing a suitable anchor point would be otherwise very difficult. OSHA asked C–DAC to consider whether there is any reason to prohibit using a crane or derrick for such purpose. C–DAC believed that the hook or load line of a crane could be used safely as an anchor point under the conditions proposed in the rest of this paragraph.

Proposed paragraph (h)(1) would allow the hook or load line to be used as an anchorage point when a qualified person has determined that the set-up and rated capacity of the crane/derrick (including the hook, load line and rigging) meets or exceeds the requirements in § 1926.502(d)(15). C–DAC concluded that, as long as the crane or derrick had sufficient capacity to meet those criteria, there is no reason to prohibit its use for this purpose.

The criteria in § 1926.502(d)(15) were developed to ensure that fall protection anchorages provide adequate employee protection. A number of factors related to the crane's capacity in the particular configuration and set-up involved would need to be considered, including, in some cases, the angle of the fall arrest lanyard to the boom if a fall were to occur. In C–DAC's view, determining whether those criteria are met when anchoring to the hook or load line requires the expertise of a qualified person.

Proposed paragraph (h)(2) would require that the equipment operator be at the work site and informed that the equipment is being used to anchor a fall arrest system. This would ensure that the operator is available to make any necessary adjustments, such as moving the boom or load lines. Further, in the event of an emergency that results in a tied-off employee being suspended from the hook or load line, the operator would be available to bring the worker to the ground safely.

Section 1424 Work Area Control

Proposed paragraph (a) addresses the hazard of employees being struck, pinched-between or crushed when within the swing radius of the equipment's rotating superstructure. Proposed 1926.1424(a)(1) states that the precautions in § 1926.1424(a)(2) must be

[58] At the top of the tower, there is a long horizontal structure that supports the load (the ''jib'' or, if the luffing type, the ''boom''), and a shorter horizontal structure that supports the counterweights, which is referred to as the ''counter-jib.''

taken when there are accessible areas in which the equipment's rotating superstructure (whether permanently or temporarily mounted) poses a reasonably foreseeable risk of either: (i) Striking and injuring an employee; or (ii) pinching/crushing an employee against another part of the equipment or another object.

Currently, § 1926.550(a)(9) provides: ''Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.'' In proposed § 1926.1401, ''superstructure'' is defined as a synonym for ''upperworks'' and ''upperstructure.'' Under this definition, all three terms mean the following: ''the revolving frame of equipment on which the engine and operating machinery are mounted along with the operator's cab. The counterweight is typically supported on the rear of the upperstructure and the boom or other front end attachment is mounted on the front.''

The Committee agreed that barriers around danger areas are a viable, safe option, but they also agreed that such barriers are not always feasible and that, in such cases, there needs to be alternative means of protecting the employees. In addition, C–DAC was concerned that the language ''accessible areas within the swing radius . * * *'' would require that all areas accessible to an employee within the swing radius would have to be protected, irrespective of whether an employee could be injured while in such an area. C–DAC viewed such a requirement as overly broad and unnecessary.

The Committee drafted the proposed requirement so that protective measures would be required for accessible areas that pose a ''reasonably foreseeable risk'' that an employee would be struck or pinched/crushed. The principle of reasonably foreseeable risk is one that is well established in Occupational Safety and Health Review Commission caselaw and in the courts of appeals. For example, in *Pete Miller Inc.*, 19 O.S.H.C. (BNA) 1257, 1258 (Rev. Comm'n 2000), the Review Commission stated that a violation occurs when ''it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.'' [59] The following are two illustrative examples of the application of this principle to the swing radius provision:

Illustrative example #1: The bottom of the rear of the rotating superstructure of crane A is 12 feet above the ground. An employee standing on the ground within that swing radius could not be struck by the rotating superstructure since the rotating superstructure would swing well above him/her. There is nothing within that area on which the employee could stand. In this example the area does not pose a reasonably foreseeable risk of the employee being struck or pinched/crushed.

Illustrative example #2: Same scenario as example #1 above, except that a truck with material that is to be unloaded from its bed is within the swing radius. If an employee were to stand on the truck bed the employee would be within the swing radius. In this example there is a reasonably foreseeable risk of an employee being struck or pinched/crushed.

Under proposed paragraph (a)(2), the employer would be required to institute two types of measures to prevent employees from entering these hazard areas. Specifically, under proposed § 1926.1424(a)(2)(i), the employer would have to train employees assigned to work on or near the equipment in how to recognize these areas. The Committee believed that employees need to understand and appreciate the risk posed by the rotating superstructure for the other precautions required by § 1926.1424(a)(2)(ii) to be effective.

Proposed paragraph (a)(2)(ii) would require the employer to erect and maintain control lines, warning lines, railings, or similar barriers to mark the boundaries of the hazard areas, but contains an exception when such a precaution is infeasible. If it is neither feasible to erect such barriers on the ground nor on the equipment, the employer would be required to mark the danger zone with a combination of warning signs and high visibility markings on the equipment that identify the hazard areas. In addition, the employer would have to train employees to understand what those markings signify.

To help prevent struck-by and crushed-by injuries and fatalities, C–DAC concluded that it is necessary to address the protection of employees who must sometimes enter the hazard area to perform work. Proposed § 1926.1424(a)(3) is designed to help protect such employees by ensuring that there is adequate communication and coordination between the operator and the employee in the danger area.

Under proposed paragraph (a)(3)(i), if an employee is going to go to a location in a hazard area that is out of view of the operator, before that employee goes in that area the employee (or someone instructed by the employee) would have to ensure that the operator is informed that the employee is going to that location. Since the operator will typically be under the assumption that no one is in that area, informing the operator that an employee is going to enter the hazard area is an essential first step in preventing the operator from moving the superstructure and causing injury to that employee.

Under proposed paragraph (a)(3)(ii), once informed that an employee is going to enter a hazard area out of the operator's view, the operator would be prohibited from rotating the superstructure unless and until he/she gives a warning that the employee understands is a signal that the superstructure is about to be rotated and gives the employee time to get clear.

Alternatively, the operator may rotate the superstructure if informed in accordance with a pre-arranged system of communication that the employee is in a safe position. An example of such a system would be the use of a signal person who gives an all-clear signal to the operator once the signal person sees that the employee has exited the hazard area. Another example would be where the employee in the hazard area is equipped with a portable air horn and, in accordance with a pre-arranged horn signal system, sounds an appropriate signal to the operator that the employee has exited the hazard area. To be effective, the pre-arranged signal system would need to be designed so that this all-clear signal could not be confused with a horn signal from some other employee for another purpose.

Proposed paragraph (b) addresses situations where multiple pieces of equipment are located in such proximity that their working radii overlap. Such situations pose the danger of employees being pinched/crushed between the equipment and being injured as a result of unintended movement or collapse when pieces of equipment collide. To prevent such accidents, the controlling entity would be required to coordinate the operations of these pieces of equipment. In the event that there is no controlling entity, the employer or employers operating the equipment would be required to institute a coordination system.

C–DAC's language for proposed paragraph (b) refers to ''employers operating the equipment'' but does not address a situation in which only one employer is operating the multiple pieces of equipment. It appears to the Agency that a coordination system is also needed in that situation. OSHA is considering revising the C–DAC

[59] See also, *Daniel Int'l Corp.* v. *Donovan*, 705 F.2d 382, 388 (10th Cir. 1983); *Mineral Indus. & Heavy Constr. Group* v. *OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981).

language to make clear that such an employer would be required to institute a coordination system. Proposed § 1926.1424(b) could be revised in this regard as follows:

(b) Multiple equipment coordination. Where any part of a crane/derrick is within the working radius of another crane/derrick, the controlling entity shall institute a system to coordinate operations. If there is no controlling entity, the employer (if there is only one employer operating the multiple pieces of equipment), or employers, shall institute such a system.

OSHA requests public comment on whether such a revision should be made.

Section 1425 Keeping Clear of the Load

Currently, 29 CFR part 1926 subpart N at § 1926.550(a)(19) states: ''All employees shall be kept clear of loads about to be lifted and of suspended loads.'' C–DAC believed that compliance with this provision is infeasible in certain circumstances. For example, many urban construction sites have a relatively small footprint with numerous construction employees throughout the site. These sites are typically bounded on all sides by roads and sidewalks with high concentrations of pedestrian and vehicular traffic. In such circumstances it is not always possible to route a suspended load in such a way that all employees will be clear of the load at all times. In addition, meeting that objective may sometimes conflict with meeting local requirements regarding public safety.

C–DAC also believed that employers have a greater ability to avoid having static suspended loads over employees than moving loads, since a static suspended load usually affects a much smaller area. Furthermore, in a static situation, it is possible to limit the number of employees in the fall zone to only those whose jobs involve the handling of the load and therefore require them to be in that area at that time. Accordingly, this proposed section is designed to account for these considerations and protect employees to the extent feasible.

Paragraph 1425(a)

Proposed paragraph (a) would require the employer to use hoisting routes that minimize employee exposure to hoisted loads to the extent consistent with public safety. This provision addresses the fact that in many situations, especially urban construction sites with high concentrations of employees throughout the site, it is not feasible to prevent all employees from being exposed to hoisted loads that are moving at all times (see discussion above).

Also, C–DAC recognized that there could be situations where minimizing employee exposure to hoisted loads would be in conflict with local requirements regarding public safety, as when an alternative route would take the load over a street with public traffic. The Committee wanted to make clear that choosing a route that would endanger the public was not required.

Paragraph 1425(b)

Proposed paragraph (b) addresses those situations where the equipment operator is not actually engaging the controls to move the load. In such situations, the load affects a more limited area then when it is moved up or horizontally. Consequently, C–DAC determined that, in these static situations, it is feasible to preclude most employee exposure to the load's fall zone. The only exceptions are employees engaged in the types of activities specified in proposed § 1926.1425(b)(1) through (3).

''Fall zone'' is defined in § 1926.1401 as ''the area (including but not limited to the area directly beneath the load) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident.'' The ''fall zone'' thus includes both the area directly under the load as well as other areas into which it is ''reasonably foreseeable'' that suspended materials could fall. For example, if wind is causing the load to swing, the employer would need to consider the extent to which the load is or may swing in determining the extent of the fall zone. Another example is where a bundle of materials is suspended, and some loose materials at the top of the bundle may slide off sideways. In such a case those materials would foreseeably fall outside the area directly beneath the load. As discussed above in relation to § 1926.1424, *Work area control*, the concept of ''reasonably foreseeable'' risk is well established in OSHA law.

Proposed paragraph 1425(b)(1) would permit employees engaged in hooking, unhooking or guiding a load to be within the fall zone while engaged in these activities. Hooking or unhooking a load sometimes requires an employee to be within the fall zone of a load. For example, where a lifting accessory is used, the employee will typically be under the fall zone of the lifting accessory when attaching or unhooking the load. Also, guiding a load, even with a tag line, sometimes necessitates that the employee be positioned within the fall zone, especially when the work area below is restricted in size.

Proposed paragraph (b)(2) would permit employees engaged in the initial attachment of the load to a component or structure to be within the fall zone. One example is the following scenario: A subassembly of steel members is hoisted for attachment to a structure. When initially attaching the lower portion of that subassembly, an employee is within the fall zone of the load. In this example, the employee engaged in the initial attachment of the subassembly to the structure would be permitted to be within the fall zone; that work cannot be done otherwise.

Proposed paragraph (b)(3) would allow workers to be present in the fall zone when operating a concrete hopper or concrete bucket. The employee operating the hopper or bucket is necessarily in the fall zone since the hopper or bucket is suspended while the employee operates the releasing mechanism.

Paragraph 1425(c)

Proposed paragraph (c) deals with the situations addressed in paragraphs 1425(b)(1) and (b)(2). The Committee felt that additional requirements were necessary to ensure employee safety in these situations, given the additional risks posed while loads are being connected to equipment or structures.

Proposed paragraph (c)(1) would require that the load be rigged to prevent unintentional displacement, so that workers in the fall zone are less likely to be struck by shifting materials.

Proposed paragraph (c)(2) would require the use of hooks with self-closing latches or their equivalent be used, to prevent accidental failure of the hooks. However, ''J'' type hooks would be permitted for setting wooden trusses. This exception is designed to enable the truss to be unhooked without the need for an employee to go out on the truss. This avoids the additional exposure to fall hazards that would otherwise occur from going out on the truss to release a latched hook.

Proposed paragraph (c)(3) would require the use of a qualified rigger in the rigging of materials in the situations addressed by proposed § 1926.1425(c). By ensuring that the load is rigged in as safe a manner as possible, this requirement serves to reduce the risk of injury to workers who cannot perform their duties outside of the fall zone, and reduces the potential size of the fall zone.

Section 1401 of this proposed standard defines a ''qualified rigger'' as a rigger who meets the criteria for a qualified person. The same definition is

found in subpart R of 29 CFR Part 1926, Steel Erection at § 1926.753(c)(2).

Paragraph 1425(d) Receiving a Load

Proposed paragraph (d) would prohibit all employees except those needed to receive a load from being in the fall zone when it is being landed. An employee receiving a load will typically need to be within the fall zone when it is being landed because that is the time when the load needs to be guided to a specific landing point.

Paragraph 1425(e)

Proposed paragraph (e) concerns tilt-up and tilt-down operations. In these operations, one end of a component, such as a precast panel, is either raised, tilting the component up, usually from a horizontal position (often on the ground) to a vertical position; or lowered, tilting the component down, usually from a vertical position to a horizontal position on the ground or other surface.[60] Note that the requirements in this proposed paragraph would not apply when receiving a load.

As with any other suspended load, it is dangerous to be directly beneath the load because of the possibility of a failure or error that would cause the load to fall or be accidentally lowered onto an employee. To minimize the risk of such accidents, proposed § 1926.1425(e)(1) provides that no employee shall be directly under the load during a tilt-up or tilt-down operation. Section 1926.1401 defines ''directly under the load'' to mean ''a part or all of an employee is directly beneath the load.'' This provision will avoid having employees in the area that presents the greatest danger in the event of a loss of control of the load.

While C–DAC determined that tilt-up and tilt-down operations can be accomplished without anyone being directly under the load, it also found that the operation is at times infeasible unless one or more employees ''essential to the operation'' needs to be elsewhere within the fall zone. Proposed § 1926.1425(e)(2) therefore provides that employees ''essential to the operation'' may be in the fall zone (but not directly under the load) during a tilt up or tilt down operation.

The C–DAC document does not contain a definition of ''essential to the operation.'' Consequently, the proposed provision does not specify what job functions would be permitted to be performed from within the fall zone. OSHA believes that examples of an employee ''essential to the operation'' is an employee who must be within the fall zone because it is infeasible to conduct the following operations from outside the fall zone: (1) Physically guide the load; (2) closely monitor and give instructions regarding the load's movement; and/or (3) either detach it from or initially attach it to another component or structure. OSHA requests public comment on whether there are other activities that are essential to this operation and are infeasible to be done from outside the fall zone, and whether it would be appropriate to add a definition of ''essential to the operation'' to the standard.

A note to paragraph (e) refers to § 1926.1426, which addresses free fall of the boom and the load. As discussed below, it specifies that employees may not be anywhere in the fall zone of a boom that is designed to free fall, and that employees are never to be directly under the load during free fall of the load line hoist.

Section 1426 Free Fall and Controlled Load Lowering

This proposed section addresses the hazards that can arise from free fall of the boom (live boom) during lifts. Live booms are those in which the rate of lowering can be controlled only by a brake; a failure of the brake will result in a free fall (i.e., unrestricted lowering) of the boom. In contrast, in equipment that has a boom that is not ''live,'' there is a mechanism or device other than the brake which slows the boom's lowering speed.

The uncontrolled lowering of a boom could result in an accident which could injure or kill workers in proximity of the load or hoisting equipment. This proposed section would prohibit use of live booms in most circumstances. An exception is provided for older equipment manufactured before the ANSI B30.5 series prohibited free fall of the boom for all hoisting operations, but only under limited conditions that do not create hazards to employees. A limited exception is also provided for floating cranes/derricks. This proposed section includes many of the modern protective methods and mechanisms included in ASME B30.5–2004.

This section also, in § 1926.1426(d), would specify the circumstances under which free fall of the load line would be prohibited.

Paragraph 1426(a) Boom Free Fall Prohibitions

Under proposed paragraph (a)(1), the use of equipment in which the boom is designed to free fall would be prohibited under six specified conditions. C–DAC concluded that, in these six circumstances, free fall of the boom needs to be prohibited regardless of what type of equipment is used and when that equipment was manufactured.

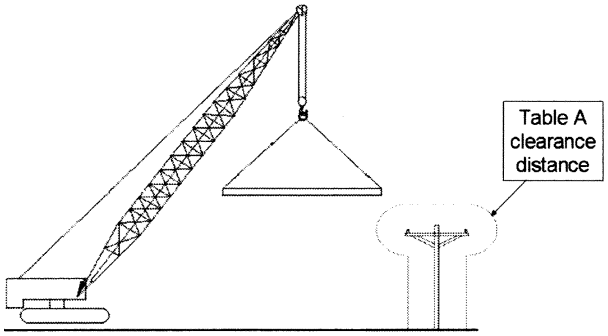
Proposed paragraph (a)(1)(i) would prohibit the use of a live boom when an employee is in the fall zone of the boom or load (see the explanation of ''fall zone'' in the discussion above of proposed § 1926.1425(b). Section 1926.1425, *Keeping clear of the load*, of this proposed standard recognizes that there are some situations in which certain employees need to be positioned in the fall zone in order to perform their assigned duties. However, the likelihood that an employee would sustain a serious injury or be killed in the event of a falling boom is very high when an employee is in the fall zone of the boom or load.

Because the likelihood of a falling boom is higher when a live boom is in use, C–DAC believed it was necessary to prohibit employees from being in the fall zone whenever a live boom is being used, without exception. Therefore, the exceptions listed in proposed § 1926.1425 that would permit employees to be in the fall zone in certain circumstances apply only where a non-live boom is being used.

Proposed paragraph (a)(1)(ii) would prohibit use of a live boom when an employee is being hoisted. This continues the current prohibition in § 1926.550(g)(3)(i)(F) of subpart N of this part, which is designed to prevent hoisted employees from being seriously injured or killed if the boom were to fall.

Proposed paragraph (a)(1)(iii) would prohibit the use of a live boom where the load or boom is directly over a power line, or over any part of the area extending the Table A (of proposed § 1926.1408) clearance distance to each side of the power line. The diagram below illustrates a situation in which a load on a live boom is over the area extending the Table A clearance distance to each side of the power line:

[60] Proposed § 1926.1401 defines ''tilt up or tilt down operation'' as ''raising/lowering a load from the horizontal to vertical or vertical to horizontal.''



As discussed above in relation to proposed §§ 1926.1407 through 1926.1411, equipment making electrical contact with power lines is one of the primary causes of equipment-related deaths on construction sites and, to prevent such contact, those sections would require equipment to maintain minimum distances from power lines.

C–DAC recognized that a live boom that is over a power line, or that is suspending a load that is over any part of the area extending the Table A clearance distance to each side of the power line, could fall or cause the load to fall into electrical contact with a power line.

The C–DAC draft of this provision stated: ''The load or boom is directly over a power line, or over the area extending the Table A clearance distance to each side of the power line.'' Since C–DAC's intent was to prohibit the boom or load from being over any part of the area extending the Table A clearance distance to each side of the line, OSHA has changed this language to make clear that the prohibition applies with respect to the boom or load being above ''any part of'' that area.

In reviewing this provision, OSHA realized that there appears to be another circumstance when a fall of the boom could cause the load or boom to breach the Table A clearance distance. This would occur as follows: Neither the boom nor load is over the power line or over the Table A clearance area. However, the Table A clearance distance is within the radius of vertical travel of the boom or load. This circumstance is depicted in the following illustrations:

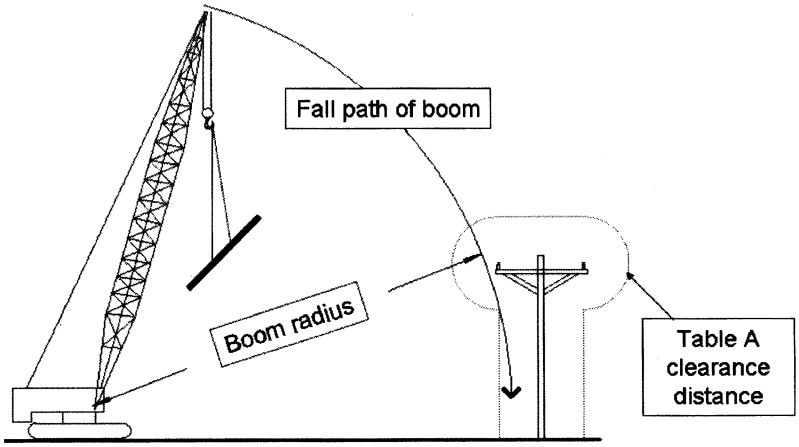
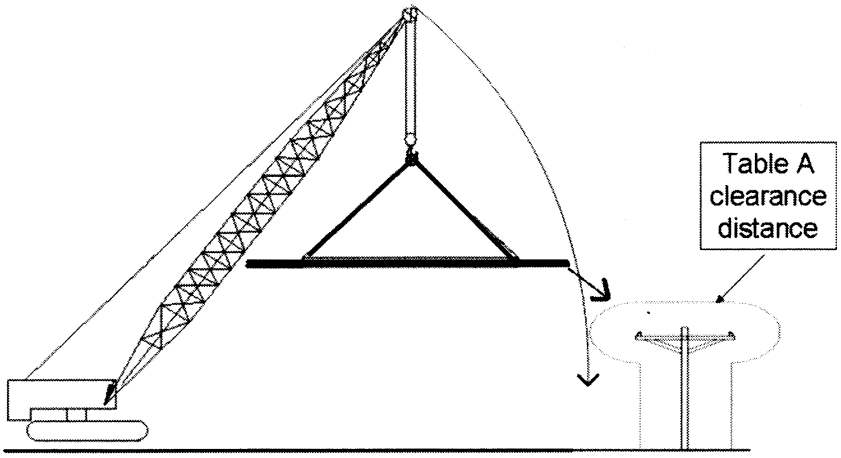


Illustration A:

Illustration B:



In Illustration A, neither the boom nor the load is above the power line or any part of the Table A zone. However, if the boom were to fall, the boom would cross into the Table A zone. In Illustration B, neither the boom nor load is above the power line or any part of the Table A zone. However, if the boom were to fall, the load would cross into the Table A zone.

The Agency therefore requests public comment on whether proposed § 1926.1426(a)(1)(iii) should be modified to also prohibit the equipment from being positioned such that the fall path of the boom or load would breach the Table A clearance distance.

Proposed paragraph (a)(1)(iv) would prohibit use of a live boom where the load is over a shaft. As discussed in relation to § 1926.1426(a)(1)(i) of this proposed section, C–DAC recognized that there are situations where employees must be in the fall zone of a suspended load. One particular scenario is when employees must receive a load that is lowered into a shaft. Such employees would be at a particularly high risk of being killed or injured by a free falling boom because the shaft severely limits or eliminates any ability to get out of the way.

Proposed paragraph (a)(1)(v) would prohibit free fall of a boom when the load is over a cofferdam, except where there are no employees [61] in the fall zone. Much like employees who must receive a suspended load in a shaft, employees have limited ability to escape a free falling boom or load in a cofferdam. However, because cofferdams are typically much larger work spaces than shafts, the fall zone of a falling boom or load may only affect one part of the cofferdam. Therefore, this provision contains an exception for situations where there are no employees in the fall zone.

Proposed paragraph (a)(1)(vi) would prohibit use of a live boom for lifting operations in a refinery or tank farm. C–DAC was concerned that a free falling boom could strike pipes or a tank in a refinery or tank farm. Such accidental impact could cause a release of toxic materials or conflagration.

Proposed paragraph (a)(2) is an exclusive list of conditions under which the use of cranes with live booms would be permitted. C–DAC believed that cranes with live booms could be used safely under some circumstances and did not believe that the cost of replacing or retrofitting all existing such equipment was justified as long as the use of live boom equipment was limited to those circumstances.

Proposed paragraph (a)(2)(i) would allow the use of equipment with a live boom if that equipment was manufactured prior to October 31, 1984 and none of the circumstances listed in proposed § 1926.1426(a)(1) are present. C–DAC noted that ANSI B30.5 first prohibited live booms in its 1972 version and reiterated the prohibition in the 1982 edition, which was published on October 31, 1983 and became effective on October 31, 1984.

C–DAC concluded that manufacturers would have begun to phase out live-boom equipment when ANSI first prohibited its use in 1972 and that little, if any, live boom equipment would have been manufactured after October 31, 1984. Moreover, during this period, hydraulic hoisting equipment, the design of which typically precluded boom free fall even in its early designs, became more prevalent.

In light of these factors, C–DAC concluded that most equipment manufactured after October 31, 1984 would not have live booms. Proposed § 1926.1426(a)(2) thus allows the older live boom equipment to be phased out safely by restricting its use to situations in which none of the circumstances listed in § 1926.1426(a)(1) are present.

Proposed paragraph (a)(2)(ii) would allow use of a live boom if the equipment is a floating crane/derrick or is a land crane/derrick on a vessel/flotation device and none of the circumstances listed in proposed § 1926.1426(a)(1) are present.[62] C–DAC noted that equipment used on the water commonly has a live boom. This is because the dynamics of load transfer while on water (from side to side), as well as unexpected wave action, which can cause rapid changes in list and trim, sometimes necessitates that the operator have a free fall boom system to compensate for these effects. Non-live systems are not fast enough for this purpose. As a result, C–DAC concluded that there is no need to alter current industry practice in this regard as long as none of the circumstances listed in § 1926.1426(a)(1) are present.

[61] The C–DAC draft of this provision used the term ''workers;'' this has been changed to ''employees,'' which is the more appropriate term in light of the language in the Occupational Safety and Health Act.

[62] OSHA has modified the language used in the C–DAC version of this provision to conform to the terminology used in proposed § 1926.1437, *Floating cranes and land cranes on barges.*

Paragraph (b) Preventing Boom Free Fall

Proposed paragraph (b) sets criteria for preventing boom free fall. A boom that meets this criteria is considered to be designed to not free fall. The criteria consist of requirements for a secondary system for controlling the boom's descent in addition to the equipment's primary system. The Committee believed that the hazard posed by a failure of the primary system for holding or regulating the boom is so significant that the availability of a secondary mechanism needs to be required.

Proposed paragraph (b)(1)(i) specifies that a friction drum must have both a friction clutch and a braking device, to allow for controlled boom lowering. These provisions are similar to those in section 5–1.3.2(a)(1) and (a)(4) of ANSI B30.5–1968 and ASME B30.5–2004. Proposed § 1926.1426(b)(1)(ii) would require friction drums to also have a secondary braking or locking device, which is manually or automatically engaged, to back-up the primary brake while the boom is held (such as a secondary friction brake or a ratchet and pawl device). In the view of the Committee these have been well established as effective for this purpose.

Proposed paragraph (b)(2) would require hydraulic drums to have an integrally mounted holding device or internal static brake to prevent boom hoist movement in the event of hydraulic failure. The requirements of this proposed paragraph are similar to those in section 5–1.3.1(d) of ASME B30.5–2004. The hazard presented by this type of hoisting system is that once the hydraulic system fails, the boom hoist drum could free spin and allow the boom to free fall.

Proposed paragraph (b)(3) states that clutches or hydraulic motors do not qualify as brakes or locking devices for purposes of this subpart. C–DAC believed the use of clutches or hydraulic motors for such purposes would accelerate the wear of these systems and increase the risk they will fail when they are needed to control the lowering of the boom.

Proposed paragraph (b)(4) would require hydraulic boom cylinders to have an integrally mounted holding device. An integrally mounted holding device would secure the boom from pivoting down in the event that hydraulic pressure is lost. This requirement is similar to section 5–1.3.1(d) of ASME B30.5–2004.

Paragraph 1426(c) Preventing Uncontrolled Retraction

Proposed paragraph (c) would require hydraulic telescoping booms (which are also referred to as hydraulic extensible booms) to have an integrally mounted holding device to prevent the boom from retracting in the event of hydraulic failure. This proposed provision is similar to section 5–1.3.3(c) of ASME B30.5–2004.

The C–DAC draft of this provision stated that the purpose of this device was ''to prevent boom movement in the event of hydraulic failure.'' OSHA believes that this language was unintentionally broad in that it refers to any ''boom movement.'' The purpose of proposed § 1926.1426(b)(4) is, as discussed above, to prevent the boom from pivoting down in the event of hydraulic failure. Therefore, there is no need for proposed § 1926.1426(c) to also require a device to prevent that type of boom movement.

The Agency's understanding is that the purpose of proposed § 1926.1426(c) is, as reflected in C–DAC's heading (''Preventing uncontrolled retraction''), to prevent a telescoping hydraulic boom from retracting in the event of hydraulic failure. Therefore, OSHA has modified the language to state that the purpose of the integrally mounted holding device is ''to prevent the boom from retracting'' in the event of hydraulic failure. OSHA requests public comment on the appropriateness of this change.

Paragraph1426(d) Load Line Free Fall

Proposed paragraph (d) lists circumstances under which free fall of the load line hoist is prohibited and controlled load lowering is required. ''Free fall (of the load line)'' is defined in § 1926.1401 to mean ''where only the brake is used to regulate the descent of the load line (the drive mechanism is not used to drive the load down faster or retard its lowering).'' ''Free fall'' is contrasted with ''controlled load lowering,'' which § 1926.1401 defines as ''lowering a load by means of a mechanical hoist drum device that allows a hoisted load to be lowered with maximum control using the gear train or hydraulic components of the hoist mechanism. Controlled load lowering requires the use of the hoist drive motor, rather than the load hoist brake, to lower the load.''

As with free fall of the boom, free fall of the load line hoist presents a struck-by hazard to employees. One difference with boom free fall, however, is that free fall of the load line endangers a smaller area. When a boom free falls, its tip (and any attached load) moves both downward and outward. Because the load will moving in at least two directions simultaneously, the area that will be affected by the fall is comparatively large.

In contrast, if a load line free falls, the load will tend to fall in a relatively straight path downward (as long as the boom is not being moved and the load is not significantly affected by winds). Thus the area affected will typically be smaller. C–DAC therefore concluded that it would be appropriate to have a more limited prohibition compared with use of a live boom. This is reflected in the prohibition in proposed § 1926.1426(d)(1) against an employee being directly under the load. That provision is more limited than proposed § 1926.1426(a)(1)(i), which would prohibit an employee from being in the fall zone of the boom or load.

Similarly, unlike the live boom provisions, proposed § 1926.1426(d) does not include a prohibition against use of load line hoist free fall in a refinery or tank farm. Because of the more limited affected area, the operator can more readily set up the equipment so that, in the event of a load line free fall, the affected area will not include safety critical refinery or tank equipment.

However, paragraphs (d)(2), (3), and (4) are similar to the boom free fall prohibitions in that they prohibit free fall of the load line when (1) an employee is being hoisted; (2) the load is directly over a power line or over any part of the area extending the Table A (of proposed § 1926.1408) clearance distance to each side of the power line; and (3) the load is over a shaft or cofferdam.

The C–DAC draft of proposed paragraph (d)(3) stated: ''The load is directly over a power line, or over the area extending the Table A clearance distance to each side of the power line.'' As discussed above, C–DAC's intent was to prohibit the load from being over any part of the area extending the Table A clearance distance to each side of the line, and OSHA has therefore changed this language to make clear that the prohibition applies with respect to the load being above ''any part of'' that area.

In reviewing proposed paragraph (d)(4), OSHA noted that it would prohibit load line free fall over a shaft or cofferdam, but contains no exception regarding cofferdams in which there is no employee in the fall zone. In this respect this provision is broader than the live boom provision in proposed § 1926.1426(a)(1)(v), which does contain such an exception. OSHA requests public comment on whether proposed § 1926.1426(d)(4) should be modified to include such an exception.

Section 1427 Operator Qualification and Certification

Proposed § 1926.1427 addresses the safety concerns created by under-qualified crane operators. In the Committee's experience, human error resulting from insufficient operator knowledge and capability is a significant cause of fatal crane/derrick accidents. It concluded that a verified testing process is essential for ensuring sufficient knowledge and capability of crane/derrick operators and would be an effective and efficient way to reduce these accidents.

The Committee's view was based on the extensive collective experience of the Committee members. Members expressed the belief that crane/derrick safety depends heavily on the operator having the knowledge and ability to implement safe operation practices. For example, an operator who does not know how to properly use load charts could miscalculate the capacity of the crane and inadvertently overload the equipment. An operator who lacks the knowledge and skill to control and manipulate a load could lose control of it, causing other employees to be struck by the load or the equipment.

In addition, knowledge and skill are needed to prevent electrical contact with power lines (see the discussion above regarding proposed §§ 1926.1407–1926.1411). For example, an operator who does not understand an operational/performance characteristic such as dynamic loading may inadvertently allow the boom to get too close to a power line. This could occur where the operator failed to account for the fact that, under certain conditions, the boom would flex and so continue to move towards the line after the operator had stopped the superstructure's rotation.

Similarly, understanding and being able to minimize such effects is important in situations such as blind picks, where the operator will be relying on information relayed to him/her by a signal person.

The Committee considered whether it would be sufficient to set testing criteria without a third-party (that is, independent) verification mechanism, and determined that such an approach was not likely to be effective in ensuring sufficient operator qualifications. During the Committee's deliberations, members expressed a concern that testing conducted without a check on the quality of the test, with respect to both its content and administration, has been ineffective in ensuring that crane operators are qualified to operate the equipment safely. Members noted that operator ''certification'' cards are easily obtained from various Internet sites without having to pass a credible test. They also noted that the current OSHA standards, which require employers to instruct employees on the hazards involved with crane operation, and require the employer to permit only those employees qualified by training or experience to operate equipment,[63] but do not require testing verified by a third party, have been generally ineffective in ensuring an adequate degree of consistency with respect to crane operator knowledge and ability. The Committee concluded that significant advances in crane/derrick safety would not be achieved unless such testing was required.

The Committee was aware that testing of equipment operators by an impartial party has been used in the past to prevent fatal and other serious accidents that result when operators lack the knowledge and skills needed to operate safely. An example is the Department of Transportation's requirements for over-the-road commercial drivers' licenses (''CDL''). These are designed to reduce the incidence of serious accidents caused by unqualified drivers of vehicles such as trucks and buses. These requirements, codified at 40 CFR part 383, require drivers of commercial motor vehicles to have state licenses that are issued in accordance with federal standards for qualification, training, and testing. To receive a license, the driver must pass knowledge and skills tests administered either by the state or by a third party whose examiners meet the same qualification and training standards as state examiners. 40 CFR 383.75(a).

The Committee's view of the importance of independent testing is further buttressed by a study conducted over a 34-year period (1969–2002), by the Construction Safety Association of Ontario. (OSHA–2007–0066–0009). The study showed a substantial decrease in crane and rigging fatalities in Ontario beginning in 1979, when mandatory training and certification requirements for Ontario crane operators went into effect.

The Ontario system requires prospective or current crane operators (referred to in Ontario as ''hoisting engineers'') to either successfully complete an apprenticeship program or demonstrate sufficient previous experience before seeking certification as a hoisting engineer. The apprenticeship program includes in-school training in a number of topics determined by the Ministry of Education, a practical examination administered at Ministry-designated sites, and a written examination administered by the Ministry. Upon passing this examination and proving completion of the requisite work hours, an apprentice receives a certificate of qualification as one of three types of hoisting engineer from the Ministry. (OSHA–2007–0066–0010).

Hoisting engineers already qualified elsewhere must also obtain a certification from the Ministry to operate cranes in the province. These candidates must sit for the written examination and complete the practical skills assessment required for qualification of apprentices, but may demonstrate sufficient previous experience instead of completing the number of work/training hours required by the apprenticeship program, to receive a certificate of qualification from the Ministry in one of the three hoisting engineer categories. (OSHA–2007–0066–0011).

In the ten year period from 1969 through 1978, before Ontario's requirements went into effect, 85 Ontario construction workers suffered crane and rigging fatalities, amounting to 8.5 per year, or 19.8% of all construction fatalities in Ontario. In the 24 year period from 1979 through 2002, there were 51 crane and rigging fatalities, or slightly more than two per year. For this period, crane and rigging fatalities equaled 9.6% of all Ontario construction fatalities. In the 12-year period from 1991 through 2002, the total number of crane and rigging fatalities was 9, or fewer than one per year. During this period, crane and rigging fatalities amounted to 4.1% of total construction fatalities. (OSHA–2007–0066–0009).

Proposed § 1926.1427 would afford employers several options for ensuring that operators have obtained sufficient knowledge and ability. These options are designed to provide employers flexibility for meeting the proposed requirement and to accommodate the needs of the U.S. military.

Paragraph 1427(a)

As drafted by C–DAC, proposed paragraph (a) would have required the employer to ensure that the operator of any equipment covered under § 1926.1400 is either qualified or certified to operate the equipment in accordance with the provisions of this section or is operating the equipment

[63] Section 1926.20(b)(4) states that ''the employer shall permit only those employees qualified by training or experience to operate equipment and machinery''; § 1926.21(b)(2) states that ''the employer shall instruct each employee in the recognition and avoidance of unsafe conditions.* * *''

during a training period. OSHA notes, however, that C–DAC provided for exceptions to the general rule for operator qualification/certification in proposed §§ 1436, *Derricks;* 1926.1440, *Sideboom cranes;* and 1926.1441, *Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less.* To make proposed § 1926.1427(a) reflect the exceptions provided in these sections, OSHA has added the following language to proposed § 1926.1427(a):

Exceptions: Operator qualification or certification under this section is not required for operators of derricks (see § 1926.1436), sideboom cranes (see § 1926.1440), and equipment with a rated hoisting/lifting capacity of 2,000 pounds or less (see § 1926.1441).

Paragraph 1427(b) Option 1: Certification by an Accredited Crane/Derrick Operator Testing Organization

Proposed paragraph (b) sets out Option 1, in which the employee becomes certified to operate equipment of a certain type and capacity by passing an examination administered by an accredited testing organization. Certification under this option would be ''portable,'' which means that any employer covered by the proposed standard could meet the requirements of proposed § 1926.1427 by using an operator who had this certification. These certifications would be valid for five years.

Proposed section § 1926.1427(b) incorporates a number of safeguards to ensure that the Option 1 certification could be relied upon by any employer to meet the requirements of § 1926.1427, and adequately establishes the employee's ability to operate the types and capacities of crane for which he/she is certified. The first of these safeguards is proposed § 1926.1427(b)(1)(i), which would require that the testing organization be accredited by a nationally recognized accrediting agency.

As defined in § 1926.1401, a ''nationally recognized accrediting agency'' is ''an organization that, due to its independence and expertise, is widely recognized as competent to accredit testing organizations.'' The Agency notes that, under this definition, new accrediting organizations would meet this definition upon establishing a national reputation based on independence, use of widely recognized criteria, and demonstrated competence in applying those criteria.

For a testing organization to be accredited, the accrediting agency would have to determine that the testing organization meets industry recognized criteria for written testing materials, practical examinations, test administration, grading, facilities/equipment and personnel.

In its deliberations, the Committee expressed concern about the need for independent evaluation of certification programs. It believed such evaluation is necessary to ensure that the certification programs are adequately and consistently applying the requisite criteria for safe crane operation when testing operators. This accreditation would ensure that the testing procedures would accurately measure whether the operator has met the knowledge and skill criteria specified in proposed § 1926.1427(j) (discussed below).

Under proposed § 1926.1427(b)(1)(v), the accreditation would be required to be reviewed every three years, to ensure continuing quality of testing materials and administration. The Committee believed that an entity that meets the proposed definition for a nationally recognized accrediting agency (''an organization that, due to its independence and expertise, is widely recognized as competent to accredit testing organizations''), would have both the expertise and independence needed to provide reliable assurance that a testing organization meets the proposed standard's criteria.

The use of a nationally recognized accrediting agency to provide an independent, authoritative assurance of a testing organization's competence is a well-established practice. For example, for a number of years, the National Commission for Certifying Agencies (NCCA), the accreditation body of the National Organization for Competency Assurance (NOCA), has accredited testing organizations in a wide variety of fields, including those that provide crane operator certification. (OSHA–2007–0066–0021). Also, in 2003, the American National Standards Institute began accrediting personnel certification entities. (OSHA–2007–0066–0022).

Another safeguard is in proposed § 1926.1427(b)(1)(ii)(A), under which a testing organization would be required to administer both written and practical tests addressing the criteria set forth in proposed § 1926.1427(j). The Committee believed that operator ability cannot be assessed reliably unless both written and practical tests are used. In its view, operator ability depends both on knowledge of a variety of subjects, which the written test would address, and the ability to apply that knowledge, which would be addressed by the practical test.

Proposed paragraph 1427(b)(1)(ii)(B) would require that different levels of certification be provided, based on varying equipment capacities and types. This proposed requirement is designed to ensure that the extent of knowledge and skill required is commensurate with the type and capacity of equipment the employee operates. For example, an employee who only operates a hydraulic truck crane would not need to also have the additional knowledge and skills necessary to operate a lattice boom crawler crane. Similarly, an employee who operates only a 22 ton capacity hydraulic truck crane would not need to also have the additional knowledge and skills necessary to operate a 300 ton hydraulic truck crane.[64]

In its deliberations, the Committee determined that requiring the certification to be model-specific would be unnecessarily restrictive, and instead agreed on the term ''type.'' In the SBREFA Panel Report, the Panel recommended that OSHA solicit public comment on whether the term ''type'' is sufficiently clear for this purpose. OSHA requests public comment on whether this term is appropriate, whether it needs to be defined (and if so, what that definition should be),[65] and suggestions as to what other terms may be better.

During the SBREFA process, several SERs described situations in which an operator is very knowledgeable and skillful with respect to one particular model of crane, but has very limited knowledge and ability regarding other models and types of cranes. These SERs were concerned that such operators would be unable to obtain a certification based on equipment capacity and type. They believe that, since these operators are well qualified to operate a particular crane model, there should be a mechanism for them to become certified to operate that model. The Panel recommended that OSHA consider and solicit public comment on expanding the levels of certification so as to allow an operator to be certified on a specific brand's model of crane. Consistent with the Panel's recommendation, OSHA seeks public comment on this issue.

The SBREFA Panel also received comments from some SERs suggesting that the standard should accommodate crane operators who were fully capable

[64] Note that certification on a more complex and/or higher capacity piece of equipment would typically qualify an operator to operate less complex/lower capacity equipment of the same type. For example, an operator certified for a 300 ton hydraulic truck crane would not need a separate certification to operate a 22 ton hydraulic truck crane.

[65] One possible approach, referred to by the SBREFA Panel, would define ''type'' by using the categories of equipment represented in Figures 1–10 of the ASME B30.5–2004 standard.

of operating particular equipment in a limited set of circumstances but who would be unable to pass certification tests that required knowledge and abilities beyond those circumstances. The Panel recommended that OSHA consider and solicit public comment on expanding the levels of operator qualification/certification to allow such operators to be certified for a specific, limited type of circumstance defined by a set of parameters that, taken together, would describe an operation characterized by simplicity and relatively low risk. In response to the Panel's recommendation, OSHA requests public comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced.

Proposed paragraph 1427(b)(1)(iii) would require that the testing organization have procedures for operators to re-apply and be re-tested in the event an applicant fails a test. This would help ensure that if the employee initially failed to pass the test, the employee would be able to retake the test and still have the opportunity to obtain the certification.

Proposed paragraph 1427(b)(1)(iii) would also require that the testing organization have procedures for operators to re-apply and be re-tested in the event an operator was decertified. This would similarly help protect an employer's expenditures for training and certification testing.

Proposed paragraph 1427(b)(1)(iv) would require that the testing organization have procedures for re-certifying operators designed to ensure that the operator continues to meet the requirements of proposed § 1926.1427(j). The Committee believed that testing for recertification would not need to be as rigorous as for initial certification. This proposed provision was therefore included so that recertification procedures appropriate for those who have already been certified would be available.

Under proposed paragraph (b)(2), the certification would be ''portable,'' which means that any employer of an operator certified under Option 1 would meet the requirements of proposed § 1926.1427 with respect to that operator.[66] The Committee believed that accredited testing organizations could be relied upon to consistently adhere to the criteria in § 1926.1427, since they would be fully independent and their business interest would depend on their continued accreditation. Therefore, it would be appropriate for all employers to be able to rely on their certifications.

Under proposed § 1926.1427(b)(3), the certification would be valid for five years. The Committee believed that this is an appropriate length of time to assume that, absent a specific indication to the contrary, an employee would retain the knowledge and proficiency demonstrated through the testing process.

In the SBREFA Panel Report, the Panel indicated that some Small Entity Representatives were concerned that there would be an insufficient number of accredited crane operator testing organizations and that many employers would not be able to set up and maintain an audited employer program under Option 2 (see discussion of Option 2 below). At present, there are two testing organizations that have been accredited by a nationally recognized accrediting organization to certify crane operators.[67]

C–DAC considered this issue and was of the view that, with a four-year phase-in period, there would be sufficient time for the market to respond to an increased demand for certification services. Some SERs expressed a similar expectation. Nonetheless, the Panel recommended that OSHA solicit public comment on whether it would be appropriate to expand Option 1 so that an accredited educational institution could be used to ''administer'' tests. In other words, under this concept, Option 1 would be expanded so that an accredited educational institution could administer written and practical tests that were developed or approved by an accredited crane/derrick testing organization. Many educational institutions currently have an accreditation through a national or regional accrediting agency that is listed by the U.S. Secretary of Education (SOE) or have an accreditation by a State agency that has been recognized by the SOE for approval of public post-secondary vocational education. Such an expansion could broaden the availability of certification services.

C–DAC considered a related concept in which an educational institution or program accredited in this manner could both develop and administer tests. However, it rejected that concept because the SOE-related type of accreditation would be more broadly based on the institution as a whole, rather than on its operator certification program in particular.

It is the Agency's understanding that much of the Committee's concern in this regard was related to the development of the tests rather than their administration. In other words, while considerable subject-specific expertise is needed to develop accurate and reliable crane operator tests, the expertise needed to administer such tests may be similar to the expertise needed to administer tests in general. However, there is a question as to whether this is equally true for written and practical tests.

Therefore, OSHA solicits public comment on these issues. Specifically, the Agency seeks comment on whether Option 1 should be expanded so that an accredited educational institution could administer written and practical tests that were developed or approved by an accredited crane/derrick testing organization.

Paragraph 1427(c) Option 2: Qualification by an Audited Employer Program

Proposed paragraph (c) sets out Option 2, in which the employer would determine, through its own audited testing program, that its employee is qualified to operate the equipment. The Committee recognized that some employers, including those that have already established in-house testing programs, may want to do their own testing to meet the proposed § 1926.1427 requirements. The Committee also recognized that, for there to be a significant improvement in the industry with respect to operator qualifications, it is essential that there be a mechanism to ensure that such testing is accurate and reliable. Therefore, under Option 2, the tests would be required to be either developed by an accredited crane operator testing organization, or approved by an auditor who is certified by an accredited crane operator testing organization. In addition, the administration of the tests would be audited.

Proposed paragraph (c)(1) sets forth the requirements that would apply to the contents and design of the tests (requirements for the administration of the tests is dealt with separately in proposed § 1926.1427(c)(2), discussed below) used in an audited employer program. To ensure that the tests meet the industry standards for written and practical examinations, they would have to be developed by an accredited testing organization (as described in proposed

[66] See the explanation of the proposed definition of ''portable'' below in the discussion of proposed § 1926.1427(m).

[67] These organizations are the National Commission for the Certification of Crane Operators (NCCCO), which is accredited by the National Commission for Certifying Agencies (NCCA) (OSHA–2007–0066–0021) and by ANSI (OSHA–2007–0066–0025), and the Southern California Crane & Hoisting Certification Program (SCCHCP), which is accredited by NCCA.

§ 1926.1427(b)), or approved by an auditor in accordance with the requirements of proposed § 1926.1427(c)(1)(ii).

An employer choosing to use tests other than those developed by an accredited testing organization under proposed § 1926.1427(c)(1)(i) would be required to have the tests approved by an auditor in accordance with the criteria in proposed § 1926.1427(c)(1)(ii). The auditor would have to be certified as a test evaluator by an accredited testing organization. To ensure that the auditor's evaluation is independent and impartial, the auditor would be prohibited from being employed by the employer seeking evaluation of its qualification program. Also, the audit would need to determine that the program meets nationally recognized test development criteria and adequately assesses the criteria in proposed § 1926.1427(j).

The Committee believed that these requirements are necessary to ensure that the contents and design of the tests meet the criteria in proposed § 1926.1427(j) and generate valid and reliable results.

The requirements for test administration that would apply under Option 2 of this section are set forth in proposed § 1926.1427(c)(2). Proposed § 1926.1427(c)(2)(i) would require that the auditor find that the administration procedures meet nationally recognized test administration standards. The Committee believed that this proposed provision is needed to ensure that the test results would be valid and reliable.

Under proposed paragraphs (c)(2)(ii) and (c)(2)(iii), the auditor would have to be certified by an accredited certifying organization as described in § 1926.1427(b), and would be prohibited from being employed by the employer seeking the auditor's approval for its operator qualification program. Finally, proposed paragraph § 1926.1427(c)(2)(iv) would require that the audit be conducted in accordance with nationally recognized auditing standards. The Committee believed that, to avoid a conflict of interest and assure the integrity of the audit, it is necessary to have the auditor be independent of the employer and apply well recognized procedures for conducting the audit.

The Agency notes that the proposed requirement that the audit be conducted in accordance with nationally recognized auditing standards would apply only to the audit of the administration of the tests, and not to the audit of the contents of the written and practical tests. It appears to the Agency that this was a drafting error, and that the Committee intended that the entire audit be conducted in accordance with nationally recognized auditing standards. Therefore, the Agency solicits public comment on whether a new § 1926.1427(c)(1)(ii)(D), reading as follows, should be added:

(D) The audit shall be conducted in accordance with nationally recognized auditing standards.

Proposed paragraph (c)(3) addresses the need for an audit of an employer's operator qualification program shortly after its inception, as well as periodically thereafter. This would ensure regular and independent oversight of employer-run qualification programs to verify that operators are being tested according to nationally recognized standards, on at least those qualifications set forth in proposed § 1926.1427(j).

Proposed paragraph (c)(4) would require an employer's program to include re-qualification procedures, which would have to be audited as described in proposed § 1926.1427(c)(1) and (c)(2). The Committee believed that this is necessary to ensure the operators' continued proficiency with, at a minimum, the criteria set forth in proposed § 1926.1427(j).

In the event an auditor discovers a deficiency in an employer's operator qualification program, the employer would have to meet the requirements set forth in proposed § 1926.1427(c)(5). Proposed § 1926.1427(c)(5)(i) requires that no additional operators be qualified until the auditor determines that the deficiency has been corrected. Under § 1926.1427(c)(5)(ii), the program would also have to be re-audited within 180 days of the deficiency's correction to ensure that the minimum qualifications in proposed § 1926.1427(j) were being adequately and consistently tested.

Proposed paragraph (c)(5)(iii) would require the auditor to file a report of any such deficiency with the appropriate OSHA Regional Office within 15 days of discovery. In addition, records of the employer's qualification program audits would be required to be maintained by the auditor for three years and, under § 1926.1427(c)(5)(iv), would have to be made available at the request of the Secretary of Labor or a designated representative. The Committee believed that these provisions are necessary to facilitate enforcement of the Option 2 requirements.

Under proposed paragraph (c)(6)(i), a qualification by an employer's operator qualification program (Option 2) of this section would not be portable. It was the Committee's view that the degree of consistency in adhering to the proposed requirements of § 1926.1427 is likely to be highest among accredited crane operator testing organizations, since they would be fully independent and their business interest would depend on their continued accreditation. That view is reflected in full portability being restricted to certification under Option 1 of this section.

Under proposed paragraph (c)(6)(ii), a qualification by an employer's operator qualification program would be valid for five years. The Committee believed that this is an appropriate length of time to assume that, absent a specific indication to the contrary, an employee would retain the knowledge and proficiency demonstrated through the testing process.

Paragraph 1926.1427(d) Option 3: Qualification by the U.S. Military

Proposed paragraph (d) provides that an operator would be deemed qualified if he/she had a current qualification issued by the United States military. Under proposed § 1926.1427(d)(2), such a qualification would be considered valid for the length of time stipulated by the United States military, and would not be portable.

At the C–DAC meetings a representative of the United States Navy explained that, because of a variety of potential exigencies associated with the mission of the United States military, i.e., national defense, the military needs to be able to use its own qualification program, the criteria for which may have to vary based on the circumstances. Consequently, the criteria for qualification under Option 3 would be left to the military to determine, including the length of time for which such a qualification would be valid.

Proposed § 1926.1427(d) must be read in light of Executive Order (E.O.) 12196 (Feb. 26, 1980) and 29 CFR Part 1960, which exclude military personnel (uniformed members of the Armed Forces) and uniquely military equipment, systems, and operations from OSHA coverage. Consequently, uniformed military personnel would not be covered by any of this proposed standard and there would be no obligation under this standard or E.O. 12196 for uniformed military personnel operating cranes to be certified. Civilian employees of the Defense Department and Armed Forces engaged in work encompassed by ''uniquely military equipment, systems and operations'' similarly would not be covered by any of the provisions of this proposed standard, including the certification provisions. Therefore, even in the absence of Option 3, the Department of Defense is free to impose whatever

qualifications it requires for crane operators who are military personnel or civilian employees engaged in such work.

Under E.O. 12196, OSHA standards apply with respect to a civilian employee of the Department of Defense and Armed Forces who is engaged in work that falls beyond ''uniquely military equipment, systems and operations.'' Under that executive order, proposed § 1926.1427 would be applicable to those employees. Therefore, the U.S. military could use Option 3 by qualifying its own civilian employee operators engaged in work that falls beyond ''uniquely military equipment, systems and operations.''

In reviewing this part of the C–DAC consensus document, the Agency has determined that there is an ambiguity in the text of Option 3 in that it does not clearly indicate whether it would also cover employees of private contractors of the Armed Forces or Defense Department. With respect to such private contractor employees, E.O. 12196 is inapplicable and OSHA has the authority to promulgate qualification/certification requirements regarding them.

The Agency believes that C–DAC's intent was to have Option 3 be applicable only with respect to civilian employees of the U.S. military; it was not intended to include private contractor employees. This intent is reflected in C–DAC's use of the term ''Not portable'' in Option 3 and that term's definition. Proposed § 1926.1427(d)(2)(i) specifies that an operator's U.S. military-issued qualification is not portable. Under the definition of that term in § 1926.1427(m)(2), such a qualification is valid ''only where the operator is employed by (and operating the equipment for) the employer that issued the qualification.'' Since private contractor employees are not ''employed by'' the U.S. military, this indicates that Option 3 was not intended to apply to them. Instead, Option 3 was intended to apply only with respect to the U.S. military's own employees.

Accordingly, OSHA is planning on changing the regulatory language in proposed § 1926.1427(d) to more clearly reflect this intent. Specifically, the Agency is considering making the following changes to proposed § 1926.1427(d)(1):

(1) For purposes of this section, an operator who is an employee of the U.S. military is considered qualified if he/she has a current operator qualification issued by the U.S. military for operation of the equipment.

In addition, in proposed § 1926.1427(m)(Definitions), the following definition would be added:

(3) An ''employee of the U.S. military'' is a federal employee of the Department of Defense or Armed Forces and does not include employees of private contractors.

OSHA requests public comment on this issue.

Paragraph 1427(e) Option 4: Licensing by a Government Entity

This option would allow a government licensing department/office to qualify crane operators. The Committee included this option because it believed that some States have effective, reliable licensing procedures, and that making use of them for purposes of proposed § 1926.1427 would provide additional flexibility to employers. However, in the experience of Committee members, there is significant variability in criteria and administrative practices among government licensing entities. Therefore, under this option, the license could be used to meet the requirements of proposed § 1926.1427 only if the government entity meets the licensing criteria in proposed 1926.1427(e)(2).

Proposed paragraph (e)(2)(i) would require that the criteria used by the licensing department/office address the knowledge and skill requirements listed in proposed § 1926.1427(j). Proposed § 1926.1427(e)(2)(ii) would require that the government entity follow the same test content, test administration and related criteria as required under Option 1. Proposed § 1926.1427(e)(2)(iii) would require that the office with authority over the licensing department/office assess the tests and procedures used by the licensing office/department and determine that the requirements of proposed § 1926.1427(e)(2)(ii) and (e)(2)(iii) have been met. Also, the government licensing office would have to have re-certification procedures in place as discussed in proposed §§ 1926.1427(b)(1)(iv) and 1926.1427(c)(4). The Committee believed that these provisions are necessary to ensure that the government licensing criteria and procedures yield valid and reliable results.

Under proposed paragraph (e)(3)(i), this qualification would be valid only within the geographic jurisdiction of the licensing entity. For reasons of federal-local government comity, the Committee decided not to include a provision requiring the government entity to be accredited by a nationally recognized accrediting agency for purposes of Option 4. In the absence of such accreditation, there is an increased potential for variability in the degree to which the criteria in proposed § 1926.1427(e)(2) will be met. Consequently, the Committee believed that, for purposes of meeting the requirements in proposed § 1926.1427, the validity of the qualification under Option 4 should not extend beyond the geographical jurisdiction of the government entity.

Proposed paragraph (e)(3)(ii) provides that the licensing entity may determine the time period for which the qualification is valid, but cannot issue a qualification intended to be valid for more than five years. The five year maximum was included in the provision because the Committee believed that this is an appropriate length of time to assume that, absent a specific indication to the contrary, an employee would retain the knowledge and proficiency demonstrated through the testing process.

Paragraph 1427(f) Pre-Qualification/Certification Training Period

This proposed paragraph addresses the requirements that would have to be met for a trainee to operate a crane on the job while preparing for qualification/certification assessment. Proposed § 1926.1427(f)(1) would allow for the operation of cranes by employees who are not qualified or certified, provided that they meet the requirements in proposed § 1926.1427(f)(2). Proposed § 1926.1427(f)(2) would allow those undergoing training in preparation for qualification/certification tests to operate equipment under the conditions outlined in § 1926.1427(f)(2)(i) through (f)(2)(v). The Committee believed that it is necessary for there to be a process by which operators who are not certified or qualified can get experience working with the equipment to help prepare for obtaining a certification/qualification. This proposed paragraph would require appropriate oversight of such trainees to ensure worksite safety.

In the C–DAC consensus document, § 1926.1427(f)(2) states that,

An employee who has passed neither the written nor practical tests required under this section is permitted to operate equipment as part of his/her training where the following requirements are met. * * *

It is the Agency's understanding that the intent of the Committee was to allow trainees who had not yet obtained a certification or qualification to operate equipment on the job as part of the training process as long as the criteria in § 1926.1427(f)(2) were met. However, the C–DAC language would allow such an operator to do this only if the

operator had passed not yet passed both the written and practical tests.

The anomalous result of that language would have been that an operator who had passed one of those tests but not both would have been prohibited from operating the crane as a trainee under this provision. Since that would have been contrary to the Committee's intent, the Agency has modified that language for the proposed rule, which now reads:

> An employee who has not passed both the written and practical tests required under this section is permitted to operate equipment as part of his/her training where the following requirements are met. * * *

Proposed paragraph (f)(2)(i) would require that the trainee/apprentice be provided with sufficient training prior to operating the equipment to enable him/her to operate it safely under the limitations listed in this proposed section and any additional limitations established by the employer. This would ensure that, before beginning to operate the equipment at the site, the trainee/apprentice would have attained sufficient knowledge and skills to operate the equipment safely as a trainee/apprentice.

Proposed paragraph (f)(2)(ii) would restrict the trainee/apprentice's operation of the equipment to those tasks currently within his/her ability. The Committee believed that this is necessary to ensure that, throughout the training period, the tasks the trainee/apprentice performs are always commensurate with his/her ability. This provision would also allow the trainee/apprentice to perform progressively more complex tasks as the trainee/apprentice develops the necessary ability.

Proposed paragraph (f)(2)(iii) sets forth the requirements that an employee would have to meet to be permitted to supervise the trainee/apprentice's operation of the crane. The Committee believed that setting the criteria for such supervision is necessary to ensure that the equipment is operated safely during the training/apprenticeship period.

Under proposed paragraph (f)(2)(iii)(A), the trainee/apprentice's supervisor would have to be an employee or agent of the trainee's/apprentice's employer. The Committee believed that this is necessary to ensure that the supervisor would have the authority to direct the actions of the trainee/apprentice.

Proposed paragraph (f)(2)(iii)(B) would require that the trainee/apprentice's supervisor be either a certified operator (in accordance with proposed § 1926.1427), or have passed the written portion of a certification test under one of the Options in proposed § 1926.1427. In addition, whether the supervisor is a certified operator or has passed the written test, the supervisor would have to be familiar with the proper use of the equipment's controls.

The SBREFA panel recommended that OSHA consider whether the trainee/apprentice's supervisor should have additional training beyond the qualifications required under proposed § 1926.1427(f)(2)(iii)(B). This recommendation is addressed below in the discussion of § 1926.1430, *Training.*

The Committee believed that this provision is necessary to ensure that the supervisor has sufficient knowledge about the equipment to enable him/her to effectively oversee the safe operation of the crane. The Committee determined that a supervisor who had passed the written portion of a certification test would not need to be sufficiently proficient to pass the practical portion in order to effectively supervise a trainee/apprentice. However, both in the instance where the supervisor is certified and in the instance where he/she is not certified but has passed the written portion of the certification test, the Committee believed that it is necessary that he/she be familiar with the proper use of the equipment's controls, since such knowledge is essential to being able to effectively supervise a trainee/apprentice.

The C–DAC consensus document language refers to ''certified operator'' and the written portion of a ''certification'' test. However, under proposed § 1926.1427, an operator may be either ''certified,'' which would be obtained under Option 1, or ''qualified,'' which would be obtained under any one of the other options. The Agency believes that the Committee intended that as long as the supervisor meets the qualification/certification criteria under any of these options, or has passed the written portion of a test used to obtain a qualification/certification under any of these options, and all other aspects of proposed § 1926.1427(f)(2)(iii) have been met, the employer should be permitted to use that supervisor to supervise the trainee/apprentice.

In addition, the C–DAC consensus document language regarding this provision states that a supervisor who is a ''certified operator'' may, if the other criteria listed in the provision are met, supervise the trainee/apprentice. Alternatively, the supervisor must have ''passed the written portion of a certification test * * *.'' The Agency believes that it was the Committee's intent that the certification or written test that was passed be valid for the equipment that the trainee/apprentice is operating. However, the C–DAC language, read literally, would permit a supervisor with a certification or passing score on a written test that was valid only for equipment other than what the trainee/apprentice was operating to supervise that trainee/apprentice.

To conform proposed paragraph (f)(2)(iii)(B) to C–DAC's intent, OSHA is planning to modify that provision as follows and requests public comment on this change.

> (B) The operator's supervisor is either a qualified/certified operator under this section for the equipment the trainee/apprentice is operating, or has passed the written portion of a qualification/certification test for such equipment under one of the Options in paragraphs (b) through (e), and is familiar with the proper use of the equipment's controls.

Proposed paragraph (f)(2)(iii)(C) would require that the operator's supervisor perform no tasks that would detract from his/her ability to supervise the trainee/apprentice. The Committee believed that permitting the operator's supervisor to engage in tasks that would impinge on his/her ability to supervise the trainee/apprentice would endanger the trainee/apprentice and other employees in the vicinity of the crane.

Under proposed paragraph (f)(2)(iii)(D), for equipment other than tower cranes, the operator's supervisor and the trainee/apprentice would be required to be in direct line of sight of each other, and would be required to communicate either verbally or by hand signals. The Committee believed that this would ensure that the operator's supervisor could rapidly and effectively give instructions to the trainee/apprentice, especially for purposes of correcting the trainee/apprentice.

With respect to tower cranes, it was the Committee's view that the height of the operator's station would typically make it infeasible to maintain direct line of sight between the operator's supervisor and the trainee/apprentice. For the same reason, use of hand signals is also often not feasible. Therefore, the proposed provision would instead require that they be in direct communication with each other. For example, direct communication could be achieved by radio or other instant electronic voice communication system.

The Committee believed that it would be infeasible for the operator's supervisor to supervise the trainee/apprentice 100 percent of the time. Proposed § 1926.1427(f)(2)(iv) is designed to set criteria that would permit the trainee/apprentice to continue operating the crane in the absence of the operator's supervisor for

short breaks under circumstances that would result in safe operation. Those criteria would be as follows:

Under proposed paragraph (f)(2)(iv)(A), the break would be restricted to no more than 15 minutes, and no more than one break per hour. The Committee believed that this restriction is needed because otherwise there would be a significant likelihood that the other criteria (discussed below) would not be followed, and that the trainee/apprentice would not receive the amount of supervision that is needed to ensure safe operation.

Under proposed paragraph (f)(2)(iv)(B), immediately prior to the break, the operator's supervisor would have to inform the trainee/apprentice of the specific tasks that the trainee/apprentice would be authorized to perform and the limitations that he/she must adhere to during the break. Under proposed § 1926.1427(f)(2)(iv)(C), the specific tasks that the trainee/apprentice would perform during the break would have to be within the trainee/apprentice's ability. The Committee believed that these provisions are necessary to prevent injuries and fatalities that could be caused by a trainee/apprentice operating a crane under circumstances that are beyond his/her ability.

The Committee believed that there are certain circumstances in which it is inappropriate for a trainee/apprentice to operate a crane because of the complexity and/or heightened risks involved. Therefore, for the circumstances listed in proposed § 1926.1427(f)(2)(v)(A)–(D), the trainee/apprentice would be prohibited from operating the equipment in all cases, even if the operator's supervisor believed the trainee/apprentice had attained the necessary knowledge and skill.

With respect to operations involving multiple-lift rigging, the Committee believed that the difficulty and/or risk involved is not at the same level as those listed in proposed § 1926.1427(f)(2)(v)(A)–(D). Consequently, as reflected in proposed § 1926.1427(f)(2)(v)(E), while there would be a general prohibition against a trainee/apprentice operating the equipment when multiple-lift rigging is involved, an exception would apply where the operator's supervisor determined that the trainee/apprentice's skills are sufficient for this high-skill work.

Paragraph 1427(g)

Proposed paragraph (g) would permit a testing entity to provide training as well as testing services as long as the criteria of the applicable accrediting agency (in the Option selected) for an organization providing both services are met. The Committee was aware of an impression among some people in the industry that a testing entity could not get accredited if it also provided training. However, after some research, the Committee determined that this was not a bar to accreditation if certain procedures were instituted. Specifically, an industry consensus standard, the International Organization for Standardization (''ISO'') 17024, addresses entities that offer certifications to individuals. It requires that no such entity offer training unless the entity can demonstrate that the training is independent of both evaluation and certification. This is intended to preserve both confidentiality and impartiality in the testing/certification process.

Therefore, at least with respect to those accrediting agencies that apply the ISO standard, a testing entity may also conduct training as long as an adequate ''firewall'' exists between the two functions. Proposed § 1926.1427(g) reflects the Committee's intent to make clear that a testing entity is not be prohibited from providing training, as long as the applicable criteria have been met.

Paragraph 1427(h)

The Committee deliberated about the need for operators to be able to read to operate a crane safely and how some operators, even though they can read, nonetheless have difficulty taking written tests. The Committee believed that it is crucial for operators to be able to read the load chart and other manufacturer procedures for the equipment they operate. In its view, the failure to be able to read that information could result in injuries and fatalities through a wide variety of errors (for example, by overloading the crane as a result of exceeding the crane's working radius, failing to deploy outriggers in accordance with the manufacturer's instructions, or failing to apply a footnote in a load chart that explains that the capacity is lower when a particular configuration of the crane is used).

However, the Committee recognized that some employees, while they have sufficient literacy to be able to read this type of material, for other reasons are unable to take written tests effectively. Therefore, under proposed § 1926.1427(h), the written qualification/certification test could be administered verbally, with the answers given verbally, if two prerequisites are met.

The first is that the qualification/certification candidate pass a written demonstration of literacy relevant to the work (proposed § 1926.1427(h)(1)). The second is that the candidate demonstrate the ability to use the type of written manufacturer procedures applicable to the class/type of equipment for which the candidate is seeking qualification/certification (proposed § 1926.1427(h)(2)). These would typically include, for example, the load chart and operator's manual for the crane the candidate would be operating.

As reflected in the SBREFA Panel Report, some SERs expressed a concern that operators who are not proficient in English would not be able to meet either requirement. The Panel recommended that OSHA solicit comment on whether employers should be permitted to use manuals that have been re-written to accommodate the level of English proficiency (that is, lower level or lack of proficiency) of the operator.

C–DAC considered this same concern in designing § 1926.1427(h). Neither the demonstration in § 1926.1427(h)(1) nor (h)(2) would necessarily have to be made in English as those provisions are currently drafted. As an example, under these proposed provisions, an employer could obtain a Spanish-language version of the load charts and operator's manual from the manufacturer, and arrange to have the literacy test administered in Spanish. An operator able to meet the requirements of proposed § 1926.1427(h) using these Spanish language materials would have demonstrated adequate literacy under the proposed rule.

However, it may be necessary to modify proposed § 1926.1427(b)(1), (c) and (e) so that, in such instances, the qualification/certification is limited to the use of equipment that is equipped with such translated materials. In addition, there is an issue with respect to whether the rule needs to incorporate safeguards to ensure that a translation of manufacturer-supplied materials conveys the same information as in the original. OSHA requests comment on these issues.

Some SERs also expressed a concern that many operators are not sufficiently literate in any language to meet the proposed requirements in § 1926.1427(h)(1) and (h)(2). As discussed above, C–DAC determined that it is essential for ensuring safe crane operation that operators have sufficient literacy to read and comprehend written materials that relate to critical aspects of operation, such as load charts and manufacturer's manuals. However, the Panel

recommended that OSHA solicit comment on whether employers should be permitted to use manuals that have been re-written to accommodate the literacy level of operators.

The concept underlying this recommendation is that a lower level of literacy may be sufficient as long as that level still enables the operator to read and understand the simplified language (and perhaps greater use of illustrations) in the re-written manual. If this were to be allowed, it would be necessary to modify proposed § 1926.1427(b)(1), (c) and (e) so that the certification is limited to the use of equipment that is equipped with a suitably re-written manual. Another issue that such a change would raise is whether the rule would need to incorporate safeguards to ensure that the modified materials conveyed the same information as in the original, manufacturer-supplied materials. OSHA requests comment on the Panel's recommendation and these related issues.

Paragraph 1427(i) [*Reserved*.]

Proposed paragraph (i) would be reserved because it is inconvenient for readers to determine whether ''i'' is being used as a letter or a roman numeral.

Paragraph 1427(j) Certification Criteria

Proposed paragraph (j) sets out the qualification and certification criteria applicable to the options described in proposed §§ 1926.1427(b)(1)(ii)(A), 1926.1427(c)(1)(ii)(C), and 1926.1427(e)(2)(iv). The Committee determined that these are the criteria needed to address the knowledge and skills that are fundamental to safe crane operation. As stated in the introductory language in proposed § 1926.1427(j), these would constitute ''minimum'' criteria; the accredited certifying entities, employers, or local or state licensing offices would not be precluded from adding additional requirements to their certification or qualification programs.

Proposed paragraph (j)(1) describes the criteria that would have to be covered by the written examination portion of a qualification/certification program. As stated above in the discussion of examination administration, the written portion of the examination may be administered orally, so long as the candidate has demonstrated sufficient literacy relevant to the work (e.g., load charts and equipment manual).

Proposed paragraph (j)(1)(i) states that the individual seeking qualification or certification must know ''the information necessary for safe operation of the specific type of equipment the individual will operate * * *'' As discussed above with respect to proposed § 1926.1427(b)(1)(ii)(B) (requirement that different levels of certification be provided, based on varying equipment capacities and types), during the SBREFA process, several SERs described situations in which an operator is very knowledgeable and skillful with respect to one particular model of crane, but has very limited knowledge and ability regarding other models and types of cranes. These SERs were concerned that such operators would be unable to obtain a certification based on equipment capacity and type. They believe that, since these operators are well qualified to operate a particular crane model, there should be a mechanism for them to become certified to operate that model. The Panel recommended that OSHA consider and solicit public comment on expanding the levels of certification so as to allow an operator to be certified on a specific brand's model of crane. Consistent with the Panel's recommendation, OSHA seeks public comment on this issue.

Also, as discussed above with respect to proposed § 1926.1427(b)(1)(ii)(B), the SBREFA Panel received comments from some SERs suggesting that the standard should accommodate crane operators who were fully capable of operating particular equipment in a limited set of circumstances but who would be unable to pass certification tests that required knowledge and abilities beyond those circumstances. The Panel recommended that OSHA consider and solicit public comment on expanding the levels of operator qualification/certification to allow such operators to be certified for a specific, limited type of circumstance defined by a set of parameters that, taken together, would describe an operation characterized by simplicity and relatively low risk. In response to the Panel's recommendation, OSHA requests public comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced.[68]

Proposed paragraph (j)(1)(i)(A) would require that the written examination address the candidate's knowledge of the equipment controls and operational/performance characteristics of the specific type of equipment. Operational/performance characteristics would include, for example, the deflection characteristics of the boom, including how deflection affects the positioning of the load and the extent to which deflection varies with boom angle and length as well as load weight. Also, equipment with lattice/cable supported booms has different deflection characteristics than equipment with non-lattice booms (that is, hydraulic ram supported booms). Meeting these criteria would ensure that the person controlling the equipment would be able to make necessary judgments and adjustments for safe crane operation.

Proposed paragraph (j)(1)(i)(B) was included to ensure that operators would be able to use load capacity information on a variety of configurations of the capacity and type of equipment. Such information is typically contained in load charts and manuals. This would ensure that the operator would be able to accurately determine, independently, the capacity of the equipment in each situation that he/she might encounter. The Committee believed that this ability is critical to helping prevent injuries and fatalities caused by overloading the equipment.

The Committee considered whether it is also necessary for the operator to be able to use the load information without the aid of a calculator. It determined that calculators are now so commonly available and used that it is not necessary for the operator to be able to use the load information without one.

Proposed paragraph (j)(1)(i)(C) addresses the need for crane operators to know how to prevent power line contact. In the Committee's experience, electrocutions and electrical injuries are typically caused when the operator unintentionally brings the boom, load line or load in electrical contact with a power line. Operator knowledge of the procedures that are necessary for preventing such contact (see the discussions of proposed §§ 1926.1407 through 1926.1411 above) is essential for preventing these injuries and fatalities.

Proposed paragraph (j)(1)(i)(C) also addresses the need for crane operators to know how to respond to a power line contact if one occurs. For example, the Committee determined that some electrocutions of operators occur while an operator attempts to exit the equipment. After realizing that the equipment is in electrical contact with a power line, the operator is electrocuted when he/she creates a grounding path by touching the

[68] The SBREFA Panel also recommended that OSHA ask for public comment on whether the standard should state more clearly that more limited training is required for operators of smaller capacity equipment than for more complex equipment. This recommendation is addressed below in the discussion of § 1926.1430, Training.

equipment while stepping on the ground.[69]

Proposed paragraph (j)(1)(i)(D) addresses the need for crane operators to have technical knowledge on a range of subjects that, if not sufficiently understood, could cause injuries and fatalities. The list of subjects in proposed Non-Mandatory Appendix E of this subpart serves as an example of that set of knowledge. The Committee believed that a degree of flexibility should be accorded in terms of what specific subjects need to be included. For example, a subject relevant only to an extensible boom crane would not need to be covered for a certification for a traditional lattice boom crane. Therefore, the proposed provision states that the testing criteria must include technical knowledge ''similar'' to the subject matter criteria listed in Appendix E of this subpart. To accommodate those who have less of a need for such flexibility and more of a need for specificity in this regard, the proposed provision also makes clear that, when the subjects listed in Appendix E are used, the requirements of the provision would be met.

In addition to the technical knowledge that would be required under proposed § 1926.1427(j)(1)(i)(D), technical knowledge applicable to three specific subjects would also be required under proposed § 1926.1427(j)(1)(i)(E).

Proposed paragraph (j)(1)(i)(E)(1) would require that an operator be able to demonstrate sufficient knowledge of how to assess ground conditions to identify potential hazards. The operator would therefore be able to assess ground conditions through inspection, and would also be aware of the potential for unseen hazards such as sewers, water mains, and other underground installations or conditions that might affect the ability of the ground to support the equipment and expected load.

Proposed paragraph (j)(1)(i)(E)(2) would require operators to demonstrate sufficient knowledge of site hazards so that the operator would be able to identify them and understand their significance to safe operation of the equipment. Examples of typical site hazards include electrical hazards posed by underground electrical or cable lines and aboveground telephone poles and power lines, and ground-support hazards posed by manholes, drains and trenches, which can lead to tip-overs.

Proposed paragraph (j)(1)(i)(E)(3) would require operators to demonstrate sufficient technical knowledge to ensure that conditions at the entrance to the site are sufficient to enable the equipment to travel safely onto the site. For example, where equipment must descend or ascend a dirt ramp, the operator needs to be able to assess the effect of the ramp's steepness and to detect signs of instability.

Proposed paragraph (j)(1)(i)(F) would require operators to demonstrate a thorough knowledge of this subpart, including incorporated materials. The Committee believed that operators play a key role in the application of these requirements and it is therefore essential that they understand them.

Proposed paragraph (j)(1)(ii) is intended to ensure that operators have the ability, at a minimum, to demonstrate sufficient literacy to locate and understand information both in the equipment manual as well as in other sources which address the information discussed in proposed § 1926.1427(j)(1)(i)(A) through (j)(1)(i)(F). Since the Committee determined that safe crane operation depends on applying that information, the operator needs to be able to locate and understand it.

Proposed paragraph (j)(2) would require a practical test and sets criteria for such a test. Safe crane operation depends on an operator having sufficient skill to operate the equipment safely. The Committee felt that a successful demonstration of ability to perform the operations discussed below is essential to ensuring that the operator will be able to apply the requisite knowledge in the field. The practical test under this proposed paragraph would be conducted using equipment of the capacity and type for which the candidate seeks certification.

Proposed paragraph (j)(2)(i) would require an operator to demonstrate the ability to recognize, from visual and audible observation, the items listed in proposed paragraph § 1926.1412(d)(shift inspection). Irrespective of whether the operator or someone else conducts the shift inspection, the operator needs to be able to recognize apparent deficiencies associated with these parts and mechanisms. First, the operator needs to be able to identify indications of safety problems that may arise after the shift inspection has been completed. In addition, this ability is important since the operator needs to be able to effectively exercise his/her authority under proposed § 1926.1418, *Authority to stop operation* to stop lifting operations (see discussion of that proposed section above).

Proposed paragraph (j)(2)(ii) addresses the need for operators to have demonstrated proficiency with operational and maneuvering skills. Lack of such proficiency could result in a wide range of accidents that could cause injuries or fatalities. For example, without this level of skill, the operator could unintentionally exceed the crane's capacity (such as by booming out too far) and overturn the equipment, make electrical contact with power lines, or cause struck-by injuries and fatalities (such as by losing a load or losing control of the load).

Proposed paragraph (j)(2)(iii) requires that the operator demonstrate the ability to apply load chart information. The Committee believed that if an operator is unable to apply load chart information, there is a significantly heightened risk of the crane overturning. This is because an operator without this ability may fail to keep the crane within the required operational parameters called for by the load chart (for example, by failing to recognize that proceeding with the lift will result in exceeding the maximum allowable boom radius as specified in the load chart).

As with proposed paragraph (j)(2)(i) (ability to recognize inspection items), this ability is also important since the operator needs to be able to effectively exercise his/her authority under proposed § 1926.1418 (Authority to stop operation) to stop lifting operations (see discussion of that proposed section above). For example, if the only way to land the load with the crane in its current position would be to exceed the allowable radius specified in the chart, the operator would need to be able to recognize that this would happen and stop the lift.

Proposed paragraph (j)(2)(iv) would require that an operator be able to shut down and secure equipment safely. This ability is necessary to ensure that the shut down procedure is done safely and the equipment is properly secured to prevent unintended movement of the equipment after shut down.

Paragraph 1427(k) Phase-In

Under proposed paragraph (k), the qualification/certification requirements in proposed § 1926.1427 would not become effective until four years after the effective date of the final rule. The Committee believed that this four year period would provide time for operators to get additional training (where

[69] Note that, as provided in proposed § 1926.1408(g)(1)(i)(A) on power line safety, operators must be aware of the danger of electrocution if they simultaneously touch energized equipment and the ground. They must also, pursuant to proposed § 1926.1408(g)(1)(i)(B), be trained to understand that when the equipment makes electrical contact with a power line, the operator's safety requires him or her to remain inside the cab except where there is an imminent danger of fire, explosion, or other emergency that necessitates their leaving the cab.

needed) to prepare them for the testing, for additional testing organizations to become accredited for purposes of Option 1 (proposed § 1926.1427(b)), for additional organizations to become nationally recognized accrediting agencies, for employers (who so choose) to develop audited programs for use under Option 2 (proposed § 1926.1427(c)), for accredited testing organizations to develop programs to certify auditors as described under Option 2, and for state and local government entities (who so choose) to make preparations to meet the criteria under Option 4 (proposed § 1926.1427(e)). It would also give employers time to plan which of the qualification/certification options would be most suitable for them.

Under proposed paragraph (k)(1), during this four year period, proposed paragraphs § 1926.1427(k)(1)(i) and (ii) would address operator qualifications and training. Specifically, proposed § 1926.1427(k)(1)(i) would require that operators be competent for the purposes of operating the equipment safely. This would require that the operator have the requisite knowledge and skill to identify, anticipate, and avoid actions which could result in hazardous conditions related to the equipment and job site.

Proposed paragraph (k)(1)(ii) would require employers to ensure that operators who do not already have sufficient knowledge or skill to operate the equipment safely undergo training prior to engaging in operations. In addition, the employer would be required to ensure that the operator is evaluated to confirm that he/she understands the information provided in the training. These interim measures are not significantly different from current requirements under Subpart N of this part, § 1926.20(b)(4) (''the employer shall permit only those employees qualified by training or experience to operate equipment and machinery'') and § 1926.21(b)(2) (''the employer shall instruct each employee in the recognition and avoidance of unsafe conditions * * * ''). However, they would ensure that there would not be a gap with respect to this issue between the termination of the requirements under Subpart N of this part and the effective date of proposed § 1926.1427(a) through (j) and (m). The four-year phase-in period discussed above is set out in proposed § 1926.1427(k)(2).

Paragraph 1427(l) [*Reserved.*]

Proposed paragraph (l) would be reserved because of the inconvenience that would result from the use of ''l'' both as a small Arabic numeral and as the letter ''l.''

Paragraph 1427(m) Definitions

Proposed paragraph (m) defines two terms used in the qualification/certification provisions in § 1926.1427(b) through (e) (addressed above). Proposed § 1926.1427(m)(1) explains that, if an operator has a ''portable'' certification, any employer may rely on that certification. The employer of an operator who carries a portable certification (which can be obtained only through the method described in proposed § 1926.1427(b)) has ensured that the operator has been qualified or certified, and has met the requirements of proposed § 1926.1427(a).

Proposed paragraph (m)(2) explains that, if an operator has a qualification that is ''not portable,'' only the employer who issued that qualification may rely on it for purposes of meeting the requirements of proposed § 1926.1427(a). As discussed above, OSHA is considering adding a third definition for the term ''employee of the U.S. military'' (see the discussion above of proposed § 1926.1427(d)).

Dissenting View of C–DAC Member Brian H. Murphy

Under the C–DAC ground rules (OSHA–S030–2006–0663, Ex. 36–1–8), the Committee reaches consensus if no more than two non-federal members dissent on a particular issue. The ground rules also provide that, upon the request of a dissenting member, OSHA will include the member's reasons for dissenting in the preamble to the proposed rule. Two members of C–DAC, Mr. Brian H. Murphy and Mr. Craig Steel, dissented from the Committee's draft of proposed § 1427. Mr. Murphy asked that his reasons for dissenting be included in the preamble, and provided them in the letter reprinted below (OSHA–2007–0066–0007). Note that, pursuant to the ground rules, OSHA has not reprinted comments in the letter regarding issues upon which the member did not dissent.

Dear Deputy Assistant Secretary Snare:

Thank you for providing an opportunity for the Associated General Contractors of America (AGC) to serve on the Occupational Safety and Health Administration's (OSHA's) Crane and Derrick Advisory Committee (C–DAC). AGC welcomed and appreciated the chance to explore OSHA's several options for a new standard on cranes and derricks with the other knowledgeable members of that committee. In addition, it was a personal privilege for me to represent AGC's 33,000 members.

AGC is a nationwide trade association of general contractors, specialty contractors, material suppliers, equipment dealers and other firms that collectively form the core of the construction industry. The association was formed in 1918 at the express request of President Woodrow Wilson, and today, AGC maintains a network of 98 state and local chapters throughout the United States. Its members engage in the construction of commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities and multi-family housing projects, and on site preparation and utilities installation for housing development.

AGC shares and strongly supports OSHA's mission. While AGC occasionally disagrees with OSHA's views on the best and most effective means and methods of improving construction safety and health, AGC is and will remain equally committed to that goal. Indeed, from its very inception, AGC has taken a great interest in the safety and health of construction workers. Its bylaws expressly provide that ''[t]he members of [AGC] shall work to develop good relations with employees * * * and shall make every effort to provide safe working conditions on construction projects and to promote safe working habits by their employees.

AGC has long taken a very proactive approach to construction safety and health. Over the last 15 years, AGC has produced over 100 videos and publications on the various practices and procedures that may be necessary, on any given jobsite, to protect construction workers from occupational injury or illness. Each year, AGC sponsors two nationwide safety award programs. Regularly, AGC also offers safety management training courses and other safety training programs. In 2003, AGC used a Susan Harwood Training Grant to train 1,800 construction workers on OSHA's new steel erection standard. In 2004, AGC will use a third grant to train another 600 construction workers on fall protection. AGC was proud to receive these grants, and today, AGC is even prouder that an overwhelming number of its trainees gave these programs excellent reviews. These efforts demonstrate AGC's commitment to partnering with OSHA to make construction work-sites safer.

AGC also supports OSHA's very specific effort to set new standards for the men and women operating cranes and derricks. AGC agrees that systematically increasing the knowledge and improving the skill of these construction workers will reduce the number of accidents involving cranes and derricks and limit the closely related risks of injury. Long before serving on C–DAC, AGC collaborated with the St. Paul Companies on an exemplary training program on the essentials of crane safety. AGC also signed a cooperative agreement with the National Commission for the Certification of Crane Operators (NCCCO), recognizing the ''importance of safe crane operations on our nation's construction sites'' and ''the CCO written and practical examination is a method of documenting the qualifications criteria outlined in ASME B30.5–3.1–1995, ''Qualifications for and Conduct of Operators and Operating Practices.''

As a member of C–DAC, fully committed to its goals and objectives, AGC worked long

and hard to find common ground with the other members of that group. At the end of the day, both AGC and the others did reach agreement on a vast majority of the issues that the group had to confront. The group wrote forty-two sections and two appendices into the new standard that it proposed to OSHA, developing a document that totaled one-hundred-nineteen pages in length. During its deliberations, the group reached agreement on forty-one of those sections and both appendices, which collectively accounted for one-hundred-twelve of the pages of text. On only one of the sections, and only seven pages of the text, did everyone fail to agree. On only that one section, and those few pages of text, did AGC find it necessary to part company with the others. (Endnote 1).

AGC would not, however, suggest that the disagreement was a trivial one. Quite to the contrary, AGC believes that the disagreement was a serious one that OSHA needs to address. C–DAC accomplished most but not all of its mission. It is now incumbent upon OSHA to correct the one significant error that C–DAC made.

The disagreement between AGC and the other members of the committee was over section 1427 of the committee's proposal. That section is entitled ''*Operator qualification and certification*.'' In paragraph (a), it requires an employer to ''ensure'' that its crane and derrick operators are either:

• ''Qualified or certified * * * in accordance with'' one of four procedures, found in the following paragraphs (b), (c), (d) and (e); or

• ''Operating the equipment during a training period in accordance with paragraph (f)

Paragraph (b) of section 1427 provides for ''[c]ertification by an accredited crane/derrick operator testing organization.'' Paragraph (c) provides for ''[q]ualification by an audited employer program.'' Paragraph (d) provides for ''[q]ualification by the U.S. military.'' And paragraph (e) provides for ''[l]icensing by a government entity.'' (Endnote 2)

AGC opposes section 1427 primarily because its requirements for the qualification and certification of crane and derrick operators are too restrictive. For many and perhaps the vast majority of construction contractors, none of the four options for operator qualification or certification are practical to pursue. At the same time, section 1427 omits several requirements that would far more directly affect crane and derrick safety. If adopted as currently written, section 1427 would disrupt the construction industry and might actually hinder the broad effort necessary to ensure that crane and derrick operators are knowledgeable, competent and well prepared, every day, to perform their work.

Following are AGC's more specific comments on each of the four options that Section 1427 provides, on the risks that this provision would create for any employer that chose to implement an operator training program, and on several significant omissions from the proposed standard.

Certification by an Accredited Crane/Derrick Operator Testing Organization

While less restrictive than paragraph (d), paragraph (b) fails to provide an option for many and perhaps most of the small to medium-sized firms that dominate the construction industry. Paragraph (b) would permit employers to engage third parties to test and certify their crane and derrick operators, but in the process, paragraph (b) would severely restrict the number of organizations qualified to perform those tasks. The proposed standard would permit employers to rely on only those organizations ''accredited by a nationally recognized accrediting agency.''

To the best of AGC's knowledge, information and belief, only two organizations are ''accrediting'' agencies within the meaning and for the purposes of Section 1427, and only one of the two agencies has actually accredited any other organization to test and certify crane and derrick operators. During the lengthy deliberations among the members of C–DAC, the National Commission for Certifying Agencies (NCCA) and the American National Standards Institute (ANSI) were the only two organizations said to be such ''accrediting'' agencies. The NCCA was the only one of the two said to have actually accredited any other organization to test and certify operators.

To make matters worse, it was acknowledged and agreed that the NCCCO is the only testing organization that the NCCA has accredited. If other organizations are also accredited to test and certify crane and derrick operators, within the meaning and for the purposes of Section 1427, then neither the other members of C–DAC nor OSHA identified them, and AGC is unaware of them.

AGC would emphasize that it holds the NCCCO in high regard. As already mentioned, AGC has gone so far as to sign a cooperative agreement with the NCCCO. Nevertheless, AGC doubts that the NCCCO could meet the enormous demand that section 1427 would generate for crane and derrick operator testing and certification. If adopted, Section 1427 would take that demand to an entirely new level. It should be noted that NCCCO has largely succeeded in meeting the much more limited demand for voluntary certification.

In fairness, AGC believes that other members of C–DAC harbor the same doubt. Something had to motivate the authors of section 1427 to include paragraph (k), delaying the mandate for operator testing and certification for four years. It is certainly possible that the other members of C–DAC supported section 1427 in the belief that other testing organizations would use this time to seek accreditation—in the hope of profiting on a dramatic increase in the demand for operator testing and certification. The problem is that neither the other members of C–DAC nor OSHA undertook any study of the costs that such organizations would have to incur to qualify for accreditation, or to provide testing or certification services on the massive scale that section 1427 contemplates. Nor did the other members identify the sources of capital that these other testing organizations would require, or the prices they would have to charge for their services, or how they could even begin to sustain themselves until testing and certification became mandatory. There were no business plans or business models for either the committee or OSHA to review. It might be appealing to suppose that future demand for testing and certification would call forth the necessary supply, but it would remain little more than speculation. There is no factual record to support any such conclusions.

However logical it may be, AGC maintains that OSHA cannot simply suppose that the supply of the necessary services would materialize. The stakes are much too great. If other testing organizations did not enter the market, or they subsequently failed for financial or other reasons, or they simply found it necessary to charge more than most contractors could bear, the construction industry could quickly find itself in gridlock.

AGC also doubts the wisdom of giving any private organization—whether the NCCA, ANSI, the NCCCO or any other accrediting agencies or testing organization—such a dominant role in the implementation of a federal regulation. Section 1427 would set minimal standards for accreditation, leaving most of that process in private hands. OSHA would not have any direct oversight over (or other relationship with) any testing organization. The agency would be two steps removed from that process.

Qualification by an Audited Employer Program

Paragraph (c) also fails to provide an option for many and perhaps most construction companies. That provision would permit an employer to test and qualify its own employees to operate cranes and derricks, but only if *inter alia* (1) the employer's written and practical tests were ''developed by an accredited crane/derrick operator testing organization,'' (2) the employer's ''program'' were approved by an auditor ''certified,'' in turn, by such an organization, and (3) the ''circumstances'' under which the employer administered the tests were also approved by such an auditor.

As noted, the NCCCO appears to be the only ''accredited crane/derrick operator testing organization'' at this time. AGC doubts that small or medium-sized construction contractors would have the resources necessary to self-administer the NCCCO's written and practical tests, particularly ''under circumstances * * * meeting nationally recognized test administration standards.'' In addition, it appears that neither the NCCCO nor any other testing organizations would have any business incentive to develop a large pool of certified auditors. To the contrary, they would have an obvious interest in maintaining the demand for their own testing services, and their own certifications. Nothing in the proposed standard would compel or even encourage the NCCCO or any other testing organization to help construction employers develop practical alternatives.

Further eroding paragraph (c) are provisions that would require the employer to have its ''program'' re-audited every three

years, and suspend the employer's ''program'' for any ''significant deficiency.'' Though it would expressly forbid the auditor of the employer's program to be the employer's employee—and therefore subject to the employer's control—paragraph (c) would also render the employer liable for the auditor's failure to file a ''documented report'' of any ''significant deficiency'' to OSHA within 15 days, to maintain records of his or her audits for three years, or to make such records available to the U.S. Department of Labor.

For all of these reasons, AGC believes that paragraph (c) would not be a practical and dependable option for any significant number of construction employers.

Qualification by the U.S. Military

As a threshold matter, paragraph (d) is limited to the men and women in uniform. By its terms, it is ''[n]ot portable,'' meaning that it ''meets the requirements of paragraph (a) only where the operator is employed by (and operating the equipment for) the employer that issued the qualification.'' See Section 1427(m). To any operator to which paragraph (d) might apply, the military would be ''the employer that issued the qualification.'' It follows that any operator qualified by the military would be qualified to operate a crane or derrick only for the military. (Endnote 3).

Licensing by a Government Entity

Whether paragraph (e) provided any practical option for construction contractors would depend entirely on how state and local governments responded to it. This provision would permit employers to use state or local government agencies to test and license their crane and derrick operators. Employers, however, could use only the government agencies that had volunteered to perform those tasks.

In some ways, paragraph (e) is superior to paragraphs (b) and (c). The state or local agency would have to be the one that ''issue[d] operator licenses for operating [relevant] equipment,'' and it would have to qualify for accreditation as a ''government accredited crane/derrick operator testing organization.'' But the ''government authority that overs[aw]'' the agency, and not any private entity, would determine whether the agency met the substantive criteria for accreditation. Unlike paragraphs (b) and (c), paragraph (e) makes no direct or indirect reference to a ''nationally recognized accrediting agency.''

Paragraph (e) does not, however, go far enough to save Section 1427. It would not—and probably could not—require any state or local agency to test or license operators. It would not—and probably could not—provide any positive incentives for any such agency to perform those tasks. It would not—and probably could not—even reimburse any government agency that volunteered to perform those tasks.

Many state and local budgets are already tight, and neither OSHA nor other members of C–DAC have given AGC any reason to expect that any significant number of state or local agencies would be likely to step forward. AGC believes that some would do so but doubts that the number would be high enough, or their distribution broad enough, to meet what would be a truly nationwide demand for the testing and certification of crane and derrick operators. A government license issued under paragraph (e) would satisfy section 1427 ''only within the jurisdiction'' of the agency that issued it, and at best, AGC would expect an irrational patchwork of options for crane and derrick operators and their employers across the country.

Operator Training

AGC also believes that Section 1427 would put employers that provided hands-on training for crane or derrick operators at great and ultimately uncontrollable risk of liability for any accidents that their trainees or apprentices might cause, and could become a legal deterrent to such training. The relevant paragraph of the proposed standard is paragraph (f), entitled ''Pre-qualification/certification training period.'' In subparagraph (f)(2)(i), that provision states that a trainee or apprentice ''shall be provided with sufficient training prior to operating the equipment to enable the trainee to operate the equipment safely* * *'' In subparagraph (f)(2)(ii), that provision adds that ''[t]he tasks performed by the trainee/apprentice while operating the equipment shall be within the trainee's ability.'' In subparagraph (f)(2)(iv)(C), that provision further provides that ''[t]he specific tasks that the trainee/apprentice will perform during [any fifteen minute] break'' that his or her supervisor may take ''are within the trainee/apprentice's abilities.''

If these were merely statements of principle, AGC would wholeheartedly support them. AGC completely agrees that trainees and apprentices should have any prior training that they require to operate the equipment safely. AGC completely agrees that all tasks that a trainee or apprentice actually performs—at any time—should be within his or her ability.

The problem is that these would be legal requirements, and not merely goals to which contractors should aspire. As written, they would render contractors legally liable not for failing to make every reasonable effort—or even every conceivable effort—to provide such prior training, or to limit the tasks that a trainee or apprentice actually performed. In substance and effect, paragraph (f) would render contractors strictly liable for outcomes that contractors could not guarantee. If a trainee or apprentice caused an accident, it would necessarily follow that the individual did not have prior training ''sufficient'' to operate the equipment safely. It would also follow that the trainee or apprentice had actually performed a task not ''within'' his or her ''ability.''

Neither construction workers nor their supervisors are any less human than anyone else. No one can guarantee that others will not make mistakes, or that they will always follow instructions. Nor is an individual's prior training, or his or her current abilities, something that one can measure with great precision. Of course, all construction contractors should make a very strong effort to prevent accidents. The human toll of any accident involving a crane or derrick can easily exceed anything that anyone would ever want to bear. Holding employers strictly liable for any accident that a trainee or apprentice may cause would, however, punish the good as well as the bad actors, and in the end, AGC fears that it would discourage useful training and hinder the effort to protect construction workers. One could well expect employers to provide no more than the minimum training necessary to satisfy the proposed standard, and whenever feasible, to engage third parties to perform that function.

Significant Omissions From the Proposed Standard

AGC also encourages OSHA to reconsider the broader question that Section 1427 raises. At the heart of that provision lies the assumption that elaborate procedures for testing and certifying crane and derrick operators would have benefits commensurate with their cost. The proposed requirements for such testing and certification are above and beyond the broader training requirements that C–DAC embedded—with AGC's concurrence—in Section 1430. In many other instances, OSHA requires employers to train their employees, and even to ensure that the individuals employed to perform certain functions are ''competent persons.'' In these other instances, OSHA has not, however, found it necessary to go so far as to require sophisticated testing and formal certification.

Paragraph (k) of Section 1427 contemplates a four-year ''phase-in'' for the testing and certification procedures, and indeed, for that substantial phase-in period, even the authors of Section 1427 considered it sufficient to require operators ''to be competent,'' to ''be provided the necessary training,'' and to be ''evaluated to confirm that he/she understands the information provided in the training.'' Under these circumstances, AGC would consider it more than fair to request that OSHA take a hard look at the actual costs and benefits of ever going beyond paragraph (k)—to the point of requiring testing and certification by third parties beyond the federal government's supervision or direct control. (Endnote 4).

AGC would simply add that the costs of the proposed testing and certification could be social as well as financial. The construction workforce is not entire English-speaking. AGC is also concerned that Section 1427 could have the unintended but clearly detrimental effect of limiting employment opportunities for competent crane operators who do not speak English. AGC is unaware of any organization that currently provides nationally recognized testing for crane or derrick operators in any language other than English.

* * * * *

Conclusion

In closing, AGC would like to thank you for the opportunity to serve on C–DAC. Crane and derrick safety is extremely important to AGC's members, and the association greatly appreciated the chance to participate in the committee's deliberations.

In the end, C–DAC succeeded in reaching agreement on all but one of the provisions included in the standard that the committee proposed to OSHA. AGC could not support

that one provision because it is too restrictive. AGC supported the proposed requirements for the training of crane and derrick operators, and AGC could even support a carefully tailored and clear requirement that construction contractors employ ''competent'' operators for their cranes and derricks. AGC is far less certain that the benefits of mandating elaborate procedures for the sophisticated testing and formal certification of crane and derrick operators would ever outweigh the great cost of doing so.

* * * * *

AGC supports OSHA's effort to improve crane and derrick safety, and believes that C–DAC has greatly contributed to that effort, but maintains that Section 1427 of the proposed standard requires serious reconsideration.

Sincerely,

/S/

Brian H. Murphy, P.E., C.S.P. AGC C–DAC Representative.

Endnote 1: On that one section, the National Association of Home Builders also parted company with the other members of the committee.

Endnote 2: Presumably, the authors of this provision intended to equate ''licensing'' with ''qualification'' or ''certification.''

Endnote 3: AGC has received reports that some members of C–DAC were led to believe that a military certification would be valid for a construction contractor working for the military on a military installation. The wording of paragraph (d) is, however, clear and makes no reference to military projects or installations, or to the contractors construction such projects at such locations. By the express and unambiguous terms of paragraph (d), a military certification is ''[n]ot portable'' and in paragraph (m) by definition applies ''only where the operator is employed by (and operating the equipment for) the employer that issued the certification.''

Nor is it clear that OSHA could justify such awkwardly limited portability for military certifications. If OSHA rewrote paragraph (d) to provide for portability then whether a construction contractor could use a military certification to satisfy section 1427 would depend entirely on (1) whether the project owner is a branch of the military and (2) whether the project is located on a military installation. Those two factors would not, however, have any obvious bearing on the merits of the process that the military used to certify crane or derrick operators, or the knowledge or skills that such operators actually possessed. AGC cannot readily identify any rational basis for rendering a military certification portable to a contractor working for the military project on one of its installations but not portable to even the same contractor when working for a different owner, or simply across the street.

In any event, paragraph (d) could not begin to solve the larger problem. Even if it provided for portability to construction contractors working for the military on military installations, paragraph (d) would remain far too limited to provide an option for the overwhelming majority of construction contractors. The military and its installations account for only a small fraction of the contractors and projects that the new standard would cover.

Endnote 4: AGC would also encourage OSHA to compare paragraph (k) with other standards that require construction contractors to employ ''competent persons'' to perform certain functions. AGC believes that many if not most of those other provisions define the required competence far more precisely. AGC presumes that paragraph (k) refers to competence in dealing with the various subjects listed in paragraph (j) of section 1427, or perhaps paragraph (c) of Section 1430, but paragraph (k) of section 1427 does not cross-reference either of those other provisions or otherwise define the required competence. Nor does it define the ''required training.''

[End of Murphy comments.]

OSHA notes that Mr. Murphy indicated in his letter that proposed § 1926.1427 would apply to derricks. However, under paragraph (q) of proposed §§ 1926.1436 *Derricks,* § 1926.1427 would not apply to derricks. This is explained in more detail below in the discussion on proposed § 1926.1436.

Operator qualification/certification was the only section of the C–DAC document for which there were dissenting committee members (as noted above, two members dissented: Mr. Murphy and Mr. Steele). In his letter, Mr. Murphy addressed a number of issues associated with this subject, such as questioning the need for, and practicality of, limiting an employer's operator qualification/certification options to those that require the involvement of independent third parties. There was considerable discussion by C–DAC on this subject and its many associated issues, including the degree of portability of a qualification/certification. The Agency requests public comment on these issues.

Physical Qualifications and Substance Abuse Testing

Physical Qualifications

Section 5–3.1 of ANSI B30.5–1968 contains criteria for operator vision and hearing, disqualification for a ''history of epilepsy'' or a ''disabling heart condition,'' and a general statement that ''when he is physically or mentally unfit, an operator shall not engage in the operation of his equipment.'' Subpart N at § 1926.550(b)(2) states that ''all crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5–1968 * * *.''

In a May 8, 1981 letter of interpretation to Mr. A. Bennett Hill Jr. (OSHA–2007–0066–0016), OSHA stated that:

> It is the interpretation of OSHA that the physical qualifications requirements incorporated by reference in 29 CFR 1926.550 do not apply to operators of equipment covered by those standards.

In other words, OSHA interpreted the incorporation by reference in § 1926.550(b)(2) for ''operation'' as referring to how the crane was to be operated, not to who was operating it. The Agency therefore has taken the position that the incorporation by reference excludes the physical criteria listed above.

C–DAC considered whether to include in this proposed standard provisions that would require equipment operators to meet particular physical qualifications. After considering various possible approaches, including those in current industry consensus standards, the Committee decided that it would be very difficult, and likely unnecessary, to identify minimum physical requirements that would be appropriate.

First, the physical demands of equipment vary significantly depending on the type and, in some cases, age of the equipment. For example, some equipment is operated largely by electronic controls. In contrast, older ''friction cranes'' have pedal controls that can require significant strength and stamina to operate. Some equipment is air conditioned whereas other equipment is not. A requirement regarding physical qualifications would have to account for these types of differences.

Second, establishing physical qualifications that would appropriately account for the effect of medical conditions would be a complex undertaking. The Committee ultimately determined that, in light of its members' experience that accidents caused by problems associated with the operator's physical/medical condition are rare, the issue of physical qualifications did not need to be addressed by this standard.

Substance Abuse Testing

The Committee also considered whether to include mandatory substance abuse testing for equipment operators and others, such as signal persons, whose jobs affect safety. OSHA informed the Committee that the case law requires that any substance abuse testing requirements included in the proposal would have to meet constitutional safeguards.[70] Because the

[70] See *Skinner v. Railway Labor Executives' Ass'n,* 109 S. Ct. 1402 (1989) and *International*

U.S. Department of Transportation (DOT) already has substance abuse requirements and designed them to meet these safeguards, C–DAC considered whether to incorporate DOT regulations on controlled substance testing, Title 49 CFR part 382 and Title 49 CFR part 40, into the proposed rule.

The DOT regulations govern commercial drivers and are designed to protect public highway safety. Under these requirements an employer is required to establish a program for substance abuse testing. This program must include an employer's policy statement, supervisory education and training, controlled substances and (optional) alcohol testing program, evaluation of driver, and recording keeping. Under the DOT requirements the controlled substances and alcohol testing program must include six different types of testing, which include: Pre-employment, reasonable suspicion, post-accident, random, return to duty and follow up testing.

After researching the DOT regulations and several discussions with DOT representatives, OSHA presented information to C–DAC on the procedural and substantive aspects of the DOT regulations, including the administrative requirements, the types of testing by employers, and optional alcohol testing. Committee members discussed implementation and enforcement concerns such as an employer's inability to ''stand down'' a crane operator based on an unconfirmed test result, until a positive result is verified by a medical review officer. The parallel DOT requirement prohibits an employer from:

> temporarily removing an employee from the performance of a safety-sensitive function based only on a report from a laboratory to the MRO (medical review officer) of a confirmed positive test for a drug or drug metabolite, an adulterated test, or a substituted test, before the MRO has completed verification of the test result.

Committee members were concerned that including a substance testing provision in this standard would restrict an employer's ability to suspend an operator who tested positive pending confirmation of the result. Committee members believed that many employers already have voluntarily instituted substance abuse testing programs. They believed that employers are able to judge whether an operator who tested positive presents a risk to workers on the site and should be able to remove an operator immediately if, in the employer's judgment, the operator presents such a risk.

In short, the Committee balanced the potential benefits from a requirement for substance abuse testing that would have more restrictive procedures against the fact that many employers already have their own programs in place that, in C–DAC's view, may be more protective than what could be enacted as an OSHA requirement. C–DAC concluded that it would be better not to include a substance abuse requirement.

Section 1428 Signal Person Qualifications

As discussed under § 1926.1419, *Signals—general requirements,* the safety of equipment operations depends in many situations on signals given to the operator. It is critical that the operator understand the signals given, and the signal person must therefore be able to give clear, accurate and appropriate signals that unambiguously convey the needed information to the operator. The Committee was concerned that some signal persons are not able to recognize the hazards involved with certain crane operations, do not, in some cases, understand what it is that the crane needs to do to accomplish the task, and do not know how to give the appropriate signals. This poses hazards, such as struck-by and crushed-by hazards, due to either miscommunication or the communication of instructions that are inappropriate.

An example of the type of accident that can be caused by miscommunication from not knowing the appropriate signals is as follows: The signal person intends to indicate to the operator to hoist up, since the load needs to be raised straight up. However, the signal person uses the standard signal for booming up in the mistaken belief that this signal is for hoisting up. A struck-by or crushed-by incident could result because, when booming up, the load will move laterally as well as vertically.

A failure to understand what it is that the crane needs to do to accomplish a task can also lead to struck-by or crushed-by incidents. For example, as a crane booms down, boom deflection tends to increase, which has the effect of lowering the load more than if there were no boom deflection. If the signal person is unfamiliar with this boom characteristic, he or she may fail to signal in time for the load to stop at the correct point or may cause the load to descend too quickly.

The Committee concluded that to prevent such accidents it is necessary to establish qualification criteria that would have to be met in order for an individual to serve as a signal person (that criteria is set out in proposed § 1926.1428(c), discussed below). The employer would have the option of using one of two methods for ensuring that these criteria were met. Under Option (1) (proposed § 1926.1428(a)(1)), the signal person would have documentation from a third party qualified evaluator showing that the evaluator had determined that the signal person meets the requirements of § 1926.1428(c).

This qualification would be portable, that is, any employer could rely on such documentation to show that a signal person meets the criteria. C–DAC believed that such portability would be appropriate because of the independence and expertise of the third party evaluator.

Under Option (2) (proposed § 1926.1428(a)(2)), an employer's own qualified evaluator would have determined that a signal person meets the qualification requirements. Since such a determination would not be done by an independent entity, other employers would not have a basis to assume that the assessment had been done correctly. Therefore, a qualification under this option would not be portable; other employers would not be permitted to rely upon it to show that the signal person meets these requirements.

The term ''qualified evaluator'' used in proposed § 1926.1428(a)(2) is defined in proposed § 1926.1401 as ''a person employed by the signal person's employer who has demonstrated that he/she is competent in accurately assessing whether individuals meet the Qualification Requirements in this Subpart for a signal person.'' In reviewing the C–DAC document, the Agency realized that the Committee had not provided a definition for the term ''third party qualified evaluator,'' which is used in proposed § 1926.1428(a)(1). OSHA has therefore added the following definition for this term:

> An entity that, due to its independence and expertise, has demonstrated that it is competent in accurately assessing whether individuals meet the Qualification Requirements in this Subpart for a signal person.

The Agency requests public comment on whether this is an appropriate definition for this term.

Under proposed paragraph (a)(3), the documentation for whichever Option is used (that is, Option (1) or (2)) of this section, would have to be available while the signal person is employed by the employer. With respect to an

Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292 (9th Cir. 1991).

employer using Option (1) of this section, the signal person's documentation from the third party qualified evaluator would have to be available. The Committee believed that this documentation is essential for this to be a viable and effective Option. Under this option the employer would be permitted to rely on someone else's assessment of the signal person rather than its own. In such a circumstance such documentation is essential for this to be a reliable means of assuring the signal person has the requisite ability.

In reviewing these provisions, the Agency noted that C–DAC used the term ''available,'' rather than ''available at the site.'' It is OSHA's understanding that C–DAC's intent was that the documentation be available at the site by, for example, the documentation being physically present at the site or through use of an on-site computer. For clarity, OSHA is planning on changing the term ''available'' to ''available at the site.'' OSHA requests public comment on this issue.

In addition, in reviewing the C–DAC draft of Option (2) of this section, the Agency noted that it does not explicitly state that documentation of the signal person's qualification by this method is required. However, proposed § 1926.1428(a)(3) states that ''the documentation for whichever Option is used shall be available * * *.'' It is not clear to the Agency if C–DAC intended to require documentation under Option (2) as it did for Option (1), or if it only intended that any documentation the employer chose to create under Option (2) would have to be made available.

One reason to require documentation under Option (2) is the Committee's concern that, at present, the operator's employer has no ready means of determining if the signal person (who is typically a different employer's employee) has the necessary knowledge and skill for signaling until after hoisting operations have begun. In other words, a problem with the signal person's ability may not become evident to the operator until a hazardous situation has already arisen. Requiring documentation, which would have to be available at the site, would enable that determination be made before hoisting operations begin.

Requiring documentation under Option (2) of this section would address C–DAC's concern. Therefore, the Agency has expanded the first sentence of the C–DAC version of proposed § 1926.1428(a)(2) to clarify that documentation would be required under Option (2). The proposed paragraph now reads, with the added language highlighted:

(2) *Option (2)—Employer's qualified evaluator.* The employer has its qualified evaluator assess the individual and determine that the individual meets the Qualification requirements (see § 1926.1428(c)) and provides documentation of that determination. An assessment by an employer's qualified evaluator under this Option is not portable—other employers are not permitted to use it to meet the requirements of this section.

The Agency requests public comment on whether this revision is appropriate.

Proposed paragraph (b) addresses circumstances in which a signal person who had been qualified under § 1926.1428(a) subsequently acts in a manner that indicates that he or she may not meet the qualification requirements. Such an indication would result, for example, where the use of Standard Method signals have been agreed to but the signal person does not give a Standard Method signal. Another example would be where the signal person gives inappropriate signals (such as indicating to the operator to boom up when the action that is needed is to hoist up).

In such circumstances the employer would be prohibited from allowing the individual to continue working as a signal person until he or she is re-trained and has been requalified in accordance with proposed § 1926.1428(a).

Proposed paragraph (c) sets forth the qualification requirements for signal persons. Proposed paragraph (c)(1) would require that the signal person know and understand whatever signal method will be used for that particular job site.

In addition, if hand signals are used, the signal person must know and understand the Standard Method for hand signals. Hand signals are widely used in this industry. As discussed above with respect to proposed § 1926.1419(c), C–DAC believed that accidents due to miscommunication could be reduced if there were more widespread use of standardized hand signals. C–DAC concluded that this provision would promote greater use of standardized hand signals through the use of the Standard Method.[71]

Proposed paragraph (c)(2) would help prevent miscommunication between the signal person and the crane operator by requiring the signal person to be competent in the application of whatever signals are used.

[71] As discussed above with respect to proposed 1926.1419(c), there are circumstances when it would be permissible to use hand signals other than the Standard Method signals. Also, under proposed § 1926.1419, signals other than hand signals could be used.

Proposed paragraph (c)(3) would require the signal person to have a basic understanding of crane operation and limitations, including crane dynamics involved in swinging and stopping loads and boom deflection from hoisting loads. As explained above in the beginning of this discussion of proposed § 1926.1428, it is critical that a signal person understand how the crane and load will move in response to the various signals he or she gives so that the signal person will give the most appropriate signals and reduce the occurrence of struck-by, crushed-by and other hazards.

Proposed paragraph (c)(4) specifies that signal persons must know and understand the relevant requirements in proposed §§ 1926.1419–1926.1422, which address the types of signals that may be used and the circumstances surrounding their use, and the requirements of proposed § 1926.1428. C–DAC included the phrase ''relevant requirements'' to make clear that a signal person's qualification could be limited with regards to the use of a particular type of signal and associated information.

For example: A crane operation is going to use Standard Method hand signals. The signal person knows and understands all aspects of proposed § 1926.1419 that are relevant when using hand signals, as well as § 1926.1422, *Signals—hand signal chart.* In addition, the signal person meets the proposed requirements in proposed § 1926.1428(c)(1) and (2) with respect to the use of Standard Method hand signals. The signal person also has the knowledge necessary to meet the provision in proposed § 1926.1428(c)(3), and demonstrates through a verbal or written test, and through a practical test, that he/she has this knowledge and capabilities. However, the signal person is unfamiliar with the contents of proposed § 1926.1420, *Signals—radio, telephone or other electronic transmission of signals,* or of proposed § 1926.1421, *Signals—voice signals—additional requirements.*

In this example, it would be appropriate for the signal person to be qualified under either Option (1) or Option (2) (see proposed 1926.1428(a)) so long as that qualification was limited to signaling with Standard Method hand signals. Since the signal person would be qualified only for Standard Method signaling, there would be no need for that person to have the knowledge or capabilities associated with other types of signaling. In such a situation employers, though, would be precluded from using such a person if other types of signals were to be used.

Proposed paragraph (c)(5) would require that the signal person pass knowledge and practical tests to demonstrate that he or she meets the qualification requirements. It would allow the knowledge test to be either verbal or written. Reading or writing is

not normally necessary when working as a signal person. Therefore, C–DAC believed that administering the knowledge test verbally, without a separate demonstration of literacy, should be permitted.

Section 1429 Qualifications of Maintenance and Repair Workers

This proposed section addresses the qualifications that the workers who maintain and repair cranes/derricks must possess. Subpart N of this part currently contains no provisions concerning the qualifications of maintenance and repair workers.

The Committee had two basic concerns regarding maintenance and repair work. First, it was aware of accidents that had occurred when the equipment that was being maintained or repaired was operated improperly. For example, a maintenance worker who booms down a mobile hydraulic crane to one side without following the manufacturer's instructions for deploying outriggers may overturn the equipment. C–DAC believed that placing restrictions on equipment operations during such work would help prevent such accidents.

Second, the Committee sought to avoid hazards that can result from maintenance and repair work that is done improperly by ensuring that maintenance and repair workers are sufficiently qualified to perform their work. For example, if a load-bearing component is removed for maintenance or repair and re-installed incorrectly, unintended movement of the load or even a collapse could occur during operations.

Paragraph 1429(a)

The Committee was aware that maintenance and repair workers sometimes need to operate equipment in order to perform maintenance, inspect or verify the performance of the equipment. This work typically involves operating the equipment to get access to components, diagnose problems and check repairs.

C–DAC did not believe it necessary for maintenance, inspection and repair personnel to meet the requirements in proposed § 1926.1427, *Operator qualification and certification,* when operating equipment for such purposes. The operations involved for these purposes are almost always done without a load on the hook. The only instance when there is a load on the hook is if the equipment is load tested. However, even when load testing, the operation is very limited, since the load is not moved about as it would be during crane operations.

While such limited operation does not, in C–DAC's view, necessitate the maintenance, inspection or repair personnel to meet the proposed § 1926.1427 requirements, a failure to operate the equipment properly even in these limited circumstances can result in accidents from, for example, unintended movement or tip-over. Therefore, this proposed paragraph would permit maintenance and repair workers to operate equipment during their work only under specific restrictions designed to ensure safety.

Specifically, under proposed paragraph (a)(1), maintenance and repair workers would be permitted to operate the equipment only to the extent necessary to perform maintenance, inspect or verify the performance of the equipment. Under this provision, maintenance and repair workers would not be permitted to operate the equipment during regular operations.

Proposed paragraph (a)(2) would require the maintenance and repair worker who operates equipment to either (i) do so under the direct supervision of an operator who meets the requirements of § 1926.1427, *Operator qualification and certification,* or (ii) be familiar with the operation, safe limitations, characteristics and hazards associated with the type of equipment involved.

Paragraph 1429(b)

Proposed paragraph (b) provides that maintenance and repair personnel must meet the definition of a qualified person with respect to the equipment and maintenance/repair tasks they perform. Proposed § 1926.1401 defines ''qualified person'' as ''a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, successfully demonstrated the ability to solve/resolve problems relating to the work, the subject matter, or the project.'' In light of the safety hazards that could result from maintenance and repairs that are performed improperly, C–DAC believed that it was necessary for maintenance and repair workers to meet the ''qualified person'' criteria.

The Committee believed that many current maintenance and repair workers have received comprehensive, in-depth, on-the-job training from highly experienced supervisors and/or co-workers and have become highly experienced themselves. Because of such extensive training, long experience and high level of knowledge, the term ''qualified persons'' under this provision would include such workers under the prong for ''extensive knowledge, training, and experience.''

1430 Training

This proposed section both references training criteria that would be required by other sections of this subpart and sets forth training criteria and requirements not otherwise included in the proposed standard. Additionally, paragraph § 1926.1430(g) of this section would require employers to evaluate employees' understanding of the training. The following chart summarizes the location of the training requirements in this proposed rule:

Paragraph	Training requirement
§ 1926.1408(g)	Power line safety: The operator and crew assigned to work with the equipment, including spotters, must be trained in specified topics relevant to power line safety.
§ 1926.1424(a)(2)	Swing radius hazards: Employees assigned to work on or near the equipment must be trained to recognize struck-by and pinch/crush hazard areas of rotating superstructures. Also, where the employer protects against swing radius hazards by using warning signs and high visibility markings, the employer must train employees to understand what the markings signify.
§ 1926.1437(c)(2)(ii)	Swing radius hazards (floating cranes): Where the employer protects against swing radius hazards on floating cranes by using warning signs and high visibility markings, the employer must train employees to understand what the markings signify.
§ 1926.1430(e)	Crush/pinch points: Employees who work with equipment must be instructed to keep clear of holes, crush/pinch points, and the hazards addressed in § 1926.1424.
§ 1926.1430(f)	Tag-out: Operators and other employees authorized to start/energize equipment or operate equipment controls (such as maintenance and repair workers), shall be trained in the tag-out procedures in § 1926.1417(f).
§ 1926.1430(d)	Competent and Qualified Persons: Competent persons and qualified persons must be trained in the requirements of this subpart applicable to their respective roles.

Paragraph	Training requirement
§ 1926.1430(g)(2)	Refresher training (general): Refresher training in relevant topics shall be provided when the employee's conduct or an evaluation of the employee's knowledge indicates that retraining is necessary.
§ 1926.1430(b)	Signal person training: Employees who will be assigned to work as signal persons who do not meet the requirements of § 1926.1428(c) shall be trained in the areas addressed in that paragraph.
§ 1926.1428(b)	Signal person re-training: A signal person whose actions indicate that he or she does not meet the qualification requirements of § 1926.1428 must be retrained before being allowed to continue to work as a signal person.
§ 1926.1427(f)(2)(i)	Operator trainee/apprentice: Before a trainee/apprentice is assigned to operate equipment, the employee must be provided with sufficient training for operating the equipment safely under the limitations established under § 1926.1427.
§ 1926.1427(k)	Operator training during phase-in period: An employee assigned to operate the equipment during the phase-in period of § 1926.1427 who does not have the knowledge or ability to operate the equipment safely must be provided with necessary training prior to operating the equipment.
§ 1926.1430(c)(1)	Operator training for qualification or certification: Operators who have not yet been qualified or certified under § 1926.1427 must be trained in the areas addressed in § 1926.1427(j). An operator who does not pass a qualification or certification test must be retrained as necessary.
§ 1926.1430(c)(2)(i)	Operator training—boom hoist brake test: Operators must be trained to determine if the boom hoist brake needs to be adjusted or repaired by first raising the boom a short distance and testing the brake.
§ 1926.1430(c)(2)(ii)	Operator training—emergency procedures (halting unintended movement): Where a manufacturer's emergency procedures for halting unintended equipment movement are available, operators must be trained in those procedures.
§ 1926.1441(e)	Operator training (2,000 pound maximum rated capacity): Operators of equipment with a rated hoisting-lifting capacity of 2,000 pounds or less must be trained in the safe operation of the equipment the operator is using.

The Committee believed that both training and testing of certain employees are critical to the safety of equipment use on construction sites.[72] With respect to training, the Committee concluded that there is a need to improve upon the current general requirement for construction industry training established by § 1926.21, *Safety training and education,* which requires the employer to (1) ''establish and supervise programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe conditions in employments covered by the [OSH] Act,'' § 1926.21(a), and (2) ''instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury,'' § 1926.21(b).

C–DAC found that more specific provisions were needed to ensure that employees are able to work safely with and around cranes. First, greater specificity would highlight the particular tasks (and the hazards associated with them) for which certain types of training are necessary. Second, training tailored to the specific hazards faced by particular employees would be an efficient and effective means of preventing injury.

[72] With respect to operator testing, as discussed in connection with § 1926.1427, *Operator qualification and certification,* this proposed standard places special emphasis on ensuring that equipment operators have acquired the knowledge and skills necessary to operate their equipment safely. This proposed standard also includes specific assessment requirements for signal persons (see proposed § 1926.1428(a)).

Proposed paragraph (a), *Overhead powerlines,* states that employees must be trained as outlined at proposed § 1926.1408(g) (see the explanation of hazards and training requirements in the discussion of proposed § 1926.1408(g)).

Under proposed paragraph (b), *Signal persons,* employees who will be assigned to work as signal persons who need training in order to meet the requirements of § 1926.1428(c) must be trained in the areas addressed in that paragraph. As discussed in relation to proposed § 1926.1428(c), each employee who will serve as a signal person must pass a verbal or written test and a practical test demonstrating the required knowledge and skills. Any such employee who does not pass those tests must receive additional training in the areas of deficiency.

Proposed paragraph (c), *Operators,* provides, at proposed paragraph (c)(1), that an equipment operator who is neither qualified nor certified under § 1926.1427, *Operator qualification and certification,* would be required to be trained in the areas addressed in § 1926.1427(j).

This proposed paragraph applies to operators who will need to be qualified or certified under § 1926.1427 but who are not yet qualified or certified or who have lost their qualification or certification. Operators in this category would include those who, during the four-year phase-in period of § 1926.1427, would not yet be required to be qualified or certified. Also in this category would be employees who the employer has decided will be assigned to work as operators and will need to be qualified or certified under § 1926.1427, as well as operators who need such training in order to become re-qualified or re-certified, or who failed to pass a qualification or certification test.

Proposed paragraph (c)(2) would require operators to be trained in two practices. Paragraph (c)(2)(i) would require training in the testing of the boom hoist brake on friction equipment prior to moving a boom off a support to determine whether the brake requires adjustment or repair. The purpose of this procedure is to ensure that the brake is sufficient before the boom is at too great an angle or height. Using this procedure, if the brake is deficient, the boom will fall only a very short distance. This provides an additional safety practice related to the hazards resulting from an uncontrolled boom. Moving the boom when the brake is not working properly can result in uncontrolled lowering of the boom, which can endanger workers in the proximity of the hoisting equipment.

Proposed paragraph (c)(2)(ii) would require the operator to be trained in the manufacturer's emergency procedures, when available, for stopping unintended equipment movement. This provides another level of protection to minimize employee injury resulting from unintended equipment movement. The Committee recognized that manufacturer's emergency procedures for halting unintended equipment movement may not always be available and therefore this training would be required only when the procedures are available.

The C–DAC version of § 1926.1430(c)(2) began: ''In addition to training in the areas addressed in § 1926.1427(j), operators shall be trained

in the following practices.'' This wording implied that all operators must be trained in the topics listed in § 1926.1427(j). However, § 1926.1427(j) is not a training requirement but sets forth criteria that must be addressed in a qualification or certification test. Operators who are sufficiently knowledgeable in these topics through prior training and/or experience need not receive additional training under this proposed standard. To avoid any confusion in this regard, OSHA has changed C–DAC's wording to read, in proposed § 1926.1430(c)(2): ''Operators shall be trained in the following practices.''

The SBREFA Panel recommended that OSHA seek public comment on several issues related to operator training. Several Small Entity Representatives (SERs) believed that the training requirements in the proposed standard are too broad and should instead be keyed to the particular operations the operator performs and the particular equipment he/she operates. The SBREFA Panel also recommended that OSHA consider and ask for public comment on whether a more limited operator training program would be appropriate for operations based on the capacity and type of equipment and nature of operations.

The Panel noted that proposed § 1926.1427(j)(1)(i) requires operator training in ''the information necessary for safe operation of the specific type of equipment the individual will operate'' and understood this to address the SERs' concern that operators of smaller capacity equipment used in less complex operations should require less training than those operators of higher capacity, complex equipment used in more complex situations. The Panel recommended that OSHA seek public comment on whether this point should be made more clearly, and OSHA welcomes such comment.

The Panel further recommended that OSHA consider and ask for public comment as to whether the supervisor responsible for oversight for an operator in the pre-qualification period described at § 1926.1427(f) should have additional training beyond that required at § 1926.1427(f)(2)(iii)(B). The discussion was focused on the issue of whether the supervisor should be trained to be able to take over the controls, if necessary, while supervising the operator in the pre-qualification period.

As the proposed rule is written, when the supervisor is not a certified operator, he/she must be certified on the written portion of the test and be familiar with the proper use of the equipment's controls; the supervisor is not required to have passed a practical operating test. In accordance with the Panel's recommendation, OSHA requests comment on whether the supervisor needs additional training in this regard than the proposal would require.

Paragraph (d), *Competent persons and qualified persons*, would require that competent persons and qualified persons be trained regarding the requirements of this Subpart applicable to their respective roles. See § 1926.1401, *Definitions*, for a description of what is necessary to be a competent person or a qualified person.

A person assigned by an employer to be a ''competent person'' or ''qualified person'' under this proposed rule must already have had a certain level of training (or, in the case of a competent person, training or experience) in order to meet the criteria applicable to such a designation. This paragraph does not address such training—it would not require the employer to provide the training needed for an employee to meet those criteria in order to become a competent or qualified person. The sole purpose of this paragraph is to require the employer to ensure that both competent persons and qualified persons are trained on the requirements of this Subpart that are applicable to the person's role and responsibility. For example, a ''competent person'' assigned to conduct shift inspections under § 1926.1412(d) must be trained under proposed § 1926.1430(d) in the required elements of a shift inspection. This training is necessary to ensure the competent person or qualified person is aware of his/her responsibility under this subpart for finding/correcting hazardous conditions.

Proposed paragraph (e), *Crush/pinch points*, provides that employees who work with equipment covered by this Subpart must be instructed to stay clear of holes, crush/pinch points and the hazards that are addressed in § 1926.1424, *Work area control*. See the discussion of hazards and requirements in the discussion of proposed § 1926.1424.

Proposed paragraph (f), *Tag-out*, states that operators and other employees authorized to start or energize equipment or operate equipment controls (such as maintenance and repair workers) must be trained according to the tag-out procedures in § 1926.1417(f). See the discussion of tag-out procedures discussed in proposed § 1926.1417(f).

Proposed paragraph (g), Training administration, would require that employers ensure employees understand required training and provide refresher training when necessary. Specifically, proposed § 1926.1430(g)(1) would require that the employee be evaluated to verify that he/she understands the information provided in training required by this Subpart. The Committee determined that training without any follow-up measure to determine understanding or effectiveness would not achieve the goal of a safe work environment.

Proposed paragraph (g)(2) would require the employer to provide refresher training of an employee when, based on evaluation or employee conduct, it is indicated that retraining is needed.

Section 1431 Hoisting Personnel

Cranes and derricks are designed to move materials, not personnel. However, situations arise when a crane or derrick can be the safest means to move employees to their work area and/or to hold them in position while they do their work.

Although there are situations when using a crane or derrick to lift personnel to work areas is the safest means of accomplishing the task, there are inherent dangers in such an operation because of the heights, equipment and environment involved. A number of workers have been killed and seriously injured while being lifted by a crane or derrick when the equipment's lifting mechanism malfunctioned and they did not have adequate fall protection. The height to which the workers are lifted means that any instability in their supporting platform creates a serious fall hazard. See 53 FR 29116, 29117–18 (Aug. 2, 1988) (discussing accidents that occurred when cranes were used to lift personnel). Because of that risk, in 1988 OSHA added regulations to subpart N of this part to both limit the use of cranes for lifting personnel and increase employee protection when it is necessary to use cranes for this purpose. See 29 CFR 1926.550(g), *Crane or derrick suspended personnel platforms.*

Because of the inherent hazards such operations present, OSHA currently permits cranes and derricks to be used to lift personnel only ''when the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform or scaffold, would be more hazardous, or is not possible because of structural design or worksite conditions.'' 29 CFR 1926.550(g)(2). When a crane or derrick is used to lift personnel, a personnel platform that complies with requirements in § 1926.550(g) must be used.

The Committee concluded that the current subpart N standards governing

personnel hoisting by equipment have resulted in a reduction of accidents and determined that their fundamental substance should be maintained in the proposed standard. Accordingly, the Committee proposal largely continues the current requirements of subpart N, § 1926.550(g). Some changes have been made to provide additional safety and to eliminate ambiguity. Requirements specific to certain activities, such as personnel hoisting in pile-driving operations, drill shafts, storage tanks and marine transfer have been added. The discussion below focuses on these changes and additions.

One of the resources the Committee consulted in developing this proposed paragraph was ASME B30.23–1998, ''Personnel Lifting Systems.'' Since the Committee finished its work, that industry consensus standard was superseded by ASME B30.23–2005. OSHA has compared the two versions and found no substantive differences in the provisions that correspond to paragraphs in this proposal. Where the ASME standard is cited in this section, the citations will refer to the 2005 version.

OSHA stresses that the proposed provisions in this section would be additional requirements that must be met when equipment is used to lift personnel. During such use, all other applicable requirements of this proposed standard would also be required to be met.

Paragraph 1431(a)

This proposed paragraph states that equipment may be used to hoist personnel only when all other means of reaching the work area would present a greater hazard or would not be possible because of the project's structural design or worksite conditions. The same limitation is currently found in Subpart N's § 1926.550(g)(2). It reflects OSHA's longstanding recognition that using cranes and derricks to lift personnel is inherently hazardous and should only be done when it is either the least hazardous means or when, in light of the configuration of the worksite, it is the only means of performing required work.

This proposed paragraph differs from the current § 1926.550(g)(2) by substituting the word ''equipment'' for ''crane or derrick.'' The terms ''crane'' and ''derrick'' do not represent the full spectrum of equipment that would be covered by this standard. See § 1926.1400, *Scope* for a description of the equipment covered by this Subpart.

Additionally, this proposed paragraph would not apply to work covered by 29 CFR part 1926 subpart R, *Steel Erection*. Subpart R, at § 1926.753(c)(4), allows the use of equipment to hoist personnel in a platform that complies with § 1926.550 without the need for a showing that other means of reaching the work area would create a greater hazard or are impossible. This provision was included in Subpart R because steel connectors must often work at high locations before there is a solid structure to stand on and where a personnel platform suspended from a crane is the safest place for them to work. OSHA's reasons for including this exception in Subpart R are discussed in detail in the preamble to the steel erection standard, 66 FR 5196, 5209 (Jan. 18, 2001).

Paragraph 1431(b) Use of Personnel Platform

This proposed paragraph would generally require the use of a personnel platform when hoisting employees and require that criteria specified in proposed § 1926.1431(e) be met for such platforms. It also provides for exceptions to the use of personnel platforms that are not currently allowed by § 1926.550(g)(2).

For reasons discussed above, proposed § 1926.1431(b)(1) would generally require that a personnel platform be used when hoisting employees and that the platform meet the requirements of § 1926.1431(e) of this proposed section. As discussed below, the requirements of § 1926.1431(e) are comparable to requirements currently found in § 1926.550(g).

Proposed paragraph (b)(2), *Exceptions*, sets forth the construction activities in which hoisting personnel without using a personnel platform would be allowed because, in the Committee's view, use of a personnel platform might be infeasible or more hazardous than an alternative means of hoisting personnel. These activities are: Hoisting employees into and out of drill shafts 8 feet and smaller in diameter, pile driving operations, marine worksites, storage tanks (steel or concrete), and shaft operations and chimney operations. This proposed section contains specific requirements for hoisting personnel during these operations at § 1926.1431(o), (p), (r), and (s) that provide for alternatives to the use of a personnel platform. For drill shafts, pile driving operations, storage tanks, and shaft and chimney operations, which present access restrictions, the alternative to a personnel platform would be a boatswain's chair. For marine worksites, it would be a marine hoisted personnel transfer device, which is designed to facilitate exit in the event it enters the water.

For the purposes of this proposed standard, a ''marine worksite'' is a construction worksite that is located in, on or above the water (see proposed § 1926.1401, *Definitions*). The Committee determined it was necessary to clearly define this term since marine worksite conditions and hazards differ significantly from non-marine worksites. In particular, with respect to equipment covered by this section, the marine worksite presents unique hazards for equipment stability and environmental conditions affecting operations.

Section 1926.1401 defines a ''marine hoisted personnel transfer device'' as a device, such as a ''transfer net'' used to hoist an employee to or from a marine worksite that is designed to protect the employee during a marine transfer and that allows for rapid entry/exit from the device. Such devices do not include a boatswain's chair when hoisted by equipment covered by this standard. The Committee determined it was necessary to clearly specify the type of device that will or will not be considered a marine hoisted personnel transfer device for this standard, as marine worksites involve unique conditions and hazards with respect to hoisting employees. The Committee determined that it was necessary to require a device designed for such conditions while allowing flexibility so the employer may select the most appropriate device based on the site and working conditions.

Each of the exceptions is discussed below under the particular paragraph that addresses it. Subpart N of this part does not currently address these worksite activities (nor does ASME B30.23–2005 address these particular topics).

Paragraph 1431(c) Equipment Set-Up

This paragraph sets forth the basic criteria for equipment set-up for personnel hoisting. The requirements continue and refine those currently in Subpart N's § 1926.550(g)(3)(i)(D).

Proposed paragraph (c)(1) would require the equipment to be on level, firm and stable footing. It differs from the current standard at § 1926.550(g)(3)(i)(D) in that a qualified person must determine if the footing is ''sufficiently firm and stable.'' Stable footing is essential to minimize the hazard of the equipment tipping while hoisting personnel. ASME B30.23–3.2.2(a)(4)–2005 has a similar requirement, with the operator of the equipment determining equipment to be level within one percent during set-up

and hoisting operations. The Committee believed that the danger of equipment potentially tipping when hoisting personnel justifies the need for a qualified person to examine and approve the equipment's stability. See § 1926.1401, *Definitions* for the criteria for a qualified person.

Proposed paragraph (c)(2) specifies that each outrigger be both extended and locked. The amount of extension must be the same and also be in accordance with the manufacturer's specifications. This is similar to the current requirement of § 1926.550(g)(3)(i)(D); however, the current requirement that outriggers be ''fully deployed'' has been changed to require that outriggers be equally extended and in accordance with manufacturer's procedures and load charts. Equal extension eliminates the hazard of the operator forgetting that one or more outriggers has a shorter extension and swinging into that area with a load that exceeds the crane's capacity in that area. The Committee determined that a requirement of full extension of all outriggers would not be appropriate for all worksite conditions. Nor is it necessary, as long as partial extension is within the manufacturer's procedures; the critical factor is to have each outrigger extended equally, whether it is a full or shorter extension.

Proper placement and deployment of outriggers is essential to prevent the hazard of equipment tipping while hoisting personnel.

Paragraph 1431(d) Equipment Criteria

This paragraph sets forth requirements for the equipment used to hoist personnel. These requirements refine and expand the equipment requirements currently in Subpart N.

Proposed paragraph (d)(1): *Capacity: use of suspended personnel platform*, would continue the requirement at § 1926.550(g)(3)(i)(E) to limit the total load to 50 per cent of the equipment's rated capacity. It would clarify the current standard by specifying that the total load includes the hook, load line, and rigging. The 50 percent capacity limit would not apply during equipment proof testing.

The 50 percent limit reflects that using this equipment to hoist personnel requires additional safety precautions than when lifting materials. The limit provides for an extra margin of safety to prevent overloading the equipment, which could cause tip-over or structural collapse.

Proposed paragraph (d)(2), *Capacity: use of boom-attached personnel platforms*, establishes the load limit at 50 percent of rated capacity for platforms that are attached to the boom. It also provides an exception to the 50 percent capacity limit during equipment proof testing. The same reasons for the 50 percent limit in § 1926.1431(d)(1) also apply here.

The Committee considered prohibiting the use of boom attached personnel platforms for hoisting personnel. However, the Committee concluded that it was unaware of any reason to prohibit their use. As discussed above under § 1926.1400, *Scope*, Committee members were concerned that boom-attached platforms may present additional hazards not addressed in this proposed standard, and OSHA is requesting comment on whether additional requirements should apply when using them.

In reviewing the C–DAC consensus document, the Agency determined that the Committee did not address the issue of capacity when no personnel platform is used. Since there are several situations where no platform will be used at all (these are listed in proposed § 1926.1431(b)(2) of this section), the Agency believes that a capacity limit similar to those set by the Committee when using a personnel platform is needed. Therefore, OSHA has added proposed § 1926.1431(d)(3), *Capacity: hoisting personnel without a personnel platform*, which establishes the load limit at 50 percent of rated capacity. In calculating the load, the weight of the personnel, including the hook, load line, rigging and any other equipment that imposes a load must be included. The addition of this proposed paragraph has resulted in the renumbering of the remaining paragraphs in proposed § 1926.1431(d) (as compared to the numbering in the C–DAC document).

Proposed paragraph (d)(4) would require engaging all the equipment's locking or braking devices when the platform has reached its stationary work position. The purpose is to minimize sudden and unintended movement or tipping of the platform when employees have reached the work area.

This differs from current provision § 1926.550(g)(3)(i)(C) in Subpart N in that the proposed provision adds a requirement to use operator actuated secondary braking/locking features, when available, in addition to other braking systems. This is similar to sections 1.2.2(f) and 3.2.2(a)(19) of ASME B30.23–2005 for automatic brake systems and setting of brakes before work begins from the platform.

The subsections of proposed paragraph (d)(5), *Devices,* would require certain safety devices for equipment addressed by this proposed section.

Proposed paragraph (d)(5)(i) would address the requirements for equipment with a variable angle boom. Such equipment would be required to be equipped with both a boom angle indicator and boom hoist limiting device (except for derricks). Use of these devices minimizes the potential for hoisting personnel at an unsafe angle, which could result in the platform or equipment tipping.

A boom angle indicator is currently required in § 1926.550(g)(3)(ii)(A). Proposed § 1926.1431(d)(4)(i) would add a requirement for a boom hoist limiting device. The Committee believed that both a boom angle indicator and a boom hoist limiting device are necessary to prevent the boom from being moved to unsafe angles. A boom hoist limiting device would be required when hoisting personnel, even though it would not otherwise be required for equipment manufactured before December 17, 1969 under proposed § 1926.1416(d)(1) (see discussion of proposed § 1926.1416(d)—*Operational aids*). This reflects the need for equipment used to hoist personnel to have additional safety features.

Proposed paragraph (d)(5)(i) would not apply to derricks. This is consistent with C–DAC's recommendation that boom hoist limiting devices and boom angle indicators not be required on derricks. See proposed § 1926.1436(f), which addresses operational aids for derricks. As discussed below, the Committee believed that these devices were not needed on derricks because the current practice in the industry of marking the boom hoist cable of derricks with visible caution and stop marks corresponding to maximum and minimum allowable boom angles is a safe work practice. Accordingly, paragraph § 1926.1436(f) permits employers to use this practice. Alternatively, it permits employers to use an electronic or other device that either signals the operator in time to prevent the boom from moving past its minimum and maximum angles or automatically prevents such movement.

Proposed paragraph (d)(5)(ii) would address the requirements for equipment, including derricks, when a luffing jib is used for personnel hoisting. This paragraph would require all equipment to have both a jib angle indicator and jib hoist limiting device. Use of these devices minimizes the likelihood of platform tipping and equipment failure.

Neither the current Subpart N nor ASME B30.23–2005 addresses the use of luffing jibs for personnel hoisting. The Committee believed that this proposed requirement is needed to help improve

the safety of crane and derrick operations.

Proposed paragraph (d)(5)(iii) would require a telescoping boom to either have a device indicating the boom's extended length or measuring marks that are clear and visible to the equipment operator. This would allow the operator to easily ascertain the extension length in order to stay within safe operating parameters. This requirement would address the hazard of equipment or platform tipping or equipment failure that can result when a telescoping boom is extended beyond appropriate operating parameters. Currently, § 1926.550(g)(3)(ii)(B) permits, as an alternative to equipping the boom with a device to indicate the boom's extended length, an ''accurate determination'' to be made of the load radius to be used prior to hoisting personnel. Proposed § 1926.1431(d)(5)(iii)'s provision for measuring marks on the boom would enable this determination to be made accurately if the boom is not equipped with a device indicating its extended length.

Proposed paragraph (d)(5)(iv), *Anti-two-block*, would require a device that automatically prevents contact between a component on the hoist line (load block, overhaul block, etc.) with the boom tip, which can damage or sever the load line or cause other forms of equipment failure. This contact between the hoist line component and the boom tip is referred to as two-blocking. The purpose of the anti-two-blocking device is to prevent this condition, which can result in a sudden drop of the personnel platform. See the discussion of two-blocking in proposed § 1926.1416, *Operational aids*.

Paragraph (d)(5)(iv) is similar to current § 1926.550(g)(3)(ii)(C) and adds an exception for pile driving operations. The proposed requirement would not apply when hoisting personnel in pile driving operations due to the fact the vibration of the pile driving activity makes use of an anti-two-block device ineffective.

In reviewing this portion of the C–DAC document, the Agency has noted that the use of alternative measures for preventing two-blocking during pile driving operations would be required under proposed § 1926.1431(p)(2). However, the C–DAC language for proposed provision § 1926.1431(d)(5)(iv) did not refer to the requirement for alternative measures. Therefore, OSHA has added a reference to the exception in § 1926.1431(d)(5)(iv) advising the reader that alternative measures are required under § 1926.1431(p)(2).

Proposed paragraph (d)(5)(v), *Controlled load lowering*, would require a system or device on the load line hoist drum that positively regulates the lowering speed. It would require this system to be used when hoisting personnel, in addition to a load line hoist brake. The purpose is to minimize the likelihood of free fall of the personnel that could lead to hitting the ground from a sudden fast descent. Additionally, the proposed paragraph would note that free fall of the load line hoist is prohibited and use of equipment in which the boom hoist mechanism can free fall is prohibited. Refer to proposed § 1926.1426, *Free fall/controlled load lowering*, for additional information.

Currently, 1926.550(g)(3)(ii)(D) similarly requires a system or device that positively regulates the lowering speed. Proposed § 1926.1431(d)(5)(v) would explicitly specify that the system must be used when hoisting personnel.

Proposed paragraph (d)(5)(vi), *Proper operation required*, specifies that personnel hoisting would only occur when and if all the devices required in § 1926.1431(d)(5)(i) through (v) are in proper working order. It would also mandate that if a required device stops working while personnel are being hoisted, all personnel hoisting operations must be stopped and not resumed until all devices are working properly. Alternative measures would not be allowed.

The purpose of this paragraph is to clearly establish that personnel hoisting may only be done when all necessary safety devices are working properly. The hazards addressed by this requirement include: structural failure, equipment tipping, dropping personnel, and platform tipping. These are severe hazards, so safeguards to prevent them are clearly needed.

This paragraph does not have a specific corollary in the current Subpart N, although the Subpart N provisions that require safety devices implies that they be working properly. Sections 3.2.2(a)(23) and 1.2.2 of ASME B30.23–2005 are comparable to this requirement.

Proposed paragraph (d)(6) would prohibit the use of a personnel platform directly attached to a luffing jib. Thus, only a suspended type of personnel platform may be used on a luffing jib. The Committee determined that it would be dangerous to use a boom-attached personnel platform if attached to a luffing jib and that a complete prohibition of use of a boom-attached personnel platform to a luffing jib is appropriate.

Paragraph 1431(e) Personnel Platform Criteria

This proposed paragraph would establish the minimum criteria for a personnel platform. The criteria are similar to those currently in 29 CFR part 1926 subpart N's § 1926.550(g)(4)(i) and (ii). However, § 1926.1431(e)(2) would add the requirement that the connection system keep the platform within 10 degrees of level and § 1926.1431(e)(10) would add a visibility requirement for the overhead protective cover to the personnel platform.

Proposed paragraph (e)(1) would require that both the platform and its attachment/suspension system be designed by a qualified person who understands structural design and be designed for the particular function of personnel hoisting. The purpose of this paragraph is to clearly stipulate that the platform must be designed for employee safety. This would address the hazards of structural failure of the platform, failure of the attachment/suspension system, and preclude the use of designs that would be inappropriate for hoisting people. This is similar to the current 29 CFR part 1926 subpart N's § 1926.550(g)(4)(i)(A), which states that either a ''qualified engineer or a qualified person competent in structural design'' shall design the platform, but clarifies that even if the platform is designed by a qualified engineer, that engineer must understand structural design. See § 1926.1401, *Definitions*, for the definition of ''qualified person.''

Proposed paragraph (e)(2) would require the system used to connect the personnel platform to the equipment to be within 10 degrees of level. This would address the hazard of platform tipping by maintaining the platform close to level. This requirement is not currently in subpart N.

Proposed paragraph (e)(3) would require the platform designer to consider the movement of employees on the platform and design the suspension system to minimize platform tipping from such movement. The purpose is to design the platform in such a way as to limit the likelihood of platform tipping while employees are working from the platform. This continues the requirement of subpart N's § 1926.550(g)(4)(i)(B).

Proposed paragraph (e)(4) would require the platform to support its own weight plus a minimum of five times the maximum intended load without failure. This limit would provide an adequate margin of safety for employee protection from structural failure of the platform. The guardrail system and personal fall arrest system anchorages

would not be subject to this requirement but instead would be subject to proposed § 1926.1431(e)(6). This continues a requirement in proposed § 1926.550(g)(4)(i)(C).

Proposed paragraph (e)(5) would require that welding of any part of the platform or its component parts be performed by a welder who is certified and familiar with the weld grades, types and material specified in the particular platform's design. This requirement is designed to prevent structural failure of the platform due to improper welding.

''Certified welder'' is defined in § 1926.1401 as ''a welder that meets the nationally recognized certification requirements that are applicable to the task being performed.'' The requirement for a ''certified'' welder modifies the current requirement of Subpart N's § 1926.550(g)(4)(ii)(H), which requires a ''qualified'' welder. It is similar to section 1.2.1(b)(2) of ASME B30.23–2005 welding standards for personnel platforms. The Committee believed that because proper platform welding is so critical to employee safety, it is necessary for the welding to be done by a certified welder.

Proposed paragraph (e)(6) would detail the requirements of the platform for guardrails, fall arrest anchorage points and enclosure of the platform between the toeboard and mid-rail. Proper guardrails and fall arrest anchorage points are critical fall protection devices, and the required platform enclosure is needed to protect employees below from falling objects.

Proposed paragraph (e)(6) adds to the current requirements of 29 CFR part 1926 subpart N's § 1926.550(g)(4)(ii)(A) in specifying that ''points to which personal fall arrest systems are attached must meet the anchorage requirements in 29 CFR part 1926 subpart M.'' This is similar to the guardrail and anchorage specifications in sections 1.1.1(b)(2) and (3) of ASME B30.23–2005. This would update the requirements for the anchorage so that the same degree of protection currently required under Subpart M would be required under this standard.

Proposed paragraph (e)(7) would require the placement of a grab rail within the entire perimeter of the personnel platform except for access gates/doors, where a grab rail would be impractical. The grab rail provides a place for the employee to hold onto while in the platform instead of using a guardrail as a hand hold. Use of the guardrail for this purpose exposes the employee's hand to being smashed by external objects. This would modify the current requirement of Subpart N's § 1926.550(g)(4)(ii)(B) by clarifying that grab rails are not required on the access gates/door. It is similar to ASME B30.23–1.1.1(b)(4)–2005.

Proposed paragraphs (e)(8)(i) and (ii), *Access gates/doors*, would specify that access gates/doors be designed to not swing outward and must also have a mechanism that will keep the gate/door from being opened unintentionally. A door that swings outward or opens unexpectedly puts the employee at risk of fall from the platform. This modifies the current requirements of Subpart N's § 1926.550(g)(4)(ii)(C) and (D) by requiring that access doors not swing outward at any time and expands the list of types of gates/doors to include ''swinging, sliding, folding, or other types.'' Section 1.1.1(b)(8) of ASME B30.23–2005 has similar requirements for access gates.

Proposed paragraph (e)(9) would require adequate headroom to allow employees to stand upright in the personnel platform. This would provide adequate space for the employee to work from the platform while keeping his/her entire body within the platform, and would also contribute to greater stability during platform movement. This continues the current requirement at § 1925.550(g)(4)(ii)(E).

Proposed paragraph (e)(10) would require an overhead protective cover attached to the platform when an employee is exposed to falling objects. It would mandate that the overhead cover of the platform be of such material and design to provide visibility for both the operator and the employees on the platform, while maintaining adequate protection from falling objects. The reference to a wire mesh with ½ inch openings is an example of a type of material and design that could be used for the platform cover. The nature of the worksite conditions and foreseeable falling objects would determine the type of material and design to provide the necessary protection for the platform occupants. Full overhead protection (*i.e.*, no visibility through the protective cover) would be allowed when conditions are such that a full protective cover is necessary to protect employees from falling objects. The visibility requirement is similar to section 1.1.1(b)(11) of ASME B30.23–2005. This proposed paragraph would change current § 1926.550(g)(4)(ii)(F) by clarifying the type of overhead protection that is required.

Proposed paragraph (e)(10) explicitly states that the protection provided by the cover would be supplemental to the protection provided by hard hats—the use of hard hats would not obviate the requirement for the cover. While a hard hat provides some protection to an employee's head from overhead hazards, it does not protect the rest of an employee's body from such hazards.

Proposed paragraph (e)(11) would require that all edges of the platform be smooth enough to prevent injury. The purpose is to protect the employee from injuries such as lacerations and puncture wounds. A similar requirement is found in Subpart N's § 1926.550(g)(4)(ii)(G).

Proposed paragraph (e)(12) would require conspicuously posting a plate or other permanent written notice on the personnel platform listing the weight of the platform itself and the platform's rated load capacity. The purpose is to make employees aware of the platform's limits to prevent overloading, which could result in structural failure of the platform or equipment, and to facilitate compliance with § 1926.1431(f)(1), which prohibits loading the platform in excess of its rated capacity.

Proposed paragraph (e)(12) would modify the current requirement of Subpart N's § 1926.550(g)(4)(ii)(I) by deleting the phrase ''or maximum intended load.'' That phrase was included in Subpart N because platforms made on the worksite did not have a manufacturer's rated capacity. However, under proposed § 1926.1431(e)(1), all personnel platforms would be required to be designed by a qualified person familiar with structural design, and such a person will be able to determine the rated capacity for the platform.

Paragraph 1431(f) Personnel Platform Loading

Proposed paragraph (f)(1) would prohibit loading the platform in excess of its rated load capacity. Proposed § 1926.1431(f)(1) differs from current § 1926.550(g)(4)(ii)(A) by deleting a provision stating that if a personnel platform does not have a rated load capacity it shall not be loaded in excess of its maximum intended load. The ''maximum intended load'' provision was deleted for the same reason previously discussed under § 1926.4131(e)(12).

Proposed paragraph (f)(2)(i) would require that the platform be used exclusively for personnel hoisting and not for hoisting materials. However, it would allow the necessary materials and tools for the work activity to be hoisted along with the employees. Using a personnel platform to hoist materials can lead to damage of the platform due to materials shifting or excessive loading. This can subject the platform to structural stresses that may not be visible and contribute to platform structural failure. This would continue

the current requirement of § 1926.550(g)(4)(iii)(C).

Proposed paragraph (f)(2)(ii) would provide an exception to (f)(2)(i) to allow materials and tools on the personnel platform during the trial lift as long as the materials/tools are properly secured and distributed as specified in § 1926.1431(f)(3). Since the materials and tools would be secured, they would not damage the platform. Subpart N, at § 1926.550(g)(5)(i), currently allows materials/tools to be on the platform during the trial lift but does not specify that they need to be properly secured and distributed.

Proposed paragraphs (f)(3)(i) and (ii) would require that any materials and tools that are on the platform during the hoist be secured, and evenly distributed within the platform itself while the platform is suspended. These precautions are designed to prevent platform tipping and injury to employees due to movement of materials or tools during the hoist. These requirements would continue those in Subpart N's § 1926.550(g)(4)(iii)(D) & (E).

Proposed paragraph (f)(4) would limit the number of employees on a personnel platform to the lesser of either the number needed to perform the work or the maximum number for which the platform was designed. The purpose is to expose the fewest possible number of employees to the hazards presented when hoisting personnel and to minimize the load on the platform to the extent possible. This would provide greater clarity than the current requirement of Subpart N's § 1926.550(g)(4)(iii)(B) by noting that the number of platform occupants is limited not only by work requirements but also the platform's design.

Paragraph 1431(g) Attachment and Rigging

Proposed paragraph (g)(1) would establish the requirements for the device used to connect the personnel platform to the hoist line. It would expand and clarify the requirements of Subpart N's § 1926.550(g)(4)(iv)(B).

The nature and type of connector used is critical to the overall safety of the suspended personnel platform. Under the proposed paragraph, a hook used to connect the hoist line and personnel platform must be the type that can be closed/locked and must be closed/locked when attached to the platform. When a shackle is used in lieu of a hook, it must be of the alloy anchor type with either: a bolt, nut and retaining pin in place; or: the screw type with the screw pin secured against accidental removal. Any detachable device other than a shackle or hook that is used must be closable and lockable to the same extent a hook or shackle would be when in compliance with this proposed section. When used to connect the personnel platform, such a device must be closed and locked to ensure that the platform is secured to the hoist line.

Proposed paragraph (g)(2) would require that each bridle leg in a rope bridle be connected to the master link/shackle in a manner that would allow the platform's load to be equally distributed among each bridle leg. The purpose of this type of attachment is to avoid platform tipping. The proposed requirement differs from current Subpart N at § 1926.550(g)(4)(iv)(A) by changing the phrase ''wire rope'' to ''rope.'' Currently, the only type of rope that Subpart N permits to be used for bridles is wire rope, and it is C–DAC's and OSHA's understanding that no other type of rope suitable for this purpose is currently available. However, the Committee believed that synthetic ropes now under development could someday meet the safety factor requirement in § 1926.1431(g)(3) and it did not want to preclude the potential use of sufficiently strong synthetic rope.

Proposed paragraph (g)(3) would continue the current requirement of the first sentence of § 1926.550(g)(4)(iv)(C) that all hardware used for rigging must be able to support five times the maximum intended load applied to or transmitted to that component. However, the C–DAC consensus document omitted the second sentence in current § 1926.550(g)(4)(iv)(C), which requires slings using rotation resistant rope to be able to support at least ten times the maximum intended load. In promulgating § 1926.550(g)(4)(iv)(C), OSHA arrived at the safety factor of ten for rotation resistant rope by doubling the normal design factor of five for such rope (see discussion of the design factor for rotation resistant rope above under § 1926.1414, *Wire rope—selection and installation criteria*) to add an extra margin of safety when hoisting personnel. 53 FR 29116, 29122, 29132 (Aug. 2, 1988). OSHA believes that C–DAC did not intend to lower the safety factor for rotation resistant rope used for personnel hoisting and inadvertently omitted the requirement that slings using rotation resistant rope to have a safety factor of ten. OSHA has therefore restored that requirement to proposed 1926.1431(g)(3). As modified, 1926.1431(g)(3) reads:

(3) Rigging hardware (including wire rope, shackles, rings, master links, and other rigging hardware) and hooks must be capable of supporting, without failure, at least five times the maximum intended load applied or transmitted to that component. Where rotation resistant rope is used, the slings shall be capable of supporting without failure at least ten times the maximum intended load.

Proposed paragraph (g)(4) would require the eyes in wire rope slings to be fabricated with thimbles, continuing the current Subpart N's § 1926.550(g)(4)(iv)(D) requirement. The purpose of this requirement is to prevent excessive wear to the eyes and possible failure of the platform's rigging.

Proposed paragraph (g)(5) would require that bridles and rigging used to suspend the personnel platform be used exclusively for hoisting personnel operations, continuing the current requirement of § 1926.550(g)(4)(iv)(E). Rigging components must be dedicated for the sole use of personnel hoisting to provide maximum safety. Materials hoisting can lead to damage of the rigging components due to material shifting or excessive loading. This can make the rigging components susceptible to structural stress that may not be visible, yet contribute to structural failure.

Paragraph 1431(h) Trial Lift and Inspection

The proposed requirements of paragraphs (h)(1) through (5) generally continue the current requirements of Subpart N's § 1926.550(g)(5)(i) through (v). The proposed requirements have been reorganized and reworded for clarity. Requirements for removal of the test weight, checking for wire rope deficiencies, and use of a competent person for trial lifts are not currently in 29 CFR part 1926 subpart N.

Proposed paragraph (h)(1) continues the requirement of § 1926.550(g)(5)(i) for a trial lift without occupants with the platform loaded to at least the anticipated liftweight. The purpose of the trial lift is to confirm that: the lift set-up works properly; the lift route is free of obstacles; the accessibility of the work location; no work locations will place the crane or derrick in such a configuration where the intended load would exceed 50 percent of the equipment's rated capacity; the soil or other supporting surface is stable; and that the lift route is suitable for the intended lift.

The path of the trial lift would be required to begin at the point the employees enter the platform and end at the ultimate location the platform is being hoisted to and positioned (end point). When there are multiple destination locations from a single set-up point, the trial lift would be required to be conducted in one of two ways.

First, individual lifts may be conducted in which the platform is moved to one of the end points from the starting point, returned to the starting point, moved to a second end point, again returned to the starting point, and the process repeated until each end point has been reached. Second, a single lift may be conducted from the starting point to all of the end points in sequence, without returning to the starting point until after the last end point has been reached.

Upon reviewing § 1926.1431(h)(1) in the C–DAC document, OSHA believes that the phrase ''a single trial lift for all locations,'' which was taken from current § 1926.550(g)(5)(i), may not be sufficiently clear to describe the intended meaning. In addition, OSHA is concerned that allowing the trial lift to be conducted in either of these two ways, irrespective of how the personnel will actually be hoisted, may result in the trial lift failing to reveal problems that would be encountered in the actual lift. OSHA believes that the following language would more clearly reflect the intent of the provision and requests public comment on whether the language should be clarified in this manner:

(h) *Trial lift and inspection.*

(1) A trial lift with the unoccupied personnel platform loaded at least to the anticipated liftweight shall be made from ground level, or any other location where employees will enter the platform, to each location at which the platform is to be hoisted and positioned. Where there is more than one location to be reached from a single set-up position, either individual trial lifts for each location, or a single trial lift, in which the platform is moved sequentially to each location, shall be performed; the method selected must be the same as the method that will be used to hoist the personnel.

Proposed paragraph (h)(2) would require that the trial lift take place immediately prior to each shift when hoisting personnel, and each time the equipment is moved and set up in a new location or a previously used location. Additionally, a trial lift must be done when the lift route is changed, unless a competent person determines the new lift route does not present new factors affecting safety. Similar requirements are found in Subpart N's § 926.550(g)(5)(i) and (ii).

Proposed paragraph (h)(3) would require a competent person to ensure that all required safety devices and operational aids required by this proposed section are activated and properly functioning, that nothing interferes with the equipment or personnel platform during the trial lift, that the lift load does not exceed 50 percent of the equipment's rated capacity, and that the load radius used is accurately determined. These requirements would ensure that necessary safety measures are in place and validated by a competent person for the trial lift. The proposed paragraph differs from the current requirements at § 1926.550(g)(5)(i) as it would require a competent person to make the determination rather than the operator. Under sections 3.2.2(a)(9) and (a)(10) of ASME B30.23–2005, the operator is also required to determine that the trial lift has been conducted properly. It is important for this to be the responsibility of a competent person because such a person not only has the knowledge necessary to make the determinations, but also has the authority to take any necessary corrective action.

Proposed paragraph (h)(4) would establish the duties of the competent person immediately after the trial lift. It would require the competent person to conduct a visual inspection of the personnel platform and equipment to determine if there is any problem or defect resulting from the trial lift or if it produced any adverse effect. In addition, the competent person must ensure that the test weight used during the trial lift has been removed prior to personnel loading.

The purpose of these requirements is to ensure that any defects in the equipment, base support or ground and personnel platform revealed by the trial lift are seen by a competent person prior to hoisting personnel (note that, under proposed § 1926.1431(h)(6), any condition found during the trial lift that fails to meet a requirement of this proposed standard or otherwise constitutes a safety hazard must be corrected before hoisting personnel). Proposed paragraph (h)(4) would continue the current requirements of § 1926.550(g)(5)(iv) while adding the requirement that the competent person ensure that the test weight is removed. This has been added because the Committee was aware of incidents in which overloading of the personnel platform occurred due to use of the platform to hoist personnel with the test weights still on board.

Under proposed paragraph (h)(5)(i), immediately prior to each personnel lift, the competent person must inspect the platform while it is lifted a few inches to ensure that the platform is secure and properly balanced.

It is the understanding of the Agency that the purpose of this procedure is to ensure that, with the occupants and materials/tools to be hoisted on the platform immediately before the hoist is to take place, the platform is secure and properly balanced. The purpose of having the occupants and materials/tools on board during this check is twofold. First, it ensures that the check takes place just before the personnel lift, which minimizes the chance that damage or other problems affecting the platform's security will occur after the check. In addition, it would be difficult to ensure that the platform will be properly balanced when in actual use without having the employees and materials/tools on board.

However, while the text of this proposed provision implies that the check is to be done with the personnel and materials/tools on board, it does not specifically so state. The Agency plans to add language to that effect so that proposed § 1926.1431(h)(5)(i) would read as follows:

(i) The platform shall be hoisted a few inches with the personnel and materials/tools on board and inspected by a competent person to ensure that it is secure and properly balanced.

The Agency requests public comment on such a change.

Proposed paragraph (h)(5)(ii) would require a competent person to determine that hoist ropes are free of defects, that multiple part lines are not twisted around each other, and that the primary attachment is centered over the platform. If the load rope is slack, the competent person must inspect the hoisting system to ensure the rope lines are properly seated on drums and in sheaves. Proposed paragraphs (i) and (ii) continue the current requirements of § 1926.550(g)(5)(iii), with the additional clarification that hoist ropes must be free of deficiencies (that is, not just free of ''kinks,'' as required by existing § 1926.550(g)(5)(iii)(A)). The purpose of these requirements is to mandate an additional final review by a competent person to evaluate the personnel platform, the balance of the load, and the lifting devices to ensure that necessary safety requirements are met.

Proposed paragraph (h)(6) would establish that any condition that fails to meet any requirements of this standard or otherwise creates a safety hazard must be corrected before personnel are hoisted. This includes such conditions found during the trial lift or in any inspection or subsequent review of the equipment, platform or rigging. This is similar to the requirement of Subpart N's § 1926.550(g)(5)(v).

Paragraph 1431(i) [*Reserved.*]

This proposed paragraph is reserved because it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1431(j) Proof Testing

This proposed paragraph would delineate the requirement of and method for proof testing the personnel platform and rigging. It would require the proof test to be done at each jobsite prior to hoisting personnel and after any repair or modification of the platform. The proof test would be at 125 percent of the platform's rated capacity, with an evenly distributed test load. The platform must be lowered by controlled load lowering, braked, and held in a suspended position for at least five minutes. After this proof test, the competent person must inspect the platform and rigging to determine if it has passed the proof test. If not, all deficiencies that pose a safety hazard must be corrected and another proof test performed. The competent person must determine that the platform and rigging have successfully passed the proof test before any personnel hoisting begins.

The purpose of this proposed paragraph is to determine if the structural integrity of the personnel platform is intact or if it has been affected by any condition, damage, repair or modification which could result in structural failure or other safety hazards of the platform or rigging. Proposed paragraph § 1926.1431(j) contains requirements similar to those in Subpart N's § 1926.550(g)(5)(vi). It adds the requirement in proposed § 1926.1431(j)(2) that the platform be lowered by controlled load lowering and braked before being held in position for five minutes. This provision was added to ensure that the load lowering and braking mechanisms are functioning properly before personnel are lifted. In addition, proposed § 1926.1431(j)(3) clarifies that only deficiencies that present a safety hazard need be corrected to avoid any implication that minor deficiencies bearing no relation to safety need to be corrected.

The Committee discussed requiring the employer to document the proof test but determined that documentation of the proof test would not add to employee safety.

Paragraph 1431(k) Work Practices

Proposed paragraph (k)(1) would require hoisting of the personnel platform in a slow, controlled, cautious manner, with no sudden movements of the equipment or platform. This precaution would minimize the likelihood of platform tipping, loss of footing, and loss of control of the platform by the operator during hoisting. A comparable requirement is now contained in Subpart N at § 1926.550(g)(3)(i)(A).

Proposed paragraph (k)(2)(i) would require that all occupants of the personnel platform keep all parts of the body inside the platform while it is being raised, lowered or moved horizontally. This would not apply when a platform occupant must position the platform. Additionally, this does not apply while performing the duties of a signal person. The purpose of this requirement is to prevent an employee from having a body part struck or caught in between the personnel platform and another object. This differs from the current requirement of Subpart N at § 1926.550(g)(6)(i) by providing an exception for a platform occupant positioning the platform. The Committee believed that such positioning can be important to safety, and therefore an exception in this regard would be appropriate.

Proposed paragraph (k)(2)(ii) would add a new provision by prohibiting platform occupants from standing on, sitting on, or working from any surface other than the floor of the personnel platform during hoisting or when working from the platform. It would prohibit working from a railing or toeboard or the use of any means or device to raise the employee's working height. The purpose is to ensure that the occupants receive the protections of the guardrail system and do not destabilize the platform.

Proposed paragraph (k)(2)(iii) would add a new provision by prohibiting platform occupants from pulling the platform out of plumb in relation to the hoisting equipment. The purpose is to prevent tipping of the platform with employees on board, which could exacerbate the fall hazard.

Proposed paragraph (k)(3) would require a personnel platform that is not landed to be secured to the structure before employees enter or exit the platform. It would allow an exception when a greater hazard would be created by securing the platform to the structure. The purpose is to provide a stable surface to prevent loss of footing when entering or exiting the platform. This provision is similar to Subpart N's § 1926.550(g)(6)(ii) but replaces the words ''unsafe condition'' with ''greater hazard'' to clarify that the exception only comes into play when the hazard that would be created by securing the platform to the structure is greater than would exist if it were not secured.

Proposed paragraph (k)(4) would add a new requirement that the operator receive confirmation that the platform is no longer tied to the structure and is freely suspended before the operator moves the platform. This requirement would prevent structural damage to the platform and/or rigging and prevent the fall hazard that could result from pulling the platform out of plumb if there is an attempt to move it while it is still attached.

Proposed paragraph (k)(5) would require the use of tag lines when necessary to control the personnel platform. The purpose is to provide an additional way to control platform stability to decrease the risk of injury from loss of footing or from the platform striking an object. This would modify the current requirement of Subpart N's § 1926.550(g)(6)(iii), which requires the use of tag lines unless their use would create an unsafe condition. The Committee believed it is not always necessary to use tag lines even when their use would not create an unsafe condition and was of the view that this change would not decrease safety.

Under proposed paragraph (k)(6), where the platform is not equipped with controls, the equipment operator would be required to remain at the equipment controls at all times while the personnel platform is occupied. Since there are no controls in the personnel platform, the equipment operator must be available to make any necessary adjustments to protect the employees from injury from any condition arising after the platform is placed at the working location. Subpart N at § 1926.550(g)(6)(iv) currently contains a similar requirement but requires the operator to remain at the controls ''when the crane engine is running and the platform is occupied.'' Proposed § 1926.1431(k)(6) specifies that the operator must stay at the controls at all times the platform is occupied, whether or not the crane engine is running.

Proposed paragraph (k)(7), *Platforms with controls*, and its subsections apply when a personnel platform has controls. At present, platforms being manufactured with controls are boom-tip mounted platforms. Controls on certain personnel platforms enable a platform occupant to articulate both the platform and the boom. Other platform designs enable an occupant to control only the platform/basket itself, for example to level the basket as it is boomed up or down. Currently, Subpart N of this part does not distinguish between platforms with controls and platforms without controls, so the requirement of § 1926.550(g)(6)(iv) that the operator remain at the equipment controls when the engine is running and the platform is occupied applies to both types of platform.

Proposed paragraph (k)(7)(i) would require the platform occupant using the

platform's controls to be a qualified person with respect to their use, including the safe limitations of the equipment and hazards associated with its operation. Such knowledge and skill is essential for the safety of the platform occupants and employees in the surrounding area.

Proposed paragraph (k)(7)(ii) would require the equipment operator to be either at the equipment controls, in the personnel platform, or onsite in view of the equipment. It is OSHA's understanding that the purpose of this proposed provision is to require the equipment operator to be available to take action if necessary, such as where there is unexpected or inadvertent platform or equipment movement, a sudden change in wind conditions, or an injury to a platform occupant.

It is also OSHA's understanding that C–DAC intended this provision to give employers the flexibility to position the operator where he or she is needed in certain common situations. For example, if the controls on the platform are designed to control both the platform and the boom, the operator could be the qualified person on the platform who operates the controls. If the controls allow only limited control of the platform itself, the operator will be needed at the equipment controls, as under proposed § 1926.1431(k)(6). The Agency also believes that C–DAC intended the option of having the operator onsite and in view of the equipment to accommodate radio-controlled operations, in which the operator controls the equipment from a position off the equipment but within its line of sight.

Upon reviewing proposed paragraph (k)(7)(ii), OSHA is concerned that the proposed provision would not operate in this manner. Specifically, it would not limit the employer's choices to situations where they are suitable. For example, under the provision as written, the operator could be on the platform even if the controls on the platform allow only limited control of the platform, and the operator would therefore not be available at the equipment controls to move the boom when it is necessary to do so. OSHA requests public comment on whether it is necessary to reword proposed § 1926.1431(k)(7)(ii) to clarify the circumstances under which employers can use the three options for positioning the equipment operator and, if so, how the provision should be worded to achieve that goal.

Proposed paragraph (k)(7)(iii) would require the platform operating manual to be on the platform or on the equipment while the platform is occupied. The purpose is to have ready access to manufacturer's operating information when employees are on the platform.

Proposed paragraph (k)(8)(i), *Environmental conditions—Wind,* would require a qualified person to determine if it is unsafe to hoist personnel when the wind speed (gust or sustained) exceeds 20 mph. High winds increase the likelihood of platform tipping, sudden unexpected movement of the platform, or structural failure of the equipment. If the qualified person determines that hoisting personnel is unsafe, hoisting operations must not begin or, if already in progress, must be terminated.

Subpart N at § 1926.550(g)(6)(v) currently requires personnel hoisting operations to stop when there is indication of any dangerous weather conditions or other impending danger. The Committee believed that it was necessary to establish a clearer guideline with respect to hoisting personnel under windy conditions. C–DAC discussed setting a particular wind speed at which hoisting personnel would be prohibited (it considered, for example, that section 3.2.1(e) of ASME B30.23–2005 prohibits personnel hoisting operations when wind speed exceeds 20 mph). It determined that the number of variables involved at each site precludes establishing a single wind speed threshold at which, in each instance, it could be said that hoisting personnel is not safe. It did, however, determine that 20 mph is an appropriate point at which a determination, in all cases, needs to be made. Therefore, it found that it was appropriate to have the qualified person evaluate all relevant factors in order to determine if conditions are such that hoisting personnel with wind speed over 20 mph is unsafe.

Proposed paragraph (k)(8)(ii), *Environmental conditions—Other weather and environmental conditions,* would require a qualified person to determine if it is not safe to hoist personnel when there are indications of dangerous weather or any other impending/existing dangerous environmental condition. Upon determination that it is unsafe, personnel hoisting operations must not be started or must be terminated if already in progress.

The purpose of this paragraph is to require evaluation of all environmental conditions, including weather, by a qualified person, to determine if the conditions make it unsafe to hoist personnel. Dangerous conditions, such as those presented by severe weather, may contribute to the hazards of platform tipping, unexpected platform movement, dropping the platform, or structural failure of the platform or equipment. Examples of non-weather environmental dangers would be a neighboring fire that threatens the area of the crane operations or a chemical release from a neighboring manufacturing facility that threatens to drift into the area. Section 3.2.1(c) of ASME B30.23–2005 lists electric storms, snow, ice, sleet, or other adverse weather conditions that could affect the safety of personnel as reasons for suspending operations. Rather than listing specific dangers or events, C–DAC believed that the determination of whether conditions were dangerous was best left to the assessment of the qualified person.

As noted above, § 1926.550(g)(6)(v) requires personnel hoisting operations to stop when there is indication of any dangerous weather conditions or other impending danger. The proposed paragraph continues that requirement; however, it adds the requirement that a qualified person must make the determination.

Proposed paragraph (k)(9) would require employees being hoisted to remain in direct communication with either the signal person (where used) or equipment operator at all times. In some instances the platform occupants are in a better position to see potential problems developing than the operator, or to recognize that there is some other safety-related need for the operator to take action. In addition, there are instances when the operator becomes aware of a developing problem and needs to communicate that to the employees being hoisted. This provision would ensure that such information can be communicated quickly between the hoisted employees and operator.

Currently, Subpart N's § 1926.550(g)(6)(vi) requires hoisted employees to remain in continuous sight of and in direct communication with the operator or signal person. Reliance on direct communication alone (such as by radio) is only permitted when visual contact with the operator is not possible and the use of a signal person (to relay information by hand signals) would create a greater hazard. The Committee believed that direct communication, either with a signal person (when used) or with the operator, is an effective way for the hoisted employees to communicate with the operator and that § 1926.550(g)(6)(vi)'s preference for visual contact does not add to safety. Accordingly, proposed § 1926.1431(k)(9) would allow direct communication with

a signal person or the operator in all instances.

Proposed paragraphs (k)(10)(i) and (ii), *Fall protection,* would require employees on the personnel platform to be provided with and use a personal fall arrest system attached to a structural member within the personnel platform. The fall arrest system (including the attachment point) must comply with § 1926.502, *Fall protection systems criteria and practices.* When hoisting personnel over water, a personal fall arrest system would not be required since, in the event that an error or failure occurred that resulted in the employees being in the water, being tied-off would exacerbate the drowning hazard. However, the requirements of § 1926.106, *Working over or near water,* would apply.

The purpose of this requirement is to protect employees from a fall hazard while in the personnel platform in the event of sudden movement, tipping, or other circumstance in which a fall would not be prevented by the platform's guardrail system. This is similar to the requirements of Subpart N's § 1926.550(g)(6)(vii). However, it replaces use of a ''body belt/harness system with lanyard'' with ''personal fall arrest system'' to reflect current technology, terminology and practice for personal fall protection and to be consistent with 29 CFR part 1926 subpart M's personal fall arrest system requirements. Additionally, the Committee determined that the requirement in the current standard to attach a personal fall arrest system to the ''lower load block or overhaul ball'' was no longer considered good industry practice and, instead, an employee needs to be tied off to ''a structural member within the personnel platform.'' Tying off to the lower load block or overhaul ball places the employee at risk of being pulled through the top of the personnel platform and into the rigging attached to the personnel platform.

Proposed paragraph (k)(11)(i), *Other load lines,* would mandate that while hoisting personnel no other lifts may be made with any of the equipment's other load lines. This proposed provision has several purposes. First, it would prevent platform tipping due to entanglement with other load lines or loads. Second, it would reduce the chance that the equipment would be overloaded. Third, when hoisting personnel, it is essential that the operator's full attention be devoted to the personnel; use of another load line would necessarily divert his/her attention. This is comparable to the requirement of Subpart N's § 1926.550(g)(6)(viii), with the addition of an exception for pile driving equipment. In pile driving operations, personnel have to be hoisted at times as part of the pile driving operation while the pile driving apparatus is being suspended on another load line.

In reviewing this aspect of the C–DAC document, the Agency noted that under the C–DAC language, the provision would have applied only when personnel were ''suspended on a platform.'' Since there are specified exceptions to the proposed requirement to use a personnel platform, there will be specific instances where personnel will be hoisted without a platform. The Agency believes that it is equally important to safety that the prohibition against using any other load lines apply in these instances (with the exception of pile driving operations, in which it is not feasible to use only one load line), and that this was a textual oversight by the Committee. Therefore, OSHA has modified the C–DAC language of this provision so that the prohibition would apply ''while personnel are being hoisted. * * *'' OSHA requests comment on this change.

Proposed paragraph (k)(11)(ii), *Other load lines,* would allow the use of a winch line while hoisting personnel when all of the following factors are present: the personnel platform is a factory-produced boom-mounted personnel platform incorporating a winch as original equipment, the load on the winch line does not exceed 500 pounds, and the load on the winch line itself does not exceed the rated capacity of the winch and platform. The Committee believed that, when all of these factors are present, there is little chance that the use of the winch line would compromise safety.

Proposed paragraph (k)(12)(i), *Traveling—equipment other than derricks,* would prohibit any traveling by equipment with hoisted employees except in two circumstances. The first is where the equipment is traveling on fixed rails. The second is where the employer demonstrates that there is no less hazardous way to perform the work than by traveling. However, this second exception does not apply to rubber-tired equipment, for which traveling is always prohibited. Traveling with hoisted employees is also always prohibited for derricks, as set forth under proposed § 1926.1431(k)(13), discussed below.

Traveling while hoisting personnel is generally prohibited due to several additional risks that it presents. The platform will tend to swing when the equipment is traveling, which presents an increased likelihood of employee injury from platform tipping or loss of footing. If the swing is pronounced, the equipment could become unbalanced and its capacity exceeded. Also, the chance of an unplanned circumstance or event increases when the equipment travels, which heightens the risk to the employees being hoisted. Therefore, the exception to this prohibition is narrowly drawn.

Traveling would be permitted with equipment that travels on fixed rails, as travel on fixed rails is relatively stable and predictable, which reduces the chance of significant uncontrolled movement. Traveling may be done with equipment that is not on fixed rails and not rubber-tired, but only where the employer can demonstrate that there is no less hazardous way to perform the work.

However, traveling would be prohibited with rubber-tired equipment. The Committee was of the view that traveling with such equipment while hoisting personnel is inherently dangerous due to the bouncing and swaying of the equipment that is inherent in this type of equipment because of the tires and suspension.

The current requirements of Subpart N at § 1926.550(g)(7)(i), prohibit hoisting employees while a crane is traveling ''except for portal, tower or locomotive cranes, or where the employer demonstrates that there is no less hazardous way to perform the work.'' The proposed paragraph would have a clearer restriction on equipment traveling by establishing a complete prohibition on traveling while hoisting employees for any rubber-tired equipment. Instead of referring to particular types of cranes, the proposed paragraph allows for hoisting personnel by equipment that travels on fixed rails, which more directly relates to what makes the use of such equipment acceptable for this purpose. The proposed paragraph still allows for hoisting personnel if there is no less hazardous means to do the work, but this exception does not apply to rubber-tired equipment.

Proposed paragraph (k)(12)(ii), *Traveling—equipment other than derricks,* would establish certain criteria that would have to be met when traveling with employees is allowed. The purpose of this proposed paragraph is to establish the conditions necessary to minimize the effect of traveling on the stability of the equipment and personnel. In order to hoist employees while traveling, the following would be required: travel restricted to a fixed track or runway; distance of travel limited to the length of the boom, including any attached jib; the boom parallel to the direction of travel (unless

it is safer otherwise); and a complete trial run performed to test the travel route before employees occupy the platform.

In proposed § 1926.1401, a ''runway'' is defined as a firm level surface designed, prepared and designated as a path of travel for the weight and configuration of the equipment being used to lift and travel with the personnel platform, including an existing surface. For the purposes of this proposed paragraph, OSHA believes it is necessary to clearly define what constitutes a runway since its purpose differs, for example, from a runway on a gantry crane. The function of the runway required by this proposed paragraph would be to provide a stable surface for equipment during travel to minimize unexpected movement. This definition is included to remain consistent with the term, without change, as it is used in Subpart N of 29 CFR part 1926. The required trial run may be done at the same time as the trial lift testing the lift route (see proposed paragraph (h)).

This continues the requirements of Subpart N's § 1926.550(g)(7)(ii) with three exceptions. Currently, ''the boom must be parallel to the direction of travel''; the proposed paragraph allows an exception when it is safer to travel with the boom not parallel to the direction of travel. For example, if the work was being done to the side of the crane, and booming to parallel would take the personnel platform closer to a power line, and the manufacturer permits the crane to travel with the boom to the side, it would be safer to travel with the boom to the side in this instance. Next, the Committee determined that the current travel limit of ''the load radius of the boom'' was confusing terminology and found that a clearer and equally safe restriction would be to limit the distance of travel to the ''boom length.'' Finally, as discussed above, the proposed paragraph would prohibit all traveling while hoisting personnel with rubber-tired equipment. The current standard (§ 1926.550(g)(7)(ii)(E)) in effect allows use of rubber-tired equipment in limited conditions.

Proposed paragraph (k)(13), *Traveling—derricks,* would prohibit a derrick from traveling while it is hoisting personnel. The current requirements of Subpart N that address traveling refer only to cranes. C–DAC believed that the intent of Subpart N was to prohibit derricks from traveling with hoisted employees and decided it was necessary to note this exclusion to eliminate any ambiguity. Hoisting employees on a traveling derrick is dangerous because derricks are not sufficiently stable when traveling. This proposed paragraph reflects the current industry practice as reflected in section 3.3.4(a)(14) of ASME B30.6–2003, ''Derricks.''

Paragraph 1431(l) [*Reserved.*]

This proposed paragraph is reserved because it is inconvenient for readers to distinguish the letter ''l'' from the number ''1.''

Paragraph 1431(m) Pre-Lift Meeting

This proposed paragraph would require a meeting prior to the trial lift at each new work location to review the requirements of this section and the procedures to be followed when hoisting personnel. The pre-lift meeting would be attended by the equipment operator, signal person (when one is used for the lift), employees to be hoisted, and the person responsible for the task to be performed.

Also, this paragraph would require this meeting to be repeated when an employee is newly assigned to the operation. The purpose of this requirement is to make all employees involved in the personnel hoisting operation aware of the requirements of this section and the plan for the personnel lift. This would provide an opportunity for all employees involved to have a common and complete understanding of the hoisting operation and to give uniform information and instructions immediately prior to the lift. This would address hazards which could result from misunderstanding of the requirements, particular lift conditions or procedures.

The provisions of proposed paragraph (m) are comparable to the requirements of § 1926.550(g)(8).

Paragraph 1431(n) Hoisting Personnel Near Power Lines

This proposed paragraph would prohibit hoisting personnel within 20 feet of a power line 350 kV and below or within 50 feet of a power line over 350 kV, except for work that is covered by 29 CFR part 1926 Subpart V, *Power Transmission and Distribution.*

The purpose of this requirement is to establish a safe clearance distance from power lines to protect employees from an electrocution hazard that would result if the personnel, a personnel platform, or equipment made electrical contact with a power line. The clearance distances are similar to those in proposed § 1926.1407 and § 1926.1408 for equipment operating near power lines. However, under § 1926.1407 and § 1926.1408, clearances less than 20 and 50 feet are permitted for certain voltage ranges. Here, the Committee believed that the extra risk that arises when personnel are hoisted near a power line justifies the requirement to maintain the minimum distances of 20 feet for lines 350 kV or less and 50 feet for lines over 350 kV regardless of whether operations at closer distances without hoisting personnel would be permitted.

Currently, Subpart N at § 1926.550 has no specific requirement for hoisting personnel near power lines, and the normal minimum distances established by that standard apply.

Paragraph 1431(o) Hoisting Personnel in Drill Shafts

This proposed paragraph would provide requirements when hoisting personnel in drill shafts that are 8 feet and smaller in diameter. C–DAC noted that drill shafts of this size may be either too small to use a personnel platform, or that use of a personnel platform might not allow the room needed to perform the necessary work. As a result, the Committee determined that, due to the limitations of a drill shaft of this size, use of a personnel platform would typically be infeasible and a boatswain's chair may be the only practical means of hoisting personnel and performing the necessary work.

''Boatswain's chair'' is defined in § 1926.1401 as ''a single-point adjustable suspension scaffold consisting of a seat or sling (which may be incorporated into a full body harness) designed to support one employee in a sitting position.'' Except for the parenthetical, this definition is identical to that in OSHA's construction scaffolding standard, § 1926.450(b). The parenthetical has been added to clarify that a boatswain's chair in which the seat or sling is incorporated into a full body harness complies with the standard.

Proposed § 1926.1431(o)(1) would allow the employer to use either a personnel platform or a boatswain's chair; the employer would have the option of choosing which one to use.[73] When the employer elects to use a boatswain's chair in lieu of a personnel platform, particular supplementary

[73] Note that, under proposed § 1926.1431(a), an employer may only use equipment to hoist personnel when other means of reaching the work area would present a greater hazard or would not be possible because of the project's structural design or worksite conditions. C–DAC provided, in paragraphs (o)(2) and (o)(3)(i), that paragraph (a) applies to the use of either a personnel platform or a boatswain's chair. Therefore, before using either means to hoist personnel in drill shafts, the employer would need to determine that hoisting personnel in lieu of using other means of access to the work area is the least hazardous, or the only, means to gain access to the work area.

requirements in proposed paragraph (o)(3) would have to be met. These particular requirements address the heightened danger that the employee may fall from the chair or contact the wall of the drill shaft. Subpart N does not have requirements that specifically address hoisting personnel in drill shafts.

Proposed § 1926.1431(o)(1) would require that the employer use either a personnel platform or boatswain's chair.

Proposed § 1926.1431(o)(2) would require the employer to follow requirements (a) through (n) of § 1926.1431 when using a personnel platform to hoist employees. This would make clear that the provisions in proposed paragraph (o) are supplementary requirements.

Proposed § 1926.1431(o)(3) would establish the requirements when the employer elects to use a boatswain's chair in lieu of a personnel platform for hoisting personnel.

Proposed § 1926.1431(o)(3)(i) would establish which of the previous proposed paragraphs in § 1926.1431 would continue to apply when using a boatswain's chair. For these applicable paragraphs, the reader would substitute the phrase ''boatswain's chair'' for either ''personnel platform'' or ''platform,'' and the employer must comply with these requirements.

The proposed paragraphs omitted from proposed § 1926.1431(o)(3)(i) would not apply when a boatswain's chair is used. This is because the requirement is either specifically applicable to personnel platform design and use, or generally not applicable when hoisting personnel in a drill shaft.

Proposed § 1926.1431(o)(3)(ii) would require a signal person to be stationed at the opening of the shaft during personnel hoisting. The purpose is to have the signal person at the best position to watch the employee being hoisted and signal the equipment operator, since the employee would be out of visual range of the operator.

Proposed § 1926.1431(o)(3)(iii) would require the employee to be hoisted in a slow, controlled descent and ascent. This is to limit swinging or sudden movement of the boatswain's chair to prevent fall from the chair or impact with the walls of the drill shaft.

Proposed § 1926.1431(o)(3)(iv) would require the employee in the boatswain's chair to use personal fall arrest equipment, including a full body harness, that is attached independent of the crane/derrick. The purpose of requiring a tie off point independent of the equipment is to protect the employee from a sudden drop or fall due to equipment failure or other problem associated with the operation of the crane/derrick and to protect the employee from falls when accessing and egressing the boatswain's chair.

Proposed § 1926.1431(o)(3)(v) would require fall protection equipment to comply with § 1926.502, *Fall Protection Systems Criteria and Practices.*

Proposed § 1926.1431(o)(3)(vi) would require the boatswain's chair (excluding the personal fall arrest anchorages) to be capable of supporting, without failure, its own weight plus a minimum of five times the maximum intended load. This is similar to the requirement for personnel platforms at proposed § 1926.1431(e)(4). The strength requirement that would be applicable to personal fall arrest anchorages is in § 1926.502(d)(15).

Proposed § 1926.1431(o)(3)(vii) would mandate that only one person be hoisted at a time when using a boatswain's chair. The Committee believed that hoisting more than one person using a boatswain's chair in a drill shaft would present unacceptable additional hazards for the employees being hoisted.

Paragraph 1431(p) Hoisting Personnel for Pile Driving Operations

This proposed paragraph would provide requirements for hoisting personnel in pile driving operations. Subpart N does not have provisions that specifically address hoisting personnel in pile driving operations.

Proposed § 1926.1431(p)(1) would require that the employer use either a personnel platform or boatswain's chair when hoisting personnel in pile driving operations. As with drill shafts, C–DAC believed that use of a personnel platform would often be infeasible in this type of operation, and § 1926.1431(p)(1) therefore gives the employer the option of choosing which one to use.

Proposed § 1926.1431(p)(2) would require the cable being used to hoist personnel to be clearly marked at the point on the cable that would allow the equipment operator the opportunity to stop the hoist to prevent two-blocking. In the C–DAC document an alternative to marking the cable would have been permitted: use of a spotter to observe the lift and alert the equipment operator in time to prevent two-blocking. An anti-two-blocking device would not be required for equipment during pile driving operations since the vibration of the pile driver would destroy this device. (See § 1926.1431(d)(4)(iv), *Anti-two-block*).

In reviewing this portion of the C–DAC document, the Agency has noted that the means of preventing two-blocking in the C–DAC language, that is, to mark the cable or use a spotter, is consistent with the temporary alternative measure for an anti two-block device specified in proposed § 1926.1416(d)(3)(ii)(D) for lattice boom cranes. However, as indicated in proposed § 1926.1416(d)(3)(i), marking the cable is not sufficient for telescopic boom cranes when extending the boom. As discussed above in the context of that proposed provision, when extending a telescopic boom, a spotter is needed to warn against two-blocking.

The Agency believes that the Committee developed its language for preventing two-blocking when pile driving with only lattice boom cranes in mind, since that is the type of equipment that is commonly used for this work. However, as technology and construction practices evolve, telescopic boom cranes may be used for this work as well. Therefore, the Agency has modified the C–DAC language so that proposed § 1926.1431(p)(2) would require that, when using a telescopic boom crane for pile driving operations, a spotter must be used in addition to marking the cable. The Agency requests public comment on this issue.

Proposed § 1926.1431(p)(3) would require the employer to follow requirements (b) through (n) of § 1926.1431 when using a personnel platform to hoist employees. Section 1926.1431(a) would not apply because the Committee determined that the employer should not be required to demonstrate that the other means of access listed in § 1926.1431(a) are infeasible before being able to use a personnel platform to hoist personnel during pile driving operations. C–DAC believed that demonstrating infeasibility prior to using a personnel platform should not be required because, in most instances, it is not feasible to use other means of access.

Proposed § 1926.1431(p)(4) would establish the requirements when the employer elects to use a boatswain's chair in lieu of a personnel platform for hoisting personnel.

Proposed § 1926.1431(p)(4)(i) would establish which of the previous paragraphs in § 1926.1431 continue to apply when using a boatswain's chair in a pile driving operation. For these applicable paragraphs, the reader would substitute the phrase ''boatswain's chair'' for either ''personnel platform'' or ''platform'' and the employer must comply with these requirements.

The proposed paragraphs omitted from proposed § 1926.1431(p)(3)(i) do not apply when a boatswain's chair is used because the requirement is either specifically applicable to personnel

platform design and use or generally not applicable for pile driving operations.

Proposed § 1926.1431(p)(4)(ii) would require the employee to be hoisted in a slow, controlled descent and ascent. This is to limit swinging or sudden movement of the boatswain's chair to prevent a fall from the chair or impact with equipment or other structures.

Proposed § 1926.1431(p)(4)(iii) would require that the employee in the boatswain's chair use personal fall arrest equipment, including a full body harness. The fall arrest system must be attached to either the lower load block or the overhaul ball. The purpose of having the fall protection equipment and tie off point independent of the boatswain's chair and rigging used to hoist the employee is twofold. It would both protect the employee from a sudden drop or fall due to failure of that equipment and protect the employee when accessing and egressing the boatswain's chair.

Proposed § 1926.1431(p)(4)(iv) would require fall protection equipment to comply with § 1926.502, *Fall protection systems criteria and practices.* This would ensure that the fall equipment is sufficient to safely arrest the employee's fall.

In reviewing this portion of the C–DAC document, the Agency has noted that the Committee did not include a provision similar to proposed § 1926.1431(o)(3)(vi)(drill shafts) and § 1926.1431(s)(3)(v)(storage tanks) to require a minimum strength for the boatswain's chair. In addition, it did not include a provision similar to proposed § 1926.1431(o)(3)(vii)(drill shafts) and § 1926.1431(s)(3)(vi)(storage tanks) to restrict hoisting to one person at a time. Accordingly, the Agency is planning to add the following provisions to proposed § 1926.1431(p)(4) and requests public comment on these additions.

(v) The boatswain's chair itself (excluding the personal fall arrest system anchorages), shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load.

(vi) No more than one person shall be hoisted at a time.

Paragraph 1431(q) [*Reserved.*]

This paragraph is reserved because it is inconvenient for the reader to distinguish the letter q, when in parentheses, from the letter o.

Paragraph 1431(r) Hoisting Personnel for Marine Transfer

This proposed paragraph would address the particular hazards related to hoisting personnel for transfer to or from a marine construction worksite. Currently, Subpart N does not address the particular hazards and requirements of marine personnel transfer. This proposed paragraph would apply only when hoisting employees solely for such transfer.

Proposed § 1926.1431(r)(1) would require the employer to use either a traditional personnel platform or a marine hoisted personnel transfer device. This proposed paragraph would allow an employer to use a marine hoisted personnel transfer device instead of a personnel platform for several reasons. Transferring personnel to or from a marine construction site poses special problems due to the effects of waves and gusting wind. These effects, which can be unpredictable, can result in a situation where the equipment operator will not be able to adequately control the equipment. In such a situation, the device used to transfer the employees may suddenly wind up in the water. Another possibility is that the employees may need to jump off into the water to avoid a collision with the ship or an object on the construction site. A third possibility is that the operator will be unable to control the equipment while the employees are attempting to board or disembark. The longer it takes to get on or off, the greater this risk becomes. In all of these scenarios the employees need to be able to either enter or exit the device being used to transfer them quickly and easily.

A personnel platform, which is designed, in part, to keep the employees inside, would, in most marine situations, compound the hazard faced by the employees, since they can be difficult to enter and exit quickly. For example, there is usually a gate that latches shut. Also, the gate may prevent more than one employee from entering or exiting at a time. In contrast, a marine hoisted personnel transfer device is designed specifically to facilitate the employees' rapid entry and exit. The Committee believed that the employer should have the option of using such a device so that it may be used where, in the judgment of the employer, the conditions are such that the risk of being prevented from entering or exiting quickly is greater than the risk of unintentionally falling off.

OSHA notes that proposed § 1926.1431(r)(1) would give employers an unrestricted choice of whether to use a personnel platform or a marine hoisted personnel transfer device despite the fact that the personnel platform would often be a less safe choice. OSHA requests public comment on whether the employer should be required to select the device used for marine transfer on the basis of which is safer under the circumstances or should otherwise restrict the use of personnel platforms for marine transfer.

Proposed § 1926.1431(r)(2) would require the employer to follow requirements (a) through (n) of § 1926.1431 when using a personnel platform to hoist employees. As discussed previously, these provisions are designed to ensure that hoisting personnel is the safest means of moving the employees and that the personnel platform's design and use are adequate from a safety standpoint.

Proposed § 1926.1431(r)(3) would establish the requirements when the employer elects to use a marine hoisted personnel transfer device in lieu of a personnel platform for hoisting personnel.

Proposed § 1926.1431(r)(3)(i) would establish which of the previous paragraphs in § 1926.1431 continue to apply when using a marine hoisted personnel transfer device. For these applicable paragraphs, the reader would substitute the phrase ''marine hoisted personnel transfer device'' for either ''personnel platform'' or ''platform'' and the employer must comply with these requirements.

The paragraphs omitted from proposed § 1926.1431(r)(3)(i) do not apply when a marine hoisted personnel transfer device is used. This is because the requirement is either specifically applicable to personnel platform design and use or generally not applicable when hoisting personnel at a marine worksite.

Proposed § 1926.1431(r)(3)(ii) would require the marine hoisted personnel transfer device to be used exclusively for transferring employees. One purpose of this proposed provision is to not allow the device to be used as a work platform. The device's design, which specifically facilitates easy and rapid entry and exit, is ill-suited to providing a safe work platform. In particular, it is not designed to prevent falling while an employee uses his or her hands for working rather than holding on to the device. Also, it is ill-suited as a material transfer device because it is not designed to prevent materials from falling from it and could be damaged by such use.

Proposed § 1926.1431(r)(3)(iii) would limit the number of employees on the marine hoisted personnel transfer device to the maximum number the device was designed to hold. This would prevent overloading, which could result in structural failure of the device. It would also prevent overcrowding, which could cause an unintended fall or preclude a worker

from entering or exiting as rapidly as when used properly.

Proposed § 1926.1431(o)(3)(iv) would require each employee being transferred on a marine hoisted personnel transfer device to wear a U.S. Coast Guard personal flotation device that is approved for industrial use. The purpose is to protect the employee from drowning if the device enters the water, or if the employee falls or needs to jump into the water.

Paragraph 1431(s) Hoisting Personnel for Storage Tank (Steel or Concrete), Shaft and Chimney Operations

This proposed paragraph would establish requirements when hoisting personnel in storage tank (steel or concrete), shaft operations and chimney operations. C–DAC determined that use of a personnel platform, while usually feasible, is infeasible in some circumstances involving these operations due to the nature of the work activity. Consequently, the Committee determined that boatswain's chairs should be allowed instead of a personnel platform in such instances, but only when the employer can demonstrate that use of a personnel platform is infeasible.[74] For these reasons, proposed § 1926.1431(s)(1) would allow the employer to use a boatswain's chair only when the employer has determined that use of a personnel platform is infeasible.

Proposed § 1926.1431(s)(2) would require the employer to follow requirements (a) through (n) of § 1926.1431 when using a personnel platform to hoist employees. Under proposed § 1926.1431(a), an employer may only use equipment to hoist personnel when other means of reaching the work area would present a greater hazard or would not be possible because of the project's structural design or worksite conditions. Therefore, before using a personnel platform to hoist personnel in storage tank (steel or concrete), shaft operations and chimney operations, the employer would need to determine that hoisting personnel in lieu of using other means of access to the work area is the least hazardous, or the only, means to gain access to the work area.

Proposed § 1926.1431(s)(3) would establish the requirements when the employer uses a boatswain's chair in lieu of a personnel platform for hoisting personnel.

Proposed § 1926.1431(s)(3)(i) would establish which of the previous paragraphs in § 1926.1431 continue to apply when using a boatswain's chair. For these applicable paragraphs, the reader would substitute the phrase ''boatswain's chair'' for either ''personnel platform'' or ''platform'' and the employer must comply with these requirements.

The paragraphs omitted from proposed § 1926.1431(s)(3)(i) do not apply when a boatswain's chair is used. This is because the requirement is either specifically applicable to personnel platform use and design or generally not applicable when hoisting personnel in storage tanks (steel or concrete), shaft operations and chimney operations.

Proposed § 1926.1431(s)(3)(ii) would require the employee to be hoisted in a slow, controlled descent and ascent. This is to limit swinging or sudden movement of the boatswain's chair to prevent fall from the chair or impact with the walls or other areas or structures involved in these operations.

Proposed § 1926.1431(s)(3)(iii) would require the employee in the boatswain's chair to use personal fall arrest equipment, including a full body harness, that is attached independent of the crane/derrick. Having the tie off point independent of the equipment protects the employee from a sudden drop or fall due to equipment failure or other problem associated with the operation of the crane/derrick and to protect the employee from falls when accessing and egressing the boatswain's chair.

Proposed § 1926.1431(s)(3)(iv) would require fall protection equipment to comply with § 1926.502, *Fall protection systems criteria and practices.* This would ensure that the fall equipment is sufficient to safely arrest the employee's fall.

Proposed § 1926.1431(s)(3)(v) would require the boatswain's chair to be capable of supporting, without failure, its own weight plus a minimum of five times the maximum intended load. This is consistent with the requirement for personnel platforms at § 1926.1431(e)(4).

Proposed § 1926.1431(s)(3)(vi) would mandate that only one person be hoisted at a time when using a boatswain's chair. The Committee believed that hoisting more than one person using a boatswain's chair in these operations would present unacceptable additional hazards for the employees being hoisted.

Section 1432 Multiple Crane/Derrick Lifts

This proposed section lists additional requirements for operations involving multiple cranes and derricks. It addresses hazards arising from operations that use more than one crane/derrick to lift a single load. This section evolved from the Committee's concern that such operations involve an additional level of risk due to their higher degree of complexity. Specifically, the number and type of factors that must be accounted for, the difficulties associated with closely coordinating the movement of the multiple cranes/derricks, and the likelihood that such lifts are typically outside the normal routine for most employers, combine to create this higher level of risk. Consequently, the Committee agreed that such lifts need an additional level of planning and expertise over that required in routine operations. This section would require development and implementation of a plan by qualified persons, which would result in proactive decision-making and greater awareness and caution during multiple-crane/derrick operations.

Currently, Subpart N, through incorporation of section 5–3.2.31 of ANSI B30.5–1968, addresses multiple lifts as follows: ''When two or more cranes are used to lift one load, one designated person shall be responsible for the operation. He shall analyze the operation and instruct all personnel involved in the proper positioning, rigging of the load, and the movements to be made.'' As discussed below, this proposed rule also requires supervision of the operation and instruction of personnel but, in addition, specifies qualifications that the person who supervises the lift must have and contains additional provisions to ensure safety.

Paragraph 1432(a) Plan Development

The purpose of the proposed requirement for a plan is to help ensure that the hazards involved with a multiple lift are identified and eliminated. These hazards include, but are not limited to, load slipping and unintended load shifting. Such hazards can be minimized by a plan that addresses elements such as the capacity of the cranes/derricks relative to load distribution (throughout the lift), load rigging, load travel (from start to finish), and communication. The Committee discussed several specific methods of addressing these hazards, but in view of the wide variety and circumstances of such lifts, determined that a plan-based requirement would be most appropriate and would be effective in reducing the risks associated with these operations.

Proposed § 1926.1432(a)(1) would require that a qualified person develop the plan. Because of the inherent complexity of these operations,

[74] There is no current requirement in Subpart N that specifically addresses hoisting personnel in storage tanks (steel or concrete), shaft operations, or chimney operations.

Committee members believed that it is necessary for a person with a high degree of knowledge and experience to develop the plan; otherwise, there is a significant likelihood that the plan would be ineffective in addressing the hazards. Therefore, the Committee determined that the plan developer would need to be a qualified person.

Proposed § 1926.1432(a)(2) would require that the plan be designed to ensure that the requirements of this Subpart are met. This provision emphasizes that all applicable requirements in the proposed standard must be met when performing multiple crane/derrick lifts, in addition to the specific requirements set forth in this section. The Committee believed that it was important to emphasize this in the plan to help ensure safe multiple-crane/derrick lift operations.

Paragraph 1432(a)(3)

Proposed § 1926.1432(a)(3) would require engineering expertise to be provided by the employer whenever the qualified person determines that it is necessary. In the view of the Committee, some, but not all multiple-crane/derrick lifts need to be planned with engineering expertise so that the lift can be performed safely. The Committee believed that it is not practical to set criteria in this proposed rule for identifying which lifts need such expertise.

Paragraph 1432(b) Plan Implementation

Under this proposed paragraph, the employer would be required to take specific steps designed to ensure that the decisions and precautions built into the plan are effectively implemented.

Proposed § 1926.1432(b)(1) would require supervision of plan implementation by competent and qualified persons, or by one person who meets the definitions of both. The Committee believed that, especially in light of the inherent complexity of these operations, it is essential that a person (or team) with sufficient expertise and authority oversee the implementation of the plan. Supervision by a person or team with the attributes of both a competent and qualified person would ensure not only that potential problems are identified, but also that the person in charge of oversight will have the authority to correct anything that is amiss. For a detailed explanation of competent and qualified persons, refer to the preamble discussion of proposed § 1926.1404(a), *Supervision—competent-qualified person.*

Proposed § 1926.1432(b)(2) would mandate that the supervisor review the plan with all employees who will be involved with the operation before lift operations begin. This would typically involve the signal person, rigging crew, crane operator, and sometimes laborers, who would all meet to make certain that everyone understands the plan and how the operation will be conducted. The Committee believed that it is important for employees to know how the plan will work, including their responsibilities and the responsibilities of others, to help ensure that the diverse aspects of the operation will be coordinated.

Section 1433 Design, Construction and Testing

Currently, Subpart N includes design, construction, and testing requirements for specific types of equipment that either incorporate pre-1970 consensus standards or that require equipment to conform to manufacturer's specifications. The former category includes: Crawler, locomotive, and truck cranes (ANSI B30.5–1968, incorporated by 29 CFR 1926.550(b)(2)); overhead and gantry cranes (ANSI B30.2.0–1967, incorporated by 1926.550(d)(4)); and derricks (ANSI B30.6–1969, incorporated by § 1926.550(e)). The latter includes hammerhead tower cranes (§ 1926.550(c)(5)) and floating cranes and derricks (§ 1926.550(f)(2)(iii)). Except for crawler, locomotive, and truck cranes, design, construction and/or testing requirements for each of these categories of equipment is addressed in a section of this proposed standard that is dedicated to that type of equipment. This proposed section contains certain requirements applicable only to crawler, locomotive, and truck cranes and, in addition, contains requirements that apply to all of the equipment subject to this standard.

The C–DAC draft provides that the requirements of this section ''apply to equipment that has a manufacturer-rated hoisting/lifting capacity of 2,000 pounds or more.'' However, proposed § 1926.1441 sets forth requirements for equipment with a rated capacity of 2,000 pounds or less and excludes § 1926.1433 from the requirements for such equipment. The two sections conflict with respect to equipment rated at 2,000 pounds, which is a common rating. It is OSHA's understanding that C–DAC included the 2,000-pound cutoff to parallel ANSI B30.5 in this regard. The 1968 and 2004 versions of ANSI B30.5, as well as intermediate versions, exclude equipment with a capacity of one ton or less. To conform to that intent in the proposed rule, OSHA has changed the introductory sentence so that it reads: ''The following requirements apply to equipment that has a manufacturer-rated hoisting/lifting capacity of more than 2,000 pounds.''

Paragraph 1433(a)

Proposed paragraph (a) would require that crawler, truck and locomotive cranes manufactured prior to the effective date of this standard meet the applicable requirements for design, construction, and testing prescribed in ANSI B30.5–1968, safety code for ''Crawler, Locomotive, and Truck Cranes,'' ''PCSA Standard No. 2,'' the requirements in paragraph (b), or the applicable DIN (Deutsches Institut für Normung e.V., or German Institute for Standardization) standards that were in effect at the time of manufacture.

This proposed provision would allow employers to continue to use equipment that complies with § 1926.550(b)(2) of Subpart N and also gives them the flexibility to use equipment that was built to conform to applicable DIN standards. The Committee concluded that the equipment manufactured during this period that was built to conform to the applicable DIN standards has not shown signs of being less safe from the standpoint of its design and construction than equipment built during this period to meet the applicable ANSI or PCSA standards.

The C–DAC draft of this paragraph, and of § 1926.1433(c) (see discussion below), referred to ''the effective date of 1926.1400'' instead of the ''effective date of the standard.'' For consistency throughout this proposal, OSHA has changed the references to ''the effective date of 1926.1400'' to ''the effective date of the standard.''

Paragraph 1433(b)

Proposed (b) uses the phrase ''mobile and locomotive cranes'' to reflect the current terminology used in ASME B30.5–2004. As drafted by C–DAC, it would require that mobile (including crawler and truck) and locomotive cranes manufactured on or after the effective date of this standard meet certain provisions of ASME B30.5–2000 with addenda ASME B30.5a–2002, ''Safety Code for Mobile and Locomotive Cranes.'' Here, as elsewhere in this proposal, OSHA has updated the provision to refer to the 2004 version of ASME B30.5. OSHA has compared the 2004 and earlier version and, as discussed below, requests public comment on whether certain changes in the 2004 version should be adopted. The provisions of ASME B30.5–2004 incorporated in the C–DAC document are as follows:

(1) In section 5–1.1.1 (''Load Ratings—Where Stability Governs Lifting Performance''), paragraphs (a)–(d) (including subparagraphs);

(2) In section 5–1.1.2 (''Load Ratings—Where Structural Competence Governs Lifting Performance''), paragraph (b);

(3) Section 5–1.2 (''Stability (Backward and Forward)'');

(4) In section 5–1.3.1 (''Boom Hoist Mechanism''), paragraphs (a), (b)(1) and (b)(2), except that when using rotation resistant rope, § 1926.1414(c)(4)(ii)(A) applies;

(5) In section 5–1.3.2 (''Load Hoist Mechanism''), paragraphs (a), (a)(2)—(a)(4) (including subparagraphs), (b)—(d) (including subparagraphs);

(6) Section 5–1.3.3 (''Telescoping Boom'');

(7) Section 5–1.4 (''Swing Mechanism'');

(8) In section 5–1.5 (''Crane Travel''), all provisions except 5–1.5.3(d);

(9) In section 5–1.6 (''Controls''), all provisions except 5–1.6.1(c);

(10) Section 5–1.7.4 (''Sheaves'');

(11) Section 5–1.7.5 (''Sheave sizes'');

(12) In section 5–1.9.1 (''Booms''), paragraph (f);

(13) Section 5–1.9.3 (''Outriggers'');

(14) Section 5–1.9.4 (''Locomotive Crane Equipment'');

(15) Section 5–1.9.7 (''Clutch and Brake Protection''); and

(16) In section 5–1.9.12 (''Miscellaneous equipment''), paragraphs (a), (c), (e), and (f).

C–DAC's intent in this paragraph was to incorporate design and construction provisions of ASME B30.5–2004 that would only be applicable to mobile and locomotive cranes. Some other provisions of ASME B30.5–2004 are not incorporated here because they deal with issues addressed elsewhere in this proposal. For example, two-block protection, which is required by section 5–1.9.9.1 of the ASME standard, is addressed in § 1926.1416 of this proposed standard. In addition, the issues addressed in proposed paragraph (e) below are addressed in ASME B30.5–2004 but, instead of making those provisions applicable solely to mobile and locomotive cranes, C–DAC drafted corresponding provisions that would be applied to all of the equipment subject to this proposed standard.

The sections of ASME B30.5 referenced in proposed § 1926.1433(b)(1) and (b)(13) contain substantive differences between the 2004 and earlier versions. For § 1926.1433(b)(1), Table 1 of section 5–1.1.1 includes new requirements for equipment with outriggers partially extended that are not found in the earlier version. For paragraph § 1926.1433(b)(13), the 2004 version of section 5–1.9.3 contains a new paragraph (d) dealing with deploying partially extended outriggers. Inasmuch as § 1926.1404(q)(1) of this proposal permits partial deployment of outriggers when manufacturer procedures permit, OSHA believes it would serve C–DAC's intent to incorporate the provisions on partially deployed outriggers in the 2004 version of ASME B30.5. OSHA requests public comment on this issue.

Upon reviewing the C–DAC draft of § 1926.1433(b)(5), OSHA notes that two corrections are necessary. First, there is an internal inconsistency between the incorporation of paragraph (a) of the ASME section and the more limited incorporation of paragraphs (a)(2) through (a)(4). To correct this inconsistency, OSHA is deleting the reference to paragraph (a). Second, as noted earlier in the discussion of § 1926.1414, the second sentence of section 5–1.3.2(c) of ASME B30.5–2004 is stated as a recommendation rather than a mandatory requirement. OSHA believes it would be confusing to incorporate a non-mandatory recommendation into this standard. Therefore, rather than incorporating all of section 5–1.3.2(c) by reference, OSHA is proposing to incorporate only the first sentence, which reads: ''When provided, a power-controlled lowering system shall be capable of handling rated loads and speeds as specified by the manufacturer.'' With these changes, proposed § 1926.1433(b)(5) reads as follows:

(5) In section 5–1.3.2 (''Load Hoist Mechanism''), paragraphs (a)(2)–(a)(4) (including subparagraphs), (b) (including subparagraphs), (c) (first sentence only), and (d).

Finally, due to renumbering, section 5–1.9.12 of the older ASME standard is section 5–1.9.11 in the 2004 version. The proposed rule reflects this change.

Paragraph 1433(c)

Proposed (c), *Prototype testing,* would require that prototype mobile (including crawler and truck) and locomotive cranes manufactured on or after the effective date of this standard meet the prototype testing requirements in § 1926.1433(c)(1), *Test Option A* or § 1926.1433(c)(2), *Test Option B* of this proposed section. As discussed in greater detail below, Test Option A continues the prototype testing methodology that has been required under Subpart N for crawler, locomotive, and truck cranes through the incorporation of ANSI B30.5–1968. Test Option B would permit, as an alternative, the use of computer modeling technology for prototype evaluation.

Test Option A—Physical Testing

Proposed paragraph (c)(1)(i), *Test Option A,* would state that the following applies to equipment with cantilevered booms (such as hydraulic boom cranes): all the tests listed in SAE J1063, Table 1, shall be performed to load all critical structural elements to their respective limits; and all the strength margins listed in SAE J1063, Table 2 shall be met. As mentioned in previous paragraphs of this proposed standard, C–DAC recognized the abundance of hydraulic cranes now in production and believed OSHA needs to ensure that prototypes are tested to the most applicable standards. C–DAC identified current SAE standards as being most protective and applicable to the majority of cantilevered-boom cranes that are manufactured in the United States. In addition, they believed that most U.S. manufacturers already adhere to the SAE standards.

Proposed § 1926.1433(c)(1)(ii) states that the following applies to equipment with pendant supported lattice booms: all the tests listed in SAE J987, Table 1, shall be performed to load all critical structural elements to their respective limits; and all the strength margins listed in SAE J987 Table 2 shall be met. C–DAC recommended that OSHA include the minimum testing criteria specified in the referenced SAE standard to ensure that prototype cranes with pendant supported booms were safe to operate on construction sites.

The testing involved in the SAE tables under Option A uses empirical measurements of the prototype; in other words, ''physical testing,'' using equipment such as strain gauges, is done to determine if the prototype is within the requisite limits.

Test Option B—Computer Modeling With Methodology Verification

In contrast to the physical testing required under Test Option A, under proposed § 1926.1433(c)(2), *Test Option B,* the testing and verification requirements of CEN's EN 13000 (2004), which permits tests to be conducted using computer modeling, would apply. In using the CEN (Comite Europe en de Normalisation, or European Committee for Standardization) standard, the additional requirements specified in proposed § 1926.1433(c)(2)(i) through (iii), which impose conditions that must be met if computer modeling is used, would also have to be met.

During the C–DAC meetings, there was considerable discussion about

whether computer modeling is a sufficient substitute for physical testing. A German crane manufacturer gave a presentation to C–DAC in which they described successful experience with the use of computer modeling, which convinced some members of C–DAC that computer modeling should be allowed to be used to comply with this proposed section. Other C–DAC members were not convinced that computer modeling was sufficient to ensure that prototype cranes were safe for operation because the tested areas of those cranes were not strain gauged. Others believed that data was available which indicated that, when CEN testing standards were met, imported cranes were as safe as those tested using the strain gauging methods specified in § 1926.1433(c)(1). Ultimately, C–DAC agreed to allow testing under the CEN standard but to mandate that the requirements of proposed § 1926.1433(c)(2), discussed below, are met to ensure the reliability of the computer modeling.

Proposed § 1926.1433(c)(2)(i) would require that the analysis methodology (computer modeling) demonstrate that all load cases listed in SAE J1063 meet the strength margins listed in SAE J1063 Table 2 for equipment with cantilevered booms (such as hydraulic boom cranes). C–DAC determined that it is necessary that the computer modeling demonstrate that the prototype meets the same minimum strength criteria used in Test Option A (see proposed § 1926.1433(c)(1)(i), *Test Option A,* above).

Proposed § 1926.1433(c)(2)(ii) would require that the analysis methodology (computer modeling) demonstrate that all load cases listed in SAE J987 meet the strength margins listed in SAE J987 Table 2 for equipment with pendant supported lattice booms. This proposed provision was included for the same reason as explained in the discussion of proposed § 1926.1433(c)(2)(i) above.

Proposed § 1926.1433(c)(2)(iii), *Analysis verification,* is designed to ensure that computer modeling would not be used as a substitute for physical testing unless its accuracy and reliability is verified. Some C–DAC members raised objections to reliance on computer modeling because it may not accurately account for some aspects of a design, or may not be reliable for other reasons. Their concern was that if the analysis methodology did not accurately or reliably account for some aspect of the design, such error might not be known until there had been a failure of the crane when in use.

To address this concern, under this proposed provision, computer modeling may only be used as a substitute for strain gauge testing if the reliability of the computer modeling is verified by a history of strain gauge testing, or strain gauge testing combined with other physical testing. This does not mean that each computer modeling assessment of a particular prototype must be verified with strain gauge testing of that prototype. Rather, it means that strain gauge testing, or strain gauge testing combined with other physical testing, has been used to confirm the results of the computer modeling in enough relevant instances, which are documented, to demonstrate that the modeling is accurate and reliable.

Some members of C–DAC were concerned that small employers would not have the resources to determine if the computer modeling used to test its crane met the specified SAE standards. This concern is addressed by proposed paragraph (e), which allows employers to rely on manufacturer documentation to show that the testing requirements of this proposed standard have been met.

The C–DAC draft included a § 1926.1433(c) that would have required that prototype testing of crawler, locomotive, and truck cranes meet the applicable requirements for prototype testing prescribed in ANSI B30.5–1968. Upon reviewing that provision, OSHA notes that it is included in the requirement of proposed § 1926.1433(a) that such cranes meet the applicable testing requirements of ANSI B30.5–1968. To avoid any confusion that such duplication may cause, OSHA is deleting C–DAC's proposed § 1926.1433(c) and has redesignated the paragraphs that followed it. However, to make clear that this deletion does not alter the substantive requirement for prototype testing in the C–DAC document, OSHA is adding a note at the end of paragraph (c) that states that prototype testing of crawler, locomotive and truck cranes manufactured prior to the effective date of the standard must conform to paragraph (a).

OSHA notes that neither proposed § 1926.1433(c) nor any other proposed provisions would apply prototype testing requirements to tower cranes. It appears to the Agency that this was an oversight on the part of C–DAC. OSHA requests public comment on whether there should be prototype testing requirements for tower cranes, and, if so, what requirements should apply.

Paragraph 1433(d)

Proposed paragraph (d) would mandate that all equipment covered by this Subpart meet the requirements listed in § 1926.1433(d)(1) through (d)(13) of this proposed section. As noted above, the issues addressed by paragraph (d) are addressed by ASME B30.5–2004. However, instead of making those requirements apply solely to mobile and locomotive cranes, C–DAC believed that all equipment covered by this proposal presents similar issues and drafted this paragraph to apply to all covered equipment.

Proposed § 1926.1433(d)(1), *Load capacity/ratings and related information,* would require the employer to ensure that the information available in the cab (see § 1926.1417(c)) regarding load capacity/ratings and related information include the data listed in § 1926.1433(d)(1)(i) through (d)(1)(xvi). This proposed paragraph essentially tracks section 5–1.1.3 of ASME B30.5–2004 but uses wording that makes the provisions of the ASME standard applicable to all equipment subject to this standard. Some of this information is already required for mobile and locomotive cranes by Subpart N's incorporation of ANSI B30.5–1968. C–DAC believed that these equipment specifications need to be made available for the operator to reference in the cab so that the operator has immediate access to information needed to ensure safe operation.

Proposed § 1926.1433(d)(2), (3), and (4) are comparable to requirements in section 5–1.7.6 of ASME B30.5–2004. Proposed § 1926.1433(d)(2) would require that load hooks (including latched and unlatched types), ball assemblies and load blocks be of sufficient weight to overhaul the line from the highest hook position for boom or boom and jib lengths and the number of parts of the line in use. C–DAC explained that due to the various lengths of booms possible and the weight of varying lengths of cable along the entire lengths of those booms, selection of sufficiently weighted ball assemblies and load blocks is crucial to safe hoisting operations. C–DAC believed that this proposed requirement is necessary to prevent any incidents that would occur when ball assemblies, load blocks, and load hooks are of insufficient weight to keep the load line from being unintentionally pulled up the boom due to the weight of the load line itself.

Proposed § 1926.1433(d)(3) would require that hook and ball assemblies and load blocks be marked with their rated capacity and weight. C–DAC believed that marking this equipment with their rated capacities is needed to help ensure that they are not overloaded, which could lead to loss of the load. Marking them with their

weight is necessary to help enable employers to comply with proposed § 1926.1433(d)(2) (discussed above).

Proposed § 1926.1433(d)(4), *Latching hooks*, would require that hooks meet the requirements in § 1926.1433(d)(4)(i)–(iii) of this proposed section. C–DAC believed that these proposed requirements would help employers reduce or eliminate the number of incidents related to the unintentional disengaging of loads from their load line hooks.

Proposed § 1926.1433(d)(4)(i) would require that hooks be equipped with latches, except where the requirements of § 1926.1433(d)(4)(ii) are met. C–DAC believed that the use of hooks with latches is an industry recognized practice but also recognized that there are some circumstances where the use of a hook with a latch presents a greater hazard. For example, if an employee would have to climb up or out onto an unsecured, elevated member to unhook the load after its placement, the employee would be exposed to a fall hazard.

To accommodate such greater hazard scenarios, proposed § 1926.1433(d)(4)(ii) would require that hooks without latches, or with latches removed or disabled, not be used unless two criteria are met. First, a qualified person must determine that it is safer to hoist and place the load without latches (or with the latches removed/tied-back). Second, routes for the loads must be pre-planned to ensure that no employee is required to work in the fall zone except for employees necessary for the hooking or unhooking of the load.

Proposed § 1926.1433(d)(4)(iii) would require that the latch close the throat opening and be designed to retain slings or other lifting devices/accessories in the hook when the rigging apparatus is slack. This requirement was included to ensure that the rigging will not be unintentionally dislodged from the hook when the rigging apparatus is slack. C–DAC members described scenarios where loads had become caught on structures or objects and created a slack condition. This caused the rigging to become dislodged and resulted in the load falling.

Proposed § 1926.1433(d)(5), *Posted warnings*, states that posted warnings required by this subpart as well as those originally supplied with the equipment by the manufacturer shall be maintained in legible condition. Compliance with this proposed requirement would increase the likelihood that employees will recognize the hazard identified on the posted warning and avoid or protect themselves from that hazard.

Proposed § 1926.1433(d)(6) would require that an accessible fire extinguisher be on the equipment. This requirement, which is similar to one currently at § 1926.550(a)(14)(i), would enable a small fire to be extinguished before it can spread.

Proposed § 1926.1433(d)(7), *Cabs*, states that equipment with cabs shall meet the requirements listed in § 1926.1433(d)(7)(i) through (v) of this proposed section. The majority of § 1926.1433(d)(7) is currently required for crawler, locomotive, and truck cranes by Subpart N, which incorporates the construction requirements of ANSI B30.5–1968. These proposed provisions would ensure that the crane operator is provided with a safe work station that has adequate ventilation, safe means of access and egress, good visibility, protection against window breakage, and sufficient roof strength.

Proposed § 1926.1433(d)(7)(i) would require that cabs be designed with a form of adjustable ventilation and method for clearing the windshield for maintaining visibility and air circulation. Examples of means for adjustable ventilation include an air conditioner or window that can be opened (for ventilation and air circulation); examples of means for maintaining visibility include heater (for preventing windshield icing), defroster, fan, and windshield wiper. This provision would ensure adequate air circulation both for the operator's health and for good visibility.

Under proposed § 1926.1433(d)(7)(ii), cab doors (whether swinging or sliding) would have to be designed to prevent inadvertent opening or closing while traveling or operating the machine. Swinging doors adjacent to the operator must open outward. Sliding operator doors must open rearward. This proposed provision is currently required for crawler, locomotive, and truck cranes by section 5–1.8.1c of ANSI B30.5–1968, which is incorporated by reference in Subpart N. Standardization of the direction for opening doors helps ensure that an operator will be able to exit the cab quickly in an emergency.

Proposed § 1926.1433(d)(7)(iii), *Windows*, would require that cabs meet the requirements listed in § 1926.1433(d)(7)(iii)(A) through (C).

Proposed § 1926.1433(d)(7)(iii)(A) would require that the cab have windows in front and on both sides of the operator. Forward vertical visibility would have to be sufficient to give the operator a view of the boom point at all times. This proposed provision is currently required for crawler, locomotive, and truck cranes by section 5–1.8.1b of ANSI B30.5–1968, which is incorporated by reference in Subpart N.

Proposed § 1926.1433(d)(7)(iii)(B) would allow windows to have sections designed to be opened or readily removed. Windows with sections designed to be opened would have to be designed so that they can be secured to prevent inadvertent closure. This proposed provision is currently required for crawler, locomotive, and truck cranes by section 5–1.8.1b of ANSI B30.5–1968, which is incorporated by reference in Subpart N. Compliance with this provision would ensure that the operator can adequately ventilate the cab should conditions within the cab affect the safe operation of the crane. Under such conditions, inadvertent closure of the windows during the operation of the crane could distract an operator or facilitate reoccurrence of conditions within the cab which adversely affect the safe operation of the crane.

Proposed § 1926.1433(d)(7)(iii)(C) would specify that windows be of safety glass or material with similar optical and safety properties, that introduce no visible distortion or otherwise obscure visibility that interferes with the safe operation of the crane. This provision maintains the protections currently required by § 1926.550(a)(12).

Proposed § 1926.1433(d)(7)(iv) would require that a clear passageway be provided from the operator's station to an exit door on the operator's side. This proposed provision is currently required for crawler, locomotive, and truck cranes by section 5–1.8.1d of ANSI B30.5–1968, which is incorporated by reference in Subpart N. This provision will enable the operator to enter and exit the equipment safely and will enable the operator to escape from the cab quickly in the event of an emergency.

Proposed § 1926.1433(d)(7)(v) would state that areas of the cab roof that serve as a workstation for rigging, maintenance or other crane-related tasks shall be capable of supporting 250 pounds without permanent distortion. This proposed provision maintains the protection provided by Subpart N for crawler, locomotive, and truck cranes through its incorporation by reference of ANSI B30.5–1968 (section 5–1.8.4), except that the cab roof strength requirement was increased to 250 pounds from 200 pounds. This increase was recommended by C–DAC to increase the safety factor of the roof in light of heavier employees and equipment that must be supported by the cab roof.

Proposed § 1926.1433(d)(8) would require that belts, gears, shafts, pulleys,

sprockets, spindles, drums, fly wheels, chains, and other parts or components that reciprocate, rotate or otherwise move be guarded where contact by employees (except for maintenance and repair workers) is possible in the performance of normal duties. This proposed provision continues the basic requirement of § 1926.550(a)(8) of Subpart N but revises the Subpart N provision to include an exception for maintenance and repair employees. The exception would permit maintenance and repair workers to remove the guards when their work requires access to the parts being guarded. C–DAC believed this exception was necessary because these employees often cannot perform their work with the guards installed.

Proposed § 1926.1433(d)(9) would require that all exhaust pipes, turbochargers, and charge air coolers be insulated or guarded where contact by employees is possible in the performance of normal duties. As with proposed § 1926.1433(d)(8), an exception is provided when maintenance and repair workers need to remove the guards to perform their work. This proposed provision was included to retain the employee protection against burn injuries currently provided by § 1926.550(a)(10), which requires guarding or insulation of exhaust pipes, and to extend it to other components that can get hot enough to cause burns if contacted.

Proposed § 1926.1433(d)(10) would require that hydraulic and pneumatic lines be protected from damage to the extent feasible. Denting, crushing, puncturing, or nicking a hydraulic or pneumatic line could adversely affect the structural integrity of the line and compromise the safe operation of the affected systems and the crane as a whole. A similar provision is in section 5–1.9.8 of ASME B30.5–2004. C–DAC believed that most manufacturers in the industry are already providing protection for these lines but believed it was advisable to include this proposed provision in light of the increasing numbers of pneumatically and hydraulically controlled cranes now being operated in the industry.

Proposed § 1926.1433(d)(11) would require that equipment be designed so that exhaust fumes are not discharged in the cab and are discharged in a direction away from the operator. This proposed provision was included to retain the employee protection provided for crawler, locomotive, and truck cranes by section 5–1.9.2 of ANSI B30.5–1968, incorporated by reference in Subpart N, and to extend it to other types of equipment. This proposed requirement ensures that exhaust gases which are likely to adversely affect or incapacitate the operator will not accumulate in the cab because of the design of the equipment.

Proposed § 1926.1433(d)(12), *Friction mechanisms*, states that where friction mechanisms (such as brakes and clutches) are used to control the boom hoist or load line hoist, they shall be: Of a size and thermal capacity sufficient to control all rated loads with the minimum recommended reeving; and adjustable to permit compensation for lining wear to maintain proper operation. Comparable requirements now apply to crawler, locomotive, and truck cranes through incorporation by reference in Subpart N of ANSI B30.5–1968 (sections 5–1.3.2a.1 and 5–1.3.3). C–DAC believed that a similar requirement should apply to all equipment using friction mechanisms to control the boom hoist or load line. The Committee believed that this engineering technology is typical in most modern friction mechanisms.

Proposed § 1926.1433(d)(13), *Hydraulic load hoists*, would specify that hydraulic drums have an integrally mounted holding device or internal static brake to prevent load hoist movement in the event of hydraulic failure. A comparable requirement is in section 5–1.3.1(d) of ASME B30.5–2004. This requirement will protect employees against serious injuries and deaths that could result from an unintended movement of the load hoist caused by a hydraulic failure.

Paragraph 1433(e)

As noted above, proposed paragraph (e) would permit employers to rely on documentation from manufacturers to show that they are in compliance with § 1926.1433(a)–(c) and § 1926.1433(d)(7)–(d)(13) where the equipment has not changed since it was manufactured, except in accordance with § 1926.1434, *Equipment modifications*. Section 1926.1433(d)(1)–(d)(6) are excluded from this provision because the employer can easily verify compliance with them without recourse to documentation provided by the manufacturer.

A failure to have such documentation would not, in itself, constitute a violation of these provisions. Rather, proposed § 1926.1433(e) is intended to make it easier for employers to determine if their equipment meets these criteria.

Section 1434 Equipment Modifications

This proposed section addresses the procedures an employer must follow if it wants to modify equipment in a way that would affect its capacity or safe operation. Its purpose is to safeguard against unsafe modifications and to ensure that the equipment's instructions and specifications are updated to reflect the modifications so that the equipment may be used safely.

Currently, § 1926.550(a)(16) provides:

> No modifications or additions which affect the capacity or safe operation of the equipment shall be made by the employer without the manufacturer's written approval. If such modifications or changes are made, the capacity, operation, and maintenance instruction plates, tags, or decals, shall be changed accordingly. In no case shall the original safety factor of the equipment be reduced.

By requiring the manufacturer's written approval, § 1926.550(a)(16) seeks to ensure that the proposed modifications or additions will be consistent with the design and structural integrity of the equipment and will not reduce the original safety factor of the equipment. The Committee believed that manufacturer approval was an important safeguard and should be retained but was concerned that it does not address situations in which the manufacturer does not respond to a request to approve a modification or when the manufacturer is no longer available to evaluate a proposed modification. Therefore, the Committee recommended a new provision that addresses these types of scenarios with procedures that it believed would allow for modifications to be made safely.

Paragraph 1434(a)

Proposed paragraph (a) would prohibit modifications or additions which affect the capacity or safe operation of the equipment except where any of three approval options set out in proposed § 1926.1434(a)(1), (2), and (3) are met. In the first option, proposed § 1926.1434(a)(1)(i), *Manufacturer review and approval*, the employer would be required to obtain written manufacturer approval for the modifications/additions.

OSHA has corrected an inadvertent omission from proposed § 1926.1434(a)(1) by adding proposed § 1926.1434(a)(1)(ii), which requires the employer to modify the load charts, procedures, instruction manuals and instruction plates/tags/decals as necessary to accord with the modification/addition. Currently, § 1926.550(a)(16) contains such a requirement and proposed § 1926.1434(a)(2), which requires the modifications or additions to be approved by a registered professional engineer if the manufacturer declines to review the proposal, does as well (see below). It was clearly C–DAC's intent to

retain the existing protection in § 1926.550(a)(16) and require the employer to modify the load charts, procedures, instruction manuals and instruction plates/tags/decals regardless of who approved the modification/addition. The crane operator and other employees who work with the crane need accurate information about the topics addressed in those materials, and having them available, as proposed § 1926.1434(a)(1)(ii) requires, will help ensure that the equipment is operated safely.

The second option, proposed § 1926.1434(a)(2), *Manufacturer refusal to review request*, would establish a procedure where the manufacturer either declines to review a request for a modification approval or fails to respond to the request. Under this procedure, the employer would be required to provide a detailed description of the proposed modification to the manufacturer and ask it to approve the modification/addition. If the manufacturer declines to review the technical merits of the proposal or fails, within 30 days, to acknowledge the request or initiate the review, the employer would be permitted to proceed with the modification if the requirements specified in proposed § 1926.1434(a)(2)(i) and (ii) are met.

Proposed § 1926.1434(a)(2)(i) would require that a registered professional engineer who is a qualified person with respect to the equipment involved take two actions. First, under proposed § 1926.1434(a)(2)(i)(A), the engineer would have to approve the modification/addition and specify the equipment configurations to which that approval applies. The second action that the approving engineer would have to take, which is described under proposed § 1926.1434(a)(2)(i)(B), would be to modify load charts, procedures, instruction manuals and instruction plates/tags/decals as necessary to accord with the modification/addition.

This is essential for safe equipment operation because these are the charts, signs and materials that inform the user and operator of the capacities, procedures and limitations that apply to the equipment. Proposed § 1926.1434(a)(2)(ii) would specify that the modification/addition not reduce the original safety factor of the equipment, retaining the comparable requirement now found in § 1926.550(a)(16).

The Committee recommended § 1926.1434(a)(2) because it believed that the refusal of a manufacturer to review a request, or a manufacturer's failure to act on the request within a reasonable time, should not preclude an employer from making a modification if adequate precautions are followed. The Committee concluded that 30 days would give the manufacturer a reasonable amount of time to decide whether to simply decline to review the request or to proceed with evaluating it. Also, the Committee concluded that a failure to respond at all in this period would fairly reflect an intention not to act on the request in a timely manner.

C–DAC believed that the actions specified in proposed § 1926.1434(a)(2)(i) would need to be done by a registered professional engineer who is a qualified person with respect to the equipment involved. The term ''qualified person'' is defined in proposed § 1926.1401 as ''a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems related to the subject matter, the work, or the project.'' The Committee thought it important to make clear that this individual needs to be a qualified person ''with respect to the equipment involved,'' since specialized engineering knowledge is needed to make the required assessments regarding the particular equipment that is being modified.

The approval of the modification/addition under proposed § 1926.1434(a)(2)(i) would have to specify the equipment configurations to which that approval applies. Cranes typically can be configured in a variety of ways. Modifications may have different effects depending on the configuration. It is therefore essential for purposes of ensuring safe operation that the approval specify the configurations to which the approval applies. An example of an approval that met this aspect of the proposed provision would be the following: ''This is an approval to add an additional boom section of the above-described design for a brand K lattice boom crane, model 1. This approval applies only when the crane is configured without a jib.''

This proposed section uses the term ''modification/addition'' to refer to ''modification or addition.'' The Committee wanted to make clear that an addition to the equipment is a type of modification and needs to be subject to the same approval procedures as other types of modifications. For example, the addition of a generator to the back of the cab of a crane needs to be subject to the approval procedures because it will alter the crane's backward stability.

Proposed § 1926.1434(a)(3), *Unavailable manufacturer*, would address a scenario where an employer wishes to make an equipment modification and the manufacturer of the equipment is unavailable to review the proposed modifications because, for example, it has gone out of business (and has not been taken over by a successor company). Under these circumstances, if the employer wishes to modify its equipment in such a way that affects its capacity and safe operation, it must meet the requirements of proposed § 1926.1434(a)(2)(i) and (a)(2)(ii) above.

Paragraph 1434(b)

Proposed paragraph (b) would prohibit modifications or additions which affect the capacity or safe operation of the equipment where the manufacturer, after a review of the technical safety merits of the proposed modification/addition, rejects the proposal and explains the reasons for the rejection in a written response. This requirement is the same as in § 1926.550(a)(16), except C–DAC believed that it was important to expressly state the need for the manufacturer to explain why it rejected the employer's proposed modification. Such an explanation would both demonstrate that the manufacturer reviewed the technical safety merits of the request and give the employer the opportunity to modify the proposal to address the manufacturer's objections.

The C–DAC version of proposed § 1926.1434(b) did not explicitly state the effect of a manufacturer rejecting the proposal but failing to provide written reasons for the rejection. OSHA believes that C–DAC intended that such a situation be treated as a manufacturer refusal to review the request under § 1926.1434(a)(2). To effectuate this intent, OSHA has added the following sentence to proposed § 1926.1434(b):

> If the manufacturer rejects the proposal but does not explain the reasons for the rejection in writing, the employer may treat this as a manufacturer refusal to review the request under paragraph (a)(2) of this section.

Paragraph 1434(c)

Proposed paragraph (c) would state that the provisions in § 1926.1434(a) and (b) of this proposed section do not apply to modifications made or approved by the U.S. military. A representative of the U.S. Navy indicated to C–DAC that such an exception is needed in the event of military exigencies.

Section 1435 Tower Cranes

''Tower crane'' is defined in § 1926.1401 as ''a type of lifting structure which utilizes a vertical mast

or tower to support a working boom (jib) in an elevated position. Loads are suspended from the working boom. While the working boom may be of the fixed type (horizontal or angled) or have luffing capability, it can always rotate to swing loads, either by rotating on the top of the tower (top slewing) or by the rotation of the tower (bottom slewing). The tower base may be fixed in one location or ballasted and moveable between locations.'' This definition is based in part on the SC&RF Handbook's definition.[75]

Subpart N, at § 1926.550(c), addresses only one type of tower crane: those in which the working boom is fixed horizontally (hammerhead cranes). Furthermore, § 1926.550(c) addresses such tower cranes only to a limited extent. Specifically, it addresses adequate clearance for employee passage near moving and rotating parts, fall protection, trolley buffers, and limit switches for cranes that travel on rails. In addition, § 1926.550(c)(5) requires that hammerhead tower cranes meet the applicable requirements for design, construction, installation, testing, maintenance, inspection, and operation as prescribed by the manufacturer.

The Committee believed that most of the provisions in the other sections of this proposed standard are necessary and appropriate for tower cranes but that, in addition, certain unique characteristics of tower cranes necessitate certain additional requirements.

Paragraph 1435(a)

Proposed paragraph (a) states that unless provided otherwise in this section, all other sections of this proposed standard apply to tower cranes. As discussed below, sections § 1926.1415 (safety devices) and § 1926.1416 (operational aids) would not apply to tower cranes. Instead, this proposed section lists the safety devices and operational aids that would be required for tower cranes. In addition, this proposed section contains additional requirements for erecting, climbing, dismantling, and inspections.

Paragraph 1435(b) Erecting, Climbing and Dismantling

Proposed paragraph 1435(b) addresses erecting, climbing, and dismantling tower cranes. Under proposed paragraph 1435(b)(1), the employer would be required to comply with the assembly and disassembly requirements set out in proposed §§ 1926.1403, 1926.1404 and 1926.1405 except as otherwise specified in this section. Because the industry generally refers to the assembly and disassembly of tower cranes as erecting, climbing and dismantling, the term ''assembly,'' as used in §§ 1926.1403 through 1926.1405, is replaced with ''erecting and climbing,'' and the term ''disassembly'' is replaced with ''dismantling.''

OSHA notes that proposed § 1926.1403(b) specifies that employer procedures for assembly and disassembly may be used only where the employer can demonstrate that the procedures used meet the requirements in § 1926.1406. The C–DAC draft of § 1926.1435(b) inadvertently omitted a reference to § 1926.1406. OSHA has corrected that omission; proposed paragraph (b)(1) now reads as follows:

(1) Sections 1926.1403 (Assembly/disassembly—selection of manufacturer or employer procedures), 1926.1404 (Assembly/disassembly—general requirements), 1926.1405 (Disassembly—additional requirements for disassembly of booms and jibs), and 1926.1406 (Assembly/disassembly—employer procedures—general requirements), apply to tower cranes (except as otherwise specified), except that the term ''assembly/disassembly'' is replaced by ''erecting, climbing and dismantling,'' and the term ''disassembly'' is replaced by ''dismantling.''

Proposed paragraph 1435(b)(2), *Dangerous areas (self-erecting tower cranes)*, addresses the hazards associated with crew members located in certain areas. Employees would be prohibited from being in or under the tower, jib, or rotating portion of the crane during erecting, climbing and dismantling operations until the crane is secured in a locked position and the competent person indicates it is safe to enter these areas. The only exception to this would be where the manufacturer's instructions direct otherwise and the employer limits access to necessary employees only.

These areas are hazardous because, in the event of unintended movement of components, there is a heightened chance than an employee could be struck or crushed. The exception accounts for those situations in which, due to the design of the equipment, it is infeasible for all employees to be out of these areas during erecting, climbing and dismantling operations.

Under proposed paragraph (b)(3), *Foundations and structural supports*, tower crane foundations and structural supports would be required to be designed by the manufacturer or a registered professional engineer. The Committee noted that structural supports can include portions of a structure, such as the floors or columns of a building, when the tower crane is mounted to them and they are used to help support the crane.

When a tower crane is mounted to portions of a structure, it is vital for safe operation that the structure be able to withstand both the crane and the loads the crane will handle throughout the job. Accordingly, when portions of a structure are used to support a tower crane, the manufacturer or registered professional engineer who designs the crane's structural supports must ensure not only that the structure is adequate to support the crane when it is mounted but that it will continue to support the crane under all anticipated conditions of use.

Moreover, that entity must ensure both that the structure is strong enough to support the crane under all anticipated conditions of use and that the means of attaching the crane to the structure are strong enough to maintain the crane's support throughout the job. Therefore, OSHA interprets ''structural supports'' in this provision to include both the portions of the structure used for support and the means of attachment. OSHA requests public comment on whether proposed § 1926.1435(b)(3) states this intent with sufficient clarity.

As drafted by C–DAC, this provision was listed as one of the hazards the A/D supervisor must address. However, the provision imposes a specific duty on the employer to have the foundations and structural supports designed by the manufacturer or a registered professional engineer, and this will be more clearly stated if the provision is contained in a stand-alone requirement rather than as one of several requirements that the A/D supervisor must address. Accordingly, OSHA has moved the provision into a separate § 1926.1435(b)(3).[76] In addition, as discussed below, the original § 1926.1435(b)(3)(i) (now § 1926.1435(b)(4)(i)) has been modified to state that the A/D supervisor must verify that the foundation and structural supports have been installed in accordance with their design in order to ensure that the design of the manufacturer or registered professional engineer has actually been implemented.

Proposed paragraph 1435(b)(4), Addressing specific hazards, would require the employer to comply with proposed § 1926.1404(h)(1) through (9).

[75] This definition is explained in the discussion above of proposed § 1926.1401 (Definitions).

[76] The list of hazards the A/D supervisor must address was in § 1926.1435(b)(3) of the C–DAC draft; that list (as modified in accordance with the discussion above) is now located in proposed § 1926.1435(b)(4).

During erecting, climbing and dismantling, proposed § 1926.1404(h) would require that the A/D supervisor address certain hazards (these are discussed above in the discussion of proposed § 1926.1404). Proposed 1926.1435(b)(4) lists additional hazards, specific to tower cranes, that the A/D supervisor would also have to address. These additional hazards are those associated with (i) the foundations and structural supports for tower cranes, (ii) the loss of backward stability, and (iii) wind speed.

Proposed paragraph 1435(b)(4)(i) would require the A/D supervisor to verify that the foundation and structural supports are installed in accordance with their design. This paragraph is designed to ensure that the design of these components by the manufacturer or registered professional engineer is followed when they are installed.

Proposed (b)(4)(ii) would require that the A/D supervisor address the backward stability of the crane before self erecting tower cranes or cranes on traveling or stationary undercarriages are swung. This provision is similar to the assembly/disassembly requirement in § 1926.1404(h)(11)(discussed above) except that it applies only to self erecting tower cranes and cranes that are on traveling or static (stationary) undercarriages. It applies to these types of tower cranes to highlight the fact that, because they do not have a base that is fixed to the ground, the backwards stability safety issue needs to be addressed.

Tower cranes have a relatively small footprint relative to their height. The horizontal force caused by wind during erecting and dismantling can therefore have a substantial effect on the stability of a tower crane. Proposed § 1926.1435(b)(4)(iii) would require that erecting, climbing, and dismantling not take place when the wind speed recommended by the manufacturer is exceeded. Where the manufacturer does not specify the proper wind speed, a qualified person would be required to determine the wind speed not to be exceeded.

Proposed paragraph (b)(4), *Plumb tolerance*, addresses the extent to which tower cranes need to be plumb. This proposed provision would require that the crane's tower be plumb to the manufacturer's tolerance and verified by a qualified person. The Committee noted that if a vertical tower is out of plumb the stability of the crane is greatly reduced. In addition, an out of plumb condition can reduce the crane's capacity and could cause a collapse.

Where the manufacturer does not specify the plumb tolerance, this provision would require that the tower be plumbed to a tolerance of at least 1:500. The Committee noted that a tolerance of at least 1:500 is generally what manufacturers specify and that for any type of vertical structure this generally is the accepted plumb tolerance in the engineering and construction industries.

Proposed paragraph (b)(6), *Multiple tower crane jobsites*, would require construction jobsites with more than one fixed jib (hammerhead) tower crane installed to be located so that no crane could contact the structure of another crane. However, the jibs of multiple hammerhead tower cranes would be permitted to pass over/under one another.

This would help to ensure that multiple tower cranes on a construction site do not collide with each other. Such a collision could cause employee injuries or fatalities in various ways. For example, employees could be struck by a load that was caused to swing by the collision; a tower crane operator could be struck; employees could be struck by a falling load, or there could be a collapse of one or more cranes.

Proposed paragraph (b)(7), *Climbing procedures*, contains special requirements that would have to be followed during the climbing process. ''Climbing'' is defined in § 1926.1401, *Definitions*, as: ''The process in which a tower crane is raised to a new working height, either by adding additional tower sections to the top of the crane (top climbing), or by a system in which the entire crane is raised inside the structure (inside climbing).''

Currently, the process of climbing is unique to tower cranes. The Committee indicated that, if done improperly, a collapse can occur during the climbing process. This proposed paragraph would require that prior to, and during all, climbing procedures the employer (i) comply with all manufacturer prohibitions; (ii) have a registered professional engineer verify that the host structure is strong enough to sustain the forces imposed through the braces, brace anchorages and supporting floors; and (iii) ensure that no part of the climbing procedure takes place when wind exceeds the speed recommended by the manufacturer or, where the manufacture does not specify the wind speed, a qualified person must determine the appropriate wind speed.

Proposed (b)(7)(ii) would require the employer to have a registered professional engineer verify that the host structure is strong enough to sustain the forces imposed through the braces, brace anchorages and supporting floors. Examples of typical host structures include a building, parking garage, bridge or pier. If the host structure is not strong enough, the host structure could collapse and cause the tower crane to collapse as well.

Proposed (b)(7)(iii) would require the employer to ensure that no part of the climbing procedure takes place when wind exceeds the speed recommended by the manufacturer or by a qualified person if the manufacturer does not specify this information. This provision is included because, during the climbing process, a tower crane is not yet fully stabilized and excessively high winds can lead to a collapse.

The Agency notes that proposed § 1926.1435(b)(4)(iii) would require wind speed to be addressed during erecting, climbing and dismantling in the same manner as § 1926.1435(b)(7)(iii). OSHA requests public comment on whether § 1926.1435(b)(7)(iii) should be omitted as redundant.

Proposed paragraph (b)(8), *Counterweight/ballast*, addresses the hazard of instability that can result from improper installation or removal of counterweight/ballast, which can cause a collapse. Proposed § 1926.1435(b)(8)(i) and (ii) would require that tower cranes not be erected, dismantled or operated without the amount and position of counterweight or ballast in place as specified by the manufacturer or a registered professional engineer and that the maximum amount of counterweight or ballast not be exceeded. The registered professional engineer must be one who is familiar with the equipment.

OSHA has made several wording changes to proposed § 1926.1435(b)(8)(i) and (ii) as compared with the C–DAC draft of these provisions. First, the C–DAC draft of proposed § 1926.1435(b)(8) used the term ''professional engineer,'' rather than, as used in proposed § 1926.1435(b)(7)(i) and other provisions in this proposed standard, ''registered professional engineer.'' OSHA believes that this was an inadvertent omission and has added the word ''registered'' in proposed § 1926.1435(b)(8)(i) and (ii).

Second, the C–DAC draft of proposed § 1926.1435(b)(8)(ii) used the word ''approved'' in the phrase ''approved by the manufacturer or professional engineer.'' In contrast, in the draft of proposed § 1926.1435(b)(8)(i), C–DAC used the phrase ''as specified by'' rather than ''approved.'' To ensure consistency and avoid confusion, the Agency has substituted the phrase ''as specified by'' for the word ''approved'' in proposed § 1926.1435(b)(8)(ii).

Third, the C–DAC draft of proposed § 1926.1435(b)(8)(i) referred to the amount and position of the

''counterweight or ballast.'' However, some tower cranes, such as traveling tower cranes, have both counterweight and ballast. Therefore, the Agency has changed the language so that proposed § 1926.1435(b)(8)(i) refers to ''counterweight and/or ballast.''

Paragraph 1435(c) Signs

This proposed requirement addresses the hazards that can result from adding signs to tower cranes. Many employers will attach/hang/install signs (or advertisements) to the jib, boom or tower, such as signs with the company name. The force of the wind bearing against a large sign can significantly increase the horizontal force the wind exerts on the crane. According to the Committee, most manufacturers specify the maximum size and permissible location of signs so that the stability of the tower crane is not compromised. Proposed 1926.1435(c) would require employers to comply with the manufacturer's specifications [77] regarding the size and location of signs. Where the manufacturer does not specify this information or where such information is unavailable, this provision would require a registered professional engineer who is familiar with the specific type of tower crane involved to give written approval of the size and location of any signs.

Note that the C–DAC draft included this provision as § 1926.1435(b)(4). However, upon review, OSHA became aware that signs are sometimes placed on tower cranes after the erecting/climbing process has been completed. Therefore, to make clear that the provision would apply irrespective of whether the sign was installed during or after erecting/climbing, the Agency has changed this provision's designation so that it is no longer under the paragraph on erecting, climbing and dismantling.

Paragraphs 1435(d), Safety Devices, and 1435(e), Operational Aids

These proposed paragraphs set out the safety devices and operational aids that would be required on tower cranes. Proposed §§ 1926.1415 and 1926.1416, which would require safety devices and operational aids on other types of cranes, would not be applicable to tower cranes. Instead, proposed § 1926.1435(d) and (e) would apply. Although some of the safety devices and operational aids for tower cranes are the same as §§ 1926.1415 and 1926.1416 require for other equipment, others are unique to tower cranes. C–DAC believed it would promote clarity to list all the devices and aids for tower cranes in this section.

Safety devices would be required to be in proper working order. Where a safety device is not in proper working order, the crane would have to be taken out of service until it is again functioning properly. The Committee believed that the protection offered by safety devices is critical to safe operation and that there is no alternative way to achieve the same level of safety that the safety devices provide. By contrast, if an operational aid is malfunctioning, operations may continue where the employer implements specified temporary alternative measures. Where the tower crane manufacturer specifies more protective alternative measures than those specified in this proposed section, the employer would be required to follow those more protective alternative measures.

Safety Devices: Proposed paragraph (d)(2) would require the safety devices on tower cranes discussed below.

Boom stops on luffing boom type tower cranes (proposed § 1926.1435(d)(2)(i)) and jib stops on luffing boom type tower cranes if equipped with a jib attachment (proposed § 1926.1435(d)(2)(ii)) would be required. These are comparable to the boom and jib stops required for other cranes under proposed § 1926.1415 (discussed above) and are intended to prevent the boom and jib from being raised to too high an angle and toppling over backwards.

Proposed paragraph (d)(2)(iii) would require travel end rail stops at both ends of the travel rail. These are comparable to the rail stops required for equipment on rails under proposed § 1926.1415 and are designed to keep the crane from overshooting the boundaries on the rail within which it is supposed to operate. Overshooting the boundaries could result in a collapse. Subpart N currently contains a similar requirement at § 1926.550(c)(4).

Proposed paragraph (d)(2)(iv) would require travel rail clamps on all travel bogies. A ''travel bogie (tower cranes)'' is defined at § 1401 as ''an assembly of two or more axles arranged to permit vertical wheel displacement and equalize the loading on the wheels.'' This definition is comparable to the definition of ''bogie'' in the SC&RF Handbook. When tower cranes travel on rails, they are mounted on travel bogies. The rail clamps that would be required by this proposed paragraph enable the bogies to be clamped to the rail to prevent the crane from lifting off the rail. They secure the crane in place when out of operation to prevent the crane from drifting unintentionally, which could cause struck-by accidents.

Proposed paragraph (d)(2)(v) would require integrally mounted check valves on all load supporting hydraulic cylinders. A check valve permits fluid to flow in one direction only. When installed on load supporting hydraulic cylinders, such as the cylinders used to climb the crane, they protect against the loss of load support in the event of a hydraulic pressure failure by preventing the reverse flow of the hydraulic fluid supporting the cylinder.

Proposed paragraph (d)(2)(vi) would require a hydraulic system pressure limiting device. A pressure limiting device, such as a relief valve, would prevent the pressure in a hydraulic system from exceeding its design limit, which can cause the system to fail.

Proposed paragraph (d)(2)(vii) would require the following brakes, which must automatically set in the event of pressure loss or power failure: A hoist brake on all hoists; a swing brake; a trolley brake; and a rail travel brake. These types of brakes are needed to enable the motion of the crane and load to be controlled safely. Under this proposed paragraph, they must set automatically to avoid uncontrolled movement of the crane or load in the event of pressure loss or power failure that prevents their operation.

Proposed paragraph (d)(2)(viii) would require deadman control or forced neutral return control (hand) levers. These devices ensure that the crane does not move unless the movement is being controlled by the operator. In the case of a deadman control, the motion being controlled, such as hoisting or trolleying, ceases when the operator releases the control. Forced neutral return control levers automatically return to the neutral position when they are released.

Proposed paragraph (d)(2)(ix) would require an emergency stop switch at the operator's station. This safety device is needed to enable the operator to immediately stop all crane functions in the event of an emergency.

Proposed paragraph (d)(3) would require that the safety devices listed in § 1926.1435(d)(2) be in proper working order for the crane to be operated. Where a device stops working properly during operations, the operator would have to safely stop operations, and operations would be prohibited from resuming until the device is once again in proper working order.

Operational aids: Like proposed § 1926.1416 for other equipment, proposed paragraph § 1926.1435(e) divides operational aids for tower cranes into Category I aids and Category

[77] OSHA has changed the C–DAC word ''procedures'' to ''specifications'' for greater accuracy and clarity.

II aids, with the two categories differing in the amount of time that temporary alternative measures can be used until the aids are repaired. For Category I aids that period is seven days, and for Category II it is 30 days. Also like § 1926.1416, if a required part is ordered within seven days and not received in time to complete the repair in seven and 30 days, respectively, the employer would have seven days from receiving the part to complete the repair.

Proposed paragraph 1435(e)(4) specifies that operational aids must work properly during operations and, if an aid stops working, the operator would be required to safely stop operations until the aid is working properly again or until the temporary alternative measures are implemented. Where a replacement part for an operational aid is not available, the substitution of a device that performs the same function would not be considered a modification subject to proposed § 1926.1434, i.e., it would not need to be approved by the manufacturer or a registered professional engineer. See the discussion above regarding proposed § 1926.1416 for an explanation of the committee's rationale for this approach to operational aids.

Three of the operational aids discussed below would be required on tower cranes manufactured more than one year after the effective date of the standard. The remainder would be required on all cranes. It was C–DAC's understanding that the three aids that would not be required on existing cranes represent technology that has not been commonly available until recently, while the aids that would be required on all cranes have routinely been used in the industry for some time.

Proposed paragraph (e)(5) would require the Category I operational aids discussed below and specifies the alternative measures that would have to be followed if they are not working properly.

Proposed paragraph (e)(5)(i) would require trolley travel limiting devices. These devices would be required at both ends of the jib to prevent the trolley from running into the end stops. If the trolley were to run into an end stop, injuries or fatalities could result in a variety of ways. For example, the sudden stopping of the trolley at the outward end stop could cause the load to swing significantly past the crane's maximum working radius, causing a collapse. Another example is where the load swing from the sudden stopping of the trolley could cause the load to fall and strike employees.

If this operational aid was not working properly, the employer would have to use one of two temporary alternative measures: (A) Mark the trolley rope so it can be seen by the operator at a point that will give the operator sufficient time to stop the trolley prior to the end stops, or (B) use a spotter when operations are conducted within 10 feet of a trolley end stop. The Committee believed that both options would constitute safe alternatives until the trolley travel limit device is back in working order within the required time frame.

In order for the proposed option for a spotter in proposed § 1926.1435(e)(5)(i)(B) to work effectively and as the Committee intended, the spotter would need to communicate with the operator. Although such a communication requirement is implicit, the Agency believes that, to avoid ambiguity, the provision needs to explicitly require that the spotter be in communication with the operator. Therefore, OSHA believes that the C–DAC language in proposed § 1926.1435(e)(5)(i)(B), as well as the additional provisions in proposed § 1926.1435 which reference spotters, should be changed to include such a requirement. The provision, if changed in this manner, would read:

> (B) Option B. A spotter who is in direct communication with the operator shall be used when operations are conducted within 10 feet of the outer or inner trolley end stops.

OSHA requests public comment on the advisability of such a change.

In Subpart N, § 1926.550(c)(3) currently requires trolley end stops (it refers to them as ''buffers''). In reviewing the C–DAC draft of the trolley travel limiting devices provision discussed above, OSHA realized that the C–DAC draft did not carry forward the requirement in § 1926.550(c)(3) for trolley end stops. The Agency believes that this was an inadvertent omission, since the C–DAC draft included a requirement for trolley travel limiting devices, and those devices would not work without trolley end stops. Therefore, OSHA has added proposed § 1926.1435(d)(2)(x), which would require trolley end stops as safety devices.

Proposed paragraph (e)(5)(ii) would require a boom hoist limiting device. As defined in proposed § 1926.1401, the word ''boom'' used in reference to tower cranes refers to a luffing boom. Therefore, under this proposed paragraph, a boom hoist limiting device would only be required on cranes with luffing booms. A boom hoist limiting device automatically prevents the boom hoist from pulling the boom past the minimum allowable radius (maximum boom angle), which can result in boom failure (see the discussion above of boom hoist limiting device with respect to proposed § 1926.1416(d)(1)). The temporary alternative measures for this operational aid are similar to the ones for the trolley travel limiting device and the boom hoist limiting device in proposed § 1926.1416(d)(1): The employer would have the option of clearly marking the cable at a point that would give the operator sufficient time to stop the boom hoist within the minimum and maximum boom radius or use a spotter.

Proposed paragraph (e)(5)(iii) would require an anti two-blocking device. This is comparable to the requirement for anti-two blocking devices for other cranes required by § 1926.1416. This operational aid would be required on tower cranes to prevent damage from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component). Where the operational aid is not working properly, the employer would have the option of clearly marking the cable at a point that would give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter. (See the discussion of the need for this type of device and rationale for including it as an operational aid above with respect to proposed § 1926.1416(d)(3)).

Proposed paragraph (e)(5)(iv) would require a hoist drum lower limiting device. This proposed paragraph would require that tower cranes manufactured more than one year after the effective date of this standard be equipped with a device that prevents the last two wraps of hoist cable from being spooled off the drum. Such a device would prevent the entire rope from being spooled off the drum, which can cause the rope to separate (and the load to fall) from the drum due to the shock from the load suddenly stopping.

OSHA notes that the C–DAC draft of this provision was mistakenly entitled, ''Hoist drum lowering device.'' Since this device is a limiting device, the title has been changed in the proposed rule to, ''Hoist drum lower limiting device.''

Proposed paragraph (e)(5)(v) would require a load moment limiting device. ''Load moment (or rated capacity) limiter'' is defined in § 1926.1401 as ''a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and when the rated capacity is reached, it shuts off power

to those equipment functions which can increase the severity of loading on the equipment, e.g., hoisting, telescoping out, or luffing out. Typically, those functions which decrease the severity of loading on the equipment remain operational, e.g., lowering, telescoping in, or luffing in.'' As the definition indicates, this type of device detects and prevents a potential overload condition which could cause the load to fall, the crane to collapse or other failure of the crane.

Where the load moment limiting device is not in proper working condition, two types of measures would be required. The first type of measure is designed to ensure that the operator determines the radius. If the crane is equipped with a radius indicating device, it would be required to be used. If the crane is not so equipped, the radius would be required to be measured (such as with a tape measure) to ensure that the load is within the rated capacity of the crane.

The second type of measure is designed to ensure that the operator accurately determines the weight of the load. The load weight would be required to be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information would be required to be provided to the operator prior to the lift.

The C–DAC document refers to this device as a ''load moment limit device.'' OSHA has corrected this to ''load moment limiting device.''

Proposed paragraph (e)(5)(vi) would require a hoist line pull limiting device so that the load applied to the hoist drum will not exceed the hoist's capacity. If the hoist is equipped with a multiple speed hoist transmission, the device would have to limit the hoist's lifting capacity in each individual gear ratio. If the hoist line pull were to exceed the hoist's capacity, the hoist could fail and unspool the line, causing the load to drop suddenly. Such a drop could cause a worker to be struck by the load.

The temporary alternative measure for this operational aid would be that the operator would ensure that the weight of the load does not exceed the capacity of the hoist, taking into account each individual gear ratio if the crane is equipped with a multiple speed hoist transmission. For example, this could be done by the operator checking the hoist capacity in the equipment manual and verifying that the load will not exceed that capacity.

Proposed paragraph (e)(5)(vii) would require a rail travel limiting device in each direction to prevent the travel bogies from running into the end stops or buffers. As noted above, rail stops that keep the crane from overshooting the section of rail within which it is supposed to operate is one of the safety devices required for tower cranes that travel on rails. A rail travel limiting device is a device that limits the crane's travel to keep a travel bogie from running into a rail stop. C–DAC believed that rail stops should not be the exclusive means of ensuring that the crane stays within its intended limits because the crane could jump the tracks if it were to strike the rail stops at a high enough speed. The temporary alternative to a rail travel limiting device that is not in proper working order would be to use a spotter when the crane is operated within 10 feet of a rail stop.

Proposed paragraph (e)(5)(viii) would require the boom hoist drum to be equipped with a positive locking device. One example of such a device is a ratchet and pawl mechanism. The purpose of the device is to prevent the boom (and therefore the load as well) from inadvertently lowering.

C–DAC intended that the device be able to be set from the operator's station because it provided that the temporary alternative to a device that can be set from the operator's station is to set the device manually when its use is required. However, neither the requirement for a device that can be set from the operator's station nor the alternative of setting the device manually will help the operator lock the boom hoist drum if the device itself malfunctions. Accordingly, the Agency requests public comment on whether this provision should include a temporary measure that would be required if the positive locking device is not working properly (regardless of whether it is attempted to be set automatically or manually) and, if so, what temporary measure is available in such a situation.

Proposed paragraph (e)(6) would require the category II operational aids discussed below and specifies the alternative measures that would have to be followed if they are not working properly.

Proposed paragraph (e)(6)(i) would require a boom angle or hook radius indicator as specified in proposed § 1926.1435(e)(6)(i)(A) and (B). Under these provisions, luffing boom tower cranes would be required to have a boom angle indicator readable from the operator's station. Hammerhead tower cranes manufactured more than one year after the effective date of this standard would be required to have a hook radius indicator readable from the operator's station. These devices are needed because the information they provide is necessary for the operator to determine the crane's capacity under its load chart. As with the similar devices required under § 1926.1416, the temporary alternative would be to measure the boom angle or hook radius with a measuring device (proposed § 1926.1435(e)(6)(i)(C)).

Proposed paragraphs (e)(6)(ii) through (iv) would require a trolley travel deceleration device, boom hoist deceleration device, and load hoist deceleration device. These devices reduce the speed of the trolley, boom and load as they approach certain limits. They prevent crane components from being subjected to the excessive stress that would result if the trolley, boom, or load were to run into a limiting device without slowing down. Such high stresses could cause a crane component to fail, which could cause unintended movement of the load, loss of the load, or damage/collapse of a component (and therefore struck-by injuries or fatalities).

Proposed (e)(6)(ii) would require tower cranes to have a trolley travel deceleration device which would automatically reduce the trolley speed before the trolley reached the end limit in both directions. Proposed § 1926.1435(e)(6)(iii) would require tower cranes to have a boom hoist deceleration device, which would automatically reduce the boom speed before a luffing boom reaches the minimum or maximum radius limit. Proposed § 1926.1435(e)(6)(iv) would require tower cranes to have a load hoist deceleration device, which would automatically limit the load speed before the load hoist reaches the upper limit. The temporary alternative measure for each of these operational aids would be for the operator to reduce the speed when approaching the limits.

In specifying temporary alternative measures generally for operational aids, C–DAC sought to identify some measure in each instance that would assist the operator in performing the necessary task (in this case, slowing the action of a crane component before it reaches a limiting point). However, in the case of these deceleration devices, the Committee was unable to identify or develop that type of alternative measure. The Agency requests public comment on whether there are any such alternative measures that could be used in these instances.

Proposed (e)(6)(v) would require tower cranes to have a device that

displays the wind speed, mounted above the upper rotating structure. On self-erecting cranes, which typically rotate at the tower base and do not have an ''upper rotating superstructure,'' it would have to be mounted at or above the jib level to be in a position to give a useful reading.

As discussed under proposed § 1926.1417 (Operation), paragraph § 1926.1417(n) would require a competent person to consider the effect of wind (and other weather conditions) on equipment stability and rated capacity. Tower cranes are particularly susceptible to the effects of high wind, and knowledge of wind speed is needed so that the competent person can consider its effect on equipment stability and rated capacity. The temporary alternative measure would be for the wind speed to be obtained from a properly functioning device on another tower crane on the same site or to be estimated by a qualified person.

Proposed paragraph 1435(e)(6)(vi) would require tower cranes manufactured more than one year after the effective date of this standard to have a device that displays the magnitude of the load that is on the hook. This could be either a separate device or one that is part of the load moment limiting device (discussed above) that displays the load that is on the hook. By informing the operator of the weight of the load, this device will help the operator ensure that the crane is operated within its rated capacity. The temporary alternative would be for the weight of the load to be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information would be required to be provided to the operator prior to the lift.

Paragraph 1435(f) Inspections

Under proposed paragraph (f)(1), § 1926.1412 (Inspections) would apply to tower cranes except that the term ''assembly'' would be replaced by ''erection'' (the appropriate term for tower cranes).

Proposed paragraph (f)(2) would supplement the requirement in proposed § 1926.1412(c). It would require that a load test be conducted as part of the post-erection inspection required by proposed § 1926.1412(c). The load test would have to be conducted using certified weights or weights that have been weighed on a calibrated scale (with a current certificate of calibration) (proposed § 1926.1412(f)(2)(i)). The test would have to be conducted in accordance with the manufacturer's instructions or, if those are unavailable, in accordance with written procedures developed by a registered professional engineer familiar with the type of equipment involved (proposed § 1926.1412(f)(2)(ii)). This would help ensure that any significant problems or errors made during the erection process would be revealed prior to placing the crane in operation.

Proposed paragraph (f)(3) would require that additional items be included in the monthly inspections of tower cranes. These include tower (mast) bolts and other structural bolts (for loose or dislodged condition) from the base of the tower up or, if the crane is tied to or braced by the structure, those above the upper-mast brace support (proposed § 1926.1435(f)(3(i)). The monthly inspection would also include the uppermost tie-in, braces, floor supports, and floor wedges where the tower crane is supported by the structure (proposed § 1926.1435(f)(3(i)), for loose or dislodged components. These items are critical to the stability of the crane, and C–DAC believed that a monthly inspection would uncover any deficiencies that would endanger the crane's stability.

Section 1436 Derricks

This proposed section contains requirements for derricks that would supplement the other requirements of this standard. Currently, 29 CFR part 1926 subpart N, at § 1926.550(e), requires derricks to meet the applicable requirements for design, construction, installation, inspection, testing, maintenance, and operation as prescribed in ANSI B30.6–1969, safety code for ''Derricks,'' as well as the general requirements of Subpart N applicable to all equipment.

C–DAC's review of injury and fatality statistics did not indicate a need to deviate significantly from the requirements of Subpart N. For the most part, the most recent version of the ANSI standard, ASME B30.6–2003, does not differ substantively from the 1969 version insofar as the provisions discussed below are concerned, so the requirements of this section differ substantively from those of Subpart N in only limited respects. Where substantive differences exist, they are discussed in the context of that requirement.

Paragraph 1436(a)

Proposed paragraph (a) explains that this section contains supplemental requirements for derricks, whether temporarily or permanently mounted; all sections of this Subpart would apply to derricks unless specified otherwise. Proposed § 1926.1436(a) defines a derrick as powered equipment consisting of a mast or equivalent member that is held at or near the end by guys or braces, with or without a boom, and its hoisting mechanism. The mast/equivalent member and/or the load is moved by the hoisting mechanism (typically base-mounted) and operating ropes. Derricks include: A-frame, basket, breast, Chicago boom, gin pole (except gin poles used for erection of communication towers), guy, shearleg, stiffleg, and variations of such equipment.

Proposed paragraph (a)'s exclusion of gin poles used for erection of communication towers mirrors the exclusion of such equipment from the scope of the standard under proposed § 1926.1400(c)(12). As explained above in the discussion of proposed § 1926.1400(c)(12), gin poles used for erecting communication towers are excluded because the erection of communication towers is a highly specialized subset of the construction industry and involves interests and issues that go beyond the interests and issues C–DAC was designed to address.

Paragraph 1436(b) Operation—Procedures

Proposed paragraph (b)(1) states that § 1926.1417 (Operation) of this proposed standard applies except for proposed § 1926.1417(c) (Accessibility of procedures). C–DAC believed that it was appropriate to keep the operation requirements for derricks consistent with those of cranes as much as possible because they both present many of the same hazards and operational issues. However, proposed § 1926.1417(c) would require the operating procedures, including load charts, to be located in ''the cab'' of the equipment and derricks often do not have a cab. Therefore, that proposed requirement would not apply to derricks. Proposed § 1926.1436(b)(3), discussed below, sets forth requirements for accessibility of the load chart for derricks.

Proposed paragraph (b)(2), *Load chart contents,* would list what information must be included on load charts. Subpart N incorporated similar load chart requirements of section 6–1.1.2 in ANSI B30.6–1969, which remains the same in the ASME B30.6–2003 version of the consensus standard.

Proposed paragraph (b)(2)(i) would require the load chart to contain the rated capacity at corresponding ranges of boom angle or operating radii. This information is necessary to prevent overloading of the derrick.

Paragraph (b)(2)(ii) requires the load chart to list the specific lengths of components to which the rated capacities apply. This information is needed because the derrick's load capacity varies with different component lengths.

Proposed paragraph (b)(2)(iii) would require the load chart to list parts for hoist reeving. By listing the reeving parts considered during the tabulation of available load charts, the employer can determine if available load charts are applicable to the configuration of the derrick at its work site. As with proposed § 1926.1436(b)(2)(i) and (ii), meeting this requirement would help prevent accidents that could occur resulting from errors in determining the equipment's rated capacity.

Proposed paragraph (b)(2)(iv) would require the size and construction of rope to be included on the load chart or in the operating manual. This proposed requirement would prevent hoisting accidents that might occur if a rope fails because it was the wrong size or construction for the load being lifted.

Proposed paragraph (b)(3), *Load chart location,* states where the required load charts must be kept. Proposed § 1926.1436(b)(3)(i), *Permanent installations,* would require permanently installed derricks with fixed lengths of boom, guy, and mast, to have a load chart posted where it is visible to personnel responsible for the operation of the equipment. Proposed § 1926.1436(b)(3)(ii), *Non-permanent installations,* requires derricks that are not permanently installed, to have the load chart readily available at the job site to personnel responsible for the operation of the equipment. These requirements would ensure that the critical information contained on these charts is available on the worksite to enable the employer to calculate the parameters of a safe lift.

Paragraph 1436(c) Construction

Proposed paragraph (c) contains supplemental engineering and fabrication requirements that address hazards specific to derricks. Proposed paragraph (c)(1), *General requirements*, would list general construction requirements that apply to the use of all types of derricks. The requirements that follow are similar to section 6–1.2.1 of ANSI B30.6–1969 and ASME B30.6–2003 and would help the employer prevent accidents caused by inadequate structural design and fabrication.

Proposed paragraph (c)(1)(i) states that derricks shall be constructed to meet all stresses imposed on members and components when installed and operated in accordance with the manufacturer's/ builder's procedures and within its rated capacity. ''Builder'' is defined in § 1926.1401 as ''an employer builder/constructor of equipment.'' This definition distinguishes a ''builder'' of equipment (an employer at the worksite where the derrick is erected) from a manufacturer, who sells products that may be used at any worksite. Section § 1926.1436(c)(1)(i) uses the word ''builder'' in addition to ''manufacturer'' because it will often be the builder's procedures, rather than the manufacturer's, that must be followed to ensure that derricks are constructed properly. This requirement is similar to section 6–1.2.1(a) of ANSI B30.6–1969 and ASME B30.6–2003.

Proposed paragraph (c)(1)(ii) specifies that the welding of load sustaining members shall conform to recommended practices in ANSI/AWS D14.3–94 or D1.1–02. This latter provision is similar to section 6–1.2.1(b) of ASME B30.6–2003 and relies on newer welding standards than the corresponding requirement of ANSI B30.6–1969, which requires welding of critically stressed members to conform to AWS D2.0–66.[78] These provisions would prevent structural failures when using the derrick within its rated capacity.

Proposed paragraph (c)(2), *Guy derricks*, lists additional requirements applicable to the construction of guy derricks. In addition, proposed § 1926.1436(d), *Anchoring and guying*, contains requirements for anchoring and guying guy derricks. Both of these sections contain provisions that address the specifications for guys, and OSHA is concerned about whether placing related requirements in two different paragraphs could lead to confusion and impede compliance.[79] Moreover, OSHA is concerned about whether proposed § 1926.1436(c)(2) is worded in a way that clearly states its intent. OSHA requests public comment on whether these provisions need to be modified to provide clearer guidance and, if so, how they should be modified. A discussion of the issues these proposed paragraphs present follows.

A guy derrick consists of a vertical, rotating mast anchored at its base and a boom connected to the bottom of the mast in such a way that the boom can pivot in a vertical plane, i.e., the angle between the boom and the mast can vary. The mast is supported at its top by guys that run from the mast to the surface on which the derrick is mounted. Factors such as the number, spacing, and angle of the guys, the material of which they are made, and the tension in the guys, affect whether the derrick is able to handle loads within its rated capacity.

The following proposed provisions apply to guy derricks.

(c) Construction

* * * * *

(2) Guy derricks.

(i) The minimum number of guys shall be 6, with equal spacing, except where a qualified person or derrick manufacturer approves variations from these requirements and revises the rated capacity to compensate for such variations.

(ii) Guy derricks shall not be used unless the employer has the following guy information:

(A) The number of guys.

(B) The spacing around the mast.

(C) The size, grade, and construction of rope to be used for each guy.

(iii) For guy derricks manufactured after December 18, 1970, in addition to the information required in paragraph (ii), the employer shall have the following guy information:

(A) The amount of initial sag or tension.

(B) The amount of tension in guy line rope at anchor.

(d) Anchoring and guying.

(1) Load anchoring data developed by the manufacturer or a qualified person shall be used.

(2) Guy derricks.

(i) The mast base shall be anchored.

(ii) The guys shall be secured to the ground or other firm anchorage.

(iii) The anchorage and guying shall be designed to withstand maximum horizontal and vertical forces encountered when operating within rated capacity with the particular guy slope and spacing specified for the application.

Proposed paragraph (c)(2)(i) specifies that the minimum number of guys shall be 6, with equal spacing, except where a qualified person or derrick manufacturer approves variations from these requirements and revises the rated capacity to compensate for such variations. This requirement is comparable to section 6–1.2.2 of ANSI B30.6–1969 and ASME B30.6–2003.

Proposed paragraph (c)(2)(ii) states that guy derricks shall not be used unless the employer has the following guy information: (A) The number of guys; (B) The spacing around the mast; and (C) The size, grade, and construction of rope to be used for each guy.

Proposed paragraph (c)(2)(iii) requires that for guy derricks manufactured after December 18, 1970, in addition to the

[78] The text of section 6–1.2.1(b) of ASME B30.6—2003 does not state the dates of the welding standards it incorporates. However, those dates are specified in section 6–0.3 of the ASME standard, and OSHA has added them to the text of § 1926.1436(c)(1)(ii).

[79] A similar problem with the provisions on stiffleg derricks is discussed below.

information required in § 1926.1436(c)(2)(ii), the employer shall have the following guy information: (A) The amount of initial sag or tension; and (B) The amount of tension in guy line rope at anchor.

OSHA notes that proposed § 1926.1436(c)(2)(ii) does not establish specifications an employer must follow when installing a guy derrick. They require only that the employer have the specified information on the guying used to install the derrick.

The requirement of proposed § 1926.1436(c)(2) that the derrick user possess certain guy information differs substantially from that found in the ANSI/ASME standards on which proposed § 1926.1436(c) is based. The corresponding ANSI/ASME provisions are section 6–1.2.2 of ANSI B 30.6–1969 and ASME B30.6–2003, which require the derrick manufacturer to furnish complete information recommending the guy specifications listed in § 1926.1436(c)(2)(ii).[80] Thus, the ANSI/ASME provisions impose a duty on derrick manufacturers to provide certain information and recommendations to their customers. The C–DAC provisions, by contrast, impose an obligation on derrick users to possess the information provided by the manufacturer. However, as drafted, proposed § 1926.1436(c)(2) does not require derrick users to follow the manufacturer's recommendations on the listed guy specifications, only to have that information.

In sum, proposed § 1926.1436(c) tells guy derrick users (1) that they must install a minimum of six guys with equal spacing, unless the derrick manufacturer or a qualified person approves variations from these requirements and revises the rated capacity accordingly, and (2) that they must have information on the number of guys and spacing, as well as the type of guy material used and, for newer derricks, the tension in the guys.

The subject of guy installation is also addressed by proposed § 1926.1436(d). Proposed § 1926.1436(d)(1) requires the derrick user to use load anchoring data developed by the manufacturer (or a qualified person) to anchor the mast and install the guys. Under proposed § 1926.1436(d)(2), the employer must use this data to (i) anchor the mast base; (ii) secure the guys to the ground or other firm anchorage; and (iii) install guying that will withstand the maximum horizontal and vertical forces encountered when operating within rated capacity with the particular guy slope and spacing specified for the application. Although this provision requires the employer to install guying that will enable the derrick to handle loads within its rated capacity and to use manufacturer's (or a qualified person's) data for this purpose, it does not explicitly require the employer to follow manufacturer recommendations on guying. Nor does it explicitly say that an employer who follows the manufacturer's guying recommendations is in compliance.

OSHA believes that, in many if not most cases in which guy derricks are used, the employer who uses the derrick will want to be able to rely on the manufacturer's recommendations for number, spacing, angle, material, and tension of guys and that permitting employers to do so will promote safe use of such derricks. OSHA is concerned about whether the proposed C–DAC provisions clearly permit an employer to rely on such manufacturer recommendations.[81]

OSHA requests public comment on whether and, if so how, any of these proposed provisions should be modified to make clear what information the derrick user must use when installing guys. For example, should the derrick user be required to use specifications provided by the manufacturer of the derrick (assuming such specifications are available from the manufacturer) on all of the topics listed in proposed § 1926.1436(c)(2)(ii) and (iii)?

OSHA further notes that the need for the ''grandfathering'' provision in proposed § 1926.1436(c)(2)(iii) is problematic. Although the 1969 ANSI B30.6 standard did not require manufacturers to provide information on sag and tension of guy line rope, proposed § 1926.1436(d)(1) contemplates that such information could be developed by a qualified person. OSHA therefore additionally requests public comment on whether the standard should require guy tension (as well as other guy specifications) to be developed by a qualified person if not available from the manufacturer.

Proposed paragraph (c)(2)(iv) states that the mast base shall permit the mast to rotate freely with allowance for slight tilting of the mast caused by guy slack. Proposed § 1926.1436(c)(2)(v) requires that the mast cap shall: (A) Permit the mast to rotate freely; (B) Withstand tilting and cramping caused by the guy loads; (C) Be secured to the mast to prevent disengagement during erection; and (D) Be provided with means for attaching guy ropes. These requirements track similar ones in sections 6–1.2.2(c) and (d) of ANSI B30.6–1969 and ASME B30.6–2003.

Proposed paragraph (c)(3), *Stiffleg derricks*, provides additional requirements specific to stiffleg derricks to help ensure their safe use. These requirements are comparable to those in section 6–1.2.3 of ANSI B30.6–1969 and ASME B30.6–2003.

As with guy derricks, specifications for stiffleg derricks are found in both proposed § 1926.1436(c) and (d). Both paragraphs contain provisions dealing with the ability of stifflegs to withstand loads, and OSHA is concerned about the possibility for confusion if two different provisions address the same issue. The two provisions are:

> Proposed § 1926.1436(c)(3)(ii): The stifflegs shall be capable of withstanding the loads imposed at any point of operation within the load chart range.
>
> Proposed § 1926.1436(d)(3)(ii): The mast base and stifflegs shall be designed to withstand maximum horizontal and vertical forces encountered when operating within rated capacity with the particular stiffleg spacing and slope specified for the application.

Even though these two provisions appear to be consistent with each other, there is always the possibility for confusion if two differently worded provisions address the same topic, and OSHA requests public comment on whether either or both of these provisions should be changed or deleted to avoid any such potential confusion.

Proposed paragraph (c)(3)(i) would require that the mast be supported in the vertical position by at least two stifflegs; one end of each would have to be connected to the top of the mast and the other end securely anchored.

Proposed paragraph (c)(3)(ii) states that the stifflegs shall be capable of withstanding the loads imposed at any point of operation within the rated load chart range.

Proposed paragraph (c)(3)(iii) specifies that the mast base shall: (A) Permit the mast to rotate freely (when necessary); and (B) Permit deflection of the mast without binding.

Proposed paragraph (c)(3)(iv) states that the mast shall be prevented from lifting out of its socket when the mast is in tension.

Proposed paragraph (c)(3)(v) requires the stiffleg connecting member at the top of the mast to: (A) Permit the mast

[80] The 1969 version of the ANSI standard does not include the items in proposed § 1926.1436(c)(2)(iii), but later versions of the B30.6 standard, including the 2003 version, list those items.

[81] The provisions do not explicitly permit the employer to rely on manufacturer recommendations and could be read not to permit reliance on such recommendations because the provisions on guy information, which would typically be provided by the manufacturer (proposed § 1926.1436(c)(2)(ii) and (iii)), and those on installing anchoring and guying (propose § 1926.1436(d)(1) and (2)), are found in different paragraphs and may therefore be read to be mutually exclusive.

to rotate freely (when necessary); (B) Withstand the loads imposed by the action of the stifflegs; and (C) Be secured so as to oppose separating forces.

Paragraph (c)(4), *Gin pole derricks*, contains additional requirements specific to gin pole derricks to help ensure their safe use. Similar requirements are found in section 6–1.2.4 of ASME B30.6–2003. ANSI B 30.6–1969, which is incorporated by reference in Subpart N, does not contain provisions specific to gin pole derricks.

Proposed paragraph (c)(4)(i) provides that guy lines be sized and spaced so as to make the gin pole stable in both boomed and vertical positions. Exception: Where the size and/or spacing of guy lines do not result in the gin pole being stable in both boomed and vertical positions, the employer shall ensure that the derrick is not used in an unstable position.

Proposed paragraph (c)(4)(ii) requires that the base of the gin pole permit movement of the pole (when necessary).

Proposed paragraph (c)(4)(iii) would require the gin pole to be anchored at the base against horizontal forces (when such forces are present).

Proposed paragraph (c)(5), *Chicago boom derricks*, states that the fittings for stepping the boom and for attaching the topping lift shall be arranged to: (i) Permit the derrick to swing at all permitted operating radii and mounting heights between fittings; (ii) Accommodate attachment to the upright member of the host structure; (iii) Withstand the forces applied when configured and operated in accordance with the manufacturer's/builder's procedures and within its rated capacity; and (iv) Prevent the boom or topping lift from lifting out under tensile forces. Similar requirements, which will help ensure that such derricks are used safely, are found in section 6–1.2.5 of ASME B30.6–2003. ANSI B 30.6–1969, which is incorporated by reference in Subpart N, does not contain specific requirements for Chicago boom derricks.

Paragraph 1436(d) Anchoring and Guying

Proposed paragraph (d) lists requirements for anchoring and guying derricks to the surfaces that support them.

Proposed paragraph (d)(1) would require use of load anchoring data developed by the manufacturer or a qualified person. Currently, Subpart N, through incorporation of section 6–1.4.3 of ANSI B30.6–1969, requires load anchoring data for non-permanent installations, which would include most derricks used for construction work, to be determined by the user. The 2003 version of ASME B30.6 requires the data to be determined by a qualified person. C–DAC believed that, to better ensure safety, a qualified person (as defined in proposed § 1926.1401) is needed to develop such data. The proposal affords the employer the additional flexibility of relying on data provided by the derrick manufacturer rather than relying exclusively on a qualified person to develop such data.

For permanent fixed installations, the 1969 ANSI standard requires load anchoring data to be provided by the derrick manufacturer, while the 2003 version requires it to be provided by the owner. C–DAC believed that derrick users should be able to rely on data developed by the manufacturer or a qualified person for any type of installation and therefore did not distinguish between fixed and temporary installations for this purpose.

Proposed paragraph (d)(2), *Guy derricks*, lists additional requirements, for anchoring and guying, that are specific to the use of guy derricks. These provisions are similar to section 6–1.4.1of ANSI B30.6–1969 and ASME B30.6–2003. These provisions are discussed above in connection with proposed § 1926.1436(c)(2).

Proposed paragraph (d)(3), *Stiffleg derricks*, lists anchoring and guying requirements that are specific to the use of stiffleg derricks. The provisions in this paragraph are similar to section 6–1.4.2 in ANSI B30.6–1969 and ASME B30.6–2003.

Proposed paragraph (d)(3)(i) would require the mast base and stifflegs to be anchored. Proposed paragraph (d)(3)(ii) would require the mast base and stifflegs to be designed to withstand maximum horizontal and vertical forces encountered when operating within rated capacity with the particular stiffleg spacing and slope specified for the application. This provision is discussed above in connection with proposed § 1926.1436(c)(3).

Paragraph 1436(e) Swingers and Hoists

Proposed paragraph (e) lists requirements for swinger mechanisms and hoists that are used as part of a derrick.

Proposed paragraph (e)(1) would require that the boom, swinger mechanisms and hoists be suitable for the derrick work intended and be anchored to prevent displacement from the imposed loads. This provision is similar to section 6–1.5.1 of ANSI B30.6–1969 and section 6–1.5 of ASME B30.6–2003.

Proposed paragraph (e)(2), *Base-mounted drum hoists*, would specify minimum requirements for hoists used for derricks. Currently, Subpart N has requirements for base-mounted drum hoists in 29 CFR 1926.553. These requirements apply to all base-mounted drum hoists used in construction, including those used for derricks.

It should be noted that this rulemaking is limited to setting requirements for cranes and derricks, and therefore does not address the requirements in § 1926.553 for base-mounted drum hoists to the extent they apply beyond their use for derricks. Consequently, proposed § 1926.1436(e)(2) would set requirements for base-mounted drum hoists only to the extent such hoists are used for derricks. Also note that the requirements in § 1926.553 for base-mounted drum hoists would no longer apply to such hoists used for derricks. To make this clear, this proposed rule would amend § 1926.553 by adding the following § 1926.1436(c) to that section and requests public comment on this proposed change:

(c) This section does not apply to base-mounted drum hoists used in conjunction with derricks. Base-mounted drum hoists used in conjunction with derricks must conform to § 1926.1436(e).

Section 1926.553 requires base-mounted drum hoists to meet the applicable requirements for design, construction, installation, testing, inspection, maintenance, and operations prescribed by the manufacturer. In addition, it imposes requirements to guard exposed moving parts, locate controls within easy reach of the operator's station, and equip electric motor operated hoists with certain safety features.

For such hoists used for derricks, instead of relying on a manufacturer's recommendation for most requirements, proposed § 1926.1436(e)(2) incorporates by reference certain sections of ASME B30.7–2001, ''Base Mounted Drum Hoists,'' and sets forth specific requirements for load tests.

Proposed paragraphs (e)(2)(i)(A) through (D) would require that base mounted drum hoists meet the requirements in the following sections of ASME B30.7–2001:

(A) Sections 7–1.1 (Load ratings and markings).

(B) Section 7–1.2 (Construction), except: 7–1.2.13 (Operator's cab); 7–2.15 (Fire extinguishers) (Note: The requirements excluded by this proposed paragraph would be covered by the general fire extinguisher and operator's cab requirements in § 1926.1433(e)(6) and (7) of this proposed standard. Therefore, the incorporation by

reference of those requirements from ASME B30.7–2001 would be redundant.)

(C) Section 7–1.3 (Installation).

(D) Applicable terms in Section 7–0.2 (Definitions).

The requirements incorporated from section 7–1.2 include those for guarding exposed moving parts, locating controls within easy reach of the operator's station, and equipping electric motor operated hoists with certain safety features. Comparable requirements are now found in § 1926.553. Section 7–1.2 also contains a number of additional requirements from ASME B30.7, including requirements for hoist and swinger mechanisms, brakes, clutches, adjustments for brakes and clutches, ropes, prime mover controls, electric resistors and switches, and lubrication.

Proposed paragraph (e)(2)(ii), *Load tests for new hoists*, would require that the employer ensure that new hoists are load tested to a minimum of 110% of rated capacity, but not more than 125% of rated capacity, unless otherwise recommended by the manufacturer. This requirement is met where the manufacturer has conducted this testing. ASME B30.7–2001, in section 7–2.2.2(a), requires similar load testing but requires the test to be conducted by the manufacturer. OSHA recognizes that the manufacturer will usually be the party who conducts the test and allows the manufacturer to do so, but this proposal permits the test to be conducted by any party as long as it is performed correctly.

Proposed paragraph (e)(2)(iii), *Repaired or modified hoists*, would require that hoists which have had repairs, modifications or additions affecting their capacity or safe operation be evaluated by a qualified person to determine if a load test is necessary. If it is, load testing shall be conducted in accordance with § 1926.1436(e)(2)(ii) and (iv). This requirement parallels section 7–2.2.2(b)(1) of ASME B30.7–2001.

Proposed paragraph (e)(2)(iv), *Load test procedure*, would state that load tests required by § 1926.1436(e)(2)(ii) or (e)(2)(iii) shall be conducted in accordance with the requirements listed in § 1926.1436(e)(2)(iv)(A) to (C). Proposed § 1926.1436(e)(2)(iv)(A) would require that the test load be hoisted a vertical distance to assure that the load is supported by the hoist and held by the hoist brake(s). Proposed § 1926.1436(e)(2)(iv)(B) provides that the test load shall be lowered, stopped and held with the brake(s). These specifications are comparable to those in section 7–2.2.2(b)(2) of ASME B30.7–2001.

Proposed paragraph (e)(2)(iv)(C) states that the hoist shall not be used unless a competent person determines that the test has been passed.[82] The requirement that a competent person determine whether a base-mounted drum hoist has passed a load test is consistent with the requirement, discussed below under proposed § 1926.1436(g), that a competent person determine whether a derrick has passed a load test. C–DAC believed that, to ensure that the load test is properly assessed, this determination needs to be made by a competent person.

Paragraph 1436(f) Operational Aids

Proposed paragraph (f) would specify the types of operational aids that must be used on derricks during construction activities.

Proposed paragraph (f)(1) states that proposed § 1926.1416 (Operational aids) applies, except for § 1926.1416(d)(1) (Boom hoist limiting device), (e)(1) (Boom angle or radius indicator) and (e)(4) (Load weighing and similar devices). Under proposed § 1926.1436(f)(1), two operational aids—an anti two-block device and a hoist drum rotation indicator (if the drum is not visible from the operator's station)—would be required on a derrick manufactured more than one year after the effective date of this subpart. Neither is currently required under 29 CFR part 1026 subpart N.[83] The safety functions served by these operational aids are described above in the discussion of proposed § 1926.1416.

Proposed paragraph (f)(2), *Boom angle aid*, would require the employer to ensure that either: (i) The boom hoist cable is marked with caution and stop marks, corresponding to maximum and minimum allowable boom angles, that are within view of the operator or a spotter who is in direct communication with the operator, or (ii) an electronic or other device that signals the operator in time to prevent the boom from moving past its maximum and minimum angles, or automatically prevents such movement, is used.

C–DAC discussed whether to require derricks to be equipped with boom angle indicators. Section 6–1.6.4 of ASME B30.6–2003 advises that derricks have such devices, stating that ''Boom angle indicators should be provided and be readable by the operator or the signal person, unless the derrick has one rating for all boom angles.'' C–DAC believed that, instead of requiring such a device, marking the boom hoist cables to indicate maximum and minimum boom positions is a safe work practice that is routinely implemented by many derrick operators in the industry.

The Committee also believed that the most recent accident data it reviewed did not indicate that this work practice was ineffective and concluded that requiring boom angle indicators would be an added cost to the industry with no significant impact on safety. The proposed standard therefore would require the employer either to mark the boom hoist lines or to use an electronic signaling device in lieu of using a boom angle indicator.

OSHA notes that, as drafted by C–DAC, proposed § 1926.1436(f)(2) would require derrick users to take one of the two specified precautions even if the derrick is equipped with a boom angle indicator as suggested by ASME B30.6. It is the Agency's understanding that C–DAC intended those precautions to be taken in lieu of requiring boom angle indicators and that they are not needed if the derrick has such a device. OSHA therefore requests public comment on whether it should modify § 1926.1436(f)(2) by adding the words ''If the derrick is not equipped with a functioning boom angle indicator'' so that it would read as follows:

(2) *Boom angle aid.* If the derrick is not equipped with a functioning boom angle indicator, the employer shall ensure that either:

(i) The boom hoist cable shall be marked with caution and stop marks. The stop marks shall correspond to maximum and minimum allowable boom angles. The caution and stop marks shall be in view of the operator, or a spotter who is in direct communication with the operator, or

(ii) An electronic or other device that signals the operator in time to prevent the boom from moving past its maximum and minimum angles, or automatically prevents such movement, is used.

Proposed paragraph (f)(3), *Load weight/capacity devices*, would require that derricks manufactured more than one year after the effective date of this Subpart with a maximum rated capacity over 6,000 pounds have at least one of the following: load weighing device, load moment indicator, rated capacity indicator, or rated capacity limiter. This paragraph would adopt for derricks a comparable requirement to that for cranes required by proposed § 1926.1416(e)(4). However, the requirement for cranes applies to cranes manufactured after March 29, 2003.

[82] ASME B30.7–2001 does not specify who must determine if a hoist passes its load test.

[83] Other operational aids listed in § 1926.1416—a luffing jib limiting device, a jib angle indicator, a boom length indicator on equipment with a telescoping boom, and an outrigger position sensor/monitor on equipment with outriggers—are required on equipment with components not possessed by derricks.

That date was chosen for cranes because it was when ANSI B30.5 first required load weighing devices on all mobile cranes with a rated capacity over 6,000 pounds. There is no comparable requirement for derricks in the ASME B30.6 standard. Since this proposed paragraph, if adopted, would impose a requirement not previously applied to derricks by an industry standard, C–DAC believed it is appropriate to allow one year after this standard becomes effective for new derricks to be equipped with such devices.

Proposed paragraph (f)(3) sets temporary alternative measures that must be used when the load weight/capacity device is not working properly. These temporary alternatives are the same as those required by proposed § 1926.1416(e)(5) for equipment generally and under proposed § 1926.1435(e)(6)(vi) for tower cranes specifically. Under § 1926.1416(e) and § 1926.1435(e)(6), such a device is a category II operational aid and, as such, it must be repaired within 30 days if it is not working properly. OSHA requests comment on whether to apply that same 30-day requirement, along with the exception if a part is ordered within 7 days of the malfunction and not received in time to complete the repair within 30 days, to proposed § 1926.1436(f)(3).

Paragraph 1436(g) Post-Assembly Approval and Testing—New or Reinstalled Derricks

Proposed paragraph (g) would list the minimum testing and approval requirements that an employer must meet to assure that its derrick will be structurally and functionally able to perform within the manufacturer's specifications and recommendations. C–DAC believed that by meeting these minimum requirements, the employer would provide its workers with a safe derrick that will not endanger its workers during hoisting operations.

Proposed paragraph (g)(1), *Anchorages*, would list minimum requirements for an anchor used to support a derrick. Proposed § 1926.1436(g)(1)(i), would require that the anchorages, including the structure to which the derrick is attached (if applicable), be approved by a qualified person.

Proposed paragraph (g)(1)(ii) would require the qualified person to determine if any special testing of the anchorage is needed when rock or hairpin anchorage are used. If so, it shall be tested accordingly. The provisions in proposed § 1926.1436(g)(1) are similar to what is required by Subpart N through its incorporation of section 6–2.2.1b in ANSI B30.6–1969 and also what is currently in section 6–2.2.1(b) in its newest revision, ASME B30.6–2003.[84] These requirements would help the employer ensure that the derrick would not collapse due to insufficient anchoring and injure or kill workers who must use or be in the vicinity of the derrick.

Proposed paragraph (g)(2), *Functional test*, would require that, prior to initial use, new or reinstalled derricks shall be tested by a competent person with no hook load to verify proper operation. Section 2.2.1a of ANSI B30.6–1969, incorporated in Subpart N, requires the employer to test the derrick to ensure that it can safely hoist and lower the load, boom up and down, swing left and right, and brake/control the speed of its hoist lines. The five provisions of this proposed paragraph are similar to section 6–2.2.1 of ASME B30.6–2003 and would require, respectively, the following tests: (i) Lifting and lowering the hook(s) through the full range of hook travel; (ii) raising and lowering the boom through the full range of boom travel; (iii) swinging in each direction through the full range of swing; (iv) actuating the anti two-block and boom hoist limit devices (if provided); and (v) actuating locking, limiting and indicating devices (if provided).

Proposed paragraph (g)(3), *Load test*, would require that, prior to initial use, new or reinstalled derricks shall be load tested by a competent person. Subpart N requires operational tests prior to initial use of all new and altered derricks through the incorporation of section 6–2.2.1 of ANSI B30.6–1969, but a load test is not explicitly required. C–DAC recommended that OSHA adopt the revised guidance provided in section 6–2.2.2 of ASME B30.6–2003, which includes a requirement to load test all new and reinstalled derricks prior to initial use and specifies the elements such a test should include. OSHA believes that compliance with the load test requirements listed below would help the employer identify defects in the derrick prior to its actual use.

Proposed paragraph (g)(3)(i) would require that test loads shall be at least 100% and no more than 110% of the rated capacity, unless otherwise recommended by the manufacturer or qualified person, but in no event shall the test load be less than the maximum anticipated load.

[84] This proposed paragraph differs from section 6–2.2.1(b) of ASME B30.6–2003 in the following respect: The ASME section states that rock or hairpin anchorages ''may require'' special testing. C–DAC believed that it is necessary to explicitly require that a qualified person determine whether such testing is needed.

Proposed paragraph (g)(3)(ii) would list minimum procedures that must be accomplished during the load testing. These are: (A) The test load be hoisted a few inches and held to verify that the load is supported by the derrick and held by the hoist brake(s); (B) the derrick must be swung, if applicable, the full range of its swing, at the maximum allowable working radius for the test load; (C) the derrick must be boomed up and down within the allowable working radius for the test load; and (D) the load must be lowered, stopped and held with the brake(s).

Proposed paragraph (g)(3)(iii) would require that the derrick not be used unless the competent person determines that the test has been passed.

Proposed paragraph (g)(4), *Documentation*, would require that tests conducted under this paragraph be documented. The document must contain the date, test results, and the name of the tester. The document shall be retained until the derrick is re-tested or dismantled, whichever occurs first. Because a load test meeting the criteria listed in the proposed standard is so important to the safe use of the derrick, C–DAC believed that documentation of the test was needed to show that the test had been conducted properly. Section 6–2.2.2(a)(1) of ASME B30.6–2003 similarly requires that a written report of the load test be prepared and maintained.

Paragraph 1436(h) Load Testing Repaired or Modified Derricks

Proposed paragraph (h) would require that derricks that have had repairs, modifications or additions affecting the derrick's capacity or safe operation be evaluated by a qualified person to determine if a load test is necessary. If it is, load testing shall be conducted and documented in accordance with § 1926.1436(g). Subpart N, through incorporation by reference of section 6–2.3.3 of ANSI B30.6–1969, *Adjustments and Repairs*, requires all replaced and repaired parts to have at least the original safety factor. However, there is no explicit requirement to load test the derricks after parts are repaired or replaced. ASME B30.6–2003 does address load testing of repaired, altered or modified derricks in its section 6–2.2.2(b), specifying that the need for such a test be determined by a qualified person. C–DAC recommended that load testing should be mandatory after a derrick has been repaired or modified. Such testing will help the employer identify safety defects in a repaired or modified derrick prior to its actual use.

Paragraph 1436(i) [*Reserved.*] This proposed paragraph is reserved because

it is inconvenient for readers to determine whether ''(i)'' is being used as a letter or a roman numeral.

Paragraph 1436(j) Power Failure Procedures

Proposed paragraph (j) would require the derrick operator to safely stop operation if the power fails during operations and would list additional steps that must be taken. Proposed § 1926.1436(j)(1) would require setting all brakes or locking devices. Proposed § 1926.1436(j)(2) would require moving all clutch and other power controls to the off position. These steps would prevent inadvertent movement of the load during the power outage or upon restoration of power. These precautions are found in section 6–3.2.3(h) of ANSI B30.6–1969, which is incorporated by reference in Subpart N of this part, and are reiterated in ASME B30.6–2003.

Paragraph 1436(k) Use of Winch Heads

Proposed paragraph (k) would specify minimum requirements for the safe use of a winch during hoisting operations. Proposed paragraph (k)(1) would require that ropes not be handled on a winch head without the knowledge of the operator. Proposed § 1926.1436(k)(2) would require the operator to be within reach of the power unit control while a winch head is being used. These proposed requirements are in section 6–3.3.5 of ANSI B30.6–1969, which is incorporated by reference in Subpart N, and are continued in section 6–3.3.6 of ASME B30.6–2003.

Paragraph 1436(l): [*Reserved*.] This proposed paragraph is reserved because it is inconvenient for readers to distinguish the letter ''l'' from the number ''1.''

Paragraph 1436(m) Securing the Boom

Proposed paragraph (m) would list minimum requirements for ensuring the stability of a derrick's boom at rest to prevent injuries and deaths that could occur if it inadvertently shifted or fell. Subpart N incorporates section 6–3.3.6 of ANSI B30.6–1969, which contains similar requirements. ASME B30.6–2003 revised those provisions in its section 6–3.3.7, and C–DAC recommended that OSHA list elements of the updated consensus standard's provisions in proposed § 1926.1436(m)(1) and (2) below.

Proposed paragraph (m)(1) would require that when the boom is being held in a fixed position, dogs, pawls, or other positive holding mechanisms on the boom hoist be engaged. Proposed § 1926.1436(m)(2) would require that when taken out of service for 30 days or more, the boom be secured by one of the following methods: (i) By laying down the boom; (ii) by securing the boom to a stationary member, as nearly under the head as possible, by attachment of a sling to the load block; (iii) for guy derricks, by lifting the boom to a vertical position and securing it to the mast; or (iv) for stiffleg derricks, by securing the boom against the stiffleg.

The comparable ASME B30.6–2003 provision (section 6–3.3.7) would require the boom to be secured when the derrick is ''not in use.'' C–DAC believed the intent of the ANSI provision was to require the boom to be secured when the derrick was not in service but thought the ASME wording could be misconstrued to mean that the boom had to be secured whenever the derrick was not in the process of lifting a load. To avoid misunderstanding and establish an objective requirement for when the boom had to be secured, C–DAC proposed that the boom be secured whenever the derrick was taken out of service for 30 days or more.

Paragraph 1436(n)

''Jumping the derrick'' is the practice of moving structural components of the derrick to different locations, such as to the upper floors as a building is constructed, and is essential to some construction activities. Proposed § 1926.1436(n) would require that the process of jumping the derrick be supervised by the A/D (assembly/disassembly) supervisor. As provided in § 1926.1401, the A/D supervisor must either be a person who meets the criteria for both a competent person and a qualified person, or a competent person who is assisted by one or more qualified persons.

As discussed above, proposed § 1926.1436(g) would require a derrick to be load tested to confirm that the derrick and its support can withstand rated loads. C–DAC discussed whether load testing should be required when a derrick is jumped. Some members stated that load testing a derrick after it has been jumped would be unduly burdensome since it is often already difficult to locate loads heavy enough to meet the 100–110% of rated capacity requirement of the initial load test. C–DAC agreed that a jumped derrick need not be load tested and believed that the A/D supervisor could be relied upon to see that the jumped derrick is properly erected and anchored and complies with the applicable requirements of this proposed standard. OSHA is satisfied with C–DAC's rationale and believes that giving the A/D supervisor the responsibility for supervising the jumping of a derrick will ensure that the jumped derrick is safe to use.

Paragraph 1436(o)

Proposed paragraph (o) would require that derrick operations be supervised by a competent person. Subpart N incorporates by reference section 6.3.1.1 of ANSI B30.6–1969, which requires derrick operations to be directed by a designated individual. ASME B30.6–2003 contains a similar requirement, and both consensus standards specify the requirements and practices of that designated individual. OSHA believes its definition of competent person meets the objectives of the ANSI/ASME designated individual requirements to competently perform the specific duties involved in supervising derrick operations. The experience and knowledge possessed by the competent person and his/her ability to recognize and correct potential hazardous conditions will help ensure safety of derrick operations.

Paragraph 1436(p) Inspections

Under proposed paragraph (p), the inspection requirements of proposed § 1926.1412 apply to derricks. In addition to the items that must be inspected under § 1926.1412, proposed § 1926.1436(p) requires certain additional items to be inspected. These additional items, when combined with the items that must be inspected under § 1926.1412, are consistent with ANSI B30.6–1969 and ASME B30.6–2003.

Proposed paragraph (p)(1), *Daily*, would require the inspection of guys for proper tension. Guy wires are critical elements of the support system for derricks, and ANSI B30.6–1969 and ASME B30.6–2003 both require their daily inspection in section 6–2.1.2.

Proposed paragraph (p)(2), *Annual*, contains two requirements.

Proposed paragraph (p)(2)(i) would require the inspection of the gudgeon pin for cracks, wear, and distortion. This requirement is found in section 6–2.1.3 of ANSI B30.6–1969 and ASME B30.6–2003, which establish requirements for periodic inspections.

Proposed paragraph (p)(2)(ii) would require foundation supports for continued ability to sustain the imposed loads. Since a derrick is more likely to remain stationary and supported by the same foundation throughout the duration of its use than the majority of the equipment covered by this standard, C–DAC believed it was necessary to require the foundation to be inspected annually in addition to the items specified in § 1926.1412 of this proposed standard. This requirement is similar to section 6–2.1.3(b) of ANSI B30.6–1969 and ASME B30.6–2003.

Paragraph 1436(q)

Proposed paragraph (q) would state that § 1926.1427 (Operator qualification and certification) does not apply. As discussed in regard to § 1926.1427 above, C–DAC paid considerable attention to the need for equipment operators to be well qualified to operate the equipment to which they are assigned, and the Committee concluded that crane operators need to be certified through an accredited testing process to ensure that they are sufficiently qualified. After discussing whether there should be a similar certification requirement for derrick operators, the Committee decided against recommending such a requirement.

The Committee noted that there are no accredited testing criteria to use for testing of derrick operators nor are there nationally recognized accredited testing facilities readily available. C–DAC questioned whether testing providers would find it cost-effective to establish accredited testing programs for derrick operator certification in light of the relatively small number of derrick operators in the construction industry. C–DAC also believed it would be difficult to establish accredited testing programs for derrick operators, noting that most training for derricks must be site specific because the types of derricks used, their support structures, and the hazards associated with specific projects vary from company to company. Moreover, the accident investigation data reviewed by C–DAC did not indicate that there was a need to require derrick operators to meet certification requirements similar to those proposed for crane operators.

Training

In reviewing the C–DAC language of proposed § 1926.1430, *Training* and § 1926.1436, *Derricks*, the Agency realized that C–DAC did not specify any training requirements for derrick operators, which OSHA believes was an inadvertent omission. The Agency is planning to add such a requirement, such as a provision that would require that derrick operators be trained ''on the safe operation of the equipment the operator will be using.'' OSHA requests public comment on this issue.

Section 1437 Floating Cranes/Derricks and Land Cranes/Derricks on Barges

Currently, § 1926.550(f) of Subpart N includes limited requirements specific to floating cranes/derricks and land cranes attached to a vessel. The current requirements are broadly written and incorporate manufacturer's guidelines for design, construction, installation, testing, maintenance, and operation (proposed § 1926.550(f)(2)(iii)). The Committee believed that greater clarity and specificity, along with some additional safety requirements, would improve safety by more effectively addressing the unique hazards in the marine construction environment. Of special concern to the Committee were drowning incidents from cranes overturning from or sliding off vessels and the hazardous effects of wind, water and the marine environment on equipment and operations.

Section 1926.1437 covers two types of equipment in a marine environment: Those manufactured as a combination crane/derrick and vessel, and equipment designed to operate on land but used on a means of flotation, such as a vessel. The first type is referred to as ''floating cranes/derricks,'' which are defined in § 1926.1401, *Definitions*, as ''equipment designed by the manufacturer (or employer) for marine use by permanent attachment to a barge, pontoons, vessel, or other means of flotation.'' ''Land cranes/derricks'' are defined in § 1926.1401 as ''equipment not originally designed by the manufacturer for marine use by permanent attachment to barges, pontoons, vessels, or other means of flotation.''

Most provisions of this section apply to both floating cranes/derricks and land cranes/derricks used on barges, pontoons, vessels or other means of flotation. Proposed § 1926.1437(m) applies only to floating cranes/derricks, and proposed § 1926.1437(n) only to land cranes/derricks used on barges, pontoons, vessels or other means of flotation.

Paragraph 1437(a)

Proposed paragraph (a) specifies that the requirements of § 1926.1437 are supplemental requirements and, therefore, all other requirements of this proposed subpart would continue to apply unless specifically noted otherwise. Proposed § 1926.1437(a) would specifically exempt equipment operating on jacked barges in certain circumstances from the requirements of § 1926.1437. The barges would be exempted when the jacks are deployed to the river/lake/sea bed and the barge is fully supported by the jacks.

The Committee explained that a jacked barge deployed in this manner has four ''spuds'' on its corners that are grounded into the sea-bottom, providing a level and stable platform on which employees work. This results in work conditions similar to a crane working on land and unlike the work conditions pertinent to equipment covered by this section. Therefore, equipment used on a jacked barge deployed in this manner would be subject to all other applicable requirements of this proposed Subpart and not the requirements of this section.

The C–DAC consensus document, at § 1926.1437(a), states that, ''The requirements of this section do not apply to jacked barges. * * *'' To clarify that this sentence pertains to situations when equipment is used on a jacked barge, the Agency has modified the language for the proposed rule to now read: ''The requirements of this section do not apply when using jacked barges when the jacks are deployed to the river/lake/sea bed and the barge is fully supported by the jacks.''

Proposed § 1926.1437(a) of the C–DAC draft states that, ''This section contains supplemental requirements for floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation; all sections of this Subpart apply to floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation, unless specified otherwise.'' At various points in proposed § 1926.1437, the phrase ''vessels/flotation devices'' is used synonymously with ''barges, pontoons, vessels or other means of flotation.'' To make it clear that these two phrases mean the same thing, the Agency has modified the first sentence of proposed § 1926.1437(a) to read as follows: ''This section contains supplemental requirements for floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation (vessels/flotation devices); all sections of this Subpart apply to floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation, unless specified otherwise.''

Some paragraphs of proposed § 1926.1437 in the C–DAC draft employ other phrases to mean the same thing as ''barges, pontoons, vessels or other means of flotation (vessels/flotation devices).'' For example, proposed § 1926.1437(h)(2) uses the phrase ''vessel/means of flotation.'' The Agency has identified a number of such paragraphs and, to avoid ambiguity, has modified the language of proposed § 1926.1437 to use either the phrase ''barges, pontoons, vessels or other means of flotation'' or ''vessel/flotation device'' in the following proposed paragraphs: §§ 1926.1437(e)(1), 1926.1437(h)(2), 1926.1437(j)(4), 1926.1437(n)(3)(i), 1926.1437(n)(5)(i), 1926.1437(n)(5)(iv)(B), and 1926.1437(n)(5)(iv)(C).

Paragraph 1437(b) General Requirements

Proposed paragraph (b) specifies that proposed § 1926.1437(c)–(k) apply to both floating cranes/derricks and land cranes/derricks mounted on barges, pontoons, vessels, or other means of flotation. As noted above and discussed below, proposed § 1926.1437(m) would apply only to floating cranes/derricks, and proposed § 1926.1437(n) only to land cranes/derricks mounted on vessels/flotation devices.

Paragraph 1437(c) Work Area Control

Proposed paragraph (c) provides that the requirements of § 1926.1424, *Work area control,* applies to equipment covered by this section, except for the requirements of § 1926.1424(a)(2)(ii). Section 1926.1437(c)(2) of this section closely parallels § 1926.1424(a)(2)(ii) but dispenses with the requirement that the employer demonstrate infeasibility in order to use a combination of warning signs and high visibility markings in place of erecting and maintaining control lines, warning lines, railings, or similar boundaries of hazard areas. Because equipment covered by this section operates within limited physical work space, the Committee believed that employers need increased flexibility in determining which work area control method is most appropriate in light of special site-specific circumstances. To ensure that employees are adequately protected if the employer uses high visibility markings to supplement warning signs, this paragraph would require that the employer train employees to understand the meaning of the markings.

Paragraph 1437(d) Keeping Clear of the Load

Proposed paragraph (d) states that the requirements of proposed § 1926.1425, *Keeping Clear of the Load,* do not apply to the equipment covered by § 1926.1437. Due to the limited space available for equipment on worksites covered by this section (i.e., the decks of barges and other vessels), the Committee determined that the requirements of § 1926.1425 are infeasible in these worksite environments.

Paragraph 1437(e) Additional Safety Devices

Proposed paragraph (e) lists additional safety devices required for equipment covered by this section. Equipment covered by § 1926.1437 would also be required to have the safety devices listed in proposed § 1926.1415, *Safety Devices,* unless otherwise noted in § 1926.1415. The additional safety devices required by proposed § 1926.1437(e) reflect the special conditions of a marine worksite, especially with respect to vessel stability, inadvertent movement due to water conditions, and the greater effect of wind and other environmental conditions on equipment operating at these sites. However, note that § 1926.1415 would exempt floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels, or other means of flotation from having crane level indicators and floating cranes from having foot pedal brake locks. See the discussion above of § 1926.1415(a)(1)(iii) and (a)(4).

Proposed paragraph (e)(1) would require that equipment covered by this section have a barge, pontoon, vessel or other means of flotation, list and trim device. The Committee believed that it is necessary to have this device since it allows an operator to have a reading of the current list and trim of the vessel. Since the degrees of list and trim are directly related to the stability of the vessel/flotation device and therefore to the stability of the equipment and its operation, the Committee believed it necessary to define these two terms for clarity. Proposed § 1926.1401 defines ''list'' as ''the angle of inclination about the longitudinal axis of a barge, pontoon, vessel, or other means of flotation.'' ''Trim'' is defined in proposed § 1926.1401 as ''the angle of inclination about the transverse axis of a barge, pontoon, vessel, or other means of flotation.'' (Note that proposed § 1926.1437 includes requirements related to the maximum degrees of list and trim that can exist when equipment is used on marine worksites.) The list and trim device required by this proposed paragraph is needed to inform the operator during an operation whether environmental conditions have changed to affect list or trim and how the movement of the load is affecting or may affect the stability of the vessel. Based on this information, the equipment operator can make any necessary adjustments to keep the equipment within required parameters.

Proposed paragraph (e)(2) would require that equipment covered in this section have a horn. The sounding of a crane's horn is commonly understood in the marine segment of the industry as a warning to employees.

Proposed paragraph (e)(3) would require that all equipment with a rotating superstructure have a positive crane house lock. The Committee indicated that this device is necessary for equipment covered within this section because it positively locks the rotating superstructure. The lock provides additional protection from the superstructure's unintended movement that can result due to the action of wind, waves, or current.

Because the speed and direction of the wind can directly affect equipment operations, such as by diminishing equipment capacity and inducing unintended movement of the load, proposed § 1926.1437(e)(4) would require that equipment covered by this section have and use a wind speed and direction indicator when a competent person determines that wind is a factor that needs to be considered during operations.

Paragraph 1437(f) Operational Aids

Proposed paragraph (f) modifies the application of some of the proposed requirements in proposed § 1926.1416, *Operational Aids,* for equipment covered by this section. Apart from these specific differences, in all other respects proposed § 1926.1416 would apply to equipment covered by this section.

Paragraph (f)(1) would require that equipment covered by this section be equipped with an anti two-block device only when hoisting personnel or when hoisting over an occupied cofferdam or shaft. As discussed above with respect to proposed § 1926.1416(d)(3), two-blocking can result in a sudden drop of the load on the line. Anti two-block devices protect against this danger. However, the Committee determined that anti two-blocking devices have a high rate of failure in a marine environment due to wind and other environmental factors. Also, the equipment covered by this section is often performing live boom/fast-moving functions, causing an anti-two-block device to consistently malfunction. Therefore, C–DAC proposed to only require the use of the anti two-block devices when hoisting personnel or hoisting over an occupied cofferdam or shaft due to the additional risk to employees during these operations.

Proposed paragraph (f)(2) specifies that employers using equipment to perform dragline, clamshell (grapple), magnet, drop ball, container handling, concrete bucket, and pile driving work covered by this section, would be exempt from the requirements of proposed § 1926.1416(e)(4), *Load weighing and similar devices.* These operations add heavy loads and repetitive motion to the marine characteristics described above. As a result, load weighing devices used during these operations consistently malfunction. Additionally, the listing and tilting that is typical in marine

worksites often prevents these devices from providing accurate load readings.

Paragraph 1437(g) Accessibility of Procedures Applicable to Equipment Operation

Proposed paragraph (g) sets forth a set of requirements regarding accessibility of equipment operation procedures. The provision is split into different requirements based on whether the equipment has a cab. If the equipment covered by this section has a cab, the requirements of proposed § 1926.1417(c), *Operation—accessibility of procedures,* would apply. If the equipment covered by this section does not have a cab, proposed § 1926.1437(g)(1) and (g)(2) of this section would apply.

During the C–DAC negotiations, individuals from the marine construction industry addressed the Committee and emphasized the importance of load charts being located where the operator is stationed. Under proposed § 1926.1437(g)(1), if the operator's station is movable, such as with pendant-controlled equipment, the load chart must be posted on the equipment. Under proposed § 1926.1437(g)(2), the remaining procedures (other than load charts) would be required to be readily available on board. Where there is no cab for the equipment, it is impractical to require these other procedures to be next to the operator; however, it is still necessary for the operator to have easy access to these procedures for reference, if necessary, during operations.

Paragraph 1437(h) Inspections

Proposed paragraph (h) sets forth additional inspection requirements applicable to equipment covered by this section. It states that § 1926.1412, *Inspections,* applies to the inspection of the crane/derrick. The additional inspection requirements in this paragraph apply to the vessel/flotation device that supports the crane/derrick.

The Agency notes that there is a discrepancy between two proposed paragraphs of § 1926.1437. Paragraph (b) of the C–DAC Consensus Document specifies that the requirements of proposed § 1926.1437(c)—(k), which include proposed § 1926.1437(h), apply to both floating cranes/derricks and land cranes/derricks mounted on barges, pontoons, vessels, or other means of flotation. Proposed § 1926.1437(h), as drafted by C–DAC, contains provisions for inspecting vessel-related items only for land cranes/derricks mounted on barges, pontoons, vessels, or other means of flotation, but not for floating cranes/derricks.

OSHA believes that C–DAC intended the vessel-related inspections to apply to all the equipment covered by this section and is changing the introductory sentence of this paragraph to read: ''In addition to meeting the requirements of § 1926.1412 for inspecting the crane/derrick, the employer shall ensure that the vessel/means of flotation used to support a floating crane/derrick or land crane/derrick is inspected as follows.'' The Agency requests public comment on this change.

The Committee's discussions regarding § 1926.1437(h) were extensive and focused on three aspects of inspection of vessels/means of flotation: (1) Who would conduct the inspection of the equipment; (2) what would the equipment be inspected for; and (3) how often.

The Committee believed that inspections need to be required at four distinct times: Each shift, each month, annually, and quadrennially. The Committee determined that a competent person (see proposed § 1926.1401, *Definitions*) needs to conduct the shift and monthly inspections. If the competent person identifies one or more deficiencies, an immediate determination by a qualified person (see proposed § 1926.1401, *Definitions*) would be required to determine if the deficiency constitutes a hazard. If the deficiency constitutes a hazard, the vessel would have to be removed from service until the deficiency is corrected.

The Agency notes that the C–DAC draft of § 1926.1437(h)(3) refers to ''The daily and monthly inspections * * *'' To be consistent with the usage throughout this proposed rule, the reference to ''daily'' inspections has been changed to ''shift'' inspections. Therefore, the proposed rule reads: ''The shift and monthly inspections * * *''

The Committee indicated that the conditions listed under the requirements of shift and monthly inspections are easily identifiable to a competent person with respect to a vessel or other means of flotation and did not necessitate a more extensive professional knowledge of vessel deficiencies. Therefore, a competent person would be required to conduct shift and monthly inspections.

Under this proposed paragraph, a qualified person would have to determine if the identified deficiency constitutes a hazard. This differs from the shift and monthly general inspection provisions of proposed § 1926.1412, in which the competent person who identified a deficiency would then determine whether the deficiency was a safety hazard requiring immediate correction. The reason for this difference is that that this is a highly specialized area and the judgments involved require a very high level of knowledge and ability.

With respect to the annual inspections, proposed § 1926.1437(h)(4) would require the equipment and vessel/flotation device to be inspected by a qualified person with expertise with respect to vessels/flotation devices. The Committee believed it is important to explicitly state that the qualified person conducting these inspections must have the necessary expertise with respect to barges, pontoons, vessels or other means of flotation for the items listed for the annual inspection.

The qualified person required in the shift and monthly inspections must have expertise with respect to the nature of the work conditions, the crane/derrick and the vessel/flotation device. (See § 1926.1401, *Definitions—Qualified person.*) However, the annual inspection is more extensive than the shift or monthly inspections. As a result, the Committee chose to clearly specify that the qualified person for the annual inspection must have a greater level of expertise than that of the qualified person required for determining whether deficiencies identified in shift and monthly inspections constitute hazards. The qualified person for the annual inspection must have the level of expertise for all the areas covered by the annual inspection in addition to general expertise regarding the equipment and vessel/flotation device.

Proposed paragraph (h)(5) would require quadrennial inspections of the internal portion of the barge, pontoons, vessel, or other means of flotation by a marine engineer, marine architect, licensed surveyor, or other qualified person who has expertise with respect to vessels/flotation devices. As with the qualified person performing an annual inspection, C–DAC chose to emphasize the higher level of expertise necessary for performing the quadrennial inspection. By listing ''other qualified person'' together with ''marine engineer,'' ''marine architect,'' and ''licensed surveyor,'' C–DAC intended to make clear that the expertise of the ''other qualified person'' would need to be equivalent to that of a marine engineer, marine architect, or licensed surveyor.

Proposed § 1926.1437(h) specifies the items that would have to be inspected under the shift, monthly, and annual inspections. C–DAC used ASME B30.8–1999, ''Floating Cranes and Floating Derricks,'' specifically section 2.1 of B30.8, as a basis for developing the

inspection list.[85] However, the Committee did not set forth a specified list of inspection items to be checked in the quadrennial survey of the internal portion of the vessel/flotation device, instead deferring to the expert knowledge of the marine engineer, marine architect, licensed surveyor, or other qualified person who has expertise with respect to vessels/flotation devices. The Committee chose a once-every-four-year time period for surveying the internal portion of a vessel/flotation device based on the comments of individuals from the marine construction industry that this frequency reflects the prevailing industry practice and provides adequate safety.

Proposed paragraph (h)(6) sets forth the documentation requirements for the monthly, annual, and quadrennial inspections, which follow those in proposed § 1926.1412, *Inspections,* at § 1926.1412(e)(3) and (f)(7). However, with respect to the quadrennial inspections the written documentation of the inspection would have to be maintained for four years. This would enable the employer to track changes in the condition of the vessel from the previous inspection.

Paragraph 1437(i) [*Reserved.*]

Paragraph (i) is reserved because it is inconvenient for readers to determine whether ''i'' is being used as a letter or a roman numeral.

Paragraph 1437(j) Working With a Diver

Proposed paragraph (j) sets forth supplemental requirements designed to ensure that a diver is hoisted safely from the vessel and back when equipment covered by this section is used to move a diver to and from the water. Extra precautions and measures are needed when engaged in this activity due to the drowning, struck-by, crushed-by, and other hazards involved in this activity.

Marine environments and the condition of a diver can change quickly and unexpectedly; the operator must be constantly aware of the diving operation and in position to take immediate action when necessary. Therefore, under proposed § 1926.1437(j)(1), when one or more divers are being hoisted into and out of the water, the employer would be prohibited from using the equipment for any other purpose until all divers have returned back on board. This would ensure that the operator's attention is not diverted from the welfare of the divers. Proposed § 1926.1437(j)(2) would require the equipment operator to remain at the equipment controls the entire time. This would ensure that the operator can respond as necessary.

Proposed paragraph (j)(3) would require that, in addition to the signal requirements in proposed §§ 1926.1419–1422, the diver tender must be in direct communication with the equipment operator. This communication may be done either through maintaining a clear line of sight between the operator and tender or by electronic transmission between the operator and tender. As defined in proposed § 1926.1401, a ''tender'' is the individual responsible for monitoring and communicating with the diver. The Committee determined it was necessary to define tender since that person is critical to effective communication with the equipment operator during an operation with a diver. In this section, the diver tender is required to maintain effective communication with the equipment operator when the equipment is used to get the diver in and out of the water. The tender is the member of the dive team who closely monitors the diver's condition during the dive and checks the equipment prior to the dive. Therefore, the tender is able to let the operator know when a diver needs to be lifted out of the water or when other action by the crane is needed.

Proposed paragraph (j)(4) specifies that when using a crane/derrick to hoist a diver, the crane/derrick must be secured in such a way that there is no amount of shifting in any direction. The Committee determined that even a small shift of a crane/derrick on a barge can result in unintended movement that can injure the diver.

OSHA notes that proposed § 1926.1431, *Hoisting Personnel,* applies when a crane/derrick is used to hoist personnel. In most instances when personnel are hoisted, they must be located in a personnel platform that meets criteria specified in proposed § 1926.1431. However, proposed § 1926.1431(b)(2) contains exceptions to the need to use a personnel platform and one such exception, in § 1926.1431(b)(2)(iii), applies when an employer transfers an employee to or from a marine worksite in a marine hoisted personnel transfer device. Under the definition in proposed § 1926.1401, ''marine worksite'' includes a worksite in the water, so the exception to the requirement to use a personnel platform in proposed § 1926.1431(b)(2)(iii) would apply when a diver is hoisted into or out of the water in a marine hoisted personnel transfer device.

Paragraph 1437(k)

Proposed paragraph (k) would require the employer to adhere to the specifications and limitations established by the manufacturer of the barge, pontoon, vessel, or other means of flotation with respect to imposed environmental, operational, and in-transit loads. The purpose of this provision is to ensure that the equipment can operate safely under the forces imposed on it. The Committee believed that the manufacturer is in the best position to determine the maximum external loads the vessel/flotation device can withstand while maintaining the necessary stability and buoyancy and that the necessary protection would be provided by requiring employers to adhere to the manufacturer's specifications and limitations.

The text developed by C–DAC reads:

(k) The barge, pontoons, vessel or other means of flotation shall be capable of withstanding imposed environmental, operational and in-transit loads under conditions specified by its manufacturer.

Upon reviewing this language, OSHA believes it does not clearly convey C–DAC's intent to place a duty on the employer who uses the equipment to comply with the manufacturer's recommendations. The Agency has therefore modified this proposed paragraph to read:

(k) The employer shall ensure that the manufacturer's specifications and limitations with respect to environmental, operational, and in-transit loads for a barge, pontoon, vessel, or other means of flotation are not exceeded or violated.

OSHA requests public comment on this change.

Paragraph 1437(l) [*Reserved.*]

Paragraph (l) is reserved because it is inconvenient for readers to distinguish the letter ''l'' from the number ''1.''

Paragraph 1437(m) Floating Cranes/Derricks

Proposed paragraph (m) sets forth requirements with respect to load charts, rated capacity, allowable list, allowable trim, wind speed and related measures for floating cranes/derricks.

The requirements set forth in § 1926.1437(m)(1) through (5) address the various hazards which can contribute to instability of the vessel/flotation device and the effect of marine conditions that can lead to boom/equipment failure.

As defined in proposed § 1926.1401, a floating crane/derrick may be built either by a manufacturer or by the employer who uses the equipment. Both types would have to meet the criteria in

[85] The 1999 version of ASME B30.8 has since been superseded by a 2004 version. The list of items to be inspected in section 2.1 is the same in both versions.

proposed § 1926.1437(m)(1) through (3). These provisions are designed to prevent the crane/derrick portion of the equipment from failures due to overloading and to prevent capsizing.

Proposed paragraph (m)(1) would require that load charts applicable to operations on water not be exceeded. The employer would be required to comply with all the parameters and limitations that apply to proper application of the load charts. Additionally, § 1926.1437(m)(1)(ii) would require the load charts to account for a minimum wind speed of 40 mph.[86]

Proposed paragraph (m)(2) sets forth criteria (in Table M1 proposed § 1926.1437) for maximum allowed list and trim relative to rated capacity of the equipment.[87] Section 1926.1437(m)(3) sets forth two charts that would set stability criteria regarding certain specified conditions. The first chart (Table M2 of proposed § 1926.1437) contains the minimum requirements relative to stability with respect to wind speed and freeboard distance of the vessel/flotation device. The second chart (Table M3 of proposed § 1926.1437) addresses the backward stability of the boom.[88] In reviewing Table M2, the Agency realized that the term ''freeboard,'' which is used in the table, was not defined in the C–DAC document. OSHA requests public comment on an appropriate definition for this term.

Employer-made equipment is defined in proposed § 1926.1401 as ''equipment designed and built by an employer for its own use.'' In some cases, for example, an employer designs and custom-builds the equipment for a particular operation or worksite. The Committee therefore determined it was necessary to include criteria for employer-made equipment.

Under proposed paragraph (m)(4), employer-made equipment would have to meet the same criteria as those in proposed § 1926.1437(m)(1)–(3) for manufacturer-made equipment. In addition, an employer using equipment it builds would be required to have documents demonstrating that those criteria have been met. Such documents would have to be signed by a registered professional engineer who is a qualified person with respect to a design of the type involved.

C–DAC concluded that manufacturers have sufficient expertise with respect to the development of load charts, rated capacities and related operational limitations that there is no need for a documentation requirement for manufacturer-built floating cranes/derricks. However, the expertise in this regard of non-manufacturers can vary greatly. Because of the specialized knowledge and skill needed for this work, and the potentially catastrophic consequences if this work was not done correctly, C–DAC believed that this documentation requirement is needed to provide the same level of safety for employer-made equipment as manufactured equipment.

Proposed paragraph (m)(5) addresses structural and access requirements for the barge, pontoon, vessel or other means of flotation. These requirements are related to the stability of the vessel, including minimizing unintended movement while operating equipment and minimizing the likelihood of capsizing.

Proposed paragraph (m)(5)(i) would require that the vessel be structurally sufficient to withstand the stress of both static and dynamic loads of the crane/derrick when operating at the crane/derrick's maximum rated capacity with all anticipated deck loads and ballasted compartments. This is necessary to minimize the likelihood of the vessel's structure failing, which could result in unintended movement during equipment operations or drowning.

Proposed paragraph (m)(5)(ii) would require a subdivided hull with at least one longitudinal watertight bulkhead to reduce the free surface effect on the vessel. ''Free surface effect'' is defined in § 1926.1401 as the ''uncontrolled transverse movement of liquids in compartments which reduce a vessel's transverse stability.'' By reducing the free surface effect, subdividing the hull limits the influence of liquid movement on vessel stability and reduces the risk of the vessel capsizing.

Proposed paragraph (m)(5)(iii) would require void compartments to be accessible for inspection and pumping. This is needed to evaluate the amount of water in them so that the employer can determine the potential free surface effect on vessel stability and initiate pumping when necessary. As defined in § 1926.1401 of this proposed standard, ''stability (flotation device)'' means the tendency of a barge pontoon, vessel or other means of flotation to return to an upright position after having been inclined by an external force. Since the stability of the vessel is critical to the safe operation of equipment at a marine worksite, the Committee determined it necessary to clarify this term. The Agency determined it was appropriate to add the parenthetical ''(flotation device)'' to the term as the word stability in its more common usage occurs frequently throughout this proposed standard.

Paragraph 1437(n) Land Cranes/Derricks

Proposed paragraph (n) sets forth the requirements for land cranes/derricks when used on a barge, pontoons, vessel or other means of flotation. As noted above, ''land cranes/derricks'' are not originally designed for marine use but are addressed by this paragraph when they are mounted on a vessel/flotation device and used on water. The Committee determined that special requirements were needed to address the distinctive safety issues presented by the use of such equipment.

The stability of the vessel/flotation device is affected by the use of a land crane/derrick on board. The Committee determined that one of the primary causes of accidents for a land crane/derrick on a vessel is related to the crane/derrick not being properly secured to the vessel. This can result in the equipment sliding off the vessel or the vessel capsizing. Implementing a system that keeps the equipment properly located on the vessel is essential for maintaining stability.

In addition, land cranes/derricks have less capacity when on a vessel/flotation device than when on land. Consequently, the rated capacity must be adjusted for use on the vessel/flotation device. If not properly determined, the land crane/derrick may be overloaded, which can cause loss of stability (including tip-over) and boom/equipment failure.

Proposed paragraph (n)(1) sets forth the requirements for determining the rated capacity for land cranes/derricks used on a vessel/flotation device. Load charts for this equipment developed for use on land do not reflect the use of the equipment on a flotation device or the environmental conditions of a marine worksite. Therefore, under proposed § 1926.1437(n)(1)(i), the rated capacity (load charts) must be reduced for list, trim, wave action and wind.

In establishing the rated capacity for use on the vessel/flotation device, the capacity of the vessel/flotation device must also be considered. Since some locations on the vessel/flotation device will have less ability to support the crane/derrick than others, under proposed § 1926.1437(n)(1)(ii), the rated capacity would have to be applicable to a specified location (or specific locations) on the particular vessel/

[86] This is the same wind speed that section 8–1.2.2(c) of AMSE B30.8–2004, ''Floating Cranes and Floating Derricks,'' requires to be considered in establishing operating criteria for floating cranes.

[87] These criteria are the same as those in section 8–1.2.2(a) of ASME B30.8–2004.

[88] The criteria in Tables M2 and M3 are the same as those in section 8–1.2.2(b) of ASME B30.8–2004.

flotation device. This assessment would have to be made considering the expected environmental conditions.

Furthermore, the rated capacity would have to be designed to ensure that the maximum allowable list and trim for the vessel/flotation device, as required in proposed § 1926.1437(n)(3), would not be exceeded. Also, the rated capacity would have to be designed so that the conditions listed in proposed § 1926.1437(n)(4) would be maintained. If the rated capacity was not so designed, the operator could inadvertently cause these criteria to be violated.

Proposed paragraph (n)(2) would require that the modification to rated capacity required by proposed § 1926.1437(n)(1) of this section be prepared either by the manufacturer of the equipment or by a qualified person with expertise in both land crane/derrick capacity and stability of vessels/flotation devices. The Committee determined this was necessary to achieve equivalent operational safety conditions as for floating cranes/derricks.

In the SBREFA Panel Report, the Panel recommended that OSHA solicit comment on whether there are qualified persons in the field with expertise in both land crane/derrick capacity and stability of vessels/flotation devices with respect to this equipment performing duty cycle work. Additionally, the Panel recommended that OSHA solicit comment on the following: When cranes are solely used for duty cycle work: (1) Whether the requirements of proposed § 1926.1437(n)(2) are necessary for safety for equipment performing duty cycle work, (2) the safety justification for the requirement for equipment performing duty cycle work, and (3) a definition of ''duty cycle work.'' As recommended by the Panel, OSHA solicits public comment on these issues.

Proposed paragraph (n)(3) would set parameters for the maximum allowable list and trim for the vessel/flotation device and the land crane/derrick to help ensure the necessary vessel and crane/derrick stability and to help prevent the crane/derrick from exceeding its rated capacity.

The maximum list and trim for the vessel/flotation device may not exceed the least of the following: 5 degrees, the amount specified by the crane/derrick manufacturer, or the amount specified by a qualified person in the event an amount is not specified by the manufacturer.[89]

Under proposed paragraph (n)(4), when a land crane/derrick is used on a flotation device, all deck surfaces would have to be above water and the entire bottom area must be submerged. This is necessary to ensure a stable platform when operating the land crane/derrick, to protect against loads that would cause the system used to secure the land crane/derrick (see proposed § 1926.1437(n)(5)) to fail, and to protect against overloading the vessel/flotation device land/crane derrick.

Proposed paragraph (n)(5) sets forth four options for securing[90] the land crane/derrick on the vessel/flotation device. The Committee determined that providing several options would address the variety of work scenarios that are found in the industry. It also determined that each option would be effective in preventing the land crane/derrick from rolling, sliding or otherwise shifting away from its proper location. It is these horizontal movements that can cause the vessel/flotation device to be destabilized or cause the land crane/derrick to slide or fall into the water. Additionally, the Committee determined that an exception is appropriate for use of mobile auxiliary cranes on a vessel. The proposed requirements for this type of equipment are outlined in proposed § 1926.1437(n)(5)(vi).

Proposed paragraphs (n)(5)(i) through (iv) set forth the four options from which the employer must choose to secure the land crane/derrick to the vessel/flotation device. The options to prevent shifting of the equipment include direct physical attachment, corralling, a rail system or a centerline cable system. All of these options serve the purpose of preventing inadvertent movement of the equipment away from its proper location on the vessel/flotation device, which can result in harm to employees working nearby, the equipment sliding off the vessel, or capsizing the vessel.

Note that it is not the purpose of these options to prevent any portion of the land crane/derrick from pulling vertically up from the deck when handling loads beyond the land crane/derrick's rated capacity. Rather, their purpose is, as discussed above, to prevent horizontal rolling or shifting away from the land crane/derrick's proper location.

Proposed paragraph (n)(5)(v) would require that the option selected for securing the equipment on the vessel be designed by a marine engineer, a registered professional engineer familiar with floating crane/derrick design, or a qualified person familiar with floating crane/derrick design. The Committee determined that expertise in floating crane/derrick design was essential to design a securing system that would meet the selected option's requirements and prevent unintended movement of the equipment on the vessel.

Proposed paragraph (n)(5)(vi) would provide an exception under which, where the employer demonstrates that certain conditions have been met, mobile auxiliary cranes would not be required to be secured to a floating crane/derrick as outlined in proposed § 1926.1437(n)(5)(i) through (v) above.

The Committee determined that an exception to the application of these options would be appropriate in certain circumstances where a mobile crane travels on the deck of a floating crane/derrick. Typically the movement of the mobile crane on these vessels does not adversely affect the stability of the floating crane/derrick because of the large size, displacement and design of the floating crane/derrick. Also, because of the size and design of the floating crane/derrick, it is less susceptible to the effects of wind, waves, and other environmental forces than other vessels. The Committee concluded that where the employer can demonstrate that the criteria in proposed § 1926.1437(n)(5)(vi)(A) through (F) have been met, there would be adequate protection against unintended horizontal movement of the mobile crane while on the deck of a floating crane/derrick.

As indicated by the language of this proposed provision, the Committee concluded that it would not be appropriate to expand this exception beyond its application to mobile auxiliary cranes used on the deck of a floating crane/derrick. Therefore, in such other circumstances, even if the criteria in proposed § 1926.1437(n)(5)(vi)(A) through (F) were met, the employer would still have to use one of the four options in proposed § 1926.1437(n)(5)(i) through (iv).

Under proposed paragraph (n)(5)(vi)(A), a written plan that is

[89] This is similar to section 8–1.2.2(a)(3) of ASME B30.8–2004, which specifies that the list and trim shall be the lesser of 5 degrees or the maximum recommended by the manufacturer.

[90] In this preamble the Agency uses the term ''securing'' and ''secured'' to refer collectively to the systems described in Options (1)–(4) in proposed paragraphs § 1926.1437(n)(5)(i) through (iv). The Agency notes that this differs from the term ''positively secured'' in the current Subpart N in 29 CFR 1926.550(f)(1)(iv), which requires that ''mobile cranes on barges shall be positively secured.'' As OSHA has stated in letters of interpretation, the term ''positively secured'' in that Subpart N provision means ''physically attached''—similar to the type of system described in Option 1 of proposed paragraphs (n)(5)(i). (See OSHA's interpretation letter to Mr. Gary C. Hay, October 12, 2004. (OSHA–2007–0066–0014).

designed and signed by a marine engineer or a registered professional engineer familiar with floating crane/derrick design would be required. Because of the specialized knowledge and skill needed for this work, and the potentially catastrophic consequences if this work was not done correctly, C–DAC believed that this documentation requirement is needed to ensure safety.

Under proposed paragraph (n)(5)(vi)(B), this plan would have to be designed so that the applicable requirements of proposed § 1926.1437 will be met despite the position, travel, operation, and lack of physical attachment, corralling, use of rails or use of cable system of the mobile auxiliary crane. An example of one aspect of such a plan would be that it would have to be designed so that the vessel's stability was such that, while operating within specified dynamic/environmental conditions (see proposed § 1926.1437(n)(5)(vi)(E) and (F)), the movement of the vessel will not cause the mobile crane to shift horizontally or for the vessel's or mobile crane's maximum list and trim to be exceeded.

Under proposed paragraph (n)(5)(vi)(C), the plan would have to specify the areas of the deck where the mobile auxiliary crane is permitted to be positioned, travel, and operate. It would also have to specify the parameters (that is, limitations) of such movements and operation. For example, one aspect of the plan may be to specify that the mobile crane is permitted to move within one particular area without a load, and is permitted to handle a load only when in another particular area.

Under proposed paragraph (n)(5)(vi)(D), the employer would be required to mark the deck to identify the permitted areas for positioning, travel and operation of the mobile crane. This is necessary for the operator to be able to maneuver and operate the crane within the limitations identified in the plan.

Under proposed paragraph (n)(5)(vi)(E), the plan would have to specify the particular dynamic/environmental conditions that must be present for movement and operation of the mobile auxiliary crane on the vessel. Under proposed § 1926.1437(n)(5)(vi)(F), if the necessary dynamic/environmental conditions are not present, then the mobile auxiliary crane would be required to be secured according to one of the four options outlined in proposed § 1926.1437(n)(5)(i) through (iv). For example, the plan would have to address environmental conditions such as maximum amount of wind and wave action; if those were exceeded, the mobile crane would have to be secured using one of the four options.

In reviewing the C–DAC draft of proposed § 1926.1437(n)(5)(vi), the Agency realized that there is no explicit requirement that the employer implement the written plan. Therefore, OSHA has modified the introductory language of the proposed paragraph as follows:

> (vi) Exception. For mobile auxiliary cranes used on the deck of a floating crane/derrick, the requirement to use Option (1), Option (2), Option (3), or Option (4) of this section does not apply where the employer demonstrates implementation of a plan and procedures that meet the following requirements: * * *

Proposed paragraph (n)(6) contains requirements regarding the barge, pontoon, vessel or other means of flotation on which the land crane/derrick will be located. The requirements of proposed § 1926.1437(n)(6) are identical to those listed at proposed paragraph (m)(5) of this section. These requirements are related to the stability of the vessel and its structural ability to support the land crane/derrick. These proposed provisions are designed to help prevent unintended movement while operating equipment and to prevent capsizing. The Committee determined it is necessary to include these requirements to provide a safe, stable work environment.

Section 1438 Overhead and Gantry Cranes

Currently, specific requirements for overhead and gantry cranes are found in section 1926.550(d) of Subpart N. Section 1926.550(d)(4) incorporates by reference ANSI B30.2.0–1967, safety code for ''Overhead and Gantry Cranes.'' The general industry standard for overhead and gantry cranes, § 1910.179, is also derived from ANSI B30.2.0–1967. Therefore, the current requirements for overhead and gantry cranes are generally the same regardless of whether the equipment is used in general industry or construction.

As defined in proposed § 1926.1401, overhead and gantry cranes include overhead/bridge cranes, semigantry, cantilever gantry, wall cranes, storage bridge cranes, launching gantry cranes, and similar equipment, irrespective of whether it travels on tracks, wheels, or other means. The Committee developed this definition to reflect the wide range of this type of equipment that has been developed.

Overhead and gantry cranes are commonly found on general industry as well as construction worksites. Sometimes overhead and gantry cranes installed in general industry facilities are used for construction purposes (for example, the overhead/gantry crane in a factory is sometimes used when a part of the factory is being renovated). The Committee believed that applying the general industry standard for overhead and gantry cranes, § 1910.179, to the use of those cranes for construction work would reduce compliance burdens without jeopardizing employee protection.

The Committee proposal therefore distinguishes between permanently installed overhead and gantry cranes, which are primarily used in general industry, and those that are not permanently installed, which are primarily used in construction work. For the former, this proposed rule would apply the requirements of § 1910.179, the general industry standard. For the latter, the C–DAC proposal would apply specific provisions of both this standard and § 1910.179.

Paragraph 1438(a) Permanently Installed Overhead and Gantry Cranes

Proposed § 1926.1438(a)(1) establishes the scope of § 1926.1438(a). By its terms, § 1926.1438(a) would pertain to overhead and gantry cranes, including semigantry, cantilever gantry, wall cranes, storage bridge cranes, and others with fundamentally similar characteristics, when they are used in construction and are permanently installed in a facility.

Proposed paragraph (a)(2) would apply the requirements of § 1910.179 to the equipment listed in § 1926.1438(a)(1), with the exception of § 1910.179(b)(1). Section 1910.179(b)(1) sets forth the scope of the general industry standard as defined under 29 CFR Part 1910. It is excluded to avoid any confusion that might arise from having two separate scope provisions applicable to § 1926.1438(a).

Paragraph (a)(1) only applies to these cranes if they are used in construction and are permanently installed in a facility. This will typically be equipment that is used in general industry but may also be used for construction purposes. For example, a manufacturing plant that uses an overhead crane for lifting large components may use that same crane when adding a new room to the facility or changing its floorplan. Under the proposed provision, the requirements of § 1910.179 would apply to both uses.

Paragraph 1438(b) Overhead and Gantry Cranes That Are Not Permanently Installed in a Facility

Paragraph (b)(1) would provide the scope of § 1926.1438(b). By its terms,

§ 1926.1438(b) would pertain to overhead and gantry cranes, overhead/bridge cranes, semigantry, cantilever gantry, wall cranes, storage bridge cranes, launching gantry cranes, and similar equipment, when they are used in construction and are not permanently installed in a facility.

Proposed paragraph (b)(2) specifies which requirements would apply to the equipment identified in § 1926.1438(b)(1).

Proposed paragraph (b)(2)(i) would require overhead and gantry cranes not permanently installed in a facility to comply with §§ 1926.1400 through 1926.1414; 1926.1417 through 1926.1425; 1926.1426(d); 1926.1427 through 1926.1434; 1926.1437, 1926.1439, and 1926.1441 of this standard. Sections 1926.1435, 1926.1436 and 1926.1440, entitled Tower cranes, Derricks, and Sideboom cranes, respectively, would not be applicable because they pertain to different kinds of equipment. Sections 1926.1415, 1926.1416 and 1926.1426(a) through (c) would not apply because they refer to devices not used on overhead and gantry cranes.

Proposed paragraph (b)(2)(ii) would incorporate by reference several requirements from § 1910.179.

Proposed paragraph (b)(2)(ii)(A) specifies the portions of § 1910.179 that would be applicable to the equipment identified in § 1926.1438(b)(1). The Committee selected these requirements because each is a safety requirement that applies to this type of crane regardless of whether it is used in construction or general industry. Other than certain definitions (described below), these are the only provisions of § 1910.179 that would apply to the equipment identified in § 1926.1438(b)(1). These requirements are:

1910.179 (b)(5)—Rated load marking
1910.179 (b)(6)—Clearance from obstruction
1910.179 (b)(7)—Clearance between parallel cranes
1910.179(e)(1)—Trolley stops
1910.179(e)(3)—Trolley bumpers
1910.179(e)(5)—Guards for hoisting ropes
1910.179(e)(6)—Guards for moving parts
1910.179(f)(1)—Brakes for hoists
1910.179(f)(4)—Brakes for trolleys and bridges
1910.179(g)—Electric equipment
1910.179(h)(1)—Sheaves
1910.179(h)(3)—Equalizers
1910.179(k)—Testing
1910.179(n)—Handling the load

The C–DAC version of paragraph 1438(b)(2)(ii)(B) would have incorporated the definitions in § 1910.179(a) that do not differ from those in § 1926.1401 of this Subpart. Upon examining this provision, OSHA believes that it can be stated more clearly without changing its substance.

Only three terms are defined in both § 1926.1401 and § 1910.179: ''hoist,'' ''load,'' and ''runway.'' With respect to ''hoist'' and ''load,'' the definitions in § 1926.1401 and § 1910.179(a) are similar but worded differently. ''Hoist'' is defined in § 1926.1401 as ''a mechanical device for lifting and lowering loads by winding rope onto or off a drum.'' In § 1910.179, ''hoist'' is defined as ''an apparatus which may be part of a crane, exerting a force for lifting and lowering.'' ''Load'' is defined in § 1926.1401 as ''the object to be hoisted and the weight of the object being lifted or lowered, including the weight of the load-attaching equipment such as the load block, ropes, slings, shackles, and any other ancillary equipment.'' Section 1910.179 defines ''load'' as ''the total superimposed weight on the load block or hook.'' In both cases, the § 1926.1401 definition is clearer and more precise.

With respect to ''runway,'' the § 1926.1401 and § 1910.179 definitions address different subject matter. The definition in § 1926.1401 addresses the criteria for a ground surface used as a path of travel for a mobile crane traveling with a suspended personnel platform. The definition in § 1910.179 refers to the rails, beams, and other structural components along which an overhead or gantry crane travels. Because the § 1926.1401 definition of ''runway'' does not pertain to overhead and gantry cranes, the § 1910.179 definition should apply under this section.

The Agency believes it will be consistent with C–DAC's intent and promote clarity to modify proposed § 1926.1438(b)(2)(ii)(B) to list the definitions in § 1910.179(a) that do not apply to overhead and gantry cranes under proposed § 1926.1438(b). Accordingly, OSHA has changed that paragraph to read as follows:

(B) The definitions in § 1910.179(a) except for ''hoist'' and ''load.'' For those words, the definitions in § 1926.1401 apply.

Proposed paragraph (b)(2)(ii)(C) would limit the application of § 1910.179(b)(2) to equipment identified in proposed § 1926.1438(b)(1) that was manufactured before September 19, 2001. Section 1910.179(b)(2) requires cranes manufactured after August 31, 1971 to comply with the design specifications in American National Standard Safety Code for Overhead and Gantry Cranes, ANSI B30.2.0–1967. As discussed below, equipment manufactured after September 19, 2001 would have to comply with the updated provisions of ASME B30.2–2001. Proposed § 1926.1438(b)(2)(ii)(C) is a transitional provision covering equipment manufactured between August 31, 1971 and September 19, 2001.

Proposed paragraph (b)(2)(iii) would have incorporated several sections of the 2001 version of ASME B.30.2 into this section to update the Subpart N of 29 CFR part 1926 provision, § 1926.550(d), which incorporates ANSI B.30.2.0–1967. The Committee agreed that the 2001 version should be used because it is more comprehensive than the 1967 version and thus more conducive to safety. The sections referenced are:

ASME B30.2–2001

2–1.3.1—Foundations and Anchorages
2–1.3.2—Crane Runways
2–1.4.1—Welded Construction
2–1.6—Lubrication
2–1.7.2—Ladders and Stairways
2–1.8.2—Bridge Bumpers
2–1.9.1—Bridge Rail Sweeps
2–1.9.2—Trolley Rail Sweeps
2–1.11—Truck Frame Drop
2–1.12.2—Hoist Control Braking Means
2–1.13.7—Lifting Magnets
2–1.14.2—Drums
2–1.14.3—Ropes
2–1.14.5—Hooks
2–1.15—Warning Devices or Means for a Crane with a Power-Traveling Mechanism
2–2.2.2—Load Test
2–3.2.1.1—Planned Engineered Lifts
2–3.5—Crane Lockout/Tagout, except that in 2–3.5.1(b), ''29 CFR 1910.147,'' the OSHA general industry Lockout/Tagout standard, is substituted for ''ANSI Z244.1.''

When C–DAC drafted proposed paragraph (b)(2)(ii)(C), the current version of ASME B30.2 was the 2001 edition. That has since been superseded by a 2005 edition. OSHA notes that, in all material respects, the 2001 and 2005 versions of the provisions listed in proposed § 1926.1438(b)(2)(iii) are the same. Except for section 2–1.8.2, the 2001 and 2005 provisions are identical.

Section 2–1.8.2 contains a wording change that does not substantively alter that provision. The 2001 version of section 2–1.8.2 contains the following requirement, among others, for bridge bumpers: ''energy-absorbing (or -dissipating) capacity to stop the bridge when traveling with power off in either direction at a speed of at least 40% of rated load speed.'' In the 2005 version ''(or -dissipating)'' is changed to ''(or

energy-dissipating).'' This is clearly a clarification rather than a substantive change. Accordingly, OSHA has changed the reference in proposed § 1926.1438(b)(2)(iii) to refer to the 2005 version of ASME B30.2.

When employers engaged in construction work must lock or tag components of overhead and gantry cranes during maintenance and repair work, proposed § 1926.1438(b)(2)(iii) would require them to comply with OSHA's general industry lockout/tagout standard at § 1910.147 instead of the ANSI lockout/tagout standard (ANSI Z244.1) referenced in paragraph 2–3.5.1(b) of ASME B30.2–2005. The Committee believed that the OSHA general industry lockout/tagout standard would be more accessible and familiar to employers in the construction industry than the ANSI standard. Therefore, requiring compliance with the OSHA standard will promote compliance and, as a result, improve worker protection.

Section 1439 Dedicated Pile Drivers

The term ''dedicated pile driver'' is defined in § 1926.1401 as follows:

> [A] machine that is designed to function exclusively as a pile-driver. These machines typically have the ability to both hoist the material that will be pile-driven and to pile-drive that material.

As the definition above indicates, this section covers equipment that is designed to function exclusively as a pile driver. Unlike the other equipment covered by Subpart N, dedicated pile drivers are not designed primarily to hoist, lower, and horizontally move suspended loads. However, the Committee decided to include dedicated pile drivers in this standard because of similarities to cranes with respect to hazards and functions. For a complete discussion of the Committee's rationale for the inclusion of dedicated pile drivers within this standard, see the discussion above of proposed § 1926.1400, *Scope.*

As discussed below, most of the provisions of this standard apply to dedicated pile drivers, but this section includes certain provisions that accommodate unique characteristics of such equipment. In addition to the requirements established by this standard, pile driving equipment will continue to be covered by § 1926.603, *Pile driving equipment.*

Paragraph 1439(a)

This proposed paragraph would apply most of the provisions of this proposed standard to dedicated pile drivers. The provisions that would not apply, or would apply with some modification, are specified in proposed § 1926.1439(b) through (e) (discussed below).

Paragraph 1439(b)

Under this proposed provision, proposed § 1926.1416(d)(3), which requires that cranes manufactured after February 28, 1992, be equipped with anti-two-blocking devices, would not apply to dedicated pile drivers. A note to this paragraph in the C–DAC draft states that anti two-block devices are required under proposed § 1926.1431(d)(5)(iv) when hoisting personnel. This note misstates the requirement of proposed § 1926.1431(d)(5)(iv), which provides that an anti two-block device is not required when hoisting personnel in pile driving operations. OSHA is therefore deleting the note to avoid inconsistency and conform to C–DAC's intent.

As discussed above in relation to proposed § 1926.1416(d)(3), anti two-block devices are not required during pile driving operations because the heavy repetitive forces imposed on such devices during pile driving cause them to malfunction. However, because anti two-block protection is needed when hoisting personnel to prevent a sudden drop of a personnel platform should a two-block condition occur, the proposed rule specifies, in proposed § 1926.1431(p)(2), that when hoisting an employee in pile driving operations using a lattice boom crane, the employer clearly mark the cable (so that it can be easily seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter.

When using a telescopic boom crane, the employer must similarly clearly mark the cable (so that it can be easily seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, and use a spotter. As discussed above in relation to proposed § 1926.1416(d)(3)(i), marking the cable is not sufficient to prevent two-blocking when extending the boom of a telescopic boom crane. Other requirements that apply when hoisting personnel for pile driving operations are also listed in proposed § 1926.1431(p) and are discussed under that paragraph.

Paragraph 1439(c)

This provision would apply the requirements of proposed § 1926.1416(e)(4) (load weighing and similar devices) to dedicated pile drivers, except that only dedicated pile drivers manufactured more than one year after the effective date of this standard would be required to be equipped with load weighing or rated capacity devices. The purpose of requiring load-weighing and rated capacity devices would be to provide dedicated pile driver operators with a reliable load weight prior to each lift to prevent the equipment from being overloaded. The Committee believed that this phase-in period would be appropriate because there are some technical challenges with designing this type of equipment to work consistently and reliably on dedicated pile drivers.

The C–DAC draft would have required dedicated pile drivers manufactured after January 1, 2008 to be equipped with load weighing or rated capacity devices. As explained in the Introduction, OSHA has changed the January 1, 2008 date to ''more than one year after the effective date of this standard'' wherever that date appears in the C–DAC document. OSHA seeks public comment on the current availability of load-weighing or rated capacity devices for dedicated pile drivers and the related issue of whether a date other than one year after the effective date of this standard would be the appropriate date for requiring future dedicated pile drivers to be equipped with such devices.

Paragraph 1439(d)

Under this provision, the only aspects of proposed § 1926.1433 (Design, construction and testing) that would apply to dedicated pile drivers would be proposed § 1926.1433(e) and (f). In § 1926.1433, proposed § 1926.1433(a) through (d) apply to specific types of equipment other than dedicated pile drivers. By contrast, proposed § 1926.1433(e) and (f) would apply to equipment in general (see the explanation of proposed § 1926.1433 above).

Paragraph 1439(e)

This proposed paragraph would require pile driver operators to be qualified or certified pursuant to § 1926.1427. The Committee concluded that there was no reason to exclude dedicated pile drivers from the requirements of that section; in its view, the concerns underlying the need for § 1926.1427 (see the discussion of that proposed section above) are equally applicable to the operation of dedicated pile drivers.

Proposed '' 1926.1439(e) would modify the application of § 1926.1427 in one respect. Dedicated pile driver operators would have to have a qualification or certification applicable either to dedicated pile drivers or equipment that is most similar to dedicated pile drivers. This addresses a

concern of the Committee that there are relatively few dedicated pile drivers in use. As a result, even with the four year phase-in period provided under § 1926.1427, certification testing specific to dedicated pile drivers may be unavailable due to lack of market demand. Similarly, there may be a lack of auditors for auditing employer qualification programs for dedicated pile driver operators under proposed § 1926.1427(c).

However, most of the aspects involved in the safe operation of a dedicated pile driver are similar to those involved with operating equipment that performs the same function as a dedicated pile driver. For example, there is substantial similarity in the operation of a crane with a pile driving attachment and the operation of a dedicated pile driver. C–DAC believed that an operator who is qualified or certified to operate a crane with a pile driving attachment would have the knowledge and skill to operate a dedicated pile driver safely. C–DAC concluded that any lack of qualification or certification services specific to dedicated pile drivers would be alleviated by allowing qualification or certification on similar equipment.

Section 1440 Requirements for Sideboom Cranes

''Sideboom crane'' is defined in § 1926.1401 as ''a track-type or wheel-type tractor having a boom mounted on the side of the tractor, used for lifting, lowering, or transporting a load suspended on the load hook. The boom or hook can be lifted or lowered in a vertical direction only.''

This is the definition of ''side boom tractor'' in ASME B30.14–2004, ''Side Boom Tractors,'' which serves as the basis for most of the requirements of this proposed section. C–DAC included a definition of ''side boom tractor'' in its original draft that stated only that the term was synonymous with ''sideboom crane.'' However, this proposed section uses ''sideboom crane'' exclusively. To avoid any confusion that could be caused by the use of two different terms and to provide a meaningful definition of ''sideboom crane,'' OSHA has deleted the definition of ''side boom tractor'' from § 1926.1401 and substituted the above definition of ''sideboom crane.'' OSHA has also substituted ''sideboom crane'' for ''side boom tractor'' in § 1926.1400, *Scope.*

This proposed section identifies which of the other sections of the proposed standard would apply to this equipment and sets additional requirements. These more limited requirements for this equipment reflect the particular construction and more limited functions of sideboom cranes. For a discussion of the Committee's rationale for the inclusion of sideboom cranes within this standard, see the preamble of § 1400, *Scope.*

Paragraph 1440(a)

Proposed paragraph (a) states that the provisions of this standard apply with the exception of § 1926.1402 (Ground conditions), § 1926.1415 (Safety devices), § 1926.1416 (Operational aids), and § 1926.1427 (Operator qualification and certification). The Committee exempted sideboom cranes from the requirements of these four sections because the Committee believed that, in light of the limited capacity and relative simplicity of operation of sideboom cranes, these requirements would be unnecessary.

During the SBREFA process, one Small Entity Representative (SER) raised a question as to whether small sideboom cranes incapable of lifting above the height of a truck bed and with a capacity of not more than 6,000 pounds should be covered by the proposed rule. This SER felt that these small sideboom cranes should be exempted from the scope of this Subpart. In light of this suggestion, the SBREFA panel recommended that OSHA ask for public comment about the appropriateness of such an exemption for these small sideboom cranes. OSHA requests comments on this issue.

Paragraph 1440(b)

This proposed paragraph addresses the hazards posed by boom free fall (that is, ''live'' booms). For equipment other than sideboom cranes, as explained above in the discussion of proposed § 1926.1426 (Free fall and controlled load lowering), C–DAC determined that, in general, the use of such equipment with live booms needs to be prohibited. However, it also found that it would be appropriate to allow equipment manufactured before consensus standards had prohibited live booms to be used as long as certain limitations were applied. The prohibition in § 1926.1426 therefore applies to equipment manufactured from October 31, 1984 onwards. Equipment manufactured before that date with live booms may only be used where the specified limitations are met.[91]

C–DAC applied a similar approach to sideboom cranes in proposed § 1926.1440(b), which applies most of § 1926.1426 to sideboom cranes. The only difference is the cut-off date for the use of sideboom cranes with live booms. As explained above in the discussion of proposed § 1926.1426(a)(2), C–DAC concluded that, in light of the history of the ANSI B30.5 prohibition against live booms, most equipment covered by this proposed standard manufactured after October 31, 1984 does not have live booms. In contrast, the ANSI/ASME standards applicable to sideboom cranes (ANSI/ASME B30.14) have never prohibited live booms. As a result, C–DAC recognized that sideboom cranes with live booms continued to be manufactured after 1984.

Consequently, under proposed § 1926.1440(b), the cut-off date for using sideboom cranes with live booms is the effective date of this standard. Sideboom cranes in which the boom is designed to free fall that were manufactured prior to that date could continue to be used except under the circumstances specified in proposed § 1926.1426(a)(1).

Paragraph 1440(c)

As drafted by C–DAC, this proposed paragraph would have required that sideboom cranes meet certain requirements of ASME B30.14–1996 with addenda ASME B30.14a–1997, B30.14b–1999, and B30.14c –2001, ''Side Boom Tractors.'' Since the Committee completed its work, ASME has consolidated the requirements of the 1996 version with those in the supplements, and these are now found in ASME B30.14–2004. In that consolidation, ASME did not substantively change any of the provisions of those prior consensus standards. Accordingly, OSHA has modified the C–DAC paragraph to refer to the 2004 version of the ASME standard.

In deciding which sections of ASME B30.14 to incorporate in this section, the Committee was mindful that, as noted in the discussion of § 1926.1440(a), most provisions of this proposed standard apply to sideboom cranes. To avoid any duplication, conflicts or possible confusion, the Committee wanted to avoid incorporating provisions of the ASME standard that dealt with issues addressed by other provisions of this standard. The provisions of ASME B30.14 incorporated by the Committee through this section consist of requirements that are specific to sideboom cranes. The Committee believed that these ASME requirements

[91] Under proposed § 1926.1426(a)(2)(i), the use of cranes in which the boom is designed to free fall (live boom) is limited to situations where both of the following criteria are met: (1) none of the free fall prohibitions outlined in proposed § 1926.1426(a)(1) are present and § 1926.1426(a)(2) the equipment was manufactured prior to October 31, 1984.

are necessary and appropriate with respect to this equipment.

Paragraph 1440 (c)(i) through Paragraph (c)(viii). These proposed paragraphs set forth sections of ASME B30.14–2004 which would be incorporated by reference to apply to sideboom cranes. Those sections are section 14–1.1 (''Load Ratings''), section 14–1.3 (''Side Boom Tractor Travel''), section 14–1.5 (''Ropes and Reeving Accessories''), section 14–1.7.1 (''Booms''), section 14–1.7.2 (''General Requirements-Exhaust Gases''), section 14–1.7.3 (''General Requirements-Stabilizers [Wheel-Type Side Boom Tractors]''), section 14–1.7.4 (''General Requirements-Welded Construction''), and section 14–1.7.6 (''General requirements-Clutch and Brake Protection''). The Committee found that each of these would provide appropriate employee protection.

Paragraph 1440 (c)(9) through Paragraph (c)(12). These proposed paragraphs set forth sections of ASME B30.14–2004 which would be incorporated by reference to apply to sideboom cranes, but with some exceptions or with only certain paragraphs selected from a section. Those sections are section 14–2.2.2 (''Testing-Rated Load Test''), except that it applies only to equipment that has been modified or repaired; paragraph (a) of section 14–3.1.2 (''Operator Qualifications'') except that the phrase ''when required by law'' would be omitted; Paragraphs (e), (f)(1) through (4), (6), and (7), (h), and (i) of section 14–3.1.3 (Operating Practices), and paragraphs (j), (l),and (m) of section 14–3.2.3 (Moving the Load).

Section 1441 Requirements for Equipment with a Rated Hoisting/Lifting Capacity of 2,000 Pounds or Less

Proposed § 1926.1441 would establish requirements for equipment with a maximum-rated hoisting/lifting capacity of 2,000 pounds. Equipment in this category is inherently less hazardous than higher-capacity equipment for several reasons. First, the reduced mass of these loads makes them easier to manipulate. Second, the working radius of such equipment is very limited, which reduces the zone of danger involved. Third, the equipment itself is less complex to operate, which places fewer demands on the operator's ability to maneuver the equipment and the load safely.

Consequently, the Committee believed that not all of the requirements proposed for higher-capacity equipment should apply to this relatively light-duty equipment. For example, the Committee believed that the operator certification requirement of proposed § 1926.1427, which was developed with the complexities and hazards of heavy equipment in mind, should not apply to the low-capacity equipment addressed in this section. This proposed section identifies the sections of this proposal that the Committee believed need to apply to equipment with a capacity of 2,000 pounds or less and contains provisions that would apply specifically to this category of equipment.

Under the C–DAC document, this section would have applied to equipment with a ''manufacturer-rated'' hoisting/lifting capacity of 2,000 pounds or less. However, as discussed below, § 1926.1441(j) was intended to address equipment designed and built at the jobsite, rather than manufactured equipment. Changing the term ''manufacturer-rated'' in the title and regulatory text to ''rated'' will clarify that this section applies to both jobsite-built equipment and manufactured equipment. OSHA requests public comment on this change.

The 2,000 pound cutoff for this section corresponds to that found in a number of consensus standards. For example, the ANSI standards that are currently incorporated by reference into Subpart N (B30.2–1967 for overhead and gantry cranes; B30.5—1968 for crawler, locomotive and truck cranes; and B30.6–1969 for derricks) do not apply to equipment with a hoisting/lifting capacity of 2,000 pounds or less. ASME B30.5–2004 continues to exclude equipment whose capacity is 2,000 pounds or less.[92]

The requirements of 29 CFR part 1926 subpart N that do not incorporate consensus standards by reference apply regardless of the equipment's capacity, so equipment with a capacity of 2,000 pounds or less is currently subject to those requirements. The Committee believed that the requirements in proposed § 1926.1441 would be more appropriate for this category of equipment and would be adequate to protect employees.

In 2004, as discussed above, C–DAC found the 2,000 pound threshold for the application of this section, which is consistent with the 2004 ASME standard and prior ANSI standards, to be appropriate. The Agency is interested in information on whether there have been changes in technology or other considerations that would suggest a different threshold capacity for equipment covered by this proposed section. OSHA solicits public comment on this issue.

Paragraph (a)

Proposed paragraph (a) sets forth sections of the proposed standard that would apply, in their entirety, to equipment with a rated capacity of 2,000 pounds or less to the same extent that those sections would apply to that type of equipment with a rated load capacity in excess of 2,000 pounds. *Tower cranes* (§ 1926.1435), *Derricks* (§ 1926.1436), *Floating cranes & land cranes/derricks on barges* (§ 1926.1437), and *Overhead and gantry cranes* (§ 1926.1438) are included in the list and thus would be subject to uniform requirements regardless of rated capacity. The Committee determined that the hazards addressed by these sections apply irrespective of the equipment's rated capacity.

For example, the dangers associated with making electrical contact with a power line do not depend on the lifting capacity of the equipment, so C–DAC believed that proposed §§ 1926.1407 through 1926.1411 on power line safety should apply to all equipment regardless of rated capacity. Similarly, the proposed sections on *Scope* (§ 1926.1400), *Definitions* (§ 1926.1401), *Ground conditions* (§ 1926.1402), *Wire rope* (§§ 1926.1413 through 1926.1414), *Authority to stop operation* (§ 1926.1418), *Signals* (§§ 1926.1419 through 1926.1422), *Fall protection* (§ 1926.1423), *Free fall/controlled load lowering* (§ 1926.1426), *Multiple crane lifts* (§ 1926.1432), and *Equipment modifications* (§ 1926.1434) are listed and would apply to equipment with a rated capacity of 2,000 pounds or less to the same extent that those sections would apply to that type of equipment with a rated capacity in excess of 2,000 pounds.

The hazards addressed by the sections not listed in § 1926.1441(a) are dealt with in the remainder of this proposed section in a manner that takes into account the lower capacity of the equipment. The discussion below explains how the Committee believed those hazards should be addressed for the equipment covered by this section.

Note that proposed § 1926.1441(b) (discussed below) addresses assembly/disassembly, and identifies some sections and paragraphs elsewhere in the standard that are applicable to this category of equipment (it also provides other assembly/disassembly requirements tailored to this category).

[92] There are some consensus standards that do not have a capacity threshold. For example, the current ASME B30.6—2003 on overhead and gantry cranes no longer limit their application by hoisting/lifting capacity. Further, the current ASME standard for floating cranes and derricks (ASME B30.8—204) and for construction tower cranes (ASME B30.3—2004) similarly do not limit their application by hoisting/lifting capacity.

A note to this effect has been added to the regulatory text of proposed § 1926.1441(a), as follows:

Note: Under paragraph (b)(1) of this section, § 1926.1403 (Assembly/Disassembly—selection of manufacturer or employer procedures) and § 1926.1406 (Assembly/Disassembly—employer procedures) also apply.

Paragraph (b) Assembly/Disassembly

Paragraph (b)(1). This proposed paragraph identifies the provisions related to assembly and disassembly that would apply to equipment with rated capacities of 2,000 pounds or less. The Committee identified two applicable Sections: § 1926.1403 (Assembly/Disassembly—selection of manufacturer or employer procedures) and § 1926.1406 (Assembly/Disassembly—employer procedures). Sections 1926.1404 (Assembly/Disassembly—general requirements) and § 1926.1405 (Disassembly—additional requirements for disassembly of booms and jibs) were not included. The Committee believed that those comprehensive assembly/disassembly procedures are unnecessary for this category of equipment, which typically involves substantially less complexity.

Paragraph (b)(2) Components and Configuration

Paragraph (b)(2)(i). This proposed paragraph sets forth two options for selecting components and configuration of the equipment that affect capacity or safe operation. This paragraph, as well as the four paragraphs below, mirror § 1926.1404(m)(1), (m)(1)(i), (m)(1)(ii), (m)(2), and (n) of this subpart. See § 1926.1404(m) for further explanation of these provisions.

Paragraph (b)(2)(i)(A). This first option would allow employers to select and configure components of the equipment in accordance with the manufacturer instructions, recommendations, limitations, and specifications. Furthermore, when the manufacturer instructions are not available, this provision would require a registered professional engineer, familiar with the type of equipment involved, to approve, in writing, the selection and configuration of components.

Paragraph (b)(2)(i)(B). In this second option, employers would be able to select and configure components of the equipment in accordance with equipment modifications that meet the requirements of § 1926.1434 (Equipment modifications).

Paragraph (b)(2)(ii). Post-assembly inspection. This proposed paragraph would require employers to conduct an equipment inspection when assembly is complete in order to ensure compliance with § 1926.1441(b)(2)(i) above. The employer would be required to conduct such post-assembly inspections in a manner that complied with proposed § 1926.1412(c). The same requirement applies to higher-capacity equipment under proposed § 1926.1404(m)(2). Ensuring that the assembled equipment aligns with the manufacturer instructions, recommendations, limitations, and specifications, would prevent hazards from arising and ensure the safe operation of the equipment.

Paragraph (b)(3). Manufacturer prohibitions. This proposed paragraph would require employers to comply with applicable manufacturer prohibitions when using equipment with manufacturer-rated hoisting/lifting capacities of 2,000 pounds or less. The same requirement applies to higher-capacity equipment under proposed § 1926.1404(n). The Committee agreed on this provision because manufacturers' prohibitions are designed to prevent hazards that can arise with the use of their products.

Paragraph 1441(c) Operation—Procedures

Paragraph (c)(1). This proposed paragraph would require the employer to comply with all manufacturer procedures applicable to equipment operation, including equipment operation with attachments. The same requirement applies to higher-capacity equipment under proposed § 1926.1417(a). The Committee agreed on this provision because manufacturer procedures are designed to prevent hazards that can arise with the use of their products.

Paragraph (c)(2) Unavailable Operation Procedures[93]

Paragraph (c)(2)(i). In the event that manufacturer procedures are not available, this paragraph would require the employer to develop, and ensure compliance with, its own procedures necessary for the safe operation of the equipment and its attachments. This paragraph is designed so that safe operation procedures, whether they come from the manufacturer or an employer, are utilized.

Paragraph (c)(2)(ii). This proposed paragraph would require that when employers develop procedures as outlined in the previous paragraph, the procedures for the operational controls must be developed by a qualified person. The Committee concluded that, in light of the critical nature of the operational controls and the degree of expertise needed to develop safe procedures for their use, it is necessary that they be developed by a qualified person.

Paragraph (c)(2)(iii). When manufacturer procedures are unavailable, this proposed paragraph would require that operational procedures related to equipment capacity be developed and signed by a professional engineer familiar with the equipment. The Committee concluded that, in light of the critical nature of such procedures and the high degree of complexity needed to develop them, a registered professional engineer who is familiar with the equipment is needed for this task. In addition, for the same reasons as discussed with respect to proposed § 1926.1417(b)(3), the Committee concluded that it is necessary that they be signed by the engineer.

Paragraph (c)(3) Accessibility

Paragraph (c)(3)(i). This proposed paragraph would require employers to make the load chart available to the operator at the control station. The Committee intended this provision to help prevent cranes from being used to perform operations beyond their capacities. The Committee believed that the load chart must be readily available to crane operators since capacity varies according to a variety of factors addressed in such charts, including, for example, boom length, radius, boom angle, and equipment configuration.

A similar requirement applies to higher-capacity equipment under proposed § 1926.1417(c)(1). However, § 1926.1417(c)(1) requires that the load chart be available in the cab. Because the equipment covered by this section may not have a cab, this proposed paragraph requires the chart to be available at the control station.

Paragraph (c)(3)(ii). This proposed paragraph would require that procedures applicable to equipment operation, including recommended operating speeds, special hazard warnings, instructions, and the operator's manual, be readily available for use by the operator. The Committee intended operators to have easy access to these materials because that information is needed to operate the equipment safely. A similar requirement applies to higher-capacity equipment under proposed § 1926.1417(c)(1), but this provision omits the reference to ''the cab'' for reasons explained above with respect to proposed § 1926.1441(c)(3)(i).

[93] The requirement in this paragraph are the same as those that apply to higher-capacity equipment under proprosed § 1926.1417(b).

Paragraph (c)(3)(iii). Where rated capacities are available at the control station only in electronic form, and in the event that a failure makes the rated capacities inaccessible, this proposed paragraph would require that the operator immediately cease operations or follow safe shut-down procedures until the rated capacities become available again. The same requirement applies to higher capacity equipment under proposed § 1926.1417(c)(2). The Committee agreed that it is unsafe to continue to operate the equipment if the rated capacities are inaccessible to the operator.

Paragraph (d) Safety Devices and Operational Aids

Paragraph (d)(1). This proposed paragraph would require employers to maintain originally-equipped safety devices and operational aids in accordance with manufacturer procedures. The Committee believed that the full range of safety devices and operational aids required by proposed §§ 1926.1415 and § 1926.1416 were generally not needed for this relatively low-capacity equipment to operate safely.

However, C–DAC also concluded that if the manufacturer included such devices or aids, it is probable that the manufacturer's design relies on them working properly for the equipment to operate safely. Therefore, it is appropriate for the standard to require them to be maintained in accordance with the manufacturer's procedures.

Paragraph (d)(2). Anti two-blocking By its terms, this proposed paragraph would require that equipment covered by this section that is manufactured more than one year after the effective date of this standard be either equipped with an anti-two block device that would meet the requirements of proposed § 1926.1416(d)(3) or be designed so that no damage or load failure would occur in the event of a two-block situation.

The provision identifies an example of equipment designed to prevent equipment damage load failure—where the power unit of the machine stalls in the event of a two-block situation. In such a case, the power unit does not have sufficient power to cause the load to fail or to damage the equipment. Instead, when the two-block occurs, the power unit simply stalls out.

The purpose of this paragraph is to prevent equipment damage and/or failure stemming from contact between a component on the hoist line and the boom tip, which occurs during a two-block. Such contact can lead to a damaged or severed load line, as well as other types of equipment failure.

The Committee agreed to provide employers with discretion to choose between two options for eliminating two-block hazards. The first option is designed to prevent a two-block from occurring. The second option is designed to prevent equipment damage and load failure in the event of a two-block. The Committee believed that each option would, for this category of equipment, be equally protective of employee safety.

As discussed under proposed § 1926.1416, *Operational aids*, the Committee believed that anti two-block devices should be required on higher-capacity cranes manufactured after the date that ANSI/ASME B30.5 began to require them. Consequently, proposed § 1926.1416(d)(3) states that telescopic boom cranes and lattice boom cranes manufactured after February 28, 1992 are required to have an anti two-block device. However, none of the various versions of ANSI/ASME B30.5 has applied to equipment with a capacity under 2,000 pounds. C–DAC believed that it would be inappropriate to apply this requirement to equipment manufactured before either a voluntary consensus standard or federal requirement has been in place. Therefore, proposed § 1926.1441(d)(2) would only apply to equipment manufactured more than one year after the effective date of this standard.

As discussed above, an anti two-block device used to comply with proposed 1926.1441(d)(2) must meet the requirements for such devices in proposed § 1926.1416(d)(3). Proposed § 1926.1416(d)(3) addresses two types of anti two-block devices: The warning type and the automatic prevention type (these are explained above in the discussion of proposed § 1926.1416(d)(3)). The type required depends on the type of crane and the date of manufacture. However, the automatic prevention type is required on all equipment manufactured more than one year after the effective date of this standard. Since proposed § 1926.1441(d)(2) only applies to equipment with a capacity of 2,000 pounds or less manufactured more than one year after the effective date of the standard, an anti two-block device on such equipment would need to be the automatic prevention type.

Note that, under proposed § 1926.1441(d)(1) (discussed above), equipment of 2,000 pounds or less capacity manufactured prior to the standard's effective date, if manufactured with an anti-two-block device, would be required to have that device properly maintained. For further discussion of anti-two-blocking devices, see the explanation in proposed § 1926.1416, *Operational aids*.

Paragraph (e) Operator Qualifications

This proposed paragraph would require that, before operating equipment, the operator is trained on the safe operation of the type of equipment the operator will be using. The Committee believed that familiarizing operators with safe operation techniques would help minimize operator error and thereby reduce the likelihood of accidents and injuries. However, the Committee concluded that the operator certification/qualification procedures that would be required for higher capacity equipment under proposed § 1926.1427 was not needed for this lighter and less complicated equipment.

Paragraph 1441(f) Signal Person Qualifications

This proposed paragraph would require employers to ensure that signal persons are trained in the proper use of signals applicable to the use of equipment with a rated capacity of 2,000 pounds or less. Though the equipment covered by this section has limited capacity, in some circumstances its safe operation depends on signals given by a signal person. In that event, this paragraph would ensure that communication between the crane operator and the signal person is clear and effective.

However, the Committee concluded that the comprehensive signal person qualification procedures that would be required for higher capacity equipment under proposed § 1428 were not needed for this equipment.

Paragraph 1441(g) Keeping Clear of the Load

This proposed paragraph states that proposed § 1926.1425 is applicable to equipment with a rated capacity of 2,000 pounds or less, with the exception of proposed § 1926.1425(c)(3). Proposed § 1926.1425(c)(3) would require materials to be rigged by a qualified rigger. The Committee believed that, in light of the limited capacity of this equipment, it was unnecessary to require a qualified rigger.

Paragraph 1441(h) Inspections

The general provision on inspections, § 1926.1412, would not apply to this equipment. Instead, this proposed paragraph would require that the equipment be inspected pursuant to the manufacturer's procedures. The Committee believed that inspections

pursuant to manufacturers' procedures would be sufficient to detect conditions that could lead to equipment failure because manufacturers typically recommend procedures that are designed to prevent hazards that can arise with the use of their products. The Committee concluded that the comprehensive inspection procedures that would be required for higher capacity equipment under proposed § 1926.1412 were not needed for this lighter and less complicated equipment.

Paragraph 1441(i) [Reserved.]

This paragraph is reserved because it is inconvenient for the reader to determine whether (i) is used as a letter or a Roman numeral.

Paragraph 1441(j) Hoisting Personnel

This proposed paragraph would prohibit the practice of using equipment with manufacturer-rated load capacities of 2,000 pounds or less to hoist personnel. The Committee believed that this equipment is inherently unsuited to lifting personnel safely due to its low capacity and typically light construction.

Paragraph 1441(k) Design

This proposed paragraph would require that the equipment be designed by a qualified engineer. The Committee was concerned that some employers may design and construct equipment in this category themselves, rather than using equipment built by a manufacturer. This provision is intended to ensure that the design of such equipment would be sufficient from a safety standpoint.

V. Procedural Determinations

A. Legal Authority

The purpose of the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.* (''the Act''), is ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards, 655(b) (authorizing promulgation of standards pursuant to notice and comment), 654(b) (requiring employers to comply with OSHA standards)).

A safety or health standard is a standard ''which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment'' (29 U.S.C. 652(8)).

A safety standard is reasonably necessary or appropriate within the meaning of Section 652(8) if it substantially reduces or eliminates significant risk, is economically and technologically feasible, is cost effective, is consistent with or is a justified departure from prior Agency action, is supported by substantial evidence, and is better able to effectuate the Act's purposes than a relevant national consensus standard.

A standard is technologically feasible if the protective measures it requires already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be expected to be developed. *American Textile Mfrs. Institute v. OSHA*, 452 U.S. 490, 513 (1981) (''ATMI''); *AISI v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991) (''AISI'').

A standard is economically feasible if industry can absorb or pass on the costs of compliance without threatening its long-term profitability or competitive structure. See *ATMI*, 452 U.S. at 530 n. 55; *AISI*, 939 F.2d at 980. A standard is cost effective if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection. *ATMI*, 453 U.S. at 514 n. 32; *International Union, UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994) (''LOTO III'').

Section 6(b)(7) authorizes OSHA to include among a standard's requirements labeling, monitoring, medical testing and other information gathering and transmittal provisions. 29 U.S.C. 655(b)(7).

Safety standards must be highly protective. See 58 FR at 16614–16615; *LOTO III*, 37 F.3d at 669. Finally, whenever practical, standards shall ''be expressed in terms of objective criteria and of the performance desired.'' *Id.*

B. Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis

Summary

Affected Industries

The proposal would affect employers and employees in a variety of different construction industries in which cranes and derricks are used as part of the performance of work duties. These industries include firms involved in renting cranes for use in construction projects such as: Multi-family housing; industrial buildings and warehouses; other nonresidential buildings; highway and street construction; and water, sewer, power, and communication line construction. For purposes of this preliminary economic analysis (PEA), the Agency has grouped affected establishments, by industry, into the following categories:

- Crane Rental with Operators,
- Crane Rental without Operators,
- Own and Rent Cranes with Operators,
- Own but Do Not Rent, and
- Crane Lessees in the Construction Industry (or referred to simply as just ''Crane Lessees'' throughout this preliminary economic analysis).

The full industrial profile of affected firms and establishments, including information on number of employees, revenues, and profits, is presented below in section 3 with data on affected employers presented in Table B–2.

Benefits

The proposed standard addressing construction work involving cranes and derricks is expected to reduce accidents, fatalities, and injuries in the construction industry. The Agency estimates that 53 fatalities and 155 injuries would be avoided annually from compliance with the provisions of the proposed standard. Applying an average monetary value of $50,000 per prevented injury and a value of $7.5 million per prevented fatality, the Agency estimates the monetized benefit at about $406 million annually. The Agency believes that affected employers and employees will also benefit from the additional clarity of the revised standards as well as their comprehensiveness. Table B–1 provides a summary of the benefits, costs, and net benefits of the proposed standard. Net benefits are estimated to be $283 million annually.

TABLE B–1—ANNUAL BENEFITS, COSTS, AND NET BENEFITS

Annualized Costs	
Crane Assembly/Disassembly	$33.5 million.
Power Line Safety	30.8 million.
Crane Inspections	21.6 million.

TABLE B–1—ANNUAL BENEFITS, COSTS, AND NET BENEFITS—Continued

Operator Qualification and Certification	37.3 million.
Total Annual Costs	123.2 million.
Annual Benefits	
Number of Injuries Prevented	155
Number of Fatalities Prevented	53
Total Monetized Benefits	$406 million.
Annual Net Benefits (Benefits Minus Costs)	$283 million.

Source: OSHA Office of Regulatory Analysis.
Benefits base year 2006; costs based on wages in BLS Employment and Earnings 2004.

Compliance Costs

The estimated compliance costs for this proposed standard represent the additional resources necessary for employers to achieve full compliance. The Agency believes provisions in four areas of the proposed standard will generate the largest costs for employers: Crane assembly/disassembly; power-line safety; inspections; and operator qualification and certification. Estimated costs do not include costs when employers are already complying with the new requirements of the proposed standard. The total annualized costs of compliance with the proposed standard are estimated to be about $123 million.

OSHA solicits comments from the public regarding the ranges of cost and benefits calculated in the economic analysis.

Economic Impacts

To assess the economic impacts associated with the proposed rule, OSHA compared the estimated employer costs with employer revenues and profits. The costs of compliance with the proposed rule are not large in relation to the corresponding annual financial flows. The economic impacts are presented in Table B–13. At most, the estimated costs of compliance represent about 0.3 percent (less than 1 percent) of revenues for each affected industry. Alternatively, the estimated compliance costs also represent less than 1 percent of profits, for the average establishment among the affected industries.

The impact of the proposal measured by the ratio of costs to profits varies across the affected sectors. Among the industries in the Crane Lessees (in the construction industry) sector, which includes about 142,500 of the 164,500 affected establishments, average employers are expected to have costs that represent much less than 1 percent of profits. Within the sector of employers which Own but Do Not Rent, affected establishments in 11 of the 30 industry sectors have average costs as high as a few percent of profits (from 2 to 6 percent).

The economic impact of the proposed rulemaking is most likely to consist of a small increase in prices for affected construction projects—less than 0.3 percent, on average. (Note that costs/impacts will be far less for the construction industry in its entirety, which consists of over 700,000 establishments and over $1 trillion in revenue.) It is unlikely that a price increase of this magnitude will significantly alter the amount of construction goods demanded. If the compliance costs of the proposed rule can be substantially recouped with a minimal increase in prices, there will be little effect on profits.

OSHA concludes preliminarily that compliance with the requirements of the proposed rulemaking is economically feasible in every affected industry sector. In addition, based on an analysis of the costs and economic impacts associated with this rulemaking, OSHA preliminarily concludes that the effects of the proposed standard on international trade, employment, wages, and economic growth for the United States would be negligible.

Initial Regulatory Flexibility Analysis

OSHA has analyzed the impact of the proposed rule on small entities and has prepared an Initial Regulatory Flexibility Analysis (IRFA) (in section 8, below), describing the potential effects on small entities. The IRFA includes a discussion of the Small Business Advocacy Review Panel (SBARP) process that has been completed for this proposed standard. The SBARP process provided small businesses the opportunity to comment on a draft of the proposed standard and on the corresponding economic analysis. The SBARP subsequently submitted a report to OSHA which summarized these comments and made specific findings and recommendations regarding the draft proposed standard. The Panel's recommendations are presented in section 8 of this PEA. Table B–15 presents the impacts on small entities. Costs as a percent of revenues range from 0.01 to 0.26 percent (less than 1 percent); costs as a percent of profit range from 0.03 to 6.6 percent.

1. Introduction

The Occupational Safety and Health Act of 1970 (OSH Act) requires OSHA to demonstrate the technological and economic feasibility of its rules. Executive Order (E.O.) 12866 and the Regulatory Flexibility Act (RFA), as amended in 1996, require federal agencies to analyze the costs, benefits, and other consequences and impacts, including small business impacts, of their rules. Consistent with these requirements, OSHA has prepared a Preliminary Economic Analysis (PEA) and an Initial Regulatory Flexibility Analysis to accompany this proposal. The proposal on cranes and derricks in construction will increase the protection of construction workers from hazardous working conditions in and around cranes.

It has been determined that this is an economically significant action under E.O. 12866 and a major rule under the Small Business Regulatory Enforcement Fairness Act (SBREFA). In addition, as required by the RFA, the Agency has assessed the potential impacts of this proposal on small entities and has prepared an Initial Regulatory Flexibility Analysis. This rule is not a significant federal intergovernmental mandate, and the Agency has no obligations to conduct analyses of this rule under the Unfunded Mandates Reform Act of 1995. Because this proposed rule would have costs of over $100 million in any given year, this proposed rule would establish a federal mandate for the private sector. The analysis presented for compliance under E. O. 12866 also serves as the UMRA analysis.

The purpose of this analysis is to identify the establishments and

industries affected by the rule; evaluate its costs, benefits, and economic impacts; assess the technological and economic feasibility of the proposal for affected industries; and evaluate the appropriateness of regulatory non-regulatory alternatives to the rule.

This PEA has been developed according to the requirements of the E.O. 12866 and the OSH Act. In addition, in accordance with the RFA as amended by the SBREFA, this analysis identifies and estimates the impacts of the proposal on small businesses, using the Small Business Administration's (SBA's) industry-specific definitions of small businesses. In addition, OSHA assessed the impacts of the rule on very small businesses, i.e., those with fewer than 20 employees.

Methodology

The Agency's occupational safety and health standards are required to be ''reasonably necessary or appropriate'':

(8) The term ''occupational safety and health standard'' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

E.O. 12866 further defines appropriate regulatory goals and how regulations should be analyzed, and pursuant to the E.O. OSHA develops an economic analysis to estimate benefits and costs. A comparison of estimated benefits and costs from the economic analysis further addresses whether an occupational standard is reasonably necessary. Since 2002, under the direction of the Office and Management and Budget, the Agency has also provided a ''monetized'' value of benefits for avoided injuries, illnesses, and fatalities from its standards, which permits comparison of benefits and costs where required.

For all significant occupational safety and health standards, OSHA derives estimates of benefits and costs as annualized values, as the Agency believes these are the simplest and most understandable ways to weigh and assess the impact of its standards. Computing annualized estimates focuses Agency analysis on information from current conditions and recent years which the Agency deems the best information—most accurate and reliable—to analyze a standard's impact on employers and employees. OSHA typically uses a time period of ten years for its analysis, unless there are significant long-term effects not captured within a ten-year time frame. In this case, adding additional years to the time frame of the analysis would not change any major conclusions.

To isolate and describe only the effects of a new standard, the Agency carefully distinguishes, for both benefits and costs, the change induced by the new standard without regard to compliance with existing standards. So, when injuries or fatalities have occurred because existing standards were not adhered to, the Agency neither counts such avoidable accidents as a benefit of the proposed new standard nor includes as an additional cost meeting existing occupational standards. This analysis assumes that all costs are incurred in the first year following the promulgation of the final standard and that benefits result immediately, although some costs will actually likely be incurred over a longer horizon since the standard has phase-in periods for some provisions.

The Agency employs a ''willingness to pay'' (WTP) approach in estimating benefits. This is a two-step process in which, for the cranes and derricks' proposal, the past 10 years of accident reports were studied to estimate the number of fatalities and injuries, and also the number that would be avoided by full compliance with the proposed standard. Secondly, the Agency uses values from the WTP approach to produce a monetary value of benefits. The WTP approach applied by many economic studies estimates the ''value of a statistical life'' (VSL) based on data collected about job risks and the ''risk premium'' in wages that is paid to employees in riskier jobs. The VSL is used as a metric by many government regulatory authorities, such as National Highway Traffic Safety Administration and the Environmental Protection Agency, but is particularly appropriate for occupational standards since it is derived from occupational risks and wages.

The Agency's calculation of estimates for benefits and costs, summarized and compared in the tables on net benefits, is implicitly one that looks at society as a whole. Estimated costs are borne by all affected employers while benefits from the WTP approach are market-derived estimates of employees' valuation of job risk and reward (economic feasibility, discussed in section 7 below focuses on employer and industry economic impacts without regard to benefits). The VSL represents to some extent the employees' value of taking on additional job risks and describes the value to employees of avoiding fatality and injury. The monetary value of an (avoided) injury from the WTP approach is based on survey results. Summing together estimates of costs and benefits that impact different parts of society is an approach that is considered (by economists) to represent the welfare of society as a whole.

The primary alternative to a WTP approach is a cost of injury (COI) approach. A COI approach estimates such factors as medical costs for injuries, the costs of work disruption from accidents and accident investigations, indirect costs to employers (absenteeism and hiring costs, for example), lost wages or job opportunities to employees, rehabilitation, and many other potential sources of costs to all parties. The COI approach results in ascribing costs and benefits to many involved entities: The employer, the employee, workers' compensation programs, medical insurance, federal disability programs, and government/taxpayers, for example. A COI approach does not capture a value for loss of life, pain and suffering, impacts on families, and similar parameters, and for that reason the Agency believes that the VSL better represents a monetary value that is consistent with the purposes of the OSH Act, placing great value on workers' health and lives.

The remainder of this part of the preamble is organized as follows:

2. Identification of Market Failure and Need for Regulation
3. Industry Profile
4. Benefits and Net Benefits
5. Technological Feasibility
6. Costs of Compliance
7. Economic Feasibility and Impacts
8. Initial Regulatory Flexibility Analysis
9. References

2. Identification of Market Failure and Need for Regulation

The justification for imposing appropriate occupational safety and health standards generally, and for adopting this change to the cranes and derricks standard in particular, is that without these requirements, fatality and injury risks to employees would remain unacceptably high. Workplace risks and resulting injuries and costs would be too high from a moral- and social-preference perspective, as determined by Congress through the passage of the Occupational Safety and Health Act. In addition, risks would be too high in terms of imposing large net costs (both pecuniary and non-pecuniary) on society, producing an inefficient allocation of resources, and reducing overall social welfare.

''Market failure'' is a term used by economists to describe when the allocation of goods and services by a market is not efficient, in the sense that it is possible for at least one person to be made better off without making anyone else worse off (termed ''Pareto

efficiency''). One common cause of market failure is that the person responsible for a decision does not bear the full costs or consequences of that decision. When this occurs, the person responsible for the decision will not fully consider all of the costs involved, and, as a result, may arrive at an inappropriate decision. In the case of occupational injuries, the employer has the primary decision-making responsibility, and does not, in fact, bear the full costs of occupational injuries. As a result, employers will tend to allocate less to occupational safety than would be efficient if all costs of occupational injuries were considered.

Who bears the costs of an employee injury, which include loss of income, medical care costs, the non-monetary burdens the injury imposes, and other outcomes? Some of these costs, particularly medical costs and a portion of income loss, are paid for through workers' compensation. While some employers self insure, and pay the workers' compensation costs directly, the overwhelming majority of employers purchase (and are required to purchase) workers' compensation insurance. Thus, in most cases, employers do not directly pay for workers' compensation to the injured worker. The remainder of the costs of the injury is normally borne by the employee, though some of the costs may be borne by the government in the form of welfare. (In almost all states, workers' compensation is an exclusive remedy, meaning that an employee may not sue his employer for a work-related injury.)

In principle, both employees and insurers could contract with employers for payment in advance for the risks incurred. Insurers charge premiums for their insurance. Workers could, in theory, demand increased pay for increased risk, and there is evidence that workers do demand increased pay for more dangerous occupations, work in more dangerous industries, and exposure to well known hazardous substances. In this situation, there is not an externality, where an externality is defined as damage to an outside party who is not party to a market agreement. There are, however, several informational and institutional problems that prevent an ideal set of payments for risks incurred.

The first requirement for reasonable valuation of risk in transfers of risk between parties is that the risk be known. Further, for the estimate of risk to affect the behavior of employers, it is necessary that employees and insurers be able to differentiate the risk among different employers, not just be able to assess the risk across all employers in an industry. In the case of relatively rare accidents such as serious crane accidents, this is quite difficult to do. As a result, simply looking at the past record will not provide much useful information concerning relative risk among employers. The employers themselves may be equally uncertain about the risks associated with their practices.

Even if such information on past performance were available, there is no guarantee that future performance will be identical to past performance. Different management or even the same management (with different objectives, financial performance or schedule) may do things differently than they have in past. Further, once the risk has been transferred by contract to employees and insurers, the employer has reduced incentives to maintain a low level of risk. This phenomenon is a constant problem in insurance, where it is known as a moral hazard—the tendency of the insured to act with less care as a result of having insurance. As a result, the only way for an insurance company to estimate the risk of crane accidents for a specific employer is through monitoring actual employer practices that affect crane safety—an expensive method of obtaining information and one that insurance companies do not perform, the Agency concludes. In addition, workers' compensation insurance uses, and, in most states is required by law to use, an experience rating system. Experience rating ties the quoted premium closely to a combination of all similar occupations in all firms and the individual firm's actual record over the previous three years. For very small firms, this means that, in practice, the individual firm's record has no impact on their insurance premium. Even quite large firms pay, through insurance premium increases, less than the full costs of accidents. Further, the use of experience rating makes it difficult for insurers to make use of information from monitoring and inspection of safety practices, even if they had such information.

Employees also have problems obtaining and using this information. First, employees may simply be unacquainted with safe practices—as these are commonly taught by employers. (One effect of the proposed standard's requirement for crane operator certification is to assure that crane operators will be acquainted with rules for crane safety, and have the appropriate skills to apply them.) Second, information on safety is commonly not available before taking a job. Third, wages are sometimes determined by industry contracts, with no room for added risk premiums for individual employers. Finally, there are significant costs in many cases to leaving a job, which means that even if the employee realizes a job is less safe than some other available jobs, the employee may be reluctant to leave the job.

In summary, the market failure in job safety is that employers commonly transfer the costs of job safety to other parties, and a combination of informational and institutional constraints prevents the costs of the transfer from actually reflecting the risk to the individual employer—instead employers pay to transfer the risk at a cost closer to the average costs for the occupation rather than their own costs reflecting their own risks. As result, employers do not pay the full costs if they have above average risks or poor safety practices. Under these circumstances, the need for regulation is established by the significant risk presented by crane and derrick operations (see section 4).

3. Industrial Profile

The proposed standard would affect establishments across a variety of different construction industries with work involving cranes and derricks. Table B–2 presents data on the numbers of affected firms, establishments, employees, and average establishment revenues and profits. The Agency sorted establishments, by industry, into five sectors according to their crane or equipment activities, as follows:

- Crane Rental with Operators,
- Crane Rental without Operators,
- Own and Rent Cranes with Operators,
- Own but Do Not Rent, and
- Crane Lessees in the Construction Industry (or just ''Crane Lessees'').

TABLE B–2—INDUSTRIAL PROFILE OF AFFECTED FIRMS AND ESTABLISHMENTS FOR THE PROPOSED STANDARD

NAIC/Industry	Affected			Profit rate (percent)	Average per estab.	
	Firms	Estabs.	Employees		Revenues ($1,000)	Profits ($1,000)
Crane Rental with Operators:						
238990 All Other Specialty Trade Cont	1,183	1,240	16,244	4.10	$1,918	$79
Crane Rental without Operators (Bare Rentals):						
532412 Const./Min./For. Machine & Equip	2,137	4,631	50,409	4.00	3,289	132
Own and Rent Cranes with Operators:						
236115 New Single-Family Housing Const	168	168	261	4.41	233	10
236118 Residential Remodelers	21	21	45	4.41	528	23
236210 Industrial Building Construction	8	10	1,067	4.41	14,656	646
236220 Commercial and Institutional Building	21	28	757	4.41	4,603	203
237110 Water and Sewer Line and Related Struct	47	62	1,432	4.65	4,570	213
237120 Oil and Gas Pipeline and Related Struct	16	21	1,457	4.65	6,822	317
237130 Power and Communication Line and Rel	36	36	666	4.65	2,720	126
237310 Highway, Street, and Bridge Construction	76	101	6,456	4.65	12,483	580
237990 Other Heavy and Civil Engineering Const	143	191	5,857	4.65	5,394	251
238110 Poured Concrete Foundation and Struct	263	263	4,328	4.65	2,256	105
238120 Structural Steel and Precast Concrete	239	319	7,389	4.65	2,868	133
238130 Framing Contractors	20	20	120	3.90	200	8
238150 Glass and Glazing Contractors	41	41	328	3.90	631	25
238170 Siding Contractors	3	3	18	3.90	827	32
238190 Other Foundation, Structure, and Building	26	35	1,145	3.90	2,802	109
238210 Electrical Contractors	12	12	176	3.90	1,629	63
238220 Plumbing, Heating, and Air-Conditioning	2	3	196	3.90	5,835	227
238290 Other Building Equipment Contractors	104	138	4,076	3.90	3,801	148
238320 Painting and Wall Covering Contract	20	20	159	3.90	962	37
238910 Site Preparation Contractors	311	311	4,706	3.90	2,146	84
Subtotal	1,576	1,803	40,639			
Own but Do Not Rent:						
236115 New Single family housing construction	2,915	2,915	13,621	4.41	1,057	47
236116 New Multifamily housing construction	220	220	2,219	4.41	3,792	167
236117 New housing operative builders	1,302	1,302	12,015	4.41	5,338	235
236118 Residential Remodelers	827	827	3,201	4.41	544	24
236210 Industrial building construction	235	277	9,359	4.41	6,132	270
236220 Commercial and Institutional Bldg. Const	3,718	3,718	71,536	4.41	6,479	286
237110 Water and Sewer Line Const	922	1,230	20,306	4.65	2,630	122
237120 Oil and gas pipeline construction	104	138	9,277	4.65	8,167	380
237130 Power and communication line const	225	300	12,600	4.65	5,769	268
237210 Land subdivision	0	0	0	4.65	289	13
237310 Highway, street and bridge const	84	111	4,308	4.65	7,266	338
237990 Other heavy and civil eng	516	516	7,563	4.65	2,076	97
238110 Poured Concrete foundation and struct	269	269	3,070	4.65	1,252	58
238120 Structural steel and precast concrete	400	400	7,249	4.65	2,018	94
238130 Framing Contractors	1,083	1,083	11,834	3.90	998	39
238140 Masonry Contractors	129	129	1,303	3.90	788	31
238150 Glass & Glazing Contractors	53	53	504	3.90	1,187	46
238160 Roofing Contractors	232	232	2,262	3.90	991	39
238170 Siding Contractors	33	33	215	3.90	641	25
238190 Other foundation, structure, building, ext	14	14	158	3.90	1,254	49
238210 Electrical Contractors	63	63	771	3.90	1,312	51
238220 Plumbing, Heating and Airconditioning Cont	87	87	974	3.90	1,346	52
238290 Other building equipment cont	45	59	1,237	3.90	2,383	93
238310 Drywall and insulation contractors	0	0	0	3.90	1,573	61
238320 Painting and wall covering contractors	39	39	234	3.90	433	17
238330 Flooring Contractors	0	0	0	3.90	760	30
238340 Tile and Terrazzo contractors	0	0	0	3.90	655	26
238350 Finish Carpentry contractors	0	0	0	3.90	517	20
238390 Other building finishing contractors	0	0	0	3.90	1,304	51
238910 Site Preparation	302	302	2,825	3.90	1,228	48
Subtotal	13,815	14,316	198,641			
Crane Lessees in the Construction Industry:						
236115 New Single family housing construction	29,236	29,236	136,601	4.41	2,116	93
236116 New Multifamily housing construction	2,199	2,199	22,192	4.41	7,606	335
236117 New housing operative builders	13,022	13,022	120,146	4.41	10,692	472
236118 Residential Remodelers	8,275	8,275	32,021	4.41	5,442	240
236210 Industrial building construction	2,777	2,777	93,931	4.41	6,307	278
236220 Commercial and Institutional Bldg. Construction	37,208	37,208	715,896	4.41	6,490	286
237110 Water and Sewer Line Const	12,357	12,357	204,085	4.65	2,629	122
237120 Oil and gas pipeline construction	1,052	1,403	94,176	4.65	8,254	384

TABLE B–2—INDUSTRIAL PROFILE OF AFFECTED FIRMS AND ESTABLISHMENTS FOR THE PROPOSED STANDARD—Continued

NAIC/Industry		Affected			Profit rate (percent)	Average per estab.	
		Firms	Estabs.	Employees		Revenues ($1,000)	Profits ($1,000)
237130	Power and communication line const	2,263	3,017	126,753	4.65	11,295	525
237210	Land subdivision	0	0	0	4.65	0	0
237310	Highway, street and bridge const	843	1,124	43,471	4.65	72,437	3,367
237990	Other heavy and civil eng	5,251	5,251	77,036	4.65	3,950	184
238110	Poured Concrete foundation and struct	1,358	1,358	15,498	4.65	24,877	1,157
238120	Structural steel and precast concrete	4,321	4,321	78,266	4.65	2,019	94
238130	Framing Contractors	10,841	10,841	118,502	3.90	1,331	52
238140	Masonry Contractors	1,286	1,286	13,035	3.90	15,762	614
238150	Glass & Glazing Contractors	529	529	5,080	3.90	12,086	471
238160	Roofing Contractors	2,319	2,319	22,620	3.90	9,923	387
238170	Siding Contractors	332	332	2,152	3.90	12,932	504
238190	Other foundation, structure, building, ext	139	139	1,599	3.90	26,387	1,028
238210	Electrical Contractors	626	626	7,712	3.90	132,080	5,147
238220	Plumbing, Heating and Airconditioning Cont	875	875	9,744	3.90	135,367	5,275
238290	Other building equipment cont	457	609	12,662	3.90	23,770	926
238310	Drywall and insulation contractors	0	0	0	3.90	0	0
238320	Painting and wall covering contractors	389	389	2,346	3.90	43,317	1,688
238330	Flooring Contractors	0	0	0	3.90	0	0
238340	Tile and Terrazzo contractors	0	0	0	3.90	0	0
238350	Finish Carpentry contractors	0	0	0	3.90	0	0
238390	Other building finishing contractors	0	0	0	3.90	0	0
238910	Site Preparation	3,050	3,050	28,543	3.90	12,380	482
Subtotal		141,004	142,542	1,984,066			
Total		159,715	164,532	2,289,999			

Source: U.S. Census Bureau, Economic Census, 2002 for establishments, employees, revenues, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA).

These sectors have an estimated total of about 164,500 affected establishments. Crane Lessees in the Construction Industry (just ''Crane Lessees'' hereafter) have almost 90 percent of the firms and employees affected by the proposed standard. The profile was constructed by combining two kinds of sources: (1) General data on numbers of establishments, firms, revenues, employees, and profits for affected individual industries, and (2) data on the number or percentage of establishments in the industries that use cranes.

General Data Sources

Data from the U.S. Bureau of the Census (CB) was used to develop the industry profile estimates (which include establishments, employees, and revenues) for the five sectors, except the Crane Rental without Operators sector, which was developed using 2002 Dunn and Bradstreet (D&B) data, except for estimates of the number of firms which was based on CB data. The Agency used 2002 D&B data for the Crane Rental without Operators sector because these data matched best with SBA data for estimating the characteristics of small firms in that sector.

Profit rates were taken from the § 2002 Source Book Statistics of Income'' published by the Internal Revenue Service. The profit rates were calculated by dividing the reported net income by total receipts for each 3-digit NAIC, and were applied to each industry falling within that 3-digit NAIC. For example, for NAIC 236 Building Construction, OSHA used the calculated profit rate of 4.41 percent for all industries performing building construction (residential and non-residential).

Adjustments for Use of Cranes

OSHA used the ''2002 Economic Census'' of the Census Bureau (CB) for data on numbers of firms, establishments, and employees, by size, for establishments that rent cranes (Crane Rental with Operators, Crane Rental without Operators). To estimate the number of establishments that Own but Do Not Rent Cranes and those that only lease cranes (see Table B–3), the Agency applied several adjustments to the CB ''2002 Economic Census'' data. First, adjustments were made so that estimates of establishments would be consistent with the data from CB which identified establishments that report crane rental revenue. OSHA reviewed the construction industry sub-sectors in the ''NAICS Manual 2007'' to determine the type of work activities that would require the use of a crane. Some of the industries affected by the proposal consist entirely of contractors and general contractors—either of whom might be the lessee of a crane. In some cases, OSHA determined that general contractors in residential construction would lease cranes instead of the trade contractor. Secondly, during the SBAR panel process some small entity representatives stated that some establishments that were categorized as Crain Lessees (in the construction industry) do in fact own their own cranes, and that some who were categorized as owning cranes typically lease them, or do both. Table B–3 shows the adjustments the Agency made to estimate the number of establishments renting cranes in each industry (which are reflected in Table B–2) and the Agency's rationale.

TABLE B–3—INDUSTRIAL PROFILE ADJUSTMENTS FOR CRANE LESSEES FOR ALL ESTABLISHMENTS

NAIC	Industry description	Establishments (2002 economic census)	OSHA assumption	Revised estimate
236115	New Single-Family Housing Const	58,472	Estimated that 50 percent would contract out instead of leasing the crane themselves.	29,236
236116	New Multifamily Housing Const	4,397	Estimated that 50 percent would contract out instead of leasing the crane themselves.	2,199
236117	New Housing Operative Builders	26,043	Estimated that 50 percent would contract out instead of leasing the crane themselves.	13,022
236118	Residential Remodelers	82,750	Estimated that only 10 percent of the establishments perform work that requires a crane. Only new buildings may require them.	8,275
236210	Industrial Building Construction	2,777	All estimated to be affected	2,777
236220	Commercial and Institutional Bldg. Const.	37,208	All estimated to be affected	37,208
237110	Water and Sewer Line Const	12,357	All estimated to be affected	12,357
237120	Oil and Gas Pipeline Const	1,403	All estimated to be affected	1,403
237130	Power and Communication Line Const.	6,034	Estimated that 50 percent (only in Power Line Construction) would involve work that requires a crane.	3,017
237210	Land Subdivision	8,403	Work performed does not require crane	0
237310	Highway, Street, and Bridge Const	11,239	Estimate only 10 percent (larger employers) would use cranes. Street and highway construction would typically not require them.	1,124
237990	Other Heavy and Civil Eng	10,502	Estimated that only 50 percent would need a crane	5,251
238110	Poured Concrete Foundation and Struct.	27,151	Estimated that only 5 percent would perform tasks that require a crane. In many cases a site crane performs lifting.	1,358
238120	Structural Steel and Precast Concrete.	4,321	All estimated to be affected	4,321
238130	Framing Contractors	14,455	Estimated that 75 percent would need a crane that would typically not be leased by the residential general contractor.	10,841
238140	Masonry Contractors	25,720	Estimated that only 5 percent would perform work that requires a crane. For new multi-story structures, the site crane lifts materials.	1,286
238150	Glass and Glazing Contractors	5,294	Estimated that only 10 percent would perform work that requires a crane. Typically only use powered personnel platforms.	529
238160	Roofing Contractors	23,192	Estimated only 10 percent would need a crane. Typically use site crane for any high rise building projects.	2,319
238170	Siding Contractors	6,632	Estimated that only 5 percent would need a crane. Most of the work is done on scaffolds, ladders, platforms.	332
238190	Other Foundation, Structure, Bldg. Ext.	2,786	Estimated that only 5 percent would need a crane	139
238210	Electrical Contractors	62,586	Estimated that only 1 percent would need a crane	626
238220	Plumbing, Heating, Air Conditioning Cont.	87,501	Estimated that only 1 percent would need a crane	875
238290	Other Building Equipment Const	6,087	Estimated that only 10 percent would need a crane	609
238310	Drywall and Insulation Contractors	19,598	Work performed does not require crane. Site crane used on multi-story structures.	0
238320	Painting and Wall Coverings Contractors.	38,943	Estimated that only 1 percent would need a crane	389
238330	Flooring Contractors	12,865	Work performed does not require crane	0
238340	Tile and Terrazzo Contractors	8,950	Work performed does not require crane	0
238350	Finish Carpentry Contractors	35,087	Work performed does not require crane	0
238390	Other Building Finishing Contractors.	3,729	Work performed does not require crane	0
238910	Site Preparation	30,496	Estimated that only 10 percent of establishments (large employers that work on high rises) would require cranes.	3,050

Affected Establishments and Employees

This section describes OSHA's method for estimating the number of affected establishments and employees in construction for each of the five affected construction industry sectors. The Agency derived estimates of the number of affected employees and establishments primarily from CB data on establishments, employees, annual payroll, and revenues (see Table B–2).

The CB also collects data on establishments that have reported revenue from renting cranes with operators (''cranes,'' which are more numerous than derricks, will be used throughout this section as shorthand for

''cranes and derricks''). This data was acquired via special data runs by CB for OSHA. This data includes crane-rental revenue percentages which OSHA used to determine separate estimates for those establishments that (1) rent cranes with operators as their main revenue source, and (2) rent their cranes to other firms when they are not using them. Thus, the Agency was able to compile profile estimates for employers who (1) provide crane rental with operators (which are only found in NAIC 238990), and (2) own and rent cranes with operators (which are found across several NAICS codes). The Crane Rental without Operators category consists of establishments in NAICS 532412 that rent cranes without operators (also known as bare rentals) that fall within the scope of this proposal. Estimates for the Own but Do Not Rent category are based on the assumption that ten percent of all establishments in the construction industry own their own cranes, but do not rent them when they are not using them. The last category, Crane Lessees, consists of all of the other construction establishments that do not own their own cranes, but only lease cranes from crane-rental companies or other companies that own cranes. In preparing this profile of industries affected by the proposal, OSHA assumed that the proposed rule would affect all establishments that either rent or use cranes in construction activities.

Among the affected crane-rental industries, the largest is the Crane Rental without Operators (bare rentals) (NAICS 532412 Construction/Mining/Forestry Machine and Equipment Rental), with an estimated 4,631 affected establishments and 50,409 employees. The largest crane-use industry is Commercial and Institutional Building Construction (NAICS 236220), with an estimated 37,208 affected establishments and 715,896 employees.

Crane Rental with Operators

This sector consists of 1,240 affected establishments (part of NAICS 238990 All Other Specialty Trade Contractors) that rent cranes with operators. These establishments employ 16,244 employees and have total revenues of $1.9 billion. The profit rate for this NAIC is 4.1 percent. The CB data did not report estimates of the number of firms. The Agency estimated the number of firms by assuming a 1:1 ratio of establishments to firms in the less-than-20-employee size class. For all other size classes, the Agency multiplied the number of establishments by 75 percent to estimate the number of firms. These ratios of establishments to firms are typical for the size classes in the construction industry. Based on revenues for this sector and an estimate of the total number of cranes in use, the Agency estimated that each crane generates about $400,000 in average annual revenue, and so estimated the average number of cranes per establishment, by size class, by dividing the average revenues per establishment by $400,000. The Agency estimated that there is, on average, one crane operator for each crane in this sector since this category rents cranes with operators.

Crane Rental without Operators (bare rentals)

Establishments that rent cranes without operators (bare rentals) are incorporated into NAICS 532412 Construction, Mining, and Forestry Machinery and Equipment Rental and Leasing. The Agency estimated that there are 4,631 affected establishments in this NAIC engaged in construction activity, with over 50,000 employees and revenues of $3.2 billion. The profit rate for this industry is 4.0 percent. Since the D&B data did not report estimates of the number of firms, OSHA used 2002 Small Business Administration (SBA) data for firms in the less-than-20-employee size class (the only size class in this category considered to be small by SBA). An estimate of the number of cranes was derived by dividing the revenues per establishment by the estimated $250,000 that each crane generates in average annual revenue (less than the average revenue per crane rented with operators). The Agency estimated that the ratio of cranes-to-operators is 4:1 for this category since establishments in this category rent cranes without operators.

Own and Rent Cranes with Operators

The CB identified establishments that own cranes and rent them when they are not being used. These 1,803 establishments employ 40,639 employees with total annual revenues of $6 billion. The profit rate for the firms in these sectors ranged from 3.9 to 4.7 percent. The Agency assumed a 1:1 ratio of establishments to firms, in most cases, for those establishments with less than 20 employees. For all others, the Agency multiplied the number of establishments by 75 percent to estimate the number of firms. To derive an estimate of the number of cranes, OSHA divided the per establishment revenues by the $400,000 which each crane generates in average annual revenue. The Agency used a 1:1 ratio of cranes-to-operators to estimate the number of crane Operators.

Own but Do Not Rent

To estimate the number of establishments that Own but Do Not Rent, the Agency subtracted those establishments that own and rent cranes from the total number of construction firms per NAICS sector. This difference was then multiplied by 10 percent to estimate the number of establishments that own cranes but do not rent them. Since most cranes in construction are leased, 10 percent seemed a reasonable estimate of establishments that own cranes but do not rent them. The CB provided estimates of establishments, employees, and revenues per NAICS sector. To estimate the number of firms, the Agency used employment data from the CB to estimate the average number of employees per establishment. The Agency assumed a 1:1 ratio of establishments to firms for those establishments that averaged less than 20 employees. For all others, the Agency multiplied the number of establishments by 75 percent to estimate the number of firms. The profit rate for these firms is the same as for firms in the Own and Rent Cranes with Operators category. An estimate of the number of cranes was derived by assuming that each establishment would own, on average, one crane. The Agency assumed a 1:1 ratio of cranes-to-operators for this sector. (Data on the number of cranes and crane jobs is also presented in section 6 Costs of Compliance.)

Crane Lessees (in the construction industry)

The Agency assumed that any NAICS identified from the CB data that could rent a crane would likely do so, and included all establishments in those NAICS industries as possible leasees of cranes. The corresponding estimate of the number of firms was derived using the same procedure described above for the Own but Do Not Rent category. Using the estimates from three sectors (Crane Rental with Operators, Crane Rental without Operators, and Own and Rent Cranes with Operators), OSHA concluded that, among the cranes that are rented, 74 percent are rented without operators and 26 percent with operators.

Estimates of Number of Cranes and Crane Jobs

The Agency estimates that there are 96,206 cranes that would fall under the scope of the proposal. The Preliminary Initial Regulatory Flexibility Analysis (PIRFA) estimated the number of cranes

at 91,997. Based on comments from small entity representatives (SERs) during the SBREFA panel meetings, OSHA increased its estimate of the number of cranes in the Own but Do Not Rent category by increasing to 10 percent the fraction of all construction establishments that may own cranes but not rent them. OSHA also expanded the Crane Lessees category to include light and heavy construction entities. This expansion accounts for the difference in estimates of establishments, firms, and employees between the PIRFA and in this PEA.

In the PIRFA, the Agency estimated the number of crane jobs at 368,000 annually, or four jobs per crane. For the purposes of this analysis, a crane job is defined as beginning when the crane is put into use and ending when the crane is either moved (which triggers an assessment of ground conditions and power lines) or when an increasingly hazardous situation occurs (*e.g.*, excess rain which affects ground conditions) which triggers other requirements of the standard. While no SER provided an alternative estimate, some stated that the Agency's estimate of crane jobs was extremely low. As a result of these comments, the Agency increased its estimate of the number of crane jobs to almost 860,000 for all establishments and increased the average number of annual jobs per crane to 9. OSHA requests comment on these estimates. (Estimates of the number of cranes and crane jobs can be found in section 5 Costs of Compliance.)

Estimates of Small Entities

The Small Business Administration (SBA) publishes industry-specific size criteria that classify businesses as small entities. The SBA criteria for small entities in the construction industry are based on revenue, rather than the number of employees. OSHA used 2002 CB ''Economic Census'' data to associate these revenue criteria with employment size classes. For each industry sector, the Agency used CB data to calculate average revenues for entities of each employment size class and then matched the SBA revenue criterion for that industry with the size class that had the largest average revenues not exceeding the SBA criterion.

Table B–4 shows the estimated number of construction small entities that meet the SBA criteria for each sector. As shown, the SBA revenue criteria are so large, given the size of typical construction entities, that virtually all entities in the industries fall within the SBA definition of small entities. Almost 99 percent of all construction establishments are small entities, following the SBA criteria. In addition to the SBA-defined small entities, the Agency estimated the number of establishments that are very small (having less than 20 employees). Table B–5 shows the industrial profile for this size class.

TABLE B–4—INDUSTRIAL PROFILE OF SBA DEFINED SMALL ENTITIES FOR THE PROPOSED STANDARD

Category/NAIC/Industry	SBA Size Standard (Less Than) (mil.)	Affected			Profit rate (pct.)	Avg. revenues per estab. ($1,000)	Avg. profits per estab. ($1,000)
		Firms	Estabs.	Employees			
Crane Rental with Operators:							
238990 All Other Specialty Trade Cont	$13.0	1,171	1,223	13,473	4.10	$1,551	$64
Crane Rental without Operators (Bare Rentals):							
532412 Const./Min./For. Machine & Equip	6.5	1,782	3,927	20,459	4.00	935	37
Own and Rent Cranes with Operators:							
236115 New Single-Family Housing Const	31.0	168	168	261	4.41	233	10
236118 Residential Remodelers	31.0	21	21	45	4.41	528	23
236210 Industrial Building Construction	31.0	8	10	1,067	4.41	14,656	646
236220 Commercial and Institutional Building	31.0	21	28	757	4.41	4,603	203
237110 Water and Sewer Line and Related Struct	31.0	47	62	1,432	4.65	4,570	213
237120 Oil and Gas Pipeline and Related Struct	31.0	16	21	1,457	4.65	6,822	317
237130 Power and Communication Line and Rel	31.0	36	36	666	4.65	2,720	126
237310 Highway, Street, and Bridge Construction	31.0	76	101	6,456	4.65	12,483	580
237990 Other Heavy and Civil Engineering Const	31.0	143	191	5,857	4.65	5,394	251
238110 Poured Concrete Foundation and Struct	13.0	263	263	4,328	4.65	2,256	105
238120 Structural Steel and Precast Concrete	13.0	239	319	7,389	4.65	2,868	133
238130 Framing Contractors	13.0	20	20	120	3.90	200	8
238150 Glass and Glazing Contractors	13.0	41	41	328	3.90	631	25
238170 Siding Contractors	13.0	3	3	18	3.90	827	32
238190 Other Foundation, Structure, and Building	13.0	26	35	1,145	3.90	2,802	109
238210 Electrical Contractors	13.0	12	12	176	3.90	1,629	63
238220 Plumbing, Heating, and Air-Conditioning	13.0	2	3	196	3.90	5,835	227
238290 Other Building Equipment Contractors	13.0	104	138	4,076	3.90	3,801	148
238320 Painting and Wall Covering Contract	13.0	20	20	159	3.90	962	37
238910 Site Preparation Contractors	13.0	311	311	4,706	3.90	2,146	84
Subtotal	.....	1,576	1,803	40,639			
Own but Do Not Rent:							
236115 New Single family housing construction	31.0	2,906	2,906	11,578	4.41	1,000	44
236116 New Multifamily housing construction	31.0	213	213	1,886	4.41	3,400	150
236117 New housing operative builders	31.0	1,263	1,263	10,212	4.41	5,104	225
236118 Residential Remodelers	31.0	825	825	2,721	4.41	543	24
236210 Industrial building construction	31.0	223	262	7,955	4.41	2,570	113
236220 Commercial and Institutional Bldg. Const	31.0	3,615	3,615	60,805	4.41	3,661	161
237110 Water and Sewer Line Const	31.0	918	1,223	17,260	4.65	2,324	108
237120 Oil and gas pipeline construction	31.0	98	131	7,885	4.65	3,743	174
237130 Power and communication line const	31.0	218	291	10,710	4.65	4,656	216
237210 Land subdivision	6.0	0	0	0	4.65	0	0
237310 Highway, street and bridge const	31.0	70	93	3,662	4.65	3,225	150

TABLE B–4—INDUSTRIAL PROFILE OF SBA DEFINED SMALL ENTITIES FOR THE PROPOSED STANDARD—Continued

Category/NAIC/Industry	SBA Size Standard (Less Than) (mil.)	Affected			Profit rate (pct.)	Avg. revenues per estab. ($1,000)	Avg. profits per estab. ($1,000)
		Firms	Estabs.	Employees			
237990 Other heavy and civil eng	31.0	502	502	6,429	4.65	1,500	70
238110 Poured Concrete foundation and struct	13.0	108	108	2,609	4.65	1,000	47
238120 Structural steel and precast concrete	13.0	388	388	6,161	4.65	1,425	66
238130 Framing Contractors	13.0	1,061	1,061	10,059	3.90	798	31
238140 Masonry Contractors	13.0	128	128	1,108	3.90	675	26
238150 Glass & Glazing Contractors	13.0	49	49	428	3.90	900	35
238160 Roofing Contractors	13.0	230	230	1,922	3.90	801	31
238170 Siding Contractors	13.0	33	33	183	3.90	600	23
238190 Other foundation, structure, building, ext	13.0	10	10	134	3.90	900	35
238210 Electrical Contractors	13.0	60	60	655	3.90	1,100	43
238220 Plumbing, Heating and Airconditioning Cont	13.0	86	86	828	3.90	1,100	43
238290 Other building equipment cont	13.0	34	45	1,051	3.90	1,664	65
238310 Drywall and insulation contractors	13.0	0	0	0	3.90	0	0
238320 Painting and wall covering contractors	13.0	37	37	199	3.90	419	16
238330 Flooring Contractors	13.0	0	0	0	3.90	0	0
238340 Tile and Terrazzo contractors	13.0	0	0	0	3.90	0	0
238350 Finish Carpentry contractors	13.0	0	0	0	3.90	0	0
238390 Other building finishing contractors	13.0	0	0	0	3.90	0	0
238910 Site Preparation	13.0	271	271	2,401	3.90	962	37
Subtotal	.....	13,346	13,831	168,845			
Crane Lessees in the Construction Industry:							
236115 New Single family housing construction	31.0	29,229	29,229	136,566	4.41	2,116	93
236116 New Multifamily housing construction	31.0	2,130	2,130	21,496	4.41	7,606	335
236117 New housing operative builders	31.0	12,634	12,634	116,566	4.41	10,692	472
236118 Residential Remodelers	31.0	8,274	8,274	32,018	4.41	5,442	240
236210 Industrial building construction Commercial and Institutional	31.0	2,633	2,633	75,701	4.41	6,307	278
236220 Bldg.Construction	31.0	36,174	36,174	696,001	4.41	6,490	286
237110 Water and Sewer Line Const	31.0	12,296	12,296	152,308	4.65	2,629	122
237120 Oil and gas pipeline construction	31.0	1,000	1,333	67,108	4.65	8,254	384
237130 Power and communication line const	31.0	2,211	2,948	92,891	4.65	11,295	525
237210 Land subdivision	6.0	0	0	0	4.65	0	0
237310 Highway, street and bridge const	31.0	775	1,033	29,967	4.65	72,437	3,367
237990 Other heavy and civil eng	31.0	5,214	5,214	76,493	4.65	3,950	184
238110 Poured Concrete foundation and struct	13.0	1,339	1,339	15,282	4.65	24,877	1,157
238120 Structural steel and precast concrete	13.0	4,203	4,203	76,129	4.65	2,019	94
238130 Framing Contractors	13.0	10,631	10,631	116,199	3.90	1,331	52
238140 Masonry Contractors	13.0	1,283	1,283	13,000	3.90	15,762	614
238150 Glass & Glazing Contractors	13.0	526	526	5,051	3.90	12,086	471
238160 Roofing Contractors	13.0	2,299	2,299	22,426	3.90	9,923	387
238170 Siding Contractors	13.0	331	331	2,145	3.90	12,932	504
238190 Other foundation, structure, building, ext	13.0	136	136	1,563	3.90	26,387	1,028
238210 Electrical Contractors	13.0	615	615	7,579	3.90	132,080	5,147
238220 Plumbing, Heating and Airconditioning Cont	13.0	863	863	9,615	3.90	135,367	5,275
238290 Other building equipment cont	13.0	441	588	9,168	3.90	23,770	926
238310 Drywall and insulation contractors	13.0	0	0	0	3.90	0	0
238320 Painting and wall covering contractors	13.0	389	389	2,344	3.90	43,317	1,688
238330 Flooring Contractors	13.0	0	0	0	3.90	0	0
238340 Tile and Terrazzo contractors	13.0	0	0	0	3.90	0	0
238350 Finish Carpentry contractors	13.0	0	0	0	3.90	0	0
238390 Other building finishing contractors	13.0	0	0	0	3.90	0	0
238910 Site Preparation	13.0	3,021	3,021	28,276	3.90	12,380	482
Subtotal	138,645	140,120	1,805,890				
Total	156,520	160,905	2,049,306				

Source: U.S. Census Bureau, Economic Census, 2002 for establishments, revenues, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA); Cost/establishment figures estimated by OSHA/ORA; Cost as a percent of revenue = Avg. establishment cost/avg establishment revenue.

TABLE B–5—INDUSTRIAL PROFILE OF VERY SMALL ENTITIES (LESS THAN 20 EMPLOYEES) BY MAJOR CATEGORY

Category/NAIC/Industry	Firms	Estabs	Employees	Profit rate (percent)	Average	
					Revenues per estab. ($1,000)	Profits per estab. ($1,000)
Crane Rental with Operators:						
238990 All Other Specialty Trade Cont	1,013	1,013	4,824	4.10	$614	$25
Crane Rental without Operators (Bare Rentals):						
532412 Const./Min./For. Machine & Equip	1,782	3,927	20,459	4.00	935	37
Own and Rent Cranes with Operators:						
236115 New Single-Family Housing Const	168	168	261	4.41	233	10
236118 Residential Remodelers	21	21	45	4.41	528	23
236210 Industrial Building Construction	8	10	1,067	4.41	14,656	646
236220 Commercial and Institutional Building	21	28	757	4.41	4,603	203
237110 Water and Sewer Line and Related Struct	47	62	1,432	4.65	4,570	213
237120 Oil and Gas Pipeline and Related Struct	16	21	1,457	4.65	6,822	317
237130 Power and Communication Line and Rel	36	36	666	4.65	2,720	126
237310 Highway, Street, and Bridge Construction	76	101	6,456	4.65	12,483	580
237990 Other Heavy and Civil Engineering Const	143	191	5,857	4.65	5,394	251
238110 Poured Concrete Foundation and Struct	263	263	4,328	4.65	2,256	105
(All other sectors in this category have no very small affected firms)						
Subtotal	798	901	22,326			
Own Cranes But Do Not Rent Them:						
236115 New Single family housing construction	2,763	2,763	12,910	4.41	823	36
236116 New Multifamily housing construction	197	197	1,987	4.41	1,350	60
236117 New housing operative builders	1,206	1,206	11,127	4.41	1,854	82
236118 Residential Remodelers	808	808	3,126	4.41	443	20
236210 Industrial building construction	209	209	7,076	4.41	1,247	55
236220 Commercial and Institutional Bldg. Construction	2,943	2,943	56,620	4.41	1,526	67
237110 Water and Sewer Line Const	900	900	14,864	4.65	702	33
237120 Oil and gas pipeline construction	63	63	4,224	4.65	708	33
237130 Power and communication line const	207	207	8,703	4.65	655	30
237210 Land subdivision	0	0	0	4.65	0	0
237310 Highway, street and bridge const	66	66	2,558	4.65	976	45
237990 Other heavy and civil eng	378	378	5,549	4.65	589	27
238110 Poured Concrete foundation and struct	46	46	527	4.65	494	23
238120 Structural steel and precast concrete	90	90	1,625	4.65	659	31
238130 Framing Contractors	981	981	10,728	3.90	374	15
238140 Masonry Contractors	115	115	1,165	3.90	343	13
238150 Glass & Glazing Contractors	44	44	418	3.90	619	24
238160 Roofing Contractors	206	206	2,013	3.90	447	17
238170 Siding Contractors	31	31	202	3.90	408	16
238190 Other foundation, structure, building, ext	10	10	115	3.90	394	15
238210 Electrical Contractors	54	54	671	3.90	444	17
238220 Plumbing, Heating and Airconditioning Contractors	77	77	861	3.90	509	20
238290 Other building equipment cont	30	30	624	3.90	714	28
238310 Drywall and insulation contractors	0	0	0	3.90	0	0
238320 Painting and wall covering contractors	37	37	222	3.90	265	10
238330 Flooring Contractors	0	0	0	3.90	0	0
238340 Tile and Terrazzo contractors	0	0	0	3.90	0	0
238350 Finish Carpentry contractors	0	0	0	3.90	0	0
238390 Other building finishing contractors	0	0	0	3.90	0	0
238910 Site Preparation	271	271	2,536	3.90	497	19
Subtotal	11,733	11,733	150,451			
Crane Lessees in the Construction Industry:						
236115 New Single family housing construction	28,449	28,449	132,922	4.41	1,645	73
236116 New Multifamily housing construction	1,968	1,968	19,865	4.41	2,700	119
236117 New housing operative builders	12,059	12,059	111,265	4.41	3,708	164
236118 Residential Remodelers	8,099	8,099	31,341	4.41	4,431	195
236210 Industrial building construction	2,170	2,170	62,390	4.41	1,247	55
236220 Commercial and Institutional Bldg. Construction	29,651	29,651	570,496	4.41	1,526	67
237110 Water and Sewer Line Const	9,867	9,867	122,221	4.65	702	33
237120 Oil and gas pipeline construction	740	740	37,254	4.65	708	33
237130 Power and communication line const	2,203	2,203	69,416	4.65	1,311	61
237210 Land subdivision	0	0	0	4.65	0	0
237310 Highway, street and bridge const	727	727	21,081	4.65	9,762	454
237990 Other heavy and civil engg	4,624	4,624	67,830	4.65	1,177	55
238110 Poured Concrete foundation and struct	1,213	1,213	13,844	4.65	9,888	460
238120 Structural steel and precast concrete	3,428	3,428	62,091	4.65	659	31
238130 Framing Contractors	9,953	9,953	108,788	3.90	498	19
238140 Masonry Contractors	1,150	1,150	11,655	3.90	6,859	267

TABLE B–5—INDUSTRIAL PROFILE OF VERY SMALL ENTITIES (LESS THAN 20 EMPLOYEES) BY MAJOR CATEGORY—Continued

Category/NAIC/Industry	Firms	Estabs	Employees	Profit rate (percent)	Average	
					Revenues per estab. ($1,000)	Profits per estab. ($1,000)
238150 Glass & Glazing Contractors	472	472	4,528	3.90	6,194	241
238160 Roofing Contractors	2,067	2,067	20,160	3.90	4,465	174
238170 Siding Contractors	312	312	2,027	3.90	8,155	318
238190 Other foundation, structure, building, ext	122	122	1,404	3.90	7,885	307
238210 Electrical Contractors	545	545	6,719	3.90	44,376	1,729
238220 Plumbing, Heating and Airconditioning Contractors	774	774	8,614	3.90	50,865	1,982
238290 Other building equipment cont	435	435	6,783	3.90	7,667	299
238310 Drywall and insulation contractors	0	0	0	3.90	0	0
238320 Painting and wall covering contractors	370	370	2,228	3.90	26,527	1,034
238330 Flooring Contractors	0	0	0	3.90	0	0
238340 Tile and Terrazzo contractors	0	0	0	3.90	0	0
238350 Finish Carpentry contractors	0	0	0	3.90	0	0
238390 Other building finishing contractors	0	0	0	3.90	0	0
238910 Site Preparation	2,739	2,739	25,631	3.90	4,974	194
Subtotal	124,135	124,135	1,520,554			
Total	139,461	141,709	1,718,614			

Source: U.S. Census Bureau, Economic Census, 2002; Dunn and Bradstreet, Market Profiles, 2002; Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002.

Wages

Taking the ratio of total payroll (from CB's ''2002 Economic Census'') to total employment, OSHA calculated an average annual salary of $35,352 per employee. This estimate includes both production and non-production employees. OSHA compared this CB annual salary estimate with a salary estimate that is based on weekly earnings of $724.66 for a production or non-supervisory employee in 2002, as reported by Bureau of Labor Statistics' (BLS) ''Employment and Earnings, January 2003.'' On an annual basis, the BLS salary is calculated as $37,682 (fringe benefits not included), which differs only slightly with the CB salary estimate. The Agency chose to rely on the BLS wage data for this analysis due to their breakdown into different employment categories using its National Industry-Specific Occupational Employment and Wage Estimates Survey. Estimated wages include: Base gross pay rate, cost-of-living allowances, guaranteed pay, hazardous pay, incentive pay including commissions and production bonuses, on-call pay, and tips. The estimates exclude: Back pay, jury duty pay, overtime pay, severance pay, shift differentials, non-production bonuses, and tuition reimbursement (BLS, 2000). To produce a total wage that reflects total compensation for employees in affected industries, OSHA adjusted the average base annual wage ($37,682) to include fringe benefits. BLS estimates the percentage of fringe benefits based on survey data for aggregate worker categories. In this analysis, OSHA used an average fringe-benefit rate of 40 percent.

4. Benefits and Net Benefits

This section reviews the population at risk of occupational injury or death in construction and estimates the benefits from the proposal. OSHA believes that compliance with the proposal will yield substantial benefits in terms of lives saved, injuries avoided, and accident-related cost savings. The proposal addresses several areas that will impose compliance costs: Crane assembly/disassembly; power-line safety; inspections; and operation qualification and certification. Although the proposal also includes other new provisions, they primarily update, consolidate, and clarify existing requirements. The Agency is only providing quantitative estimates of benefits for the new provisions listed above, although OSHA believes that all of the provisions are reasonably related to preventing injuries and fatalities which, in turn, will reduce expenditures for medical care, rehabilitation, death benefits, and lost work time (but note that these are not part of the calculated benefits, or cost savings, since the Agency is relying on a willingness to pay approach).

To assess the benefits, a historical analysis of the frequency of fatalities and injuries among employees in construction was conducted using OSHA and BLS data.

Data Sources

The data sources that the Agency determined are the most reliable to estimate benefits are OSHA's Integrated Management Information System (IMIS), the BLS Census of Fatal Occupational Injuries (CFOI), and the BLS survey of Occupational Injuries and Illnesses. Because not all accidents are included in the relevant data bases, the actual number of preventable fatalities and injuries addressed by this rulemaking may be somewhat higher. However, OSHA does not currently have a basis for estimating how many pertinent fatalities or injuries may have occurred that would not be represented by the relevant data sources. OSHA requests information and comments from the public regarding this issue.

Fatality Benefits

OSHA's analysis of the number of fatalities estimated to be averted by the proposal proceeds in two steps: (1) Determine the number of fatalities currently occurring, and the types and causes of these fatalities; and (2) determine the proposal's ability to avert various types of fatalities (assuming full compliance). As discussed above, only those fatalities that would have been prevented through compliance with the four new provisions noted above were estimated in the benefits analysis. To estimate the number of fatalities

associated with cranes and derricks, the Agency first averaged 10 years of construction fatality data (1994–2003) from the CFOI database. Based on the CFOI data, an average of 1,123 fatalities occurred each year during that time period in the construction industry.

According to a study from the Construction Industry Research and Policy Center (CIRPC), at least 8 percent of the total construction fatalities are crane related (CIRPC, Beavers, Moore, Rinehart, and Schriver, Report 35, March, 2005 and Journal of Construction and Engineering Management, 2006). This percentage when applied to the yearly average fatalities, results in an estimated average of 89.8 crane-related fatalities in the construction industry annually.

To determine avoidable deaths under the proposal, OSHA reviewed accident abstracts from the IMIS database from 1995 to 2005. These abstracts consist of general-duty clause citations under the OSH Act and existing 29 CFR 1926.550 citations. In reviewing these data, OSHA determined that 29 fatalities were similar to the types of accidents addressed by the existing rule or proposal. Of these 29 fatalities, OSHA determined that 17 (or 59 percent) would have been averted by compliance with the proposal. This ratio was applied to the estimated annual average of crane-related fatalities (89.8) to preliminarily estimate the fatality benefits of the proposal—i.e., 53 avoided fatalities annually. These are potentially avoided fatalities because the estimate assumes perfect compliance with the proposed standard. Table B–6 outlines the avoided fatalities under the proposed standard.

TABLE B–6—CRANES AND DERRICKS BENEFITS ANALYSIS (FATALITIES)

	Yearly average
1. CFOI Construction Fatalities	1,123
2. Number of Fatalities that are crane related (8% of #1)	89.8
3. Total Avoidable Crane-Related Fatalities (59% of #2)	53.0

Sources: ORA, OSHA; BLS CFOI database; IMIS Fatality/Catastrophe Reports; CIRPC report March, 2005.

Injury Benefits

To estimate the avoidable injuries, the Agency relied on the number of injuries involving cranes in the construction industry from 1995 to 2004 using the BLS Survey of Occupational Injuries and Illnesses. The assessment of avoidable injuries is presented in Table B–7. The Agency obtained from BLS special data runs with estimates of the number of cases involving days away from work associated with cranes in construction for the 10 years (1995–2004). In using those data to assess potential benefits, OSHA is assuming that the reported injuries encompass most of the attributes related to accidents where cranes are the true source. These BLS data do not differentiate between crane-related cases that are ''struck by'' or ''contact with electric current,'' but the Agency assumes that the majority of crane-reported cases are from these two causes.

As shown in Table B–7, over a ten-year period, 263 injuries per year occurred involving cranes in construction. To estimate the number of potentially avoidable struck-by cases, the Agency multiplied the 263 injuries each year by its ratio of avoidable cases (59 percent) derived from the fatality data. Thus, the Agency preliminarily estimates that the proposal will avoid 155 injuries annually.

TABLE B–7—CRANES AND DERRICKS BENEFITS ANALYSIS (INJURIES)

	Annual average
1. Number of Injury Cases in Construction Involving Cranes (CIDAFW)	263
2. Avoidable Cases (59% of #1 above)	155

Sources: OSHA/ORA; BLS Survey of Occupational Injuries and Illnesses.

Monetized Benefits

For informational purposes, the Agency monetized both the avoidable fatalities and injuries based on willingness-to-pay values of $7.5 million per death and $50,000 per injury. OSHA has followed EPA's approach to monetizing the reduction in the risk of premature mortality, as presented in ''The Benefits and Costs of the Clean Air Act of 1990 to 2010'' (EPA, 1999) and applied in the Radon in Drinking Water regulation. EPA's approach is presented in Chapter 7 of EPA's ''Guidelines for Preparing Economic Analyses,'' which provides a detailed review of the methods for estimating mortality risk values and summarizes the values obtained in the literature (EPA, 2000). EPA identified 26 studies that it considered relevant. Synthesizing the results of these studies, EPA arrived at a mean value for a statistical life (VSL) of $4.8 million in 1990 dollars. EPA employs this central estimate, updated for inflation, in its regulatory analyses. OSHA has updated EPA's mean VSL for 1990 using the consumer price index (CPI calculator, CPI home page), adjusted for income elasticity (GDP data, Bureau of Economic Analysis, Dept. of Commerce), and applied a value of $7.5 million to each premature fatality avoided (2006 base year). In applying these values, OSHA estimates that the annual monetized value of the 53 potentially avoidable fatalities is $397.5 million. The estimated monetized value of avoiding the 155 injuries is $8.5 million. Thus, total monetized benefits are $406 million.

Non-Quantified Benefits

OSHA believes that there are non-quantified injury benefits that are likely to result from other provisions of the proposal, and the 155 injuries should be considered a minimum estimate. The proposed provisions for signal persons, fall protection, work-area control, multiple lifts, hoisting personnel, and training, among others, are expected to result in safer working conditions that will reduce injuries to construction workers. Also, OSHA believes that employers and employees will benefit from the reorganization and plain language used in the proposal, which will make it easier for employers to comply with the requirements and, thus, improve construction safety conditions.

NET BENEFITS

Annualized Costs:	
Crane Assembly/Disassembly	$33.5 million.
Power Line Safety	$30.8 million.
Crane Inspections	$21.6 million.
Operator Qualification and Certification	$37.3 million.
Total Annual Costs	$123.2 million.
Annual Benefits:	
Number of Injuries Prevented	155.
Number of Fatalities Prevented	53.
Monetized Benefits ($50,000 per injury and $7.5 million per fatality prevented)	$406 million.
Net Monetized Benefits (Benefits Minus Costs):	$283 million annually.

Sensitivity of Estimates

The estimate of benefits is most sensitive to the estimated percentage of current annual fatalities that can be avoided by full compliance with the proposed standard. The percentage of fatalities that will be avoided is also applied to the estimate of avoided injuries involving cranes and derricks in construction. OSHA closely examined available reports of 29 fatalities that were related to the provisions in the existing and proposed standards and found that 17 would be prevented if measures in the proposal standard had been followed, or about 59 percent. Since the 29 detailed reports are a sample of all crane-related fatalities, the true benefits depend on how well the 29 cases reviewed represent the actual accidents involving cranes. So, if the true percentage of avoided fatalities varied from the estimate by 10 percent (49 or 69 percent instead of 59 percent) there would be a 10 percent change in the number fatalities and injuries prevented. The Agency believes that its estimate of annual fatalities involving cranes (about 90) in the construction industry is much less sensitive than the estimate of the percentage of fatalities avoided, because both the estimate of the annual number of all construction fatalities (1,123) and percentage related to cranes and derricks were based on 10 years of data.

According to the Agency's models for estimating costs and (monetized) benefits, the proposed standard generates considerable positive net benefits; that is, the benefits are much greater than costs. For net benefits to fall to zero, the Agency would have had to overestimate the number of fatalities prevented by the standard by several fold, from the estimated 55 fatalities prevented to about 16. Alternatively (for zero net benefits), the Agency would have had to underestimate the number of cranes and derricks in use—and the annual number of construction projects where cranes are used—by threefold, from about 96,000 cranes and derricks to 300,000. In that case estimated compliance costs would rise to over $400 million annually, or about equal to the value of estimated monetary benefits.

5. Technological Feasibility

In accordance with the OSH Act, OSHA is required to demonstrate that occupational safety and health standards promulgated by the Agency are technologically feasible. Accordingly, OSHA reviewed the requirements that would be imposed by the proposal, and assessed their technological feasibility. As a result of this review, OSHA has determined that compliance with the requirements of the proposal is technologically feasible for all affected industries. The proposal would require employers to perform crane inspections, utilize qualified or certified crane operators, address ground conditions, maintain safe distances from power lines using the encroachment prevention precautions, and to fulfill other obligations under the standard. Compliance with all of the proposed requirements can be achieved with readily and widely available technologies. Some businesses in the affected industries already implement the requirements of the proposed standard to varying degrees (some states have requirements), as noted during the SBREFA Panel. OSHA believes that there are no technological constraints in complying with any of the proposed requirements, and welcomes comments regarding this conclusion.

6. Costs of Compliance

This section presents the estimated costs of compliance for the proposed standard for cranes and derricks in construction. The estimated costs represent the additional costs necessary for employers to achieve full compliance, and these estimates do not include costs associated with current practices, or ''baseline'' activities, that affected employers already perform. If a national consensus standard exists, OSHA takes that standard as the ''baseline'' reflecting current practices—costs are attributed for provisions in the proposal that are over and above current practices. If, however, the standard is more stringent than the consensus standard, all employers incur compliance costs solely attributable to the OSHA regulation.

Table B–8 presents the total annualized estimated costs by provision across industry sectors. Information about how costs were calculated for each of the four major provisions is presented below. Table B–9 presents the average cost per affected establishment across industries. The total annualized cost of compliance with the proposed rule is estimated to be about $123 million. The major provisions generating employer compliance costs are: assembly/disassembly, power-line safety, inspections, and operator qualification and certification. There are provisions in the standard that may generate minor, but new, costs for affected employers. These provisions are noted in detailed estimates of paperwork costs in that section of the preamble below. The Agency seeks comment on whether these costs are covered under current practices, or are of sufficient magnitude to affect the overall total of costs of the proposal.

Estimation of Compliance Costs

The costs of compliance presented in this analysis are based on data from the CB ''2002 Economic Census,'' IRS Statistics of Income ''2002 Corporate Source Book,'' and D&B ''2002 Market Profiles.'' OSHA's cost model was originally developed as part of the Preliminary Initial Regulatory Flexibility Analysis (PIRFA), prepared for the Small Business Advocacy Review Panel (the Panel). The Panel process solicited comment from small businesses which would be impacted by the new standard, and the Panel

provided recommendations and findings to OSHA. (The Panel's recommendations and findings are presented in detail in section 8 Initial Regulatory Flexibility Analysis.) That initial cost analysis has been revised in response to comments from the Panel's small entity representatives (SERs), additional information received from potentially affected small businesses, and in response to the Panel's recommendations and findings.

TABLE B–8—ANNUALIZED COMPLIANCE COST BY SECTOR AND MAJOR PROVISION

NAIC/Industry	Number of affected firms	Number of affected estab's	Crane assembly/disassembly	Power line safety	Crane inspections	Operator qualification certification	Total anualized cost
Crane Rental with Operators:							
238990 All Other Specialty Trade Contractors	1,183	1,240	.....	.....	$1,315,86	$2,550,661	$3,865,787
Crane Rental without Operators (Bare Rentals):							
53248 Const./Min./For. Machine and Equipment	2,137	4,631	.....	.....	13,614,435	6,601,232	20,215,667
Own and Rent Cranes with Operators:							
236115 New Single-Family Housing Construction	168	168	$19,067	$17,572	22,341	42,467	101,447
236118 Residential Remodelers	21	21	5,388	4,966	6,314	8,001	28,669
236210 Industrial Building Construction	8	10	71,285	65,697	83,526	158,770	379,278
236220 Commercial and Institutional Bldg. Construction	21	28	62,687	57,773	73,452	139,621	333,534
237110 Water and Sewer Line Construction	47	62	137,822	87,018	161,489	306,965	733,293
23780 Oil and Gas Pipeline Construction	16	21	69,686	64,223	81,653	155,209	370,772
237130 Power and Communication Line Construction	36	36	47,622	43,889	55,800	106,068	253,380
237310 Highway, Street, and Bridge Construction	76	101	613,268	565,193	718,580	1,365,910	3,262,951
237990 Other Heavy and Civil Engineering Construction	143	191	501,156	461,870	587,216	1,116,207	2,666,449
238110 Poured Concrete Foundations and Structures	263	263	288,546	265,927	338,097	642,669	1,535,239
23880 Structural Steel and Precast Concrete	239	319	444,986	410,103	521,401	991,103	2,367,593
238130 Framing Contractors	20	20	1,941	1,789	2,274	4,323	10,326
238150 Glass and Glazing Contractors	41	41	8,589	11,603	14,751	28,040	66,984
238170 Siding Contractors	3	3	1,207	1,18	1,414	2,688	6,421
238190 Other Foundation, Structure, and Bldg. Contr's	26	35	47,708	43,968	55,901	106,259	253,836
238210 Electrical Contractors	8	8	9,506	8,761	11,139	21,173	50,579
238220 Plumbing, Heating, and Aircond. Contractors	2	3	8,515	7,847	9,977	18,965	45,304
238290 Other Building-Equipment Contractors	104	138	255,141	235,140	298,955	568,266	1,357,502
238320 Painting and Wall-Covering Contractors	20	20	9,360	8,626	10,967	20,847	49,800
238910 Site-Preparation Contractors	311	324,607	299,161	380,350	722,986	1,727,104	
Subtotal	1,576	1,803	2,932,087	2,702,239	3,435,597	6,530,537	15,600,459
Own but Do Not Rent:							
236115 New Single-Family Housing Construction	2,915	2,915	567,182	522,720	664,580	1,263,264	3,017,746
236116 New Multifamily Housing Construction	220	220	42,774	39,421	50,119	95,269	227,584
236117 New Housing Operative Builders	1,302	1,302	253,346	233,486	296,852	564,270	1,347,955
236118 Residential Remodelers	827	827	160,958	148,340	188,598	358,495	856,391
236210 Industrial Building Construction	235	277	53,835	49,615	63,080	119,904	286,433
236220 Commercial and Institutional Bldg. Construction	3,718	3,718	723,374	666,669	847,595	1,611,147	3,848,786
237110 Water and Sewer Line Construction	922	1,230	239,28	220,460	280,290	532,788	1,272,749
23780 Oil and Gas Pipeline Construction	104	138	26,888	24,780	31,506	59,887	143,061
237130 Power and Communication Line Construction	225	300	58,349	53,775	68,368	89,958	310,449
237210 Land Subdivision	0	0	0	0	0	0	0

TABLE B–8—ANNUALIZED COMPLIANCE COST BY SECTOR AND MAJOR PROVISION—Continued

NAIC/Industry	Number of affected firms	Number of affected estab's	Crane assembly/disassembly	Power line safety	Crane inspections	Operator qualification certification	Total anualized cost
237310 Highway, Street, and Bridge Construction	84	111	21,670	19,971	25,391	48,265	115,298
237990 Other Heavy and Civil Engineering Construction	516	516	100,305	92,442	117,530	223,407	533,685
238110 Poured Concrete Foundations and Structures	269	269	52,313	48,28	61,297	116,516	278,338
23880 Structural Steel and Precast Concrete	400	400	77,863	71,759	91,234	173,421	414,278
238130 Framing Contractors	1,083	1,083	210,636	194,84	246,807	469,142	1,80,708
238140 Masonry Contractors	89	89	25,019	23,058	29,316	55,725	133,118
238150 Glass and Glazing Contractors	53	53	10,220	9,419	11,975	22,763	54,378
238160 Roofing Contractors	232	232	45,117	41,580	52,864	100,487	240,047
238170 Siding Contractors	33	33	6,449	5,943	7,556	14,363	34,311
238190 Other Foundation, Structure, and Bldg. Contr's	14	14	2,676	2,466	3,136	5,961	14,239
238210 Electrical Contractors	63	63	8,174	11,220	14,265	27,116	64,775
238220 Plumbing, Heating, and Aircond. Contractors	87	87	17,024	15,689	19,947	37,916	90,576
238290 Other Building-Equipment Contractors	45	59	11,574	10,667	13,562	25,779	61,583
238310 Drywall and Insulation Contractors	0	0	0	0	0	0	0
238320 Painting and Wall-Covering Contractors	39	39	7,573	6,979	8,873	16,867	40,292
238330 Flooring Contractors	0	0	0	0	0	0	0
238340 Tile and Terrazzo Contractors	0	0	0	0	0	0	0
238350 Finish Carpentry Contractors	0	0	0	0	0	0	0
238390 Other Building Finishing Contractors	0	0	0	0	0	0	0
238910 Site-Preparation Contractors	302	302	58,728	54,84	68,813	130,803	38,468
Subtotal	13,815	14,316	2,785,259	2,566,921	3,263,555	6,203,513	14,819,248
Crane Lessees in the Construction Industry:							
236115 New Single-Family Housing Construction	29,236	29,236	5,688,159	5,242,261	.....	3,167,261	14,097,680
236116 New Multifamily Housing Construction	2,199	2,199	427,740	394,210	.....	238,173	1,060,83
236117 New Housing Operative Builders	13,022	13,022	2,533,464	2,334,864	.....	1,410,675	6,279,003
236118 Residential Remodelers	8,275	8,275	1,609,985 1,483,777	.....	896,466	3,990,228	
236210 Industrial Building Construction	2,777	2,777	540,293	497,939	.....	300,844	1,339,077
236220 Commercial and Institutional Bldg.Construction	37,208	37,208	7,239,192	6,671,707	.....	4,030,901	17,941,801
237110 Water and Sewer Line Construction	8,357	8,357	2,404,179	2,215,714	.....	1,338,687	5,958,580
23780 Oil and Gas Pipeline Construction	1,052	1,403	272,968	251,570	.....	151,993	676,530
237130 Power and Communication Line Construction	2,263	3,017	586,988	540,973	.....	326,844	1,454,806
237210 Land Subdivision	0	0	0	0	.....	0	0
237310 Highway, Street, and Bridge Construction	843	1,84	218,666	201,525	.....	81,757	541,948
237990 Other Heavy and Civil Engineering Construction	5,251	5,251	1,021,635	941,548	.....	568,863	2,532,047
238110 Poured Concrete Foundations and Structures	1,358	1,358	264,85	243,420	.....	147,069	654,614
23880 Structural Steel and Precast Concrete	4,321	4,321	840,694	774,792	.....	468,18	2,083,598
238130 Framing Contractors	10,841	10,841	2,109,275	1,943,927	.....	1,174,479	5,227,681
238140 Masonry Contractors	1,286	1,286	250,204	230,591	.....	139,318	620,113
238150 Glass and Glazing Contractors	529	529	103,000	94,926	.....	57,352	255,278
238160 Roofing Contractors	2,319	2,319	451,224	415,852	.....	251,249	1,118,325

TABLE B–8—ANNUALIZED COMPLIANCE COST BY SECTOR AND MAJOR PROVISION—Continued

NAIC/Industry	Number of affected firms	Number of affected estab's	Crane assembly/disassembly	Power line safety	Crane inspections	Operator qualification certification	Total anualized cost
238170 Siding Contractors	332	332	64,516	59,459	.....	35,924	159,898
238190 Other Foundation, Structure, and Bldg. Contr's	139	139	27,102	24,978	.....	15,091	67,171
238210 Electrical Contractors	626	626	81,767	18,222	.....	67,802	301,791
238220 Plumbing, Heating, and Aircond. Contractors	875	875	170,242	156,897	.....	94,794	421,932
238290 Other Building-Equipment Contractors	457	609	118,487	109,199	.....	65,976	293,661
238310 Drywall and Insulation Contractors	0	0	0	0	.....	0	0
238320 Painting and Wall-Covering Contractors	389	389	75,768	69,828	.....	42,189	187,784
238330 Flooring Contractors	0	0	0	0	.....	0	0
238340 Tile and Terrazzo Contractors	0	0	0	0	.....	0	0
238350 Finish Carpentry Contractors	0	0	0	0	.....	0	0
238390 Other Building Finishing Contractors	0	0	0	0	.....	0	0
238910 Site-Preparation Contractors	3,050	3,050	593,330	546,819	.....	330,376	1,470,526
Subtotal	141,004	142,542	27,733,005	25,558,997	.....	15,442,194	68,734,196
Total	159,715	164,532	33,450,351	30,828,157	21,628,713	37,328,136	83,235,357

Source: U.S. Census Bureau, Economic Census, 2002; Dunn and Bradstreet, Market Profiles, 2002; Data from Table 2 for affected firms and establishments; Cost estimates from OSHA cost model, ORA.

TABLE B–9—ANNUALIZED COMPLIANCE COSTS PER ESTABLISHMENTS BY SECTOR

NAIC/Industry	Number of affected firms	Number of affected estab's	Annualized compliance cost	Cost per estab.
Crane Rental with Operators:				
238990 All Other Specialty Trade Contractors	1,183	1,240	$3,865,787	$3,118
Crane Rental without Operators (Bare Rentals):				
532412 Const./Min./For. Machine and Equipment	2,137	4,631	20,215,667	4,365
Own and Rent Cranes with Operators:				
236115 New Single-Family Housing Construction	168	168	101,447	604
236118 Residential Remodelers	21	21	28,669	1,365
236210 Industrial Building Construction	8	10	379,278	37,928
236220 Commercial and Institutional Building	21	28	333,534	11,912
237110 Water and Sewer Lines and Related Structures	47	62	733,293	11,827
237120 Oil and Gas Pipelines and Related Structures	16	21	370,772	17,656
237130 Power and Communication Lines and Related Struct.	36	36	253,380	7,038
237310 Highway, Street, and Bridge Construction	76	101	3,262,951	32,306
237990 Other Heavy and Civil Engineering Construction	143	191	2,666,449	13,960
238110 Poured Concrete Foundations and Structures	263	263	1,535,239	5,837
238120 Structural Steel and Precast Concrete	239	319	2,367,593	7,422
238130 Framing Contractors	20	20	10,326	516
238150 Glass and Glazing Contractors	41	41	66,984	1,634
238170 Siding Contractors	3	3	6,421	2,140
238190 Other Foundation, Structure, and Building Contractors	26	35	253,836	7,252
238210 Electrical Contractors	12	12	50,579	4,215
238220 Plumbing, Heating, and Air-Conditioning Contractors	2	3	45,304	15,101
238290 Other Building-Equipment Contractors	104	138	1,357,502	9,837
238320 Painting and Wall-Covering Contractors	20	20	49,800	2,490
238910 Site Preparation Contractors	311	311	1,727,104	5,553
Subtotal	1,576	1,803	15,600,459	
Own but Do Not Rent:				
236115 New Single-Family Housing Construction	2,915	2,915	3,017,746	1,035
236116 New Multifamily Housing Construction	220	220	227,584	1,035
236117 New Housing Operative Builders	1,302	1,302	1,347,955	1,035
236118 Residential Remodelers	827	827	856,391	1,035
236210 Industrial Building Construction	235	277	286,433	1,035
236220 Commercial and Institutional Bldg.Construction	3,718	3,718	3,848,786	1,035
237110 Water and Sewer Lines and Related Structures	922	1,230	1,272,749	1,035
237120 Oil and Gas Pipelines and Related Structures	104	138	143,061	1,035

TABLE B–9—ANNUALIZED COMPLIANCE COSTS PER ESTABLISHMENTS BY SECTOR—Continued

NAIC/Industry	Number of affected firms	Number of affected estab's	Annualized compliance cost	Cost per estab.
237130 Power and Communication Lines and Related Struct.	225	300	310,449	1,035
237210 Land Subdivision	0	0	0	0
237310 Highway, Street, and Bridge Construction	84	111	115,298	1,035
237990 Other Heavy and Civil Engineering Construction	516	516	533,685	1,035
238110 Poured Concrete Foundations and Structures	269	269	278,338	1,035
238120 Structural Steel and Precast Concrete	400	400	414,278	1,035
238130 Framing Contractors	1,083	1,083	1,120,708	1,035
238140 Masonry Contractors	129	129	133,118	1,035
238150 Glass and Glazing Contractors	53	53	54,378	1,035
238160 Roofing Contractors	232	232	240,047	1,035
238170 Siding Contractors	33	33	34,311	1,035
238190 Other Foundation, Structure, and Building Contractors	14	14	14,239	1,035
238210 Electrical Contractors	63	63	64,775	1,035
238220 Plumbing, Heating, and Air-Conditioning Contractors	87	87	90,576	1,035
238290 Other Building-Equipment Contractors	45	59	61,583	1,035
238310 Drywall and Insulation Contractors	0	0	0	0
238320 Painting and Wall-Covering Contractors	39	39	40,292	1,035
238330 Flooring Contractors	0	0	0	0
238340 Tile and Terrazzo Contractors	0	0	0	0
238350 Finish Carpentry Contractors	0	0	0	0
238390 Other Building Finishing Contractors	0	0	0	0
238910 Site Preparation Contractors	302	302	312,468	1,035
Subtotal	13,815	14,316	14,819,248	
Crane Lessees in the Construction Industry:				
236115 New Single-Family Housing Construction	29,236	29,236	14,097,680	482
236116 New Multifamily Housing Construction	2,199	2,199	1,060,123	482
236117 New Housing Operative Builders	13,022	13,022	6,279,003	482
236118 Residential Remodelers	8,275	8,275	3,990,228	482
236210 Industrial Building Construction	2,777	2,777	1,339,077	482
236220 Commercial and Institutional Bldg.Construction	37,208	37,208	17,941,801	482
237110 Water and Sewer Lines and Related Structures	12,357	12,357	5,958,580	482
237120 Oil and Gas Pipelines and Related Structures	1,052	1,403	676,530	482
237130 Power and Communication Lines and Related Struct.	2,263	3,017	1,454,806	482
237210 Land Subdivision	0	0	0	0
237310 Highway, Street, and Bridge Construction	843	1,124	541,948	482
237990 Other Heavy and Civil Engineering Construction	5,251	5,251	2,532,047	482
238110 Poured Concrete Foundations and Structures	1,358	1,358	654,614	482
238120 Structural Steel and Precast Concrete	4,321	4,321	2,083,598	482
238130 Framing Contractors	10,841	10,841	5,227,681	482
238140 Masonry Contractors	1,286	1,286	620,113	482
238150 Glass and Glazing Contractors	529	529	255,278	482
238160 Roofing Contractors	2,319	2,319	1,118,325	482
238170 Siding Contractors	332	332	159,898	482
238190 Other Foundation, Structure, and Building Contractors	139	139	67,171	482
238210 Electrical Contractors	626	626	301,791	482
238220 Plumbing, Heating, and Air-Conditioning Contractors	875	875	421,932	482
238290 Other Building-Equipment Contractors	457	609	293,661	482
238310 Drywall and Insulation Contractors	0	0	0	0
238320 Painting and Wall-Covering Contractors	389	389	187,784	482
238330 Flooring Contractors	0	0	0	0
238340 Tile and Terrazzo Contractors	0	0	0	0
238350 Finish Carpentry Contractors	0	0	0	0
238390 Other Building Finishing Contractors	0	0	0	0
238910 Site Preparation Contractors	3,050	3,050	1,470,526	482
Subtotal	141,004	142,542	68,734,196	
Total	159,715	164,532	123,235,357	

Source: U.S. Census Bureau, Economic Census, 2002; Dunn and Bradstreet, Market Profiles, 2002; Data from Table 2 for number of affected establishments; Cost estimates from OSHA cost model, ORA.

Estimates of Cranes and Crane Jobs

The Agency estimates that there are about 164,500 establishments using about 96,000 cranes that would fall under the scope of the proposal. In the PIRFA, the Agency had estimated the number of cranes at about 92,000, with fewer establishments using them. Based on comments from the Panel's SERs, OSHA increased the estimated number of cranes in the Own but Do Not Rent category. OSHA also broadened and increased the industries and establishments in the Crane Lessees' category—which has almost 90 percent

of all affected establishments—to include light and heavy construction entities. These revisions account for the difference in estimated establishments, firms, and employees between the PIRFA and this PEA.

In the PIRFA, the Agency estimated the total annual number of crane jobs at 368,000, or about 4 jobs per crane. For the purposes of this analysis, a crane job is defined as beginning when the crane is put into use at a site and ending when the crane is either moved (which triggers an assessment of ground conditions and power lines) or when an increasingly hazardous situation occurs (e.g., excess rain which affects ground conditions) which triggers other requirements of the standard (e.g., post-assembly inspection, re-assembly, ground conditions assessment, power lines assessment). While no SER provided an alternative estimate of the number of crane jobs performed, some stated that OSHA's estimate was extremely low—and that rented cranes are used much more frequently. Also, a few SERs stated that some establishments that were categorized as Crane Lessees own their own cranes, and some employers categorized as owning cranes typically lease them, or both own and lease their own cranes. As a result of these comments, the Agency increased its estimate of the number of cranes in use, as noted above, and increased the annual average number of crane jobs per establishment to five. With the increase in the number of establishments in the Crane Lessee sector and the number of cranes in use, the total number of annual crane jobs is estimated to be about 860,000 per year. (Also as a result of these changes, the intensity of use of rental cranes is estimated to be much higher—on average over ten jobs per year, per rental crane.) These revisions in the cost model resulted in a higher estimated total cost for the proposed standard compared to the PIRFA, as more establishments and cranes are affected; however, these revisions increase the average estimated per establishment cost only slightly. Table B–10 presents information on numbers of cranes and crane jobs across affected industry sectors.

TABLE B–10—ESTIMATES OF CRANES, CRANE JOBS, AND AFFECTED CRANE OPERATORS FOR ALL ESTABLISHMENTS

NAIC/Industry	Number of affected firms	Number of affected estabs.	Total cranes	Cranes jobs	Affected operators
Crane Rental with Operators:					
238990 All Other Specialty Trade Contractors	1,183	1,240	5,886		5,886
Crane Rental without Operators (Bare Rentals):					
532412 Constr./Min./For. Maching and Equipment	2,137	4,631	60,934		15,233
Own and Rent Cranes with Operators:					
236115 New Single-Family Housing Construction	168	168	98	490	98
236118 Residential Remodelers	21	21	28	138	28
236210 Industrial Building Construction	8	10	366	1,832	366
236220 Commercial and Institutional Bldg. Constr	21	28	322	1,611	322
237110 Water and Sewer Line Construction	47	62	708	3,542	708
237120 Oil and Gas Pipeline Construction	16	21	358	1,791	358
237130 Power and Communication Line Constr	36	36	245	1,224	245
237310 Highway, Street, and Bridge Construction	76	101	3,152	15,760	3,152
237990 Other Heavy and Civil Engineering Constr	143	191	2,576	12,879	2,576
238110 Poured Concrete Foundations and Struct's	263	263	1,483	7,415	1,483
238120 Structural Steel and Precast Concrete	239	319	2,287	11,436	2,287
238130 Framing Contractors	20	20	10	50	10
238150 Glass and Glazing Contractors	41	41	65	324	65
238170 Siding Contractors	3	3	6	31	6
238190 Other Foundation, Struct., and Bldg. Contr's	26	35	245	1,226	245
238210 Electrical Contractors	12	12	49	244	49
238220 Plumb., Heat., and Aircond. Contractors	2	3	44	219	44
238290 Other Building-Equipment Contractors	104	138	1,311	6,557	1,311
238320 Painting and Wall-Covering Contractors	20	20	48	241	48
238910 Site-Preparation Contractors	311	311	1,668	8,342	1,668
Subtotal	1,576	1,803	15,070	75,352	15,070
Own but Do Not Rent					
236115 New Single-Family Housing Construction	2,915	2,915	2,915	14,576	2,915
236116 New Multifamily Housing Construction	220	220	220	1,099	220
236117 New Housing Operative Builders	1,302	1,302	1,302	6,511	1,302
236118 Residential Remodelers	827	827	827	4,136	827
236210 Industrial Building Construction	235	277	277	1,384	277
236220 Commercial and Institutional Bldg. Constr	3,718	3,718	3,718	18,590	3,718
237110 Water and Sewer Line Construction	922	1,230	1,230	6,148	1,230
237120 Oil and Gas Pipeline Construction	104	138	138	691	138
237130 Power and Communication Line Constr	225	300	300	1,500	300
237210 Land Subdivision	0	0	0	0	0
237310 Highway, Street, and Bridge Construction	84	111	111	557	111
237990 Other Heavy and Civil Engineering Constr	516	516	516	2,578	516
238110 Poured Concrete Foundations and Struct's	269	269	269	1,344	269
238120 Structural Steel and Precast Concrete	400	400	400	2,001	400
238130 Framing Contractors	1,083	1,083	1,083	5,413	1,083
238140 Masonry Contractors	129	129	129	643	129
238150 Glass and Glazing Contractors	53	53	53	263	53
238160 Roofing Contractors	232	232	232	1,159	232
238170 Siding Contractors	33	33	33	166	33
238190 Other Foundation, Struct., and Bldg. Constr	14	14	14	69	14

TABLE B–10—ESTIMATES OF CRANES, CRANE JOBS, AND AFFECTED CRANE OPERATORS FOR ALL ESTABLISHMENTS—Continued

NAIC/Industry	Number of affected firms	Number of affected estabs.	Total cranes	Cranes jobs	Affected operators
238210 Electrical Contractors	63	63	63	313	63
238220 Plumb., Heat., and Aircond. Contractors	87	87	87	437	87
238290 Other Building-Equipment Contractors	45	59	59	297	59
238310 Drywall and Insulation Contractors	0	0	0	0	0
238320 Painting and Wall-Covering Contractors	39	39	39	195	39
238330 Flooring Contractors	0	0	0	0	0
238340 Tile and Terrazzo Contractors	0	0	0	0	0
238350 Finish Carpentry Contractors	0	0	0	0	0
238390 Other Building Finishing Contractors	0	0	0	0	0
238910 Site-Preparation Contractors	302	302	302	1,509	302
Subtotal	13,815	14,316	14,316	71,578	14,316
Crane Lessees in the Construction Industry:					
236115 New Single-Family Housing Construction	29,236	29,236		146,180	7,309
236116 New Multifamily Housing Construction	2,199	2,199		10,993	550
236117 New Housing Operative Builders	13,022	13,022		65,108	3,255
236118 Residential Remodelers	8,275	8,275		41,375	2,069
236210 Industrial Building Construction	2,777	2,777		13,885	694
236220 Commercial and Institutional Bldg. Constr	37,208	37,208		186,040	9,302
237110 Water and Sewer Line Construction	12,357	12,357		61,785	3,089
237120 Oil and Gas Pipeline Construction	1,052	1,403		7,015	351
237130 Power and Communication Line Constr	2,263	3,017		15,085	754
237210 Land Subdivision	0	0		0	0
237310 Highway, Street, and Bridge Construction	843	1,124		5,620	281
237990 Other Heavy and Civil Engineering Constr	5,251	5,251		26,255	1,313
238110 Poured Concrete Foundations and Struct's	1,358	1,358		6,788	339
238120 Structural Steel and Precast Concrete	4,321	4,321		21,605	1,080
238130 Framing Contractors	10,841	10,841		54,206	2,710
238140 Masonry Contractors	1,286	1,286		6,430	322
238150 Glass and Glazing Contractors	529	529		2,647	132
238160 Roofing Contractors	2,319	2,319		11,596	580
238170 Siding Contractors	332	332		1,658	83
238190 Other Foundation, Struct., and Bldg. Constr	139	139		697	35
238210 Electrical Contractors	626	626		3,129	156
238220 Plumb., Heat., and Aircond. Contractors	875	875		4,375	219
238290 Other Building-Equipment Contractors	457	609		3,045	152
238310 Drywall and Insulation Contractors	0	0		0	0
238320 Painting and Wall-Covering Contractors	389	389		1,947	97
238330 Flooring Contractors	0	0		0	0
238340 Tile and Terrazzo Contractors	0	0		0	0
238350 Finish Carpentry Contractors	0	0		0	0
238390 Other Building Finishing Contractors	0	0		0	0
238910 Site-Preparation Contractors	3,050	3,050		15,248	762
Subtotal	141,004	142,542		712,711	35,636
Total	159,715	164,532	96,206	859,641	86,141

Source: U.S. Census Bureau, Economic Census, 2002 for establishments and firms, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA).

TABLE B–11—UNIT COST ESTIMATES FOR THE CRANES AND DERRICKS PROPOSED STANDARD

Section	Requirement	Incremental time	Employee type (wage)
Assembly/Disassembly (All Cases)	Assess power line issues and ground conditions.	30 minutes per assessment (15 minutes for power line conditions and 15 minutes for ground conditions).	Assembly/Disassembly (AD) Supervisor ($36.22).
Power Line Safety—Assembly/Disassembly (Near Power Lines) (Estimated as 25% of Cases).	Line Contact Determination	15 minutes per incidence	Qualified Person ($36.33).
	Planning Meeting & Voltage Information Request.	20 minutes	AD Supervisor ($36.22), Operator ($31.37), Rigger ($18.59), Employee ($16.16).
	A dedicated spotter is needed Spotter training	2 hours per incident, 15 minutes (each).	Employee ($16.16), Employee ($16.16), AD Supervisor ($36.22).

TABLE B–11—UNIT COST ESTIMATES FOR THE CRANES AND DERRICKS PROPOSED STANDARD—Continued

Section	Requirement	Incremental time	Employee type (wage)
Power Line Safety—Operations (Option 2 or 3)—Occurs in 30% of the jobs where cranes were not assembled near a power line (75%).	Elevated Warning Line and 20-foot determination.	15 minutes	Employee ($16.16).
	Planning Meeting & Voltage Information Request.	20 minutes	Supervisor ($36.22), Operator ($31.37), Rigger ($18.59), Employee ($16.16).
	Proximity Alarm/Other Operational Aids (25 % of Incidents).	0 minutes	Crane Operator ($31.37).
	Dedicated Spotter (75% of Incidents).	4 hours per incident, 15 minutes (instruction).	Employee ($16.16), Employee ($16.16), Supervisor ($36.22).
Power Line Safety—Operations (Closer Than Table A) Occurs in the 5% of the jobs where cranes were not assembled near a power line (75%).	Minimum Clearance Determination.	1 hour	Professional Engineer (PE) ($63.59).
	Planning Meeting	2 hours	Power Line Owner and PE ($63.59 each).
	Dedicated Spotter	4 hours	Employee ($16.16).
	Elevated Warning Line	15 minutes	Employee ($16.16).
	Equipment Grounding	30 minutes	PE ($63.59).
	Insulating Link	$427 (Annualized Cost).	
	Written Procedures	Developed during planning meeting.	
	Barricades	15 minutes	Employee ($16.16).
	Limit Access	Discussed during instruction/training	
	Non-Conductive Rigging	Already being done.	
	Deactivate Automatic Re-energizer.	30 minutes	Line Owner or PE ($63.59).
Crane Inspections	Monthly Inspection	15 minutes per crane in addition to current time spent (includes 2 minutes per crane for record-keeping).	Competent Person ($20.15).
	Annual Inspection	15 minutes per crane in addition to current time spent (includes 2 minutes per crane for record-keeping).	Qualified Person ($36.33).
	Repair Inspections	15 minutes per crane (includes 2 minutes per crane for record-keeping).	Qualified Person ($36.33).
Operator Training for Certification/ Qualification.	Certify operators	Wages for operator's training time (16 hours) for a 2-day course with examination. OSHA has included 2 additional hours for travel time. Thus, the total operator's training time is 18 hours. Also, the cost for a 2-day course ($7,200) divided by 15 employees per class or about $480 per person. OSHA used an estimate of $500 per person. This estimate includes 2 minutes for record-keeping. In addition to these costs, the cost for the actual examination averages about $250 per person. This totals about $1,314 per person (not annualized).	

Source: Office of Regulatory Analysis; BLS ''Employment and Earnings, 2003.''

Ground Conditions and Assembly/Disassembly

The proposal requires employers to ensure that site and ground conditions are adequate for safe assembly/disassembly (A/D) operations, including meeting ground condition criteria. Initially, an A/D supervisor must assess the ground conditions for conformance with those criteria and assess the site for suitability for assembly and disassembly. Accordingly, before beginning assembly/disassembly, the A/D supervisor would have to make the determination that ground-bearing conditions are adequate to support the equipment during assembly/disassembly. In addition, the A/D supervisor would have to consider the adequacy of site conditions that might affect the safety of assembly or disassembly. For example, at a construction site in an industrial facility with overhead piping carrying hazardous materials, the A/D supervisor would have to consider the potential for the equipment contacting the piping in determining where and how to conduct the assembly/disassembly operations.

The following is an example of how OSHA determined the cost for A/D operations. The cost for these operations for the Own-and-Rent-Cranes-with-Operators sector in NAIC 236115 was estimated to be $19,067 annually (Table B–8). OSHA calculated this cost as follows:

- Determining power-line and ground conditions for all jobs = $8,873 (490 crane jobs/year × 0.5 hour of supervisor wage ($36.22/hour));
- Marking work zones = $495 (490 crane jobs/year × 25% jobs near power lines × 0.25 hour of employee wage ($16.04/hour));
- Holding assembly-planning meetings = $4,137 (490 crane jobs/year (490) × 0.25 hour × (supervisor wage ($36.22/hour) + laborer wage ($16.04/hour) + crane operator wage ($31.36/hour) + rigger wage ($18.59/hour)));
- Using dedicated spotters under Options 2 or 3 = $3,958; (490 crane jobs/year × 25% of jobs × 2 hours × employee wage ($16.04/hour)); and
- Training spotters = $1,604 (490 crane jobs/year × 25% of jobs requiring spotters × 0.25 hours × (supervisor wage

($36.22/hour) and laborer wage ($16.04/hour))).

Some subtotals above may not exactly match the figures in parenthesis due to rounding factors.

C–DAC believed that crane tip-over incidents caused by inadequate ground conditions are a significant cause of injuries and fatalities. Conditions that increase the risk of such accidents include ground that is wet or muddy, poorly graded, or that consists of loose fill (or otherwise disturbed soil) that has not been sufficiently compacted. The Committee believed that requiring adequate ground conditions will prevent many of these accidents.

To perform these assessments, OSHA estimates that 30 minutes, on average, of assembly/disassembly (AD) supervisor time would be needed for each crane job (Table B–11). While there are requirements for disassembly, the Agency estimates that all of the costs will be incurred during the assembly process. Most of the problems dealing with disassembly are prohibited practices, which do not involve new costs to employers.

Many SERs offered input on the time needed to make the ground-condition assessment. While some time estimates were given, one SER stated that the time to assure adequate site assessment was not the issue; rather, the whole team needed to have input to assess the operations, including the crane operator. Another SER stated ''this cost is part of normal operations.'' Due to the range of estimates, OSHA believes that the 30-minute estimate is reasonable.

The Agency did not assume any current baseline for the costs of this provision, and seeks comment about current practices.

Power-Line Safety

Under the proposed standard, before beginning crane operations, employers must either: (1) Define a work zone with demarcated boundaries by using flags or a device such as a range-limiting device or range-control warning device that prohibits the operator from operating the crane past those boundaries, or (2) define the work zone as the area 360 degrees around the crane based on the crane's maximum working radius (*see* proposed 1408(a)(1)). The Agency estimates that, in most cases, the least-cost option would be to mark the zone with flags. Based on the defined work zone, the employer must determine whether the crane, load, or load line, if operated to its maximum working radius, could get closer than 20 feet to a power line. The Agency estimates that it will take a qualified person about 15 minutes to mark the work zone with flags and then determine whether the crane could come closer than 20 feet to a power line.

If the 20-foot determination is positive, then the employer would be required to take additional steps. Specifically, the employer would be required to meet the proposed requirements under one of three options. If any part of the crane, load, or load line could not come within more than 20 feet of a power line, the employer would not be required to take any further action.

The Agency estimates that 25 percent of all crane jobs would require that the crane be assembled or disassembled near a power line, which will take an estimated average of 15 additional minutes of a qualified person's time. If the crane operations take the crane closer than 20 feet, the employer must either: (1) De-Energize and visibly ground the power line, (2) maintain the 20-foot clearance, or (3) contact the utility owner/operator to get the line voltage and maintain the appropriate distance (listed in Table A of the proposal). If the employer chooses Option 2 or 3, the employer must then maintain the appropriate distance by implementing several encroachment-prevention procedures to ensure that the crane does not contact the energized power lines. The employer in either case is required to implement additional preventive encroachment measures, including having a planning meeting with the operator and other workers who will be in the area of the crane, erecting an elevated warning line, and using either a proximity alarm, operational aids/limiting devices, a dedicated spotter, or an insulating link. The Agency estimated that a designated spotter would be used in 75 percent of the cases and a proximity alarm would be used in the remaining 25 percent of cases. The Agency estimated that: the spotter would be on duty an average of 2 hours per incident; 25 percent of cranes are already equipped with proximity alarms (at no new cost to employers); and operators would use the proximity alarm instead of a dedicated spotter. Therefore, Agency did not estimate compliance costs for retrofitting cranes with proximity alarms.

Many SERs commented on this provision. The majority of them believed that, most of the time, a dedicated spotter would be used; accordingly, OSHA made no changes to the assumptions used to develop the costs for this provision. The Agency did not assume any baseline current practices for this provision, and seeks comment on this assumption.

For cranes that are not assembled near power lines (75 percent of all crane jobs), there are times when those cranes will operate closer than 20 feet to a power line, thus triggering the encroachment precautions in the proposed standard. The Agency estimates that this situation will occur 30 percent of the time, thereby affecting 22.5 percent of all these crane jobs (i.e., 30 percent $\times$ 75 percent = 22.5 percent of all crane-assembly jobs not near power lines).

The responses from the SERs as to the number of jobs that required cranes to work closer than 20 feet to a power line varied. One SER stated that as much as 50 percent of his jobs could be within 20 feet of power lines. Another SER stated that 7.3 percent of their jobs are within 20 feet of power lines, and .04 percent of jobs are within 10 feet of power lines. One SER stated that great variation exists in power-line situations; this SER had no power-line conflicts during the previous year, but in other years, the SER reported having three or four such conflicts. This SER stated further that after 20 years of crane-operation experience, his company had only been within two feet of a power line once, and then the power company was able to cut the power temporarily until the crane operations were finished.

The proposed standard allows employers to operate cranes closer than the minimum approach distances outlined in Table A. The Agency estimates that the remaining 5 percent of crane jobs (of the 75 percent that will operate close to a power line, but not be assembled near one) are required to do all of the following:

(1) Determine minimum clearance (1 hour of professional engineer time);

(2) Conduct a planning meeting (2 hours each of line owner time and professional engineer time);

(3) Provide a dedicated spotter (4 hours per job);

(4) Erect an elevated warning line (15 minutes of laborer time);

(5) Use an insulating link ($427 annualized cost);

(6) Ground equipment (30 minutes of professional engineer time);

(7) Develop written procedures (during the meeting between the line owner and professional engineer);

(8) Erect barricades (15 minutes of laborer time);

(9) Limit access to employees (by informing employees of the limits during training, and by using barricades);

(10) Provide non-conductive rigging (already being done under consensus standards and current industry practice); and

(11) Deactivate automatic re-energizers (30 minutes for the line owner or professional engineer).

Due to the closeness of the power line to the crane operations in these situations, many SERs stated that they perform duties similar to those required by the proposed standard. Some even stated that they go beyond what is required in the proposal by establishing ''no swing'' zones, marking boundaries of these zones with safety fencing and signs, and assigning a spotter to stay in communication with the operator to keep the crane boom out of the swing zone. Another SER stated that the power line could either be de-energized or relocated until the project is completed. This opinion was not shared by many other SERs, who believed that getting the power line de-energized is not an option. One SER stated that OSHA has failed to recognize the logistics of a power-line situation, which involve meetings, planning, and making preparations. This SER continued by stating that the utility company often adds costs through delays, and that costs of preparation are substantial and not accounted for by OSHA. Also, each job is specific, and it would be irresponsible to generalize the costs to do this work. Another SER stated that OSHA's estimates of costs were too low because OSHA omitted necessary travel time and support equipment, and underestimated wages. OSHA believes its estimates accurately reflect the (average) costs attributable to the proposed provisions on power-line safety, but requests comment from the public on the estimates.

The following is an example of how OSHA determined the cost of the proposed power-line safety requirements. The total cost of these requirements for the Own-and-Rent-Cranes-with-Operators sector in NAIC 236115 was estimated to be $17,752 (Table B–8), which is the sum of annual costs for operations near power lines ($3,714) and operations closer to power lines than the distances specified in Table A ($13,858). These cost estimates are based on this sector's use of 98 cranes on 490 jobs (Table B–10), as well as the unit costs described in Table B–11.

The cost of operations near power lines ($3,714) was estimated as follows:

- Hold planning meetings = $3,269 (490 crane jobs/year × 75 percent of crane-assembly jobs not near power lines × 30 percent of jobs near power lines × 0.25 hour × (wages for 2 laborers (2 × $16.04/hour) + crane-operator wage ($31.36/hour) + rigger wage ($18.59/hour) + qualified-person wage ($36.33/hour))); and
- Determine location for elevated warning line and 20-foot distance = $445 (490 crane jobs/year × 75 percent of crane-assembly jobs not near power lines × 30 percent of jobs near power lines × 0.25 hour of employee wages ($16.04/hour).

For operations near power lines closer than the distances specified in Table A, the Agency estimated annual cost ($13,858) as follows:

- Determine minimum clearance distance = $1,168 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected × 1.00 hour × professional-engineer (or equivalent) wage ($63.59/hour));
- Hold a planning meeting = $3,516 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × (2.00 hours × professional engineer (or equivalent) wage ($63.59/hour) + 4.00 hours dedicated-spotter wage ($16.04/hour)));
- Insulation for power line = $7,846 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × $427/insulation unit ($15,000/unit annualized over 10 years at 7 percent with 5 crane jobs/unit/year));
- Determine location for elevated warning lines = $74 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × 0.25 hour × laborer wage ($16.04/hour));
- Ground equipment = $584 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × 0.50 hour × professional engineer (or equivalent) wage ($63.59/hour));
- Erect and remove barricades = $74 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × 0.25 hour × laborer wage ($16.04/hour)); and
- Deactivate automatic re-energizer = $584 (490 crane jobs/year × 75 percent crane-assembly jobs not near power lines × 5 percent affected jobs × 0.50 hour × power-line owner wage ($63.59/hour)).

Inspections

The proposed standard requires several crane inspections. The Agency did not attribute any costs to daily visual inspections because these are already required in some instances and are a common industry practice. However, monthly, annual, and repair inspections will result in some incremental compliance costs attributable to the proposed standard.

Depending upon the type of crane, the current standard already requires monthly inspections and documentation for some equipment. Further, the current standard requires annual inspections (and documentation) of hoisting machinery. The Agency estimates that additional measures outlined in the proposed standard would result in some incremental cost increase. Thus, the Agency estimates an additional 15 minutes per crane for each type of inspection (including time spent for recordkeeping) is needed to comply with the additional measures in the proposed standard—the time necessary for a competent person to conduct a monthly inspection and for a qualified person to conduct an annual inspection.

OSHA also estimates that employers would incur a cost to re-inspect cranes that have been repaired. The Agency estimates that 10 percent of all cranes will be repaired annually. The Agency further estimates that an additional 15 minutes of a qualified person's time would be needed to re-inspect the crane. The 15 minutes is an additional, incremental amount as employers are already performing some kind of equipment re-inspection to ensure that the equipment is safe to operate.

The following is an example of how OSHA determined the cost of the proposed inspection requirements. The total annual cost of these requirements for the Own-and-Rent-Cranes-with-Operators sector in NAIC 236115 was estimated to be $22,341 (Table B–8). This cost estimate is based on this sector operating 98 cranes (Table B–10). The total cost consists of the sum of costs for annual and monthly inspections, as well as inspections following crane repairs, determined as follows:

- Monthly inspections = $21,362 (98 cranes × 12 months × 0.5 hours (Table B–11) × competent-person wage ($36.33/hour));
- Annual inspections = $890 (98 cranes × 0.25 hours (from Table B–11) × qualified-person wage ($36.22/hour));
- Re-inspections following repairs = $89 (98 cranes × 0.1 repaired cranes × 0.25 hours (Table B–11) × qualified person wage ($36.33)).

The annual and monthly inspections were non-controversial among the SERs, but the shift inspections sparked considerable response. One SER did not believe that the proposed standard should dictate that inspections must be performed prior to each shift. Also, the SER stated that some deficiencies only become apparent after operations begin. Implementing remedies then impacts the work, putting the operator in a difficult situation. This SER requested that OSHA align the proposal with the provisions in ANSI B30.5–2.1.2, which calls for ''frequent inspections'' at ''daily to monthly intervals.'' Another

SER believed that the required inspections would make operations safer, and his company would not have difficulty accepting them. Likewise, another SER stated that his company currently performs many of the inspections that are included in the proposed standard, but does not document the inspections as the proposal requires.

OSHA concludes that its time estimates (Table B–11) for inspections presented in the PIRFA are reasonable. The Agency seeks comment on these estimates, including the cost and extent of inspection documentation.

Operator Certification

The proposed standard requires operators to be certified or qualified. The Agency assumes only one operator for each crane, on average, in all crane-using sectors, and one operator for every four cranes in firms that rent cranes without operators. In addition, OSHA estimated a 23 percent annual turnover among crane operators, and that about one-third of the replacement operators (i.e., 8 percent of all operators) would require certification/qualification; accordingly, OSHA assumes that the remaining replacements are properly certified/qualified crane operators.

Compared to the current standards, the proposed standard requires more information that operators must know and understand, necessitating more training resources. Of the total number of existing operators, the Agency estimates that 70 percent would need to be certified or qualified. The remainder would already be certified as a result of existing state and local requirements.

To estimate the cost for crane operators' certification/qualification, the Agency used the least-cost option: employees attending a two-day test preparation course and taking the necessary examinations to be certified to operate a crane. This method would cost about $1,314 per operator (not annualized, see Table B–11 for details of this estimated cost). This figure reflects the total cost of the course, test, recordkeeping, and wages for operator course time. The Agency also estimates that 15 percent of the total number of operators needing certification/qualification would fail the first test and need to retake the test-preparation course. Eight percent would need to be certified/qualified each year due to employee turnover; that is, training of new entrants rather than certified/qualified operators moving within the industry. OSHA's estimates also include the time needed to develop and retain certification/qualification records. The Agency has assumed that employers will pay for both the course and employee wages during training, and seeks comment on this assumption. In this regard, some industries such as commercial trucking and aviation require employees to pay wholly or partially for their training or certification.

The annualized cost of training/certification is $750 per operator in course expenses and 18 hours for wages at $31.36/hour to attend a course, which is about $1,314, or $187 when annualized over 10 years at 7 percent. In addition, there are annual costs for training new entrants (8 percent of all operators) and for operators to retake the course and tests (15 percent of all operators). For example, from Table B–8, the total cost of this provision for the Own-and-Rent-Cranes-with-Operators sector in NAIC 236115 is $42,467, assuming the industry has an estimated 98 operators (Table B–10). The total cost of this provision was determined as follows:

- Initial training (annualized) = $12,828 (98 operators × 70 percent (baseline training/certification) × $187 (annualized training cost));
- Training for new entrants = $10,302 (98 operators × 8 percent (new entrants) × $1,314 (non-annualized training cost); and
- Retaking training = $19,316 (98 operators × 15 percent (operators needing to retake training) × $1,314 (non-annualized training cost)).

Many SERs objected to provisions in the proposed standard for operator certification/qualification, though some SERs found that the proposed standard adequately addresses a long-neglected problem for the construction industry. One SER expressed concern that his operator, due to his difficulty in taking written tests, would not be able to pass a written exam. The proposed standard allows for written tests to be administered orally as long as the employee can demonstrate the level of literacy needed to use the manufacturer's written procedures for the class/type of equipment that he/she would be operating. Also, the Panel recommended that OSHA consider and solicit public comment on allowing an operator to be certified for a specific, limited type of operation. In such a case, a defined set of parameters would limit the operator to simple, relatively low-risk operations. OSHA seeks comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced.

Some SERs were concerned that, to become certified/qualified, employees would have to be proficient in English. These SERs were concerned that, as a result, the certification/qualification requirement would be burdensome for employers who have operators who are unable to speak English. The Panel stated that the proposed standard does not require that the certification/qualification process be administered in English. First, the proposed rule allows employees to take the written portion of the certification/qualification test orally; there is no requirement that testing be done in English. In such a case, the operator candidate would have to demonstrate the ability to read and locate relevant information in the equipment manual and other related materials. However, the proposed standard does not specify that such materials be in English. In short, the candidates must have a level of literacy commensurate with the materials. If materials are in the candidate's language, the terms of the provision would be met.

Provisions in the Proposed Standard without Major Cost

The provisions described above contain the requirements OSHA believes will result in major costs for affected employers. There are, of course, numerous other requirements in the proposal that the Agency assumes will not impose any compliance costs. OSHA notes, however, that even if some of these provisions resulted in costs to employers, they would not, in total, be of a magnitude to affect the economic feasibility findings of this PEA. The compliance costs of the proposed rule are small with respect to the average revenues and profits of affected establishments. Even if there were additional costs placed on employers by the proposed rule, it would not '' 'threaten massive dislocation' to or imperil the existence of the industry'' (*United Steelworkers v. Marshall*, 647 F.2d 1189, 1265 (D.C. Cir. 1980) (cert. denied) (cites omitted)). (Section 7 of this PEA also discusses economic feasibility.) The Agency seeks comments on this and all assumptions used in this analysis.

Many of the provisions in the proposed rule are similar to existing national consensus standards. In some instances, the C–DAC incorporated national consensus standards by reference. (See, e.g., proposed 1926.1414(c)(4)(ii)(C); 1926.1423(c)(2)(i); 1926.1433(b); 1926.1436(c)(1)(ii); 1926.1438(b)(2)(iii); 1926.1440(c). In other instances, the C–DAC adopted the substantive requirements of a national consensus standard, but clarified the text and made it enforceable. For example, most of the

requirements in proposed 1926.1436, *Derricks* are similar to those in ANSI/ASME B30.6–2003, while proposed 1926.1426, *Free Fall and Controlled Load Lowering* includes the protective methods and mechanisms found in ASME B30.5–2004. These national consensus standards reflect industry current practices and are the baseline against which the new, incremental costs and benefits of the proposed rule are measured. Therefore, if the proposed rule requires a level of safety equivalent to that in an existing national consensus standard, then no difference exists between the proposed regulatory language and the baseline, and the proposed rule imposes no additional cost on employers. If, however, the proposed standard is more stringent than the consensus standard, the Agency concludes that all employers would incur new, incremental compliance costs solely attributable to the OSHA rule.

In addition, some of the provisions in the proposal are already required by, or based on provisions in, existing Subpart N. Section 1926.1425, *Keeping Clear of the Load*, for example, sets forth requirements to ensure that employees are protected from struck-by hazards associated with lifted and suspended loads. A similar requirement to keep employees clear of ''loads about to be lifted and suspended'' is in existing Subpart N at 1926.550(a)(19). Also, as explained in the Summary and Explanation section of the preamble above, proposed 1926.1431, *Hoisting Personnel* essentially duplicates existing requirements of Subpart N, as does proposed 1926.1418, *Authority to Stop Operation*. (See, also, proposed 1424, *Work Area Control* and proposed 1434, *Equipment Modifications*.) Because OSHA assumes employers are already complying with the requirements in existing Subpart N, provisions in the proposal that essentially duplicate these requirements would result in no incremental compliance costs to employers.

Finally, as described above, the members of the C–DAC had vast experience with cranes/derricks and, when appropriate, developed requirements that reflect current industry practices. For some provisions, the Committee determined that a different approach was warranted (e.g., power-line safety and operator qualification/certification). As described above, OSHA provided estimated costs for these provisions.

In the table below, OSHA identifies provisions in the proposed rule that do not result in new, incremental compliance costs and provides its rationale for this determination. During the SBAR Panel process, SERs did not identify any of the provisions in the table below as imposing significant new costs.

TABLE B–12—PROVISIONS FOR WHICH OSHA DID NOT ESTIMATE NEW, INCREMENTAL COSTS

Proposed requirement	Consensus standard/comment
1413 Wire Rope—inspections	Reflects similar concepts found in ASME B30.5 (2004).
(b) Monthly inspections—(1) Each month an inspection shall be conducted in accordance with paragraph 1413(a) (wire rope shift inspection).	
(c) Annual/comprehensive—(1) At least every 12 months, wire ropes in use on equipment shall be inspected by a qualified person in accordance with paragraph 1413 (a) (shift inspection).	
1415 Safety devices	Similar devices are found in ASME B30.5 (2004).
(a) Safety devices. The following safety devices are required on all equipment covered by this Subpart, unless otherwise specified: (1) Crane level indicator; (2) Boom stops, except for derricks and hydraulic booms; (3) Jib stops (if a jib is attached), except for derricks; (4) Equipment with foot pedal brakes shall have locks, except for portal cranes and floating cranes; (5) Hydraulic outrigger jacks shall have an integral holding device/check valve; and (6) Equipment on rails shall have rail clamps and rail stops, except for portal cranes.	While ASME does not require work to be delayed if the devices are not in proper working order-which the proposal does require. Current crane inspection requirements provide that any deficiencies be identified.
(b) Proper operation required. Operations shall not begin unless the devices listed in this section are in proper working order. If a device stops working properly during operations, the operator shall safely stop operations. Operations shall not resume until the device is again working properly. Alternative measures are not permitted to be used.	
1416 Operational aids	Similar to requirements in ASME B30.5–2004.
(a) The devices listed in this section (''listed operational aids'') are required on all equipment covered by this Subpart, unless otherwise specified.	
(d) Category 1 operational aids and alternative measures: (1) Boom hoist limiting device; (2) Luffing jib limiting device; (3) Anti two-blocking device.	
(e) Category 2 operational aids: (1) Boom angle or radius indicator; (2) Jib angle indicator if the equipment has a luffing jib; (3) Boom length indicator if the equipment has a telescopic boom, except where the load rating is independent of the boom length; (4) Load weighing and similar devices; (5) Outrigger position (horizontal beam extension) sensor/monitor if the equipment has outriggers; and (5)(ii) Hoist drum rotation indicator if the drum is not visible from the operator's station.	
1417 Operation	OSHA believes this duty is currently performed by a supervisor or other personnel in accord with similar provisions in ASME B30.5 (2004).
(u)(2) Where traveling with a load, the employer shall ensure that: (i) A competent person supervises the operation, determines if it is necessary to reduce rated capacity, and makes determinations regarding load position, boom location, ground support, travel route, overhead obstructions, and speed of movement necessary to ensure safety.	

TABLE B–12—PROVISIONS FOR WHICH OSHA DID NOT ESTIMATE NEW, INCREMENTAL COSTS—Continued

Proposed requirement	Consensus standard/comment
1423 Fall protection	The proposal requires all new equipment built with lattice booms to have walkways. The Agency estimates this will add $4,000 to the crane's price, a small percentage of a crane's cost. There is no requirement to retrofit existing cranes, and, therefore, no estimated costs imposed on employers.
(b)(1) Boom Walkways. Equipment manufactured more than one year after effective date of standard with lattice booms shall be equipped with walkways on the boom(s) if the vertical profile of the boom (from cord centerline to cord centerline) is 6 or more feet.	
1428 Signal Person Qualifications	The Agency believes this is a very minor cost and seeks comment on current practices from the public.
Paragraph (a)(3) requires that the signal personal evaluation be documented	
1430 Training	The proposal includes an employer evaluation. OSHA believes this evaluation is currently being made by employers; thus the Agency did not estimate additional compliance costs.
(g)(1) The employer shall ensure that employees required to be trained under this Subpart are evaluated to confirm that they understand the information provided in the training.	
1432 Multiple-crane/derrick lifts Plan development [paragraph (a)] is required before lifts with more than one piece of equipment.	2004 ANSI B30.5—3.2.1.5(k) A designated person (DP) is responsible for multi-crane lifts. The DP must analyze the operation, direct all personnel, and address changes in crane ratings, load position, boom location, ground support, and speed, which the Agency believes is equivalent to the proposal.
(b)(2) Supervisors must review the plan with workers	The Agency seeks comment on whether 1432(b)(2) is current industry practice. The Agency's paperwork package has estimated that this function may entail some costs; however, if it is current practice this provision would not add a new cost of compliance.
1433 Design, construction, and testing	2004 ANSI 30.5 Chapters 5.1 and 5.2
These provisions explicitly reference ANSI B30.5, SAE J 987 and 1063 for criteria.	The Agency believes that the consensus standards are equivalent to provisions in the proposal.
1437 Floating cranes/derricks Paragraph (n)(2) refers to reducing the rating of land cranes used on vessels.	2004 ANSI B30.5–1.1.1(e) specifies that this determination be made by the manufacturer or a qualified person. The Agency believes this is equivalent to the proposal.

Sensitivity of Estimates

The primary variable affecting the estimate of the total cost of the standard is the Agency's estimate of the number of cranes, and, secondarily, the average annual number of jobs performed per crane. All four of the major provisions that generate costs (operator certification, assembly/disassembly, inspections, and power-line safety) depend on the number of cranes. Costs for operators' certification and inspections are almost wholly a function of the number of cranes. The total estimated cost of the proposal varies directly and in rough proportion to the estimate of the number of cranes, with some minor dependence on the industries in which cranes are found. (The Agency has also estimated costs for operator certification as if all operators will be certified in the first year of the proposed four-year phase-in period. If included in the analysis, this factor (the 4-year phase-in) could introduce sources of variation in employers' costs as well.) The Agency's estimate of the average annual number of jobs per crane drives costs for jobsite assembly/disassembly and power-line safety provisions and is a secondary source of variability of cost estimates. However, this statistic introduces possible variability on the economic impact on employers, since it affects individual employer costs. In comparison, the estimate of the total number of cranes affects overall cost estimates without affecting individual employer costs in the cost model.

When the initial one-time cost of operator qualification/certification is annualized with a 3 percent rather than a 7 percent discount rate, the annual total costs are little affected. The cost for that provision alone falls to about $35.3 million annually from about $37.3 million, similarly reducing total annual costs from about $123 million to $121 million, or less than two percent. The overall costs are therefore not sensitive to the discount rate used in cost modeling.

7. Economic Feasibility and Impacts

This section presents OSHA's analysis of the potential economic impacts of the proposal and an assessment of economic feasibility. A separate analysis of the potential economic impacts on small entities (as defined by the criteria established by the Small Business Administration) and on very small entities (employers with fewer than 20 employees) is presented in the following section as part of the Initial Regulatory Flexibility Analysis, conducted in accordance with the Regulatory Flexibility Act.

A standard is economically feasible if it does not threaten massive dislocation to an industry or imperil its existence. (See *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980)). The court also found that a standard that is financially burdensome or threatens the survival of some companies in an industry is also not sufficient to render it infeasible. Further, the cost of compliance with an OSHA standard must be analyzed ''in relation to the financial health and profitability of the industry and the likely effect of such costs on unit consumer prices.'' *Id.* The court also found that ''the practical question is whether the standard threatens the competitive stability of an industry, or whether any intra-industry or inter-industry discrimination in the standard might wreck such stability or lead to undue concentration.'' *Id.*

To assess the potential economic impacts of the proposed rule, OSHA compared the anticipated costs of

achieving compliance against revenues and profits of establishments affected by the rule. This screening analysis is presented in Table B–13. This table is considered a screening analysis because it measures costs as a percentage of pre-tax profits and revenues, but does not predict impacts on pre-tax profits and sales. This screening analysis is used to determine whether the compliance costs potentially associated with the standard would lead to significant impacts on establishments in the affected industries. The actual impact of the standard on the profits and revenues of establishments in a given industry will depend on the price elasticity of demand for the services sold by establishments in that industry.

Price elasticity refers to the relationship between the price charged for a service and the demand for that service; that is, the more elastic the relationship, the less able an establishment is to pass the costs of compliance through to its customers in the form of a price increase and the more it will have to absorb the costs of compliance from its profits.

When demand is inelastic, establishments can recover all the costs of compliance simply by raising the prices they charge for that service; under this scenario, profits are untouched. On the other hand, when demand is elastic, establishments cannot recover all the costs simply by passing the cost increase through in the form of a price increase; instead, they must absorb some of the increase from their profits. In general, ''when an industry is subject to a higher cost, it does not simply swallow it, it raises its price and reduces its output, and in this way shifts a part of the cost to its consumers and a part to its suppliers,'' *American Dental Association v. Secretary of Labor*, (984 F.2d 823, 829 (7th Cir. 1993). Specifically, if demand is completely inelastic (i.e., price elasticity is 0), then the impact of compliance costs that amount to 1 percent of revenues would be a 1 percent increase in the price of the product or service, with no decline in demand or profits. Such a situation would be most likely when there are few, if any, substitutes for the product or service offered by the affected sector or if the products or services of the affected sector account only for a small portion of the income of its consumers. If the demand is perfectly elastic (i.e., the price elasticity is infinitely large), then no increase in price is possible, and before-tax profits would be reduced by an amount equal to the costs of compliance (minus any savings resulting from improved worker health and reduced insurance costs). Under this scenario, if the costs of compliance represent a large percentage of the sector's profits, some establishments might be forced to close. This scenario is highly unlikely to occur, however, because it can only arise when there are other goods and services that are, in the eye of the consumer, perfect substitutes for the goods and services the affected establishments produce or provide.

TABLE B–13—ESTIMATES OF ECONOMIC IMPACTS FOR AFFECTED ESTABLISHMENTS ACROSS INDUSTRY SECTORS

NAIC/Industry	Affected		Avg. revenues per estab. (1,000)	Avg. profits per estab. (1,000)	Cost per estab.	Cost as a percent of revenues	Cost as a percent of profits
	Firms	Estab's					
Crane Rental with Operators:							
238990 All Other Specialty Trade Cont	1,183	1,240	1,918	79	3,118	0.16	3.97
Crane Rental without Operators (Bare Rentals):							
532412 Const./Min./For. Machine & Equip	2,137	4,631	3,289	132	4,365	0.13	3.32
Own and Rent Cranes with Operators:							
236115 New Single-Family Housing Const	168	168	233	10	604	0.26	5.87
236118 Residential Remodelers	21	21	528	23	1,365	0.26	5.87
236210 Industrial Building Construction	8	10	14,656	646	37,928	0.26	5.87
236220 Commercial and Institutional Building	21	28	4,603	203	11,912	0.26	5.87
237110 Water and Sewer Line and Related Struct	47	62	4,570	213	11,827	0.26	5.57
237120 Oil and Gas Pipeline and Related Struct	16	21	6,822	317	17,656	0.26	5.57
237130 Power and Communication Line and Rel	36	36	2,720	126	7,038	0.26	5.57
237310 Highway, Street, and Bridge Construction	76	101	12,483	580	32,306	0.26	5.57
237990 Other Heavy and Civil Engineering Const	143	191	5,394	251	13,960	0.26	5.57
238110 Poured Concrete Foundation and Struct	263	263	2,256	105	5,837	0.26	5.57
238120 Structural Steel and Precast Concrete	239	319	2,868	133	7,422	0.26	5.57
238130 Framing Contractors	20	20	200	8	516	0.26	6.64
238150 Glass and Glazing Contractors	41	41	631	25	1,634	0.26	6.64
238170 Siding Contractors	3	3	827	32	2,140	0.26	6.64
238190 Other Foundation, Structure, and Building	26	35	2,802	109	7,252	0.26	6.64
238210 Electrical Contractors	12	12	1,629	63	4,215	0.26	6.64
238220 Plumbing, Heating, and Air-Conditioning	2	3	5,835	227	15,101	0.26	6.64
238290 Other Building Equipment Contractors	104	138	3,801	148	9,837	0.26	6.64
238320 Painting and Wall Covering Contract	20	20	962	37	2,490	0.26	6.64
238910 Site Preparation Contractors	311	311	2,146	84	5,553	0.26	6.64
Subtotal	1,576	1,803					
Own but Do Not Rent:							
236115 New Single family housing construction	2,915	2,915	1,057	47	1,035	0.10	2.22
236116 New Multifamily housing construction	220	220	3,792	167	1,035	0.03	0.62
236117 New housing operative builders	1,302	1,302	5,338	235	1,035	0.02	0.44
236118 Residential Remodelers	827	827	544	24	1,035	0.19	4.31
236210 Industrial building construction	235	277	6,132	270	1,035	0.02	0.38
236220 Commercial and Institutional Bldg. Const	3,718	3,718	6,479	286	1,035	0.02	0.36
237110 Water and Sewer Line Const	922	1,230	2,630	122	1,035	0.04	0.85
237120 Oil and gas pipeline construction	104	138	8,167	380	1,035	0.01	0.27
237130 Power and communication line const	225	300	5,769	268	1,035	0.02	0.39
237210 Land subdivision	0	0	289	13	0	0.00	0.00
237310 Highway, street and bridge const	84	111	7,266	338	1,035	0.01	0.31

TABLE B–13—ESTIMATES OF ECONOMIC IMPACTS FOR AFFECTED ESTABLISHMENTS ACROSS INDUSTRY SECTORS—Continued

NAIC/Industry	Affected		Avg. revenues per estab. (1,000)	Avg. profits per estab. (1,000)	Cost per estab.	Cost as a percent of revenues	Cost as a percent of profits
	Firms	Estab's					
237990 Other heavy and civil eng	516	516	2,076	97	1,035	0.05	1.07
238110 Poured Concrete foundation and struct	269	269	1,252	58	1,035	0.08	1.78
238120 Structural steel and precast concrete	400	400	2,018	94	1,035	0.05	1.10
238130 Framing Contractors	1,083	1,083	998	39	1,035	0.10	2.66
238140 Masonry Contractors	129	129	788	31	1,035	0.13	3.37
238150 Glass & Glazing Contractors	53	53	1,187	46	1,035	0.09	2.24
238160 Roofing Contractors	232	232	991	39	1,035	0.10	2.68
238170 Siding Contractors	33	33	641	25	1,035	0.16	4.14
238190 Other foundation, structure, building, ext	14	14	1,254	49	1,035	0.08	2.12
238210 Electrical Contractors	63	63	1,312	51	1,035	0.08	2.02
238220 Plumbing, Heating and Airconditioning Cont	87	87	1,346	52	1,035	0.08	1.97
238290 Other building equipment cont	45	59	2,383	93	1,035	0.04	1.11
238310 Drywall and insulation contractors	0	0	1,573	61	0	0.00	0.00
238320 Painting and wall covering contractors	39	39	433	17	1,035	0.24	6.14
238330 Flooring Contractors	0	0	760	30	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	655	26	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	517	20	0	0.00	0.00
238390 Other building finishing contractors	0	0	1,304	51	0	0.00	0.00
238910 Site Preparation	302	302	1,228	48	1,035	0.08	2.16
Subtotal	13,815	14,316					
Crane Lessees in the Construction Industry							
236115 New Single family housing construction	29,236	29,236	2,116	93	482	0.02	0.52
236116 New Multifamily housing construction	2,199	2,199	7,606	335	482	0.01	0.14
236117 New housing operative builders	13,022	13,022	10,692	472	482	0.00	0.10
236118 Residential Remodelers	8,275	8,275	5,442	240	482	0.01	0.20
236210 Industrial building construction	2,777	2,777	6,307	278	482	0.01	0.17
236220 Commercial and Institutional Bldg. Construction	37,208	37,208	6,490	286	482	0.01	0.17
237110 Water and Sewer Line Const	12,357	12,357	2,629	122	482	0.02	0.39
237120 Oil and gas pipeline construction	1,052	1,403	8,254	384	482	0.01	0.13
237130 Power and communication line const	2,263	3,017	11,295	525	482	0.00	0.09
237210 Land subdivision	0	0	0	0	0	0.00	0.00
237310 Highway, street and bridge const	843	1,124	72,437	3,367	482	0.00	0.01
237990 Other heavy and civil eng	5,251	5,251	3,950	184	482	0.01	0.26
238110 Poured Concrete foundation and struct	1,358	1,358	24,877	1,157	482	0.00	0.04
238120 Structural steel and precast concrete	4,321	4,321	2,019	94	482	0.02	0.51
238130 Framing Contractors	10,841	10,841	1,331	52	482	0.04	0.93
238140 Masonry Contractors	1,286	1,286	15,762	614	482	0.00	0.08
238150 Glass & Glazing Contractors	529	529	12,086	471	482	0.00	0.10
238160 Roofing Contractors	2,319	2,319	9,923	387	482	0.00	0.12
238170 Siding Contractors	332	332	12,932	504	482	0.00	0.10
238190 Other foundation, structure, building, ext	139	139	26,387	1,028	482	0.00	0.05
238210 Electrical Contractors	626	626	132,080	5,147	482	0.00	0.01
238220 Plumbing, Heating and Airconditioning Cont	875	875	135,367	5,275	482	0.00	0.01
238290 Other building equipment cont	457	609	23,770	926	482	0.00	0.05
238310 Drywall and insulation contractors	0	0	0	0	0	0.00	0.00
238320 Painting and wall covering contractors	389	389	43,317	1,688	482	0.00	0.03
238330 Flooring Contractors	0	0	0	0	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	0	0	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	0	0	0	0.00	0.00
238390 Other building finishing contractors	0	0	0	0	0	0.00	0.00
238910 Site Preparation	3,050	3,050	12,380	482	482	0.00	0.10
Subtotal	141,004	142,542					
Total	159,715	164,532					

Source: U.S. Census Bureau, Economic Census, 2002 for establishments, revenues, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA); Cost/establishment figures from Table B–9; Cost as a percent of revenue = Avg. establishment cost/avg establishment revenue.

A common intermediate case would be a price elasticity of one. In this situation, if the costs of compliance amount to 1 percent of revenues, then production would decline by 1 percent and prices would rise by 1 percent. The sector would remain in business and maintain approximately the same profit rate as before implementation of the standard, but would produce 1 percent less of its services. Consumers would effectively absorb the costs through a

combination of increased prices and reduced consumption; this, as the court described in *ADA v. Secretary of Labor,* is the more typical case.

Table B–13 presents estimates for the number of affected establishments, average establishment revenues and profits, and average establishment costs for each affected industry sector. Economic impacts in the table (the two right-most columns) are represented by two ratios: of average establishment costs to revenues, and of costs to profits. In the Own and Rent Cranes with Operators sector, the impacts for a number of sectors are identical. This effect is an artifact of the cost model, which estimates the number of cranes, and hence costs, based on revenues. Since profits are also derived from revenues, the impacts parallel one another in several industry sectors.

As is evident from the data and estimates in Table B–13, average establishment costs of compliance for the proposal are not large in relation to the corresponding average establishment revenues and profits in each of the industry sectors. The estimated per establishment cost of compliance represents at most, less than 0.26 percent (or 0.0026) of average establishment revenues. In most sectors it is lower.

The impact of the proposal measured by the ratio of costs to profits varies across the affected sectors. Among the sectors in the Crane Lessees sector, which includes about 142,500 of the 164,500 affected establishments, average employers are expected to have costs that represent much less than 1 percent of profits. Within the sector of employers Own but Do Not Rent, affected establishments in 11 of the 30 sectors have average costs as high as a few percent of profits (from 2 to 6 percent). This estimate of impact on costs as a percentage of profits is low, but OSHA notes that, for a few individual industries, the costs as a percentage of profits may be ''significant'' (over 5 percent). The Agency believes that in part the impact measure is high because the cost of compliance is compared with average revenues and profits for the industry as a whole. There are many very small employers across these industries, while it is likely that only larger employers own cranes. In that case, the average establishment's estimated revenue and profit are lower than that of affected establishments that own cranes, resulting in a too-high ratio (or percentage) of costs to profits for the affected employers. The Agency seeks comment on this.

In the two sectors that are most intensively involved in crane use, Crane Rental with Operators (employers primarily in the crane rental business) and Crane Rental without Operators (bare rentals), estimated costs are about 3 to 4 percent of profits. In the Own and Rent Cranes with Operators sectors, costs as a percentage of profits are estimated at 5 to 6 percent. Because these employers both own and use cranes as well as rent them, the cost model estimates significantly higher average establishment costs for them—even in relation to the sectors involved primarily in crane rentals. In addition, as noted above for the Own but Do Not Rent sector, most employers in these sectors are quite small, with only a few employees, and a relatively small fraction of employers in the sectors actually own cranes. Consequently, the average establishment revenues and profits may be considerably lower for the average establishment than for establishments that own cranes. If so, the cost as a percentage of profits overestimates that impact for affected establishments. The Agency seeks comment and additional data on this issue.

The Agency preliminarily concludes that the proposal is economically feasible for the affected industries. As described above, a standard is economically feasible if there is a reasonable likelihood that the estimated costs of compliance ''will not threaten the existence or competitive structure of an industry, even if it does portend disaster for some marginal firms'' (*United Steelworkers of America v. Marshall,* 647 F.2d 1189, 1272 (D.C. Cir. 1980). The potential impacts on employer costs associated with achieving compliance with the proposal fall well within the bounds of economic feasibility in each industry sector. Costs of 0.25 percent of revenues and 5 percent of profits will not threaten the existence of the construction industry or the potential use of cranes in construction. OSHA does not expect compliance with the requirements of the proposal to threaten the viability of employers or the competitive structure of any of the affected industry sectors.

For several reasons, the Agency believes that the impact of compliance costs will be less than estimates in Table B–13. The economic impact of the proposal is most likely to consist of a very small increase in prices for construction projects involving work with cranes (0.26 percent or less, depending on the sector). Crane rental companies, all of which must incur the costs of compliance unless they are already in compliance, should be able to pass through costs to lessees. The additional costs of crane safety measures are extremely small in relation to value of construction, and there are no economic substitutes, or alternatives, to the use of cranes in construction. It is unlikely that a price increase of this magnitude would significantly alter the services demanded by the public or any other affected customers or intermediaries. If the compliance costs of the proposal are substantially recouped with an increase in rental prices, there would be little effect on profits.

Given the small incremental increases in prices potentially resulting from compliance with the proposed standard and the lack of readily available substitutes for the products and services provided by the covered industry sectors, demand is expected to be sufficiently inelastic in each affected industry to enable entities to substantially offset compliance costs through minor price increases without experiencing any significant reduction in revenues or profits.

8. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act, as amended in 1996, requires the preparation of an Initial Regulatory Flexibility Analysis (IRFA) for certain proposed rules (5 U.S.C. 601–612). Under the provisions of the law, each such analysis must contain:

1. A description of the impact of the proposed rule on small entities;

2. a description of the reasons why action by the agency is being considered;

3. a succinct statement of the objectives of, and legal basis for, the proposed rule;

4. a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

5. a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the type of professional skills necessary for preparation of the report or record;

6. an identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap or conflict with the proposed rule; and

7. a description and discussion of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including:

(a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(c) the use of performance rather than design standards; and

(d) an exemption from coverage of the rule, or any part thereof, for such small entities.

The Regulatory Flexibility Act further states that the required elements of the IRFA may be performed in conjunction with or as part of any other agenda or analysis required by any other law if such other analysis satisfies the relevant provisions.

1. *Impact of the proposed rule on small entities.*

OSHA has analyzed the potential impact of the proposed standards on small entities. The total annual cost of compliance with the proposal for small entities is estimated to be $105 million, as shown by industry in Table B–14. The costs per establishment in the table are identical in several sectors because the cost model assumed that, on average, the number of cranes, operators, and crane jobs were the same for each affected establishment. In the crane-rental sectors, the Agency had rental income data for each sector and estimated the number of cranes owned per establishment for each sector. Different sizes of firms with different numbers of cranes in the rental sectors resulted in per establishment (average) costs varying by industry NAICS identifier.

To assess the potential economic impact of the proposal on small entities, OSHA calculated the ratios of compliance costs to profits and to revenues. These impacts are presented for each affected industry in Table B–15. OSHA expects that among small entities potentially affected by the proposal, the average increase in prices necessary to completely offset the compliance costs would be 0.08 percent. The average price increase necessary to completely offset compliance costs would not exceed 0.26 percent among small entities in any industry.

Only to the extent that such price increases are not possible would there be any effect on the average profits of small entities. Even in the unlikely event that no costs could be passed through, the compliance costs could be completely absorbed through an average reduction in profits of 1.8 percent. In most affected industries the compliance costs, without any pass-through, could be completely absorbed through an average reduction in profits of less than 1 percent; the reduction would be no more than 6.64 percent in any of the affected industries.

In order to further ensure that potential impacts on small entities were fully analyzed and considered, OSHA also separately examined the potential impacts of the proposed standards on very small entities, defined as employers with fewer than 20 employees. To assess the potential economic impact of the proposed standards on very small entities, OSHA calculated the ratios of compliance costs to profits and to revenues. These ratios are presented for each affected industry in Table B–16. OSHA expects that among very small entities potentially affected by the proposed standards, the average increase in prices necessary to completely offset the compliance costs would be 0.11 percent (less than 1 percent).

Only to the extent that such price increases are not possible would there be any effect on the average profits of very small entities. Even in the unlikely event that no costs could be passed through, the compliance costs could be completely absorbed through an average reduction in profits of 2.60 percent among affected very small entities.

TABLE B–14—ANNUALIZED COMPLIANCE COSTS FOR SBA DEFINED SMALL ENTITIES BY MAJOR CATEGORY

Category/Industry	Firms	Estabs.	Annualized compliance costs	Cost per estab.
Crane Rental with Operators:				
238990 All Other Specialty Trade Cont	$1,171	$1,223	$3,114,525	$2,661
Crane Rental without Operators (Bare Rentals):				
532412 Const./Min./For. Machine & Equip	1,782	3,927	4,870,341	1,240
Own and Rent Cranes with Operators:				
236115 New Single-Family Housing Const	168	168	101,447	604
236118 Residential Remodelers	21	21	28,669	1,365
236210 Industrial Building Construction	8	10	379,278	37,928
236220 Commercial and Institutional Building	21	28	333,534	11,912
237110 Water and Sewer Line and Related Struct	47	62	733,293	11,827
237120 Oil and Gas Pipeline and Related Struct	16	21	370,772	17,656
237130 Power and Communication Line and Rel	36	36	253,380	7,038
237310 Highway, Street, and Bridge Construction	76	101	3,262,951	32,306
237990 Other Heavy and Civil Engineering Const	143	191	2,666,449	13,960
238110 Poured Concrete Foundation and Struct	263	263	1,535,239	5,837
238120 Structural Steel and Precast Concrete	239	319	2,367,593	7,422
238130 Framing Contractors	20	20	10,326	516
238150 Glass and Glazing Contractors	41	41	66,984	1,634
238170 Siding Contractors	3	3	6,421	2,140
238190 Other Foundation, Structure, and Building	26	35	253,836	7,252
238210 Electrical Contractors	12	12	50,579	4,215
238220 Plumbing, Heating, and Air-Conditioning	2	3	45,304	15,101
238290 Other Building Equipment Contractors	104	138	1,357,502	9,837
238320 Painting and Wall Covering Contract	20	20	49,800	2,490
238910 Site Preparation Contractors	311	311	1,727,104	5,553
Subtotal	1,576	1,803	15,600,459	
Own but Do Not Rent:				
236115 New Single family housing construction	2,906	2,906	3,008,274	1,035
236116 New Multifamily housing construction	213	213	220,441	1,035
236117 New housing operative builders	1,263	1,263	1,307,790	1,035

TABLE B–14—ANNUALIZED COMPLIANCE COSTS FOR SBA DEFINED SMALL ENTITIES BY MAJOR CATEGORY—Continued

Category/Industry	Firms	Estabs.	Annualized compliance costs	Cost per estab.
236118 Residential Remodelers	825	825	854,352	1,035
236210 Industrial building construction	223	262	271,527	1,035
236220 Commercial and Institutional Bldg. Const	3,615	3,615	3,741,748	1,035
237110 Water and Sewer Line Const	918	1,223	1,266,435	1,035
237120 Oil and gas pipeline construction	98	131	135,815	1,035
237130 Power and communication line const	218	291	301,443	1,035
237210 Land subdivision	0	0	0	0
237310 Highway, street and bridge const	70	93	96,478	1,035
237990 Other heavy and civil eng	502	502	519,969	1,035
238110 Poured Concrete foundation and struct	108	108	111,349	1,035
238120 Structural steel and precast concrete	388	388	402,062	1,035
238130 Framing Contractors	1,061	1,061	1,098,374	1,035
238140 Masonry Contractors	128	128	132,658	1,035
238150 Glass & Glazing Contractors	49	49	50,247	1,035
238160 Roofing Contractors	230	230	237,708	1,035
238170 Siding Contractors	33	33	33,902	1,035
238190 Other foundation, structure, building, ext	10	10	10,476	1,035
238210 Electrical Contractors	60	60	62,427	1,035
238220 Plumbing, Heating and Airconditioning Cont	86	86	89,073	1,035
238290 Other building equipment cont	34	45	46,573	1,035
238310 Drywall and insulation contractors	0	0	0	0
238320 Painting and wall covering contractors	37	37	38,219	1,035
238330 Flooring Contractors	0	0	0	0
238340 Tile and Terrazzo contractors	0	0	0	0
238350 Finish Carpentry contractors	0	0	0	0
238390 Other building finishing contractors	0	0	0	0
238910 Site Preparation	271	271	280,543	1,035
Subtotal	13,346	13,831	14,317,883	
Crane Lessees in the Construction Industry:				
236115 New Single family housing construction	29,229	29,229	14,094,064	482
236116 New Multifamily housing construction	2,130	2,130	1,026,851	482
236117 New housing operative builders	12,634	12,634	6,091,909	482
236118 Residential Remodelers	8,274	8,274	3,989,842	482
236210 Industrial building construction	2,633	2,633	1,269,640	482
236220 Commercial and Institutional Bldg. Construction	36,174	36,174	17,443,203	482
237110 Water and Sewer Line Const	12,296	12,296	5,929,165	482
237120 Oil and gas pipeline construction	1,000	1,333	642,776	482
237130 Power and communication line const	2,211	2,948	1,421,534	482
237210 Land subdivision	0	0	0	0
237310 Highway, street and bridge const	775	1,033	498,115	482
237990 Other heavy and civil eng	5,214	5,214	2,514,205	482
238110 Poured Concrete foundation and struct	1,339	1,339	645,501	482
238120 Structural steel and precast concrete	4,203	4,203	2,026,698	482
238130 Framing Contractors	10,631	10,631	5,126,057	482
238140 Masonry Contractors	1,283	1,283	618,425	482
238150 Glass & Glazing Contractors	526	526	253,832	482
238160 Roofing Contractors	2,299	2,299	1,108,729	482
238170 Siding Contractors	331	331	159,368	482
238190 Other foundation, structure, building, ext	136	136	65,676	482
238210 Electrical Contractors	615	615	296,584	482
238220 Plumbing, Heating and Airconditioning Cont	863	863	416,363	482
238290 Other building equipment cont	441	588	283,487	482
238310 Drywall and insulation contractors	0	0	0	0
238320 Painting and wall covering contractors	389	389	187,673	482
238330 Flooring Contractors	0	0	0	0
238340 Tile and Terrazzo contractors	0	0	0	0
238350 Finish Carpentry contractors	0	0	0	0
238390 Other building finishing contractors	0	0	0	0
238910 Site Preparation	3,021	3,021	1,456,783	482
Subtotal	138,645	140,120	67,566,479	
Total	156,520	160,905	105,469,687	

Source: U.S. Census Bureau, Economic Census, 2002; Dunn and Bradstreet, Market Profiles, 2002; Data from Table 2 for number of affected establishments; Cost estimates from OSHA cost model, ORA.

TABLE B–15—ECONOMIC IMPACTS FOR SBA DEFINED SMALL ENTITIES BY MAJOR CATEGORIES

Category/Industry	Firms	Estabs.	Avg. revenues per estab. ($1,000)	Avg. profits per estab. ($1,000)	Cost per estab.	Cost as a percent of revenues	Cost as a percent of profits
Crane Rental with Operators:							
238990 All Other Specialty Trade Cont	1,171	1,223	1,551	$64	$2,661	0.17	4.18
Crane Rental without Operators (Bare Rentals):							
532412 Const./Min./For. Machine & Equip	1,782	3,927	935	37	1,240	0.13	3.32
Own and Rent Cranes with Operators:							
236115 New Single-Family Housing Const	168	168	233	10	604	0.26	5.87
236118 Residential Remodelers	21	21	528	23	1,365	0.26	5.87
236210 Industrial Building Construction	8	10	14,656	646	37,928	0.26	5.87
236220 Commercial and Institutional Building	21	28	4,603	203	11,912	0.26	5.87
237110 Water and Sewer Line and Related Struct	47	62	4,570	213	11,827	0.26	5.57
237120 Oil and Gas Pipeline and Related Struct	16	21	6,822	317	17,656	0.26	5.57
237130 Power and Communication Line and Rel	36	36	2,720	126	7,038	0.26	5.57
237310 Highway, Street, and Bridge Construction	76	101	12,483	580	32,306	0.26	5.57
237990 Other Heavy and Civil Engineering Const	143	191	5,394	251	13,960	0.26	5.57
238110 Poured Concrete Foundation and Struct	263	263	2,256	105	5,837	0.26	5.57
238120 Structural Steel and Precast Concrete	239	319	2,868	133	7,422	0.26	5.57
238130 Framing Contractors	20	20	200	8	516	0.26	6.64
238150 Glass and Glazing Contractors	41	41	631	25	1,634	0.26	6.64
238170 Siding Contractors	3	3	827	32	2,140	0.26	6.64
238190 Other Foundation, Structure, and Building	26	35	2,802	109	7,252	0.26	6.64
238210 Electrical Contractors	12	12	1,629	63	4,215	0.26	6.64
238220 Plumbing, Heating, and Air-Conditioning	2	3	5,835	227	15,101	0.26	6.64
238290 Other Building Equipment Contractors	104	138	3,801	148	9,837	0.26	6.64
238320 Painting and Wall Covering Contract	20	20	962	37	2,490	0.26	6.64
238910 Site Preparation Contractors	311	311	2,146	84	5,553	0.26	6.64
Subtotal	1,576	1,803					
Own but Do Not Rent:							
236115 New Single family housing construction	2,906	2,906	1,000	44	1,035	0.10	2.35
236116 New Multifamily housing construction	213	213	3,400	150	1,035	0.03	0.69
236117 New housing operative builders	1,263	1,263	5,104	225	1,035	0.02	0.46
236118 Residential Remodelers	825	825	543	24	1,035	0.19	4.32
236210 Industrial building construction	223	262	2,570	113	1,035	0.04	0.91
236220 Commercial and Institutional Bldg. Const	3,615	3,615	3,661	161	1,035	0.03	0.64
237110 Water and Sewer Line Const	918	1,223	2,324	108	1,035	0.04	0.96
237120 Oil and gas pipeline construction	98	131	3,743	174	1,035	0.03	0.59
237130 Power and communication line const	218	291	4,656	216	1,035	0.02	0.48
237210 Land subdivision	0	0	0	0	0	0.00	0.00
237310 Highway, street and bridge const	70	93	3,225	150	1,035	0.03	0.69
237990 Other heavy and civil eng	502	502	1,500	70	1,035	0.07	1.48
238110 Poured Concrete foundation and struct	108	108	1,000	47	1,035	0.10	2.23
238120 Structural steel and precast concrete	388	388	1,425	66	1,035	0.07	1.56
238130 Framing Contractors	1,061	1,061	798	31	1,035	0.13	3.33
238140 Masonry Contractors	128	128	675	26	1,035	0.15	3.94
238150 Glass & Glazing Contractors	49	49	900	35	1,035	0.12	2.95
238160 Roofing Contractors	230	230	801	31	1,035	0.13	3.32
238170 Siding Contractors	33	33	600	23	1,035	0.17	4.43
238190 Other foundation, structure, building, ext	10	10	900	35	1,035	0.12	2.95
238210 Electrical Contractors	60	60	1,100	43	1,035	0.09	2.42
238220 Plumbing, Heating and Airconditioning Cont	86	86	1,100	43	1,035	0.09	2.42
238290 Other building equipment cont	34	45	1,664	65	1,035	0.06	1.60
238310 Drywall and insulation contractors	0	0	0	0	0	0.00	0.00
238320 Painting and wall covering contractors	37	37	419	16	1,035	0.25	6.34
238330 Flooring Contractors	0	0	0	0	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	0	0	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	0	0	0	0.00	0.00
238390 Other building finishing contractors	0	0	0	0	0	0.00	0.00
238910 Site Preparation	271	271	962	37	1,035	0.11	2.76
Subtotal	13,346	13,831					
Crane Lessees in the Construction Industry:							
236115 New Single family housing construction	29,229	29,229	2,116	93	482	0.02	0.52
236116 New Multifamily housing construction	2,130	2,130	7,606	335	482	0.01	0.14
236117 New housing operative builders	12,634	12,634	10,692	472	482	0.00	0.10
236118 Residential Remodelers	8,274	8,274	5,442	240	482	0.01	0.20
236210 Industrial building construction	2,633	2,633	6,307	278	482	0.01	0.17
236220 Commercial and Institutional Bldg. Construction	36,174	36,174	6,490	286	482	0.01	0.17
237110 Water and Sewer Line Const	12,296	12,296	2,629	122	482	0.02	0.39

TABLE B–15—ECONOMIC IMPACTS FOR SBA DEFINED SMALL ENTITIES BY MAJOR CATEGORIES—Continued

Category/Industry	Firms	Estabs.	Avg. revenues per estab. ($1,000)	Avg. profits per estab. ($1,000)	Cost per estab.	Cost as a percent of revenues	Cost as a percent of profits
237120 Oil and gas pipeline construction	1,000	1,333	8,254	384	482	0.01	0.13
237130 Power and communication line const	2,211	2,948	11,295	525	482	0.00	0.09
237210 Land subdivision	0	0	0	0	0	0.00	0.00
237310 Highway, street and bridge const	775	1,033	72,437	3,367	482	0.00	0.01
237990 Other heavy and civil eng	5,214	5,214	3,950	184	482	0.01	0.26
238110 Poured Concrete foundation and struct	1,339	1,339	24,877	1,157	482	0.00	0.04
238120 Structural steel and precast concrete	4,203	4,203	2,019	94	482	0.02	0.51
238130 Framing Contractors	10,631	10,631	1,331	52	482	0.04	0.93
238140 Masonry Contractors	1,283	1,283	15,762	614	482	0.00	0.08
238150 Glass & Glazing Contractors	526	526	12,086	471	482	0.00	0.10
238160 Roofing Contractors	2,299	2,299	9,923	387	482	0.00	0.12
238170 Siding Contractors	331	331	12,932	504	482	0.00	0.10
238190 Other foundation, structure, building, ext	136	136	26,387	1,028	482	0.00	0.05
238210 Electrical Contractors	615	615	132,080	5,147	482	0.00	0.01
238220 Plumbing, Heating and Airconditioning Cont	863	863	135,367	5,275	482	0.00	0.01
238290 Other building equipment cont	441	588	23,770	926	482	0.00	0.05
238310 Drywall and insulation contractors	0	0	0	0	0	0.00	0.00
238320 Painting and wall covering contractors	389	389	43,317	1,688	482	0.00	0.03
238330 Flooring Contractors	0	0	0	0	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	0	0	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	0	0	0	0.00	0.00
238390 Other building finishing contractors	0	0	0	0	0	0.00	0.00
238910 Site Preparation	3,021	3,021	12,380	482	482	0.00	0.10
Subtotal	138,645	140,120					
Total	156,520	160,905					
			Simple Average of impacts			0.10	2.29

Source: U.S. Census Bureau, Economic Census, 2002 for establishments, revenues, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA); Cost/establishment figures from Table B–14; Cost as a percent of revenue = Avg. establishment cost/avg establishment revenue.

2. *A description of the reasons why action by the agency is being considered.*

Employees performing construction work involving cranes/derricks are potentially exposed to a variety of significant hazards that can and do cause serious injury and death. OSHA estimates that 263 serious injuries and 89 fatalities occur annually among these workers.

TABLE B–16—ECONOMIC IMPACTS FOR VERY SMALL ENTITIES (LESS THAN 20 EMPLOYEES) BY MAJOR CATEGORY

Category/Industry	Firms	Estabs.	Employees	Profit rate (percent)	Revenues per estab. ($1,000)	Profits per estab. ($1,000)	Cost per estab	Cost as a percent of revenues	Cost as a percent of profits
Crane Rental with Operators:									
238990 All Other Specialty Trade Cont.	1,013	1,013	4,824	4.10	$614	$25	$1,009	0.16	4.00
Crane Rental without Operators (Bare Rentals):									
5324121 Const./Min./For. Machine & Equip.	1,782	3,927	20,459	4.00	935	37	1,240	0.13	3.32
Own and Rent Cranes with Operators:									
236115 New Single-Family Housing Const.	168	168	261	4.41	233	10	604	0.26	5.87
236118 Residential Remodelers	21	21	45	4.41	528	23	1,365	0.26	5.87
236210 Industrial Building Construction	8	10	1,067	4.41	14,656	646	37,928	0.26	5.87
236220 Commercial and Institutional Building	21	28	757	4.41	4,603	203	11,912	0.26	5.87
237110 Water and Sewer Line and Related Struct.	47	62	1,432	4.65	4,570	213	11,827	0.26	5.57
237120 Oil and Gas Pipeline and Related Struct.	16	21	1,457	4.65	6,822	317	17,656	0.26	5.57
237130 Power and Communication Line and Rel.	36	36	666	4.65	2,720	126	7,038	0.26	5.57
237310 Highway, Street, and Bridge Construction	76	101	6,456	4.65	12,483	580	32,306	0.26	5.57
237990 Other Heavy and Civil Engineering Const.	143	191	5,857	4.65	5,394	251	13,960	0.26	5.57
238110 Poured Concrete Foundation and Struct.	263	263	4,328	4.65	2,256	105	5,837	0.26	6.64
(All other sectors in this category have no very small affected firms)		798	901	22,326					
Own Cranes But Do Not Rent Them:									
236115 New Single family housing construction	2,763	2,763	12,910	4.41	823	36	1,035	0.13	2.85

TABLE B–16—ECONOMIC IMPACTS FOR VERY SMALL ENTITIES (LESS THAN 20 EMPLOYEES) BY MAJOR CATEGORY—Continued

Category/Industry	Firms	Estabs.	Employees	Profit rate (percent)	Revenues per estab. ($1,000)	Profits per estab. ($1,000)	Cost per estab	Cost as a percent of revenues	Cost as a percent of profits
236116 New Multifamily housing construction	197	197	1,987	4.41	1,350	60	1,035	0.08	1.74
236117 New housing operative builders	1,206	1,206	11,127	4.41	1,854	82	1,035	0.06	1.27
236118 Residential Remodelers	808	808	3,126	4.41	443	20	1,035	0.23	5.30
236210 Industrial building construction Commercial and Institutional	209	209	7,076	4.41	1,247	55	1,035	0.08	1.88
236220 Bldg. Construction	2,943	2,943	56,620	4.41	1,526	67	1,035	0.07	1.54
237110 Water and Sewer Line Const.	900	900	14,864	4.65	702	33	1,035	0.15	3.17
237120 Oil and gas pipeline construction	63	63	4,224	4.65	708	33	1,035	0.15	3.14
237130 Power and communication line const. ...	207	207	8,703	4.65	655	30	1,035	0.16	3.40
237210 Land subdivision	0	0	0	4.65	0	0	0	0.00	0.00
237310 Highway, street and bridge const.	66	66	2,558	4.65	976	45	1,035	0.11	2.28
237990 Other heavy and civil eng.	378	378	5,549	4.65	589	27	1,035	0.18	3.78
238110 Poured Concrete foundation and struct	46	46	527	4.65	494	23	1,035	0.21	4.50
238120 Structural steel and precast concrete	90	90	1,625	4.65	659	31	1,035	0.16	3.38
238130 Framing Contractors	981	981	10,728	3.90	374	15	1,035	0.28	7.10
238140 Masonry Contractors	115	115	1,165	3.90	343	13	1,035	0.30	7.75
238150 Glass & Glazing Contractors	44	44	418	3.90	619	24	1,035	0.17	4.29
238160 Roofing Contractors	206	206	2,013	3.90	447	17	1,035	0.23	5.95
238170 Siding Contractors	31	31	202	3.90	408	16	1,035	0.25	6.52
238190 Other foundation, structure, building, ext.	10	10	115	3.90	394	15	1,035	0.26	6.74
238210 Electrical Contractors Plumbing, Heating and Airconditioning	54	54	671	3.90	444	17	1,035	0.23	5.99
238220 Contractors	77	77	861	3.90	509	20	1,035	0.20	5.22
238290 Other building equipment cont.	30	30	624	3.90	714	28	1,035	0.15	3.72
238310 Drywall and insulation contractors	0	0	0	3.90	0	0	0	0.00	0.00
238320 Painting and wall covering contractors ..	37	37	222	3.90	265	10	1,035	0.39	10.01
238330 Flooring Contractors	0	0	0	3.90	0	0	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	0	3.90	0	0	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	0	3.90	0	0	0	0.00	0.00
238390 Other building finishing contractors	0	0	0	3.90	0	0	0	0.00	0.00
238910 Site Preparation	271	271	2,536	3.90	497	19	1,035	0.21	5.34
Subtotal	11,733	11,733	150,451						
Crane Lessees in the Construction Industry:									
236115 New Single family housing construction	28,449	28,449	132,922	4.41	1,645	73	482	0.03	0.66
236116 New Multifamily housing construction	1,968	1,968	19,865	4.41	2,700	119	482	0.02	0.40
236117 New housing operative builders	12,059	12,059	111,265	4.41	3,708	164	482	0.01	0.29
236118 Residential Remodelers	8,099	8,099	31,341	4.41	4,431	195	482	0.01	0.25
236210 Industrial building construction Commercial and Institutional	2,170	2,170	62,390	4.41	1,247	55	482	0.04	0.88
236220 Bldg. Construction	29,651	29,651	570,496	4.41	1,526	67	482	0.03	0.72
237110 Water and Sewer Line Const.	9,867	9,867	122,221	4.65	702	33	482	0.07	1.48
237120 Oil and gas pipeline construction	740	740	37,254	4.65	708	33	482	0.07	1.46
237130 Power and communication line const. ...	2,203	2,203	69,416	4.65	1,311	61	482	0.04	0.79
237210 Land subdivision	0	0	0	4.65	0	0	0	0.00	0.00
237310 Highway, street and bridge const.	727	727	21,081	4.65	9,762	454	482	0.00	0.11
237990 Other heavy and civil engg.	4,624	4,624	67,830	4.65	1,177	55	482	0.04	0.88
238110 Poured Concrete Foundation and Struct.	1,213	1,213	13,844	4.65	9,888	460	482	0.00	0.10
238120 Structural steel and precast concrete	3,428	3,428	62,091	4.65	659	31	482	0.07	1.57
238130 Framing Contractors	9,953	9,953	108,788	3.90	498	19	482	0.10	2.48
238140 Masonry Contractors	1,150	1,150	11,655	3.90	6,859	267	482	0.01	0.18
238150 Glass & Glazing Contractors	472	472	4,528	3.90	6,194	241	482	0.01	0.20
238160 Roofing Contractors	2,067	2,067	20,160	3.90	4,465	174	482	0.01	0.28
238170 Siding Contractors	312	312	2,027	3.90	8,155	318	482	0.01	0.15
238190 Other foundation, structure, building, ext.	122	122	1,404	3.90	7,885	307	482	0.01	0.16
238210 Electrical Contractors Plumbing, Heating and Airconditioning	545	545	6,719	3.90	44,376	1,729	482	0.00	0.03
238220 Contractors	774	774	8,614	3.90	50,865	1,982	482	0.00	0.02
238290 Other building equipment cont.	435	435	6,783	3.90	7,667	299	482	0.01	0.16
238310 Drywall and insulation contractors	0	0	0	3.90	0	0	0	0.00	0.00
238320 Painting and wall covering contractors ..	370	370	2,228	3.90	26,527	1,034	482	0.00	0.05
238330 Flooring Contractors	0	0	0	3.90	0	0	0	0.00	0.00
238340 Tile and Terrazzo contractors	0	0	0	3.90	0	0	0	0.00	0.00
238350 Finish Carpentry contractors	0	0	0	3.90	0	0	0	0.00	0.00
238390 Other building finishing contractors	0	0	0	3.90	0	0	0	0.00	0.00
238910 Site Preparation	2,739	2,739	25,631	3.90	4,974	194	482	0.01	0.25
Subtotal	124,135	124,135	1,520,554						
Total	139,461	141,709	1,718,614						

Source: U.S. Census Bureau, Economic Census, 2002 for establishments, revenues, except Crane Rental w/o Operators group; Dunn and Bradstreet, Market Profiles, 2002 for data for Crane Rental w/o Operators group; Profit rates from Internal Revenue Service, Statistics of Income 2002 Corporation Source Book, 2002; Affected establish estimates from OSHA/Office of Regulatory Analysis (ORA); Cost/establishment figures from Table B–14; Cost as a percent of revenue = Avg. establishment cost/avg establishment revenue.

Although some of these incidents may have been prevented with better compliance with existing safety standards, research and analyses conducted by OSHA have found that most injuries and fatalities would be prevented through compliance with the proposed standard. In this regard, the existing OSHA standards for the construction industry do not directly address all of the hazards associated with work involving cranes/derricks in a comprehensive manner. An estimated 53 fatalities and 155 injuries would be prevented annually through full compliance with the proposed standard. An additional and more complete discussion of the reasons why this standard is being proposed by the Agency is provided above in the Summary and Explanation section of the Preamble.

3. *Statement of the objectives of, and legal basis for, the proposed rule.*

The primary objective of the proposed standard is to provide an increased degree of occupational safety for employees performing construction work involving cranes/derricks. As stated above, an estimated 155 injuries and 53 fatalities would be prevented annually through compliance with the proposed standard. Another objective of the proposed rulemaking is to provide employers and employees updated and more complete safety standards for construction work involving cranes/derricks.

The legal basis for the rule is the Occupational Safety and Health (OSH) Act of 1970. The OSH Act authorizes and obligates the Secretary of Labor to promulgate mandatory occupational safety and health standards as necessary ''to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.'' 29 U.S.C. 651(b).

4. *Description of and estimate of the number of small entities to which the proposed rule will apply.*

OSHA has completed a preliminary analysis of the economic impacts associated with this proposal, including an analysis of the type and number of small entities to which the proposed rule would apply, as described above. In order to determine the number of small entities potentially affected by this rulemaking, OSHA used the definitions of small entities developed by the Small Business Administration (SBA) for each industry.

For the construction industry generally, SBA defines small businesses using revenue-based criteria. For most of the affected construction industries, including those industries that are mostly comprised of general contractors, firms with annual revenues of less than $31 million are classified as small businesses. For specialty contractors, such as structural-steel erection contractors, firms with annual revenues of less than $13 million are considered to be small businesses. Based on the definitions of small entities developed by SBA for each industry, the proposal is estimated to potentially affect a total of 160,905 small entities, as shown in Tables B–14 and 15. Included in this number are an estimated 141,709 entities with fewer than 20 employees (Table B–16).

5. *Description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule.*

OSHA is proposing a standard which would address the work practices to be used, and other requirements to be followed, for performing construction work involving cranes/derricks. Employers would be required to keep certain records associated with inspections and operator certification/qualification as specified by the proposed standard. Regular reporting would not be required by the proposed standard; however, employers would be required to demonstrate compliance with the recordkeeping requirements as part of OSHA compliance inspections.

Other compliance requirements of the proposed standard include, as required, the assembly and disassembly requirements, encroachment prevention precautions when working near power lines, and ground condition and power line assessments.

The preamble to the proposed standard provides a comprehensive description of, and further detail regarding, the provisions of the proposed rulemaking. A description of the types of business entities which would be subject to the new and revised requirements, and the types of professional skills necessary for compliance with the requirements, is presented in the preceding chapters of this economic analysis.

6. *Federal rules which may duplicate, overlap or conflict with the proposed rule.*

OSHA recognizes that this standard may overlap with provisions in other construction standards, such as those standards addressing general training requirements. OSHA has clarified the relationship between the proposed standard and other pre-existing construction standards which may be applicable to cranes/derricks in the summary and explanation section of this preamble. Finally, OSHA has not identified any other Federal rules which may duplicate, overlap, or conflict with the proposal, and requests comments from the public regarding this determination.

7. *Alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.*

OSHA and C–DAC evaluated many alternatives to the proposed standards to ensure that the proposed requirements would accomplish the stated objectives of applicable statutes and would minimize any significant economic impact of the proposal on small entities. In developing the proposal, OSHA took into account the resources available to small entities. An exemption from coverage of the rule for small entities was not considered to be a viable option because the safety and health of the affected employees would be unduly jeopardized. Other regulatory alternatives were recommended by the Small Business Advocacy Review Panel, which was convened for purposes of soliciting comments on the proposal from affected small entities. A discussion of these alternatives is provided below.

Nonregulatory alternatives were also considered for occupational hazards associated with construction work involving cranes/derricks. These alternatives were discussed above in section 2 Identification of Market Failure and Need for Regulation.

Alternatives considered and changes made in response to comments from small entities and recommendations from the Small Business Advocacy Review Panel.

On August 18, 2006, OSHA convened a Small Business Advocacy Review Panel (the Panel) for this rulemaking in accordance with the provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), as codified at 5 U.S.C. 601 *et seq.*

The Panel consisted of representatives of OSHA, the Office of Information and Regulatory Affairs in the Office of Management and Budget, and of the Office of Advocacy within the U.S. Small Business Administration. The Panel received oral and written comments on a draft proposal and a draft economic analysis from small entities (businesses) that would potentially be affected by the rule. The Panel, in turn, prepared a written report which was delivered to the Assistant Secretary for Occupational Safety and Health (which can be found in the docket for this rulemaking). The report summarized the comments received from the small entities, and included

recommendations from the Panel to OSHA regarding the proposal and the associated analysis of compliance costs. In response to the Panel's recommendations, OSHA revised many of its assumptions, estimates of unit costs, and aspects of its economic model from the PIRFA for this PEA. These revisions are noted throughout the PEA, but principally in the sections for the industrial profile and estimates of costs of compliance.

Panel Report Recommendations and Alternatives

Small entity representatives (SERs) had an opportunity to meet with the Panel and comment on the draft proposal, as well as submit written comments to the Panel afterward. Some SERs who are in the business of supplying construction materials, and who deliver those materials to construction sites, believed that the proposed standard should not apply to their work. While there are many circumstances in which such businesses are not in the scope of the standard, there may be some circumstances in which they would be within the scope of the standard. The Panel recommended that OSHA consider excluding them from the scope of the standard, and solicit comment on whether equipment used solely to deliver materials to a construction site by placing/stacking the materials on the ground should be explicitly excluded from the proposed standard's scope. OSHA has addressed this issue in the scope section of the preamble.

Some SERs favored the operator certification/qualification section, and some SERs were opposed to various aspects of it. The Panel anticipated that there would be considerable public comment on the proposed rule regarding this issue. The Panel recommended that OSHA consider the information and range of opinions that were presented by the SERs on this issue when analyzing their comments. As noted above, the Panel recommended that OSHA include, as part of its preliminary economic analysis, an analysis of the costs, economic impacts, and benefits of operator certification/qualification. Also, based on the SERs' comments, the Panel recommended that OSHA consider, and solicit public comment on, expanding the levels of certification so as to allow an operator to be certified on a specific brand and model of crane. OSHA has addressed this issue in the operator qualification and certification section of the preamble and in this PEA.

Some SERs described crane operators whose abilities were limited to operating particular equipment in a very limited set of circumstances. They believed that these operators are fully capable of doing the work, but would be unable to pass certification tests that require knowledge and abilities beyond these limited circumstances. In response to these comments, the Panel recommended that OSHA consider, and solicit public comment on, expanding these provisions to allow an operator to be certified for specific, limited circumstances. Such circumstances would be defined by a set of parameters that, taken together, would limit an operation to simple, low-risk operations. Also, the Panel recommended that OSHA consider and solicit public comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced. OSHA requests comment on these issue.

A SER commented that it would be burdensome for small employers in remote areas to send their operators long distances to have them tested, and that it may be difficult or costly to arrange to have an accredited testing organization come to their area to administer the tests. The Panel recommended that OSHA consider and solicit public comment on allowing the written and practical tests described in Option (1) of proposed § 1926.1427(b) to be administered by an accredited educational institution. Also, this issue has been addressed in the preamble.

Lastly, some SERs were concerned that in order to become certified or qualified under proposed § 1926.1427, employees would have to be proficient in English. These SERs were concerned that, as a result, the certification/qualification requirement would be burdensome for employers who have operators who are unable to speak in English. The Panel noted that the C–DAC document does not state that the certification/qualification process be administered in English. The proposed rule also allows employees to take the written portion of the certification/qualification test orally. In such a case, the operator candidate (under § 1926.1427(h) and (j)) would have to demonstrate the ability to read and locate relevant information in the equipment manual and other related materials. However, the proposed rule does not specify that such written materials would have to be in English. The candidate must have a level of literacy commensurate with these materials; as long as the materials are in the candidate's language, the terms of this provision would be met. The Panel recommended that OSHA provide this interpretation in a Small Business Compliance Guide. OSHA has more fully discussed this in the preamble and intends to provide this interpretation in compliance guidance.

Table B–17 below lists the recommendations made by the Panel and presents the Agency's answers or responses. In the right-hand column of the table, where ''discussion'' of an issue is referred to in the preamble, it means in the Summary and Explanation section.

TABLE B–17—RESPONSES TO SBREFA PANEL RECOMMENDATIONS (ALSO FOUND IN TABLE 4 OF THE PREAMBLE)

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA provide full documentation for how it estimated the number of affected small entities and all other calculations and estimates provided in the PIRFA.	OSHA has developed a full preliminary economic analysis (PEA) for the proposal which explains all assumptions used in estimating the costs and benefits of the proposed standard.
The Panel recommends that OSHA reexamine its estimate of crane use in home building, the coverage of crane trucks used for loading and unloading, and the estimates of the number of jobs per crane. Changes in these estimates should be incorporated into the estimates of costs and economic impacts.	OSHA has included homebuilding industries in the ''Own but Do Not Rent'' and ''Crane Lessees'' industrial profile categories. OSHA has presented a discussion in the preamble of this rule of specific equipment that meets that functional definition of a crane The estimate of crane jobs per year has increased from 368,000 total annually (or 4 jobs per crane on average) to 860,000 (or 9 jobs per crane on average).

TABLE B–17—RESPONSES TO SBREFA PANEL RECOMMENDATIONS (ALSO FOUND IN TABLE 4 OF THE PREAMBLE)—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA review its estimates for the direct costs of operator certification and seek comment on these cost estimates.	OSHA has reviewed its cost estimates in the PEA for operator certification and seeks comment on the estimates and methodology.
The Panel recommends that OSHA carefully examine certain types of impact that could result from an operator certification requirement, including reports of substantial increases in the wages of operators; the possibility of increased market power for firms renting out cranes; and loss of jobs for existing operators due to language, literacy, or knowledge problems; and seek comment on these types of impacts. The Panel also recommends studying the impacts of the implementation of operator certification in CA.	OSHA seeks public comment on all aspects (including economic impacts, wages, number of operators, demand, etc.) of the operator certification requirements, specifically as it pertains to the State of California. OSHA has included 2 hours of travel time per operator into the unit costs for operator certification. The Agency reviewed data on wage rates for operators in California immediately before and after operator certification was required (Employment Development Department, Labor Market Information Division, State of California, 2007). The data did not show much change in operators' wages. The Agency seeks further comment from the public.
The Panel recommends that OSHA reexamine its estimates for the amount of time required to assess ground conditions, the number of persons involved in the assessment, and the amount of coordination involved; clarify the extent to which such assessments are currently being conducted and what OSHA estimates as new costs for this rule represent; and seek comments on OSHA's cost estimates.	OSHA seeks comment on the methodology used to calculate all of the costs in the PEA, which includes the costs for assessing ground conditions. OSHA assumed that inspection of ground conditions is normal business practice, and that, as a result, provisions in the proposal only add minor costs to this practice. The method of estimating costs is explained in detail in section 6, Costs of Compliance.
The Panel recommends that OSHA carefully review the documentation requirements of the standard, including documentation that employers may consider it prudent to maintain; estimate the costs of such requirements; seek ways of minimizing these costs consistent with the goals of the OSH Act; and solicit comment on these costs and ways of minimizing these costs.	The Agency describes the documentation requirements, along with cost estimates, in the section of this Preamble entitled ''OMB Review Under the Paperwork Reduction Act of 1995.''
The Panel recommends that OSHA examine whether the inspection requirements of the proposed rule require procedures not normally conducted currently, such as lowering and fully extending the boom before the crane can be used, and removing non-hinged inspection plates during the shift inspection, estimate the costs of any such requirements, and seek comment on these issues.	As explained in the discussion of section 1412, *Inspections,* OSHA's current standard at 29 CFR 1926.550 requires inspections each time the equipment is used as well as thorough annual inspections. In addition, national consensus standards that are incorporated by reference include additional inspection requirements. This proposal would list the inspection requirements in one place rather than rely on incorporated consensus standards. OSHA does not believe this proposed standard imposes significant new requirements for inspections. Paragraph 1413(a) explicitly says that booming down is not required for shift (and therefore monthly) inspections. Similarly, OSHA does not believe that inspection of any of those items would require removal of non-hinged inspection plates. In the discussion of proposed § 1412, OSHA requests public comment on these points.
The Panel recommends that OSHA consider the costs of meeting the requirements for original load charts and full manuals, and solicit comments on such costs.	Existing Subpart N, at 29 CFR 1926.550(a)(2), requires load charts; this is not a new cost. Subpart N does not require manuals. OSHA believes that most crane owners and operators have and maintain crane manuals, which contain the load charts and other critical technical information about crane operations and maintenance. The Agency believes that the cost of obtaining a copy of a manual should be modest and solicits comment on how many owners or operators do not have full manuals for their cranes or derricks.
The Panel recommends that OSHA provide full documentation for its analysis of the benefits the proposed rule are expected to produce and assure that the benefits analysis is reproducible by others.	The Agency has already placed additional materials into the rulemaking docket to aid in the reproduction of the benefits analysis. The Agency has also developed a full benefits analysis (section 4 of this PEA) which includes the methodology and data sources for the calculations.
The Panel recommends that OSHA consider and solicit public comment on whether the scope language should be clarified to explicitly state whether forklifts that are modified to perform tasks similar to equipment (cranes and derricks) modified in that manner would be covered.	OSHA addresses this recommendation in the discussion of proposed paragraph 1400(c)(8) and solicits public comment on the issue.

TABLE B–17—RESPONSES TO SBREFA PANEL RECOMMENDATIONS (ALSO FOUND IN TABLE 4 OF THE PREAMBLE)—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that there be a full explanation in the preamble of how responsibility for ensuring adequate ground conditions is shared between the controlling entity, and the employer of the individual supervising assembly/disassembly and/or the operator.	OSHA explains in the discussion of proposed paragraph 1402(e) how the various employers, including the controlling entity, the employer whose employees operate the equipment, and the employer of the A/D supervisor share responsibility for ensuring adequate ground conditions.
The Panel recommends that OSHA restate the applicable corrective action provisions (which are set forth in the shift inspection) in the monthly inspection section.	OSHA addresses this recommendation in the discussion of proposed paragraph 1412(e) and solicits public comment on the issue.
The Panel recommends that OSHA solicit public comment on whether, and under what circumstances, booming down should be specifically excluded as a part of the shift inspection, and whether the removal of non-hinged inspection plates should be required during the shift inspection.	OSHA addresses this recommendation in the discussion of proposed paragraph 1412(d) and solicits public comment on the issues raised in the recommendation.
The Panel recommends that OSHA solicit public comment on whether to include an exception for transportation systems in proposed paragraph 1412(a), which requires an inspection of equipment that has had modifications or additions that affect its safe operation, and, if so, what the appropriate terminology for such an exception would be.	OSHA addresses the recommendation in the discussion of proposed paragraph 1412(a) and solicits comment on the issues raised in the recommendation.
The Panel recommends that OSHA explain in the preamble that the shift inspection does not need to be completed prior to each shift but may be completed during the shift.	In the explanation of paragraph 1412(d)(1) of the proposed rule, OSHA explains that the shift inspection may be completed during the shift.
The Panel recommends that OSHA solicit public comment about whether it is necessary to clarify the requirement of proposed paragraph 1412(d)(1)(xi) that the equipment be inspected for ''level position.''	OSHA addresses this recommendation in the discussion of proposed paragraph 1412(d)(1)(xi) and requests public comment on the issues raised in the recommendation.
The Panel recommends that OSHA solicit comment on whether paragraph 1412(f)(2)(xii)(D) should be changed to require that pressure be inspected ''at the end of the line,'' as distinguished from ''at each and every line,'' and if so, what the best terminology would be to meet this purpose. (An SER indicated that paragraph (f)(2)(xiv)(D) of § 1412 should be modified to ''checking pressure setting,'' in part to avoid having to check the pressure at ''each and every line'' as opposed to ''at the end of the line.'')	There is no proposed requirement to check the pressure ''at each and every line.'' The provision simply states that relief valves should be checked for failure to reach correct pressure. If this can be done at one point for the entire system, then that would satisfy the requirement.
The Panel recommends that OSHA solicit public comment on whether paragraph (f)(2)(xx) of § 1412 should be deleted because an SER believes that it is not always appropriate to retain originally-equipped steps and ladders, such as in instances where they are replaced with ''attaching dollies.''	Proposed paragraph 1412(f)(2)(xx) does not require the corrective action to which the SER refers. If an inspection under proposed paragraph 1412(f) reveals a deficiency, a qualified person must determine whether that deficiency is a safety hazard requiring immediate correction. If the inspection reveals that original equipment, such as stairs and ladders, have been replaced with something equally safe, there would be no safety hazard and no requirement for corrective action.
The Panel recommends that OSHA solicit public comment on the extent of documentation of monthly and annual/comprehensive inspections the rule should require.	OSHA addresses this recommendation in the discussion of proposed paragraph 1412(f) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on whether the provision for monthly inspections should, like the provision for annual inspections, specify who must keep the documentation associated with monthly inspections.	OSHA addresses this recommendation in the discussion of proposed paragraph 1412(e) and requests public comment on the issue.
The Panel recommends that OSHA consider ways to account for the possibility that there may sometimes be an extended delay in obtaining the part number for an operational aid for older equipment and solicit public comment on the extent to which this is a problem.	OSHA addresses this recommendation in the discussion of proposed paragraph 1416(d) and solicits public comment on the issue.
The Panel recommends that the provision on fall protection (proposed § 1423) be proposed as written and that OSHA explain in the preamble how and why the Committee arrived at this provision.	In the discussion of proposed § 1423, OSHA explains the Committee's rationale underlying the proposed section.
The Panel recommends that OSHA consider the potential advantages of and solicit public comment on adding provisions to proposed § 1427 that would allow an operator to be certified on a particular model of crane; allow tests to be administered by an accredited educational institution; and allow employers to use manuals that have been re-written to accommodate the literacy level and English proficiency of operators.	OSHA addresses these recommendations in the discussion of proposed § 1427 and requests public comment on the issues raised by the Panel.
The Panel recommends that OSHA clarify in the preamble how the proposed rule addresses an SER's concern that his crane operator would not be able to pass a written qualification/certification exam because the operator has difficulty in taking written exams.	The issue is discussed in the explanation of the proposed rule for § 1926.1427(h).

TABLE B–17—RESPONSES TO SBREFA PANEL RECOMMENDATIONS (ALSO FOUND IN TABLE 4 OF THE PREAMBLE)—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends soliciting public comment on whether the phrase ''equipment capacity and type'' in proposed paragraph 1427(b)(1)(ii)(B) needs clarification, suggestions on how to accomplish this, and whether the categories represented in Figures 1 through 10 contained in ANSI B30.5–2000) (i.e., commercial truck-mounted crane—telescoping boom; commercial truck-mounted crane—non-telescoping boom; crawler crane; crawler crane—telescoping boom; locomotive crane; wheel mounted crane (multiple control station); wheel mounted crane—telescoping boom (multiple control station); wheel mounted crane (single control station); wheel mounted crane—telescoping boom (single control station)) should be used.	OSHA addresses this recommendation in the discussion of proposed paragraph 1427(b)(1)(ii)(B) and requests public comment on the issue.
The Panel recommends that OSHA ask for public comment on whether the rule needs to state more clearly that paragraph 1427(j)(1)(i) requires more limited training for operators of smaller capacity equipment used in less complex operations as compared with operators of higher capacity, more complex equipment used in more complex situations.	OSHA addresses this recommendation in the discussion of proposed paragraph 1430(c) and requests public comment on the issue.
The Panel recommends that OSHA consider and ask for public comment on whether a more limited training program would be appropriate for operations based on the capacity and type of equipment and nature of operations.	OSHA addresses this recommendation in the discussion of proposed paragraph 1430(c) and requests public comment on the issue.
The Panel recommends that OSHA consider and ask for public comment as to whether the supervisor responsible for oversight for an operator in the pre-qualification period (1427(f)) should have additional training beyond that required in the C–DAC document at paragraph 1427(f)(2)(iii)(B).	OSHA addresses this recommendation in the discussion of proposed paragraph 1430(c) and requests public comment on the issue.
The Panel recommends OSHA solicit comment on whether there are qualified persons in the field with the necessary expertise to assess how the rated capacity for land cranes and derricks used on barges and other flotation devices needs to be modified as required by proposed paragraph 1437(n)(2).	OSHA addresses these recommendations in the discussion of proposed paragraph 1437(n)(2) and requests public comment on the issues.
The Panel also recommends that OSHA solicit comment on whether it is necessary, from a safety standpoint, to apply this provision to cranes used only for duty cycle work, and if so, why that is the case, and how ''duty cycle work'' should be defined.	
The Panel recommends that OSHA consider and ask for comment on whether it would be appropriate to exempt from the rule small side boom cranes incapable of lifting above the height of a truck bed and with a capacity of not more than 6,000 pounds.	OSHA addresses this recommendation in the discussion of proposed paragraph 1440(a) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on how the proposed rule could be simplified (without creating ambiguities) and made easier to understand. (Several SERs believed that the C–DAC document was so long and complex that small businesses would have difficulty understanding it and complying with it.)	The length and comprehensiveness of the standard is an issue for this rulemaking. OSHA requests comment on how and whether the proposal can be shortened or simplified—made easier to understand—and the effect of that on addressing construction hazards.
The Panel recommends that OSHA consider outlining the inspection requirements in spreadsheet form in an Appendix or developing some other means to help employers understand what inspections are needed and when they must be done.	OSHA will consider developing such an aid as a separate guidance document.
The Panel recommends that OSHA consider whether use of the words ''determine'' and ''demonstrate'' would mandate that the employer keep records of such determinations and if records would be required to make such demonstrations.	Some SERs requested clarification as to when documentation was required, believing that the document implicitly requires documentation when it states that the employer must ''determine'' or ''demonstrate'' certain things. OSHA notes that it cannot cite an employer for failing to have documentation not explicitly called for in a standard. See also the discussion under proposed paragraph 1402(e).
The Panel recommends soliciting public comment on whether the word ''days'' as used in sections 1416(d) and 1416(e) should be clarified to mean calendar days or business days.	OSHA addresses this recommendation in the discussion of proposed paragraph 1416(d) and requests public comment on the issue.
The Panel recommends that OSHA carefully discuss what is included and excluded from the scope of this standard.	OSHA discusses in detail the types of machinery that are included under this proposed standard and those that are excluded in the explanation of § 1400.
The Panel recommends that OSHA gather data and analyze the effects of already existing certification requirements.	OSHA has obtained and evaluated a study by the Construction Safety Association of Ontario showing that Ontario's certification requirement has led to a substantial decrease in crane-related fatalities there.
The Panel recommends that OSHA consider excluding and soliciting comment on whether equipment used solely to deliver materials to a construction site by placing/stacking the materials on the ground should be explicitly excluded from the proposed standard's scope.	OSHA addresses this recommendation in the discussion of proposed paragraph 1400(c) and requests public comment on the issue.

TABLE B–17—RESPONSES TO SBREFA PANEL RECOMMENDATIONS (ALSO FOUND IN TABLE 4 OF THE PREAMBLE)—Continued

SBREFA panel recommendation	OSHA response
The Panel recommends that OSHA should consider the information and range of opinions that were presented by the SERs on the issue of operator qualification/certification when analyzing the public comments on this issue.	The information and opinions submitted by the SERs are part of the record for this rulemaking, and OSHA will consider them along with the other public comments on the proposed rule.
The Panel recommends that OSHA consider and solicit public comment on expanding the levels of certification so as to allow an operator to be certified on a specific brand's model of crane.	OSHA addresses this recommendation in the discussion of proposed paragraph 1427(j)(1) and requests public comment on the issue.
The Panel recommends that OSHA consider and solicit public comment on expanding the levels of operator qualification/certification to allow an operator to be certified for a specific, limited type of circumstance. Such a circumstance would be defined by a set of parameters that, taken together, would describe an operation characterized by simplicity and relatively low risk. The Agency should consider and solicit comment on whether such parameters could be identified in a way that would result in a clear, easily understood provision that could be effectively enforced.	OSHA addresses this recommendation in the discussion of proposed paragraph 1427(j)(1) and requests public comment on the issue.
The Panel recommends that OSHA consider and solicit public comment on allowing the written and practical tests described in Option (1) to be administered by an accredited educational institution.	OSHA addresses this recommendation in the discussion of paragraph 1427(b)(3) and requests public comment on the issue.
The Panel recommends that OSHA solicit public comment on making it clear that: (1) An employer is permitted to equip its cranes with manuals re-written in a way that would allow an operator with a low literacy level to understand the material (such as substituting some text with pictures and illustrations), and (2) making it clear that, when the cranes are equipped with such re-written manuals and materials, the ''manuals'' and ''materials'' referred to in these literacy provisions would be the re-written manuals.	OSHA addresses this recommendation in the discussion of proposed paragraph 1427(h)(1) and requests public comment on the issues.
The Panel recommends that OSHA explain in a Small Business Compliance Guide that the certification/qualification test does not need to be administered in English but can be administered in a language that the candidate can read; and that while the employee would also need to have a sufficient level of literacy to read and understand the relevant information in the equipment manual, that requirement would be satisfied if the material is written in a language that the employee can read and understand.	OSHA will issue a Small Business Compliance Guide after a final rule is issued and will explain these points in the Guide.

9. References

Beavers, J.E., Moore, R., Rinehart, R., Schriver, W.R., ''Crane Related Fatalities in the Construction Industry'', Journal of Construction Engineering and Management, September 2006

Bureau of Labor Statistics, ''Census of Fatal Occupational Injuries,'' 1994–2003

Bureau of Labor Statistics, ''Survey of Occupational Injuries and Illnesses,'' 1995–2004

Dunn and Bradstreet, ''Market Profiles,'' 2002

Environmental Protection Agency, ''The Benefits and Costs of the Clean Air Act of 1990 to 2010,'' 1999

Environmental Protection Agency, ''Guidelines for Preparing Economic Analyses'', 2000

Internal Revenue Service, ''Statistics of Income 2002 Corporation Source Book,'' 2002

Occupational Safety and Health Administration, ''IMIS Fatality Reports,'' 1995–2005

U.S. Bureau of the Census, ''Economic Census,'' 2002

C. OMB Review Under the Paperwork Reduction Act of 1995

The proposed Cranes and Derricks in Construction Standard contains collection-of-information (paperwork) requirements that are subject to review by the Office of Management and Budget (''OMB'') under the Paperwork Reduction Act of 1995 (''PRA–95''), 44 U.S.C. 3501 *et seq.*, and OMB's regulations at 5 CFR part 1320. The Paperwork Reduction Act defines ''collection of information'' as ''the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public of facts or opinions by or for an agency regardless of form or format. * * * '' (44 U.S.C. 3502(3)(A).) OSHA submitted the collection-of-information requirements identified in this NPRM to OMB for review (44 U.S.C. 3507(d)). OSHA solicits comments on the collection-of-information requirements and the estimated burden hours associated with these collections, including comments on the following:

- Whether the proposed collection-of-information requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply, for example, by using automated or other technological techniques for collecting and transmitting information.

The title, description of the need for and proposed use of the information, description of the respondents, and frequency of response of the information collections are described below, along with an estimate of the annual reporting burden and cost as required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2).

Title: Cranes and Derricks in Construction (29 CFR part 1926 subpart CC).

Description and Proposed Use of the Collections of Information: The proposed standard would impose new information-collection requirements for purposes of PRA–95. The collection-of-information requirements in the proposed standard have not been approved by OMB. These provisions are needed to protect the health and safety

of employees who work with equipment at construction worksites.

The paperwork requirements would impose a duty to produce and maintain records on employers who implement controls and take other measures to protect employees from hazards related to cranes and derricks used in construction. Accordingly, each construction business that has employees who operate or are in the vicinity of cranes and derricks would be required to have, as applicable, the following documents on file and available at the job site: Equipment ratings, employee training records, written authorizations from qualified individuals, and qualification program audits. During an inspection, OSHA would have access to the records to determine compliance under conditions specified by the proposed standard. An employer's failure to generate and disclose the information required in this standard will affect significantly the Agency's effort to control and reduce injuries and fatalities related to the use of cranes and derricks in construction.

Table C–1 below identifies and describes the new collections of information contained in the proposed standard.

TABLE C–1—COLLECTION-OF-INFORMATION REQUIREMENTS OF THE PROPOSED STANDARD

Information-Collection Requirements			
1926.1402(c)(2)	1926.1413(a)(4)(ii)(A)	1926.1427(c)(5)(iv)	1926.1436(c)(2)(ii).
1926.1403(b)	1926.1413(a)(4)(iii)(F)	1926.1427(e)(1)	1926.1436(c)(2)(iii).
1926.1404(f)(2)	1926.1413(a)(4)(v)	1926.1427(h)(1)	1926.1436(d)(1).
1926.1404(h)(4)	1926.1413(b)(3)	1926.1428(a)(3)	1926.1436(g)(1)(ii).
1926.1404(h)(6)	1926.1413(c)(4)	1926.1428(b)	1926.1436(g)(2).
1926.1404(j)	1926.1414(c)(2)(iii)	1926.1430(a)	1926.1436(g)(3).
1926.1404(k)	1926.1414(c)(3)(i)	1926.1430(b)	1926.1436(g)(4).
1926.1404(m)(1)(i)	1926.14(c)(3)(iii)	1926.1430(c)(1)	1926.1436(h).
1926.1407(b)(3)(i)(D)	1926.1415(a)(1)(ii)	1926.1431(e)(12)	1926.1437(c)(2)(ii).
1926.1407(g)	1926.1416(d)	1926.1431(o)(3)	1926.1437(g).
1926.1408(b)(1)	1926.1416(e)	1926.1431(p)(4)	1926.1437(h)(6).
1926.1408(b)(4)(ii)(D)	1926.1416(e)(4)	1926.1431(r)	1926.1437(m)(4).
1926.1408(g)	1926.1417(b)(1)	1926.1431(s)	1926.1437(n)(1).
Table A	1926.1417(b)(2)	1926.1432(a)	1926.1437(n)(2).
1926.1409	1926.1417(b)(3)	1926.1432(b)(2)	1926.1437(n)(3)(i).
1926.1410(c)(1)	1926.1417(c)(1)	1926.1433(d)(1)(ii)	1926.1437(n)(3)(ii).
1926.1410(d).	1926.1417(e)(1)(iv)	1926.1433(d)(5)	1926.1437(n)(5)(v).
1926.1410(d)(2)(iv)	1926.1417(f)(1)	1926.1434(a)(1)(i)	1926.1437(n)(5)(vi).
1926.1410(e)	1926.1417(j)	1926.1434(a)(1)(ii)	1926.1439(e).
1926.1410(f)	1926.1417(o)(3)(i)	1926.1434(a)(2)(i)	1926.1440(a).
1926.1410(j)	1926.1421(a)	1926.1434(a)(3)	1926.1441(b)(2)(i)(A).
1926.1411(b)(4)(iii)	1926.1422	1926.1434(b)	1926.1441(b)(2)(i)(B).
Table T	1926.1423(h)(2)	1926.1435(c)	1926.1441(c)(2)(i).
1926.1412(a)(1)(i)	1926.1424(a)(2)(i)	1926.1435(e)(5)	1926.1441(c)(2)(ii).
1926.1412(b)(1)(ii)(A)	1926.1424(a)(2)(ii)	1926.1435(e)(5)(v)	1926.1441(c)(2)(iii).
1926.1412(c)(2)(i)	1926.1427(a)	1926.1435(e)(6)	1926.1441(c)(3)(i).
1926.1412(e)(3)(i)	1926.1427(b)	1926.1435(e)(6)(vi)	1926.1441(c)(3)(ii).
1926.1412(e)(3)(ii)	1926.1427(c)(1)(ii)	1926.1435(f)(2)(i)	1926.1441(e).
1926.1412(f)(6)	1926.1427(c)(2)(i)	1926.1435(f)(2)(ii)	1926.1441(f).
1926.1412(f)(7)	1926.1427(c)(5)(ii)	1926.1436(b)(3)..	
1926.1412(g)(3)	1926.1427(c)(5)(iii)	1926.1436(c)(2)(i)..	
1926.1412(h)	1926.1428(a)(2)	1926.1436(f)(3)..	

Affected Public: Business or other for-profit.

Number of Respondents: 159,715 firms.

Frequency: On occasion (for most of the information-collection requirements; determined by the use of cranes and derricks and employee training and certification); annually (for equipment inspections).

Average Time per Response: Varies from 10 seconds (sounding an alarm) to two hours (developing written equipment operation procedures).

Estimated Total Burden Hours: 157,981 hours.

Estimated Costs (Operation and Maintenance): $1.4 million.

Submitting comments. Members of the public who wish to comment on the paperwork requirements in this proposal must send their written comments to the Office of Information and Regulatory Affairs, Attn: OSHA Desk Officer (RIN 1218–AC01), Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503. The Agency encourages commenters to also submit their comments on these paperwork requirements to the rulemaking docket, along with their comments on other parts of the proposed rule. For instructions on submitting these comments to the rulemaking docket, see the sections of this **Federal Register** notice titled **DATES** and **ADDRESSES**.

Docket and inquiries. To access the docket to read or download comments and other materials related to this paperwork determination, including the complete Information Collection Request (ICR) (containing the Supporting Statement (describing the paperwork determinations in detail) and attachments) use the procedures described under the section of this notice titled **ADDRESSES**. You also may obtain an electronic copy of the complete ICR by visiting the Web page *http://www.reginfo.gov/public/do/PRAMain.* Scroll under ''Currently Under Review'' to ''Department of Labor (DOL)'' to view all of the DOL's ICRs, including those ICRs submitted for proposed rulemakings. To make inquiries, or to request other information, contact Mr. Todd Owen, Directorate of Standards and Guidance, OSHA, Room N–3609, U.S. Department

of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

D. Federalism

The Agency reviewed the proposed rule according to the most recent Executive Order (''E.O.'') on Federalism (E.O. 13132, 64 FR 43225). This E.O. requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States before taking actions that restrict their policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. The E.O. allows Federal agencies to preempt State law only with the expressed consent of Congress. In such cases, Federal agencies must limit preemption of State law to the extent possible.

Section 18 of the Occupational Safety and Health Act of 1970 (''the Act''; 29 U.S.C. 667) expressly provides OSHA with authority to preempt State occupational safety and health standards to the extent that the Agency promulgates a Federal standard under Section 6 of the Act. Accordingly, Section 18 of the Act authorizes the Agency to preempt State promulgation and enforcement of requirements dealing with occupational safety and health issues covered by OSHA standards unless the State has an OSHA-approved occupational safety and health plan (namely, is a State-Plan State). (See *Gade* v. *National Solid Wastes Management Association,* 112 S. Ct. 2374 (1992).)

With respect to States that do not have OSHA-approved plans, the Agency concludes that this proposed rule would conform to the preemption provisions of the Act. Additionally, Section 18 of the Act prohibits States without approved plans from issuing citations for violations of OSHA standards; the Agency finds that the proposed rulemaking would not expand this limitation. Therefore, for States that do not have approved occupational safety and health plans, this proposed rule would not affect the preemption provisions of Section 18 of the Act.

OSHA has authority under E.O. 13132 to promulgate the proposed rule in 29 CFR part 1926 because the employee exposures related to cranes and derricks used in construction addressed by the proposed requirements are national in scope. The Agency concludes that the requirements in this proposed rule would provide employers in every State with critical information to use when protecting their employees from the hazards presented when working with cranes and derricks. However, while OSHA drafted the proposed requirements to protect employees in every State, Section 18(c)(2) of the Act permits State-Plan States and Territories to develop and enforce their own standards for cranes and derricks used in construction provided these requirements are at least as effective in providing safe and healthful employment and places of employment as the final requirements that result from this proposal.

In summary, this proposed rule complies with E.O. 13132. In States without OSHA-approved State Plans, Congress expressly provides for OSHA standards to preempt State job safety and health rules in areas addressed by the Federal standards; in these States, this rule limits State policy options in the same manner as every standard promulgated by the Agency. In States with OSHA-approved State Plans, this rulemaking does not significantly limit State policy options.

E. State-Plan States

Section 18(c)(2) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667(c)(2)) requires State-Plan States to adopt mandatory standards promulgated by OSHA. Accordingly, the 24 States and two Territories with their own OSHA-approved occupational safety and health plans would have to adopt provisions comparable to the provisions in this proposed rule within six months after the Agency publishes the final rule that it develops from this proposal. The Agency believes that the proposed rule would provide employers in State-Plan States and Territories with critical information and methods necessary to protect their employees when working with cranes and derricks in construction. The 24 States and two Territories with State Plans are: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only. Until a State-Plan State/Territory promulgates its own comparable provisions based on the final rule developed from this proposal, Federal OSHA will provide the State/Territory with interim enforcement assistance, as appropriate.

F. Unfunded Mandates Reform Act

OSHA reviewed this proposed rule according to the Unfunded Mandates Reform Act of 1995 (''UMRA''; 2 U.S.C. 1501 *et seq.*) and Executive Order 12875 (58 FR 58093). As discussed above in section V.B. of this preamble (''Preliminary Economic Analysis and Initial Regulatory Flexibility Analysis''), the Agency estimates that compliance with this proposed rule would require private-sector employers to expend about $123 million each year. However, while this proposed rule establishes a federal mandate in the private sector, it is not a significant regulatory action within the meaning of Section 202 of the UMRA (2 U.S.C. 1532).

Under voluntary agreement with OSHA, some States enforce compliance with their State standards on public sector entities, and these agreements specify that these State standards must be equivalent to OSHA standards. Thus, although OSHA has included compliance costs for the affected public sector entities in its analysis of the expected impacts associated with the proposal, the proposal would not involve any unfunded mandates being imposed on any State or local government entity. Consequently, this proposed rule does not meet the definition of a ''Federal intergovernmental mandate'' (see Sec. 421(5) of the UMRA (2 U.S.C. 658(5))). Therefore, for the purposes of the UMRA, the Agency preliminarily certifies that this proposed rule does not mandate that State, local, and tribal governments adopt new, unfunded regulatory obligations, nor does the proposed rule increase the expenditures by the private sector of more than $100 million a year.

G. Applicability of Existing Consensus Standards

Some of the types of equipment subject to this proposed standard are addressed by current national consensus standards in the ASME B30 series, including: ASME B30.5–2004, ''Mobile and Locomotive Cranes''; ASME B30.6–2003, ''Derricks''; ASME B30.8–2004, ''Floating Cranes and Floating Derricks''; ASME B30.3–2004, ''Construction Tower Cranes''; ASME B30.14–2004, ''Side Boom Tractors''; and ASME B30.2–2001, ''Overhead and Gantry Cranes.'' In addition, ASME B30.7–2005, ''Base-Mounted Drum Hoists,'' addresses a type of equipment that is often a component of derricks, and ASME B30.23–2005, ''Personnel Lifting Systems,'' addresses issues that are covered by proposed § 1926.1431, *Hoisting personnel.*

The Committee consulted these ASME standards (or the most current versions available at the time) and other resources in developing its proposal. In most instances, the ASME standards that the Committee consulted were

entered into the docket, including: ASME B30.5–2000 (OSHA–S030–2006–0663–0334); ASME B30.5a–2002 Addenda (OSHA–S030–2006–0663–0335); ASME B30.6–2003 (OSHA–S030–2006–0663–0337); ASME B30.17–2003 (OSHA–S030–2006–0663–0338); ASME B30.3–1996 (OSHA–S030–2006–0663–0353); and ASME B30.23–1998 (OSHA–S030–2006–0663–0354). Where newer versions of the ASME standards were issued after the Committee finished its work, OSHA has examined the updated standards to determine if their provisions deviate in a significant way from provisions on which C–DAC relied. Those updated standards have been entered into the record of this rulemaking. For the most part, OSHA did not find significant deviations between the updated versions and the versions before the Committee. In the few instances where deviations occurred, OSHA has identified those deviations and asked for public comment on any issues they raise.

As discussed in detail in the Summary and Explanation of the proposed standard, a number of provisions in this proposal contain concepts that are similar to those in provisions in the various ASME standards. However, the Committee determined in most instances that, for reasons of enforceability, clarity or ease of use, the wording of those concepts needed to be modified.

For some issues, the ASME standards do not address issues covered by this proposal, or the Committee determined that a different approach is needed. For example, in the provisions on inspections (§§ 1926.1412 and 1926.1413), C–DAC concluded that shift, monthly and annual inspection intervals are most appropriate, in contrast to the ASME approach, which uses ''frequent'' and ''periodic'' intervals. In the provisions addressing assembly/disassembly (§§ 1926.1403 through 1926.1406) and the encroachment prevention provisions for power lines (§ 1926.1407 through 1926.1411), C–DAC adopted approaches with no comparable counterparts in the ASME standards.

In some instances, C–DAC determined that it was appropriate to incorporate ASME standards by reference, in whole or in part. For example, in proposed § 1926.1433, Design, construction and testing, the proposed rule incorporates by reference ANSI B30.5–1968, safety code for ''Crawler, Locomotive, and Truck Cranes,'' ''PCSA Standard No. 2,'' for crawler, truck and locomotive cranes manufactured prior to [EFFECTIVE DATE OF THE FINAL RULE], and incorporates portions of ASME B30.5a-2004, ''Mobile and Locomotive Cranes,'' for mobile (including crawler and truck) and locomotive cranes manufactured on or after [EFFECTIVE DATE OF THE FINAL RULE].

H. Review of the Proposed Standard by the Advisory Committee for Construction Safety and Health

The proposed subpart would add requirements to the existing standards in 29 CFR part 1926 that protect employees from hazards associated with the use of cranes and derricks in construction. OSHA's regulation governing the Advisory Committee on Construction Safety and Health (ACCSH) at 29 CFR 1912.3 requires OSHA to consult with ACCSH whenever the Agency proposes a rule that involves the occupational safety and health of construction employees. OSHA distributed the C–DAC Consensus Document to the ACCSH members one month prior to their scheduled October 11, 2006 meeting. At the meeting, OSHA took questions from the ACCSH members regarding the C–DAC Consensus Document. On October 12, 2006, the OSHA staff provided answers to these questions to the ACCSH members. ACCSH discussed the issues related to the C–DAC Consensus Document and then adopted a resolution supporting it and recommending that OSHA use it as the basis for a proposed standard. (ACCSH 2006–1, Ex. 101x, pp. 248–49).

I. Public Participation—Comments and Hearings

OSHA encourages members of the public to participate in this rulemaking by submitting comments on the proposal and documentary evidence. In this regard, the Agency invites interested parties having knowledge of, or experience with, cranes and derricks in construction to participate in this process, and welcomes any pertinent data and cost information that will provide it with the best available evidence on which to develop the final regulatory requirements.

Comments. The Agency invites interested parties to submit written data, views, and arguments concerning this proposal. In particular, the Agency welcomes comments on its determination of the economic or other regulatory impacts of the proposed rule on the regulated community. When submitting comments, follow the procedures specified above in the sections titled **DATES** and **ADDRESSES**. The comments must clearly identify the provision of the proposal being addressed, the position taken with respect to each issue, and the basis for that position. Comments, along with supporting data and references, received by the end of the specified comment period will become part of the proceedings record, and will be available electronically for public inspection at the Federal eRulemaking Portal (*http://www.regulations.gov*), or may be read at the OSHA Docket Office, Room N–2625, 200 Constitution Ave., NW., Washington. (See the section of this **Federal Register** notice titled **ADDRESSES** for additional information on how to access these documents.)

Informal Public Hearings. Requests for a hearing should be submitted to the Agency as set forth above under the sections of this notice titled **DATES** and **ADDRESSES**.

List of Subjects in 29 CFR Part 1926

Construction industry, Occupational safety and health, Safety.

Authority and Signature

Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, directed the preparation of this notice. The Agency is issuing this proposal under the following authorities: Sections 4, 6(b), 8(c), and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*); Section 4 of the Administrative Procedure Act (5 U.S.C. 553); Secretary of Labor's Order No. 5–2007 (72 FR 31159); and 29 CFR part 1911.

Signed at Washington, DC, on September 16, 2008.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor for Occupational Safety and Health.

Proposed Amendments to Standards

For the reasons stated in the preamble of this proposed rule, the Agency is proposing to amend 29 CFR part 1926 to read as follows:

PART 1926—[AMENDED]

Subpart M—Fall Protection

1. The authority citation for subpart M of Part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 3701); Sections 4, 6 and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), and 5–2007 (72 FR 31159); and 29 CFR part 1911.

2. Section 1926.500 is amended by revising paragraph (a)(2)(ii) to read as follows:

§ 1926.500 Scope, application, and definitions applicable to this subpart.

(a) * * *

(2) * * *

(ii) Requirements relating to fall protection for employees working on cranes and derricks are provided in subpart CC of this part.

* * * * *

Subpart N—Cranes, Derricks, Hoists, Elevators, and Conveyors

3. The authority citation for subpart N of CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (49 FR 35736), and 5–2007 (72 FR 31159). Section 1926.550 also issued under 29 CFR part 1911.

4. The heading to subpart N of 29 CFR part 1926 is revised to read as follows:

Subpart N—Hoists, Elevators, and Conveyors

* * * * *

§ 1926.550 [Reserved]

5. Section 1926.550 is removed and reserved.

6. Section 1926.553 is amended by adding paragraph (c) to read as follows:

§ 1926.553 Base-mounted drum hoists.

* * * * *

(c) This section does not apply to base-mounted drum hoists used in conjunction with derricks. Base-mounted drum hoists used in conjunction with derricks must conform to § 1926.1436(e).

Subpart R—Steel Erection

7. The authority citation for subpart R of 29 CFR part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701); Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 3–2000 (65 FR 50017), 5–2002 (67 FR 65008), and 5–2007 (72 FR 31159); and 29 CFR part 1911.

8. Section 1926.753 is amended by revising paragraphs (a) and (c)(4) to read as follows:

§ 1926.753 Hoisting and rigging.

(a) All the provisions of subpart CC of this part apply to hoisting and rigging with the exception of § 1926.1431(a).

* * * * *

(c) * * *

(4) Cranes or derricks may be used to hoist employees on a personnel platform when work under this subpart is being conducted, provided that all provisions of § 1926.1431 (except for § 1926.1431(a)) are met.

* * * * *

Subpart V—Power Transmission and Distribution

9. The authority citation for subpart V of part 1926 is revised to read as follows:

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701); Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order Nos. 12–71 (36 FR 8754); 8–76 (41 FR 25059); 9–83 (48 FR 35736, 1–90 (55 FR 9033), and 5–2007 (72 FR 31159). Section 1926.951 also issued under 29 CFR part 1911.

10. Section 1926.952 is amended by revising paragraph (c) to read as follows:

§ 1926.952 Mechanical equipment.

* * * * *

(c) *Cranes and other lifting equipment.* (1) All equipment covered by subpart CC that is used for work covered by this subpart (subpart V), including cranes and other lifting equipment, shall comply with subparts CC and O of this part.

(2) Service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, such as digger derricks (radial boom derricks), when used in these industries for auguring holes to set power and utility poles, or handling associated materials to be installed or removed from utility poles, must meet the applicable minimum clearance distance in Table V–1 in § 1926.950.

(3) With the exception of equipment certified for work on the proper voltage, mechanical equipment shall not be operated closer to any energized line or equipment than the clearances set forth in § 1926.950(c) unless, in addition to the requirements in § 1926.1410:

(i) The mechanical equipment is insulated, or

(ii) The mechanical equipment is considered as energized.

11. Subparts AA and BB are added and reserved and Subpart CC is added to read as follows:

Subpart CC—Cranes and Derricks in Construction

Sec.

1926.1400 Scope.
1926.1401 Definitions.
1926.1402 Ground conditions.
1926.1403 Assembly/Disassembly—selection of manufacturer or employer procedures.
1926.1404 Assembly/Disassembly—general requirements (applies to all assembly and disassembly operations).
1926.1405 Disassembly—additional requirements for dismantling of booms and jibs (applies to both the use of manufacturer procedures and employer procedures).
1926.1406 Assembly/Disassembly—employer procedures—general requirements.
1926.1407 Power line safety (up to 350 kV)—assembly and disassembly.
1926.1408 Power line safety (up to 350 kV)—equipment operations.
1926.1409 Power line safety (over 350 kV).
1926.1410 Power line safety (all voltages)—equipment operations closer than the Table A zone.
1926.1411 Power line safety—while traveling.
1926.1412 Inspections.
1926.1413 Wire rope—inspection.
1926.1414 Wire rope—selection and installation criteria.
1926.1415 Safety devices.
1926.1416 Operational aids.
1926.1417 Operation.
1926.1418 Authority to stop operation.
1926.1419 Signals—general requirements.
1926.1420 Signals—radio, telephone or other electronic transmission of signals.
1926.1421 Signals—voice signals—additional requirements.
1926.1422 Signals—hand signal chart.
1926.1423 Fall protection.
1926.1424 Work area control.
1926.1425 Keeping clear of the load.
1926.1426 Free fall and controlled load lowering.
1926.1427 Operator qualification and certification.
1926.1428 Signal person qualifications.
1926.1429 Qualifications of maintenance & repair employees.
1926.1430 Training.
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1926.1432 Multiple-crane/derrick lifts—supplemental requirements.
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1926.1435 Tower cranes.
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1926.1437 Floating cranes/derricks and land cranes/derricks on barges.
1926.1438 Overhead & gantry cranes.
1926.1439 Dedicated pile drivers.
1926.1440 Sideboom cranes.
1926.1441 Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less.
Appendix A to Subpart CC of part 1926—Standard Hand Signals
Appendix B to Subpart CC of part 1926—Use of Non-Standard Signals
Appendix C to Subpart CC of part 1926—Checklists for Determining if Hoisting Personnel is Permissible
Appendix D to Subpart CC of part 1926—Assembly/Disassembly—Sample Procedures for Minimizing the Risk of Unintended Dangerous Boom Movement

Appendix E to Subpart CC of part 1926—Operator Certification: Written Examination: Technical Knowledge Criteria

Subpart CC—Cranes and Derricks in Construction

Authority: Section 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701); sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 5–2007 (72 FR 31159); and 29 CFR part 1911.

§ 1926.1400 Scope.

(a) This subpart applies to power-operated equipment used in construction that can hoist, lower and horizontally move a suspended load. Such equipment includes, but is not limited to: Articulating cranes (such as knuckle-boom cranes); crawler cranes; floating cranes; cranes on barges; locomotive cranes; mobile cranes (such as wheel-mounted, rough-terrain, all-terrain, commercial truck-mounted, and boom truck cranes); multi-purpose machines when configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load; industrial cranes (such as carry-deck cranes); dedicated pile drivers; service/mechanic trucks with a hoisting device; a crane on a monorail; tower cranes (such as fixed jib (''hammerhead boom''), luffing boom and self-erecting); pedestal cranes; portal cranes; overhead and gantry cranes; straddle cranes; sideboom cranes; derricks; and variations of such equipment. However, items listed in paragraph (c) of this section are excluded from the scope of this subpart.

(b) *Attachments.* This subpart applies to equipment included in paragraph (a) of this section when used with attachments. Such attachments, whether crane-attached or suspended include, but are not limited to: Hooks, magnets, grapples, clamshell buckets, orange peel buckets, concrete buckets, drag lines, personnel platforms, augers or drills and pile driving equipment.

(c) *Exclusions.* This subpart does not cover:

(1) Machinery included in paragraph (a) of this section while it has been converted or adapted for a non-hoisting/lifting use. Such conversions/adaptations include, but are not limited to, power shovels, excavators and concrete pumps.

(2) Power shovels, excavators, wheel loaders, backhoes, loader backhoes, track loaders. This machinery is also excluded when used with chains, slings or other rigging to lift suspended loads.

(3) Automotive wreckers and tow trucks when used to clear wrecks and haul vehicles.

(4) Service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, such as digger derricks (radial boom derricks), when used in these industries for auguring holes to set power and utility poles, or handling associated materials to be installed or removed from utility poles.

(5) Machinery originally designed as vehicle-mounted aerial devices (for lifting personnel) and self-propelled elevating work platforms.

(6) Telescopic/hydraulic gantry systems.

(7) Stacker cranes.

(8) Powered industrial trucks (forklifts).

(9) Mechanic's truck with a hoisting device when used in activities related to equipment maintenance and repair.

(10) Machinery that hoists by using a come-a-long or chainfall.

(11) Dedicated drilling rigs.

(12) Gin poles used for the erection of communication towers.

(13) Tree trimming and tree removal work.

(14) Anchor handling with a vessel or barge using an affixed A-frame.

(15) Roustabouts.

(d) All sections of this subpart apply to the equipment covered by this subpart unless specified otherwise.

(e) The duties of controlling entities under this subpart include, but are not limited to, the duties specified in § 1926.1402(c), § 1926.1402(e), and § 1926.1424(b).

(f) Where provisions of this subpart direct an operator, crewmember, or other employee to take certain actions, the employer shall establish, effectively communicate to the relevant persons, and enforce work rules, to ensure compliance with such provisions.

§ 1926.1401 Definitions.

A/D supervisor (Assembly/Disassembly supervisor) means an individual who meets this standard's requirements for an A/D supervisor, irrespective of the person's formal job title or whether the person is non-management or management personnel.

Articulating crane means a crane whose boom consists of a series of folding, pin connected structural members, typically manipulated to extend or retract by power from hydraulic cylinders.

Assembly/Disassembly means the assembly and/or disassembly of equipment covered under this standard. With regard to tower cranes, ''erecting and climbing'' replaces the term ''assembly,'' and ''dismantling'' replaces the term ''disassembly.''

Assist crane means a crane used to assist in assembling or disassembling a crane. Attachments means any device that expands the range of tasks that can be done by the equipment. Examples include, but are not limited to: An auger, drill, magnet, pile-driver, and boom-attached personnel platform.

Audible signal means a signal made by a distinct sound or series of sounds. Examples include, but are not limited to, sounds made by a bell, horn, or whistle.

Blocking (also referred to as ''cribbing'') is wood or other material used to support equipment or a component and distribute loads to the ground. It is typically used to support latticed boom sections during assembly/disassembly and under outrigger floats.

Boatswain's chair means a single-point adjustable suspension scaffold consisting of a seat or sling (which may be incorporated into a full body harness) designed to support one employee in a sitting position.

Bogie means ''travel bogie,'' which is defined below.

Boom (equipment other than tower crane) means an inclined spar, strut, or other long structural member which supports the upper hoisting tackle on a crane or derrick. Typically, the length and vertical angle of the boom can be varied to achieve increased height or height and reach when lifting loads. Booms can usually be grouped into general categories of hydraulically extendible, cantilevered type, latticed section, cable supported type or articulating type.

Boom (tower cranes): On tower cranes, if the ''boom'' (i.e., principal horizontal structure) is fixed, it is referred to as a jib; if it is moveable up and down, it is referred to as a boom.

Boom angle indicator means a device which measures the angle of the boom relative to horizontal.

Boom hoist limiting device includes boom hoist disengaging device, boom hoist shut-off, boom hoist disconnect, boom hoist hydraulic relief, boom hoist kick-outs, automatic boom stop device, or derricking limiter. This type of device disengages boom hoist power when the boom reaches a predetermined operating angle. It also sets brakes or closes valves to prevent the boom from lowering after power is disengaged.

Boom length indicator indicates the length of the permanent part of the boom (such as ruled markings on the boom) or, as in some computerized systems, the length of the boom with extensions/attachments.

Boom stop includes boom stops, (belly straps with struts/standoff), telescoping boom stops, attachment boom stops, and backstops. These devices restrict the boom from moving above a certain maximum angle and toppling over backward.

Boom suspension system means a system of pendants, running ropes, sheaves, and other hardware which supports the boom tip and controls the boom angle.

Builder means an employer builder/constructor of equipment.

Calculate includes use of a calculator.

Center of gravity: The center of gravity of any object is the point in the object around which its weight is evenly distributed. If you could put a support under that point, you could balance the object on the support.

Certified welder means a welder who meets nationally recognized certification requirements applicable to the task being performed.

Climbing means the process in which a tower crane is raised to a new working height, either by adding additional tower sections to the top of the crane (top climbing), or by a system in which the entire crane is raised inside the structure (inside climbing).

Come-a-long means a mechanical device typically consisting of a chain or cable attached at each end that is used to facilitate movement of materials through leverage.

Competent person means one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Controlled load lowering means lowering a load by means of a mechanical hoist drum device that allows a hoisted load to be lowered with maximum control using the gear train or hydraulic components of the hoist mechanism. Controlled load lowering requires the use of the hoist drive motor, rather than the load hoist brake, to lower the load.

Controlling entity means a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project—its planning, quality and completion.

Counterweight means a weight used to supplement the weight of equipment in providing stability for lifting loads by counterbalancing those loads.

Crane/derrick includes all equipment covered by this subpart.

Crawler crane means equipment that has a type of base mounting which incorporates a continuous belt of sprocket driven track.

Crossover points means locations on a wire rope which is spooled on a drum where one layer of rope climbs up on and crosses over the previous layer. This takes place at each flange of the drum as the rope is spooled onto the drum, reaches the flange, and begins to wrap back in the opposite direction.

Dedicated channel means a line of communication assigned by the employer who controls the communication system to only one signal person and crane/derrick or to a coordinated group of cranes/derricks/signal person(s).

Dedicated pile-driver is a machine that is designed to function exclusively as a pile-driver. These machines typically have the ability to both hoist the material that will be pile-driven and to pile-drive that material.

Dedicated spotter (power lines): In order to be considered a dedicated spotter, the requirements of § 1926.1428 (Signal person qualifications) must be met and his/her sole responsibility is to watch the separation between the power line and: the equipment, load line and load (including rigging and lifting accessories), and ensure through communication with the operator that the applicable minimum approach distance is not breached.

Directly under the load means a part or all of an employee is directly beneath the load.

Dismantling includes partial dismantling (such as dismantling to shorten a boom or substitute a different component).

Drum rotation indicator means a device on a crane or hoist which indicates in which direction and at what relative speed a particular hoist drum is turning.

Electrical contact occurs when a person, object, or equipment makes contact or comes in close proximity with an energized conductor or equipment that allows the passage of current.

Employer-made equipment means floating cranes/derricks designed and built by an employer for the employer's own use.

Encroachment is where any part of the crane, load line or load (including rigging and lifting accessories) breaches a minimum clearance distance that this subpart requires to be maintained from a power line.

Equipment means equipment covered by this subpart.

Equipment criteria means instructions, recommendations, limitations and specifications.

Fall protection equipment means guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

Fall restraint system means a fall protection system that prevents the user from falling any distance. The system is comprised of either a body belt or body harness, along with an anchorage, connectors and other necessary equipment. The other components typically include a lanyard, and may also include a lifeline and other devices.

Fall zone means the area (including but not limited to the area directly beneath the load) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident.

Flange points are points of contact between rope and drum flange where the rope changes layers.

Floating cranes/derricks means equipment designed by the manufacturer (or employer) for marine use by permanent attachment to a barge, pontoons, vessel or other means of flotation.

For example means ''one example, although there are others.''

Free fall (of the load line) means that only the brake is used to regulate the descent of the load line (the drive mechanism is not used to drive the load down faster or retard its lowering).

Free surface effect is the uncontrolled transverse movement of liquids in compartments which reduce a vessel's transverse stability.

Hoist means a mechanical device for lifting and lowering loads by winding rope onto or off a drum.

Hoisting is the act of raising, lowering or otherwise moving a load in the air with equipment covered by this standard. As used in this standard, ''hoisting'' can be done by means other than wire rope/ hoist drum equipment.

Include/including means ''including, but not limited to.''

Insulating link/device means an insulating device listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.

Jib stop (also referred to as a jib backstop), is the same type of device as a boom stop but is for a fixed or luffing jib.

Land crane/derrick is equipment not originally designed by the manufacturer for marine use by permanent attachment to barges, pontoons, vessels, or other means of floatation.

List means the angle of inclination about the longitudinal axis of a barge,

pontoons, vessel or other means of floatation.

Load refers to the object(s) being hoisted and/or the weight of the object(s); both uses refer to the object(s) and the load-attaching equipment, such as, the load block, ropes, slings, shackles, and any other ancillary attachment.

Load moment (or rated capacity) indicator means a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and indicates to the operator the percentage of capacity at which the equipment is working. Lights, bells, or buzzers may be incorporated as a warning of an approaching overload condition.

Load moment (or rated capacity) limiter means a system which aids the equipment operator by sensing the overturning moment on the equipment, i.e., load multiplied by radius. It compares this lifting condition to the equipment's rated capacity, and when the rated capacity is reached, it shuts off power to those equipment functions which can increase the severity of loading on the equipment, e.g., hoisting, telescoping out, or luffing out. Typically, those functions which decrease the severity of loading on the equipment remain operational, e.g., lowering, telescoping in, or luffing in.

Locomotive crane means a crane mounted on a base or car equipped for travel on a railroad track.

Luffing jib limiting device is similar to a boom hoist limiting device, except that it limits the movement of the luffing jib.

Marine hoisted personnel transfer device means a device, such as a ''transfer net,'' that is designed to protect the employees being hoisted during a marine transfer and to facilitate rapid entry into and exit from the device. Such devices do not include boatswain's chairs when hoisted by equipment covered by this standard.

Marine worksite means a construction worksite located in, on or above the water.

Mobile crane means a lifting device incorporating a cable suspended latticed boom or hydraulic telescopic boom designed to be moved between operating locations by transport over the road.

Moving point-to-point means the times during which an employee is in the process of going to or from a work station.

Multi-purpose machine means a machine that is designed to be configured in various ways, at least one of which allows it to hoist (by means of a winch or hook) and horizontally move a suspended load. For example, a machine that can rotate and can be configured with removable tongs (for use as a forklift) or with a winch pack, jib (with a hook at the end) or jib used in conjunction with a winch. When configured with the tongs, it is not covered by this subpart. When configured with a winch pack, jib (with a hook at the end) or jib used in conjunction with a winch, it is covered by this subpart.

Nationally recognized accrediting agency is an organization that, due to its independence and expertise, is widely recognized as competent to accredit testing organizations.

Non-conductive means that, because of the nature and condition of the materials used, and the conditions of use (including environmental conditions and condition of the material), the object in question has the property of not becoming energized (that is, it has high dielectric properties offering a high resistance to the passage of current under the conditions of use).

Operational aids are devices that assist the operator in the safe operation of the crane by providing information or automatically taking control of a crane function. These include, but are not limited to, the devices listed in § 1926.1416 (''listed operational aids'').

Operational controls means levers, switches, pedals and other devices for controlling equipment operation.

Operator means a person who is operating the equipment.

Overhead and gantry cranes includes overhead/bridge cranes, semigantry, cantilever gantry, wall cranes, storage bridge cranes, launching gantry cranes, and similar equipment, irrespective of whether it travels on tracks, wheels, or other means.

Paragraph refers to a paragraph in the same section of this subpart that the word ''paragraph'' is used, unless otherwise specified.

Pendants includes both wire and bar types. Wire type: A fixed length of wire rope with mechanical fittings at both ends for pinning segments of wire rope together. Bar type: Instead of wire rope, a bar is used. Pendants are typically used in a latticed boom crane system to easily change the length of the boom suspension system without completely changing the rope on the drum when the boom length is increased or decreased.

Personal fall arrest system means a system used to arrest an employee in a fall from a working level. It consists of an anchorage, connectors, a body harness and may include a lanyard, deceleration device, lifeline, or suitable combination of these.

Portal crane is a type of crane consisting of a rotating upperstructure, hoist machinery, and boom mounted on top of a structural gantry which may be fixed in one location or have travel capability. The gantry legs or columns usually have portal openings in between to allow passage of traffic beneath the gantry.

Power lines means electric transmission and distribution lines.

Procedures include, but are not limited to: Instructions, diagrams, recommendations, warnings, specifications, protocols, and limitations.

Proximity alarm is a device that provides a warning of proximity to a power line that has been listed, labeled, or accepted by a Nationally Recognized Testing Laboratory in accordance with 29 CFR 1910.7.

Qualified evaluator (not a third party) means a person employed by the signal person's employer who has demonstrated that he/she is competent in accurately assessing whether individuals meet the Qualification Requirements in this subpart for a signal person.

Qualified evaluator (third party) means an entity that, due to its independence and expertise, has demonstrated that it is competent in accurately assessing whether individuals meet the Qualification Requirements in this subpart for a signal person.

Qualified person means a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems relating to the subject matter, the work, or the project.

Qualified rigger is a rigger who meets the criteria for a qualified person.

Range control warning device is a device that can be set by an equipment operator to warn that the boom or jib tip is at a plane or multiple planes.

Rated capacity means the maximum working load permitted by the manufacturer under specified working conditions. Such working conditions typically include a specific combination of factors such as equipment configuration, radii, boom length, and other parameters of use.

Rated capacity indicator: See load moment indicator.

Rated capacity limiter: See load moment limiter.

Repetitive pickup points refer to, when operating on a short cycle operation, the rope being used on a

single layer and being spooled repetitively over a short portion of the drum.

Running wire rope means a wire rope that moves over sheaves or drums.

Runway means a firm, level surface designed, prepared and designated as a path of travel for the weight and configuration of the crane being used to lift and travel with the crane suspended platform. An existing surface may be used as long as it meets these criteria.

Section means a section of this subpart, unless otherwise specified.

Sideboom crane means a track-type or wheel-type tractor having a boom mounted on the side of the tractor, used for lifting, lowering or transporting a load suspended on the load hook. The boom or hook can be lifted or lowered in a vertical direction only.

Special hazard warnings means warnings of site-specific hazards (for example, proximity of power lines).

Stability (flotation device) means the tendency of a barge, pontoons, vessel or other means of floatation to return to an upright position after having been inclined by an external force.

Standard Method means the protocol in Appendix A of this subpart for hand signals.

Such as means ''such as, but not limited to.''

Superstructure: See Upperworks.

Tagline means a rope (usually fiber) attached to a lifted load for purposes of controlling load spinning and pendular motions or used to stabilize a bucket or magnet during material handling operations.

Tender means an individual responsible for monitoring and communicating with a diver.

Tilt up or tilt down operation means raising/lowering a load from the horizontal to vertical or vertical to horizontal.

Tower crane is a type of lifting structure which utilizes a vertical mast or tower to support a working boom (jib) in an elevated position. Loads are suspended from the working boom. While the working boom may be of the fixed type (horizontal or angled) or have luffing capability, it can always rotate to swing loads, either by rotating on the top of the tower (top slewing) or by the rotation of the tower (bottom slewing). The tower base may be fixed in one location or ballasted and moveable between locations.

Travel bogie (tower cranes) is an assembly of two or more axles arranged to permit vertical wheel displacement and equalize the loading on the wheels.

Trim means angle of inclination about the transverse axis of a barge, pontoons, vessel or other means of floatation.

Two blocking means a condition in which a component that is uppermost on the hoist line such as the load block, hook block, overhaul ball, or similar component, comes in contact with the boom tip, fixed upper block or similar component. This binds the system and continued application of power can cause failure of the hoist rope or other component.

Unavailable procedures means procedures that are no longer available from the manufacturer, or have never been available, from the manufacturer.

Upperstructure: See upperworks.

Upperworks means the revolving frame of equipment on which the engine and operating machinery are mounted along with the operator's cab. The counterweight is typically supported on the rear of the upperstructure and the boom or other front end attachment is mounted on the front.

Up to means ''up to and including.''

Wire rope means rope made of wire.

§ 1926.1402 Ground conditions.

(a) *Definitions.*

(1) ''Ground conditions'' means the ability of the ground to support the equipment (including slope, compaction, and firmness).

(2) ''Supporting materials'' means blocking, mats, cribbing, marsh buggies (in marshes/wetlands), or similar supporting materials or devices.

(b) The equipment shall not be assembled or used unless ground conditions are firm, drained (except for marshes/wetlands), and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer's specifications for adequate support and degree of level of the equipment are met.

(c) The controlling entity shall:

(1) Ensure that ground preparations necessary to meet the requirements in paragraph (b) of this section are provided.

(2) Inform the user of the equipment and the operator of the location of hazards beneath the equipment set-up area (such as voids, tanks, utilities) that are identified in documents (such as site drawings, as-built drawings, and soil analyses) if they are available to the controlling entity.

(d) If there is no controlling entity for the project, the requirement in paragraph (c)(1) of this section shall be met by the employer that has authority at the site to make or arrange for ground preparations needed to meet paragraph (b) of this section.

(e) If the A/D supervisor or the operator determines that ground conditions do not meet the requirements in paragraph (b) of this section, that person's employer shall have a discussion with the controlling entity regarding the ground preparations that are needed so that, with the use of suitable supporting materials/devices (if necessary), the requirements in paragraph (b) of this section can be met.

§ 1926.1403 Assembly/Disassembly—selection of manufacturer or employer procedures.

When assembling and disassembling equipment (or attachments), the employer shall comply with either:

(a) Manufacturer procedures applicable to assembly and disassembly, or

(b) Employer procedures for assembly and disassembly. Employer procedures may be used only where the employer can demonstrate that the procedures used meet the requirements in § 1926.1406.

§ 1926.1404 Assembly/Disassembly—general requirements (applies to all assembly and disassembly operations).

(a) *Supervision—competent-qualified person.*

(1) Assembly/disassembly must be supervised by a person who meets the criteria for both a competent person and a qualified person, or by a competent person who is assisted by one or more qualified persons (''A/D supervisor'').

(2) Where the assembly/disassembly is being performed by only one person, that person must meet the criteria for both a competent person and a qualified person. For purposes of this subpart, that person is considered the A/D supervisor.

(b) *Knowledge of procedures.* The A/D supervisor must understand the applicable assembly/disassembly procedures.

(c) *Review of procedures.* The A/D supervisor must review the applicable assembly/disassembly procedures immediately prior to the commencement of assembly/disassembly unless the A/D supervisor has applied them to the same type and configuration of equipment (including accessories, if any) so that they are already known and understood.

(d) *Crew instructions.*

(1) Before commencing assembly/disassembly operations, the A/D supervisor must determine that the crew members understand the following:

(i) Their tasks.

(ii) The hazards associated with their tasks.

(iii) The hazardous positions/locations that they need to avoid.

(2) During assembly/disassembly operations, before a crew member takes

on a different task, or when adding new personnel during the operations, the requirements in paragraphs (d)(1)(i) through (d)(1)(iii) of this section must be met with respect to the crew member's understanding regarding that task.

(e) *Protecting assembly/disassembly crew members out of operator view.*

(1) Before a crew member goes to a location that is out of view of the operator and is either: in, on, or under the equipment, or near the equipment (or load) where the crew member could be injured by movement of the equipment (or load), the crew member shall inform the operator that he/she is going to that location.

(2) Where the operator knows that a crew member went to a location covered by paragraph (e)(1) of this section, the operator shall not move any part of the equipment (or load) until the operator:

(i) Gives a warning that is understood by the crew member as a signal that the equipment (or load) is about to be moved and allows time for the crew member to get to a safe position, or

(ii) Is informed in accordance with a pre-arranged system of communication that the crew member is in a safe position.

(f) *Working under the boom, jib or other components.*

(1) When pins (or similar devices) are being removed, employees must not be under the boom, jib, or other components, except where the requirements of paragraph (f)(2) of this section are met.

(2) *Exception.* Where the employer demonstrates that site constraints require one or more employees to be under the boom, jib, or other components when pins (or similar devices) are being removed, the A/D supervisor must implement procedures that minimize the risk of unintended dangerous movement and minimize the duration and extent of exposure under the boom. (See Non-mandatory Appendix D of this subpart for an example.)

(g) *Capacity limits.* During all phases of assembly/disassembly, rated capacity limits for loads imposed on the equipment, equipment components (including rigging), lifting lugs and equipment accessories shall not be exceeded for the equipment being assembled/disassembled.

(h) *Addressing specific hazards.* The A/D supervisor supervising the assembly/disassembly operation must address the hazards associated with the operation with methods to protect the employees from them, as follows:

(1) *Site and ground bearing conditions.* Site and ground conditions must be adequate for safe assembly/disassembly operations and to support the equipment during assembly/disassembly (see § 1926.1402 for ground condition requirements).

(2) *Blocking material.* The size, amount, condition and method of stacking blocking must be sufficient to sustain the loads and maintain stability.

(3) *Proper location of blocking.* When used to support lattice booms or components, blocking must be appropriately placed to:

(i) Protect the structural integrity of the equipment, and

(ii) Prevent dangerous movement and collapse.

(4) *Verifying assist crane loads.* When using an assist crane, the loads that will be imposed on the assist crane at each phase of assembly/disassembly must be verified in accordance with § 1926.1417(o)(3) before assembly/disassembly begins in order to prevent exceeding rated capacity limits for the assist crane.

(5) *Boom and jib pick points.* The point(s) of attachment of rigging to a boom (or boom sections or jib or jib sections) must be suitable for preventing structural damage and facilitating safe handling of these components.

(6) *Center of gravity.*

(i) The center of gravity of the load must be identified if that is necessary for the method used for maintaining stability.

(ii) Where there is insufficient information to accurately identify the center of gravity, measures designed to prevent unintended dangerous movement resulting from an inaccurate identification of the center of gravity must be used. (See Non-mandatory Appendix D of this subpart for an example.)

(7) *Stability upon pin removal.* The boom sections, boom suspension systems (such as gantry A-frames and jib struts), or components must be rigged or supported to maintain stability upon the removal of the pins.

(8) *Snagging.* Suspension ropes and pendants must not be allowed to catch on the boom or jib connection pins or cotter pins (including keepers and locking pins).

(9) *Struck by counterweights.* The potential for unexpected movement from inadequately supported counterweights and from hoisting counterweights.

(10) *Boom hoist brake failure.* Where reliance is placed on the boom hoist brake to prevent boom movement during assembly/disassembly, the brake shall be tested to determine if it is sufficient to prevent boom movement. If it is not sufficient, a boom hoist pawl, other locking device/back-up braking device, or another method of preventing dangerous movement of the boom (such as blocking or using an assist crane) from a boom hoist brake failure shall be used.

(11) *Loss of backward stability.* Backward stability must be considered before swinging the upperworks, travel, and when attaching or removing equipment components. See, for example, Figure 1.

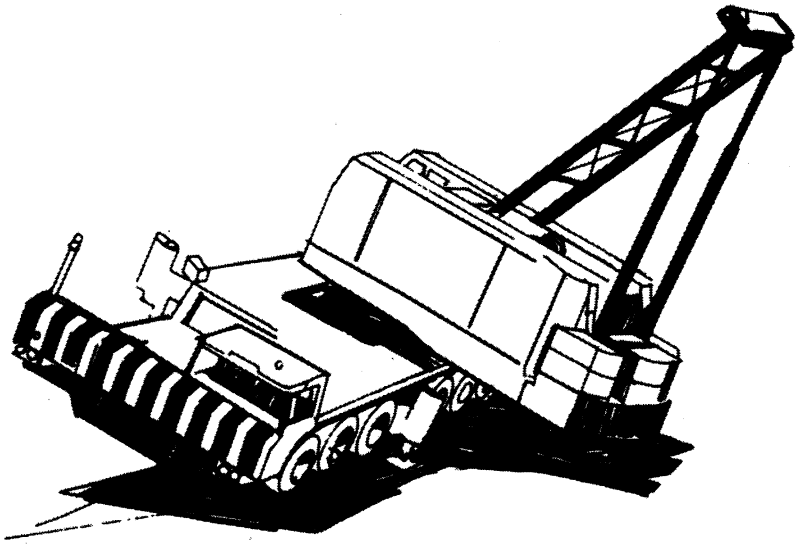

Figure 1. Lack of backward stability results in superstructure toppling.

(12) *Wind speed and weather.* Wind speed and weather must be considered so that the safe assembly/disassembly of the equipment is not compromised.

(i) [*Reserved.*]

(j) *Cantilevered boom sections.* Manufacturer limitations on the maximum amount of boom supported only by cantilevering shall not be exceeded. Where these are unavailable, a registered professional engineer familiar with the type of equipment involved shall determine this limitation in writing, which shall not be exceeded.

(k) *Weight of components.* The weight of the components must be readily available.

(l) [*Reserved.*]

(m) *Components and configuration.*

(1) The selection of components and configuration of the equipment that affect the capacity or safe operation of the equipment must be in accordance with:

(i) Manufacturer instructions, limitations, and specifications. Where these are unavailable, a registered professional engineer familiar with the type of equipment involved must approve, in writing, the selection and configuration of components; or

(ii) Approved modifications that meet the requirements of § 1926.1434 (Equipment modifications).

(2) *Post-assembly inspection.* Upon completion of assembly, the equipment must be inspected to ensure compliance with paragraph (m)(1) of this section (see § 1926.1412(c) for post-assembly inspection requirements).

(n) *Manufacturer prohibitions.* The employer must comply with applicable manufacturer prohibitions.

(o) *Shipping pins.* Reusable shipping pins, straps, links, and similar equipment must be removed. Once they are removed they must either be stowed or otherwise stored so that they do not present a falling object hazard.

(p) *Pile driving.* Equipment used for pile driving shall not have a jib attached during pile driving operations.

(q) *Outriggers.* When the load to be handled and the operating radius require the use of outriggers, or at any time when outriggers are used, the following requirements shall be met:

(1) The outriggers shall be either fully extended or, if manufacturer procedures permit, deployed as specified in the load chart.

(2) The outriggers shall be set to remove the equipment weight from the wheels, except for locomotive cranes (see paragraph (q)(6) of this section for use of outriggers on locomotive cranes).

(3) When outrigger floats are used, they shall be attached to the outriggers.

(4) Each outrigger shall be visible to the operator or to a signal person during extension and setting.

(5) Outrigger blocking shall:

(i) Meet the requirements in paragraphs (h)(2) and (h)(3) of this section.

(ii) Be placed only under the outrigger float/pad of the outrigger jack or, where the outrigger is designed without a jack, under the outer bearing surface of the extended outrigger beam.

(6) For locomotive cranes, when using outriggers to handle loads, the manufacturer's procedures shall be followed. When lifting loads without using outriggers, the manufacturer's procedures shall be met regarding truck wedges or screws.

§ 1926.1405 Disassembly—additional requirements for dismantling of booms and jibs (applies to both the use of manufacturer procedures and employer procedures).

(a) None of the pins in the pendants are to be removed (partly or completely) when the pendants are in tension. See, for example, Figure 2.

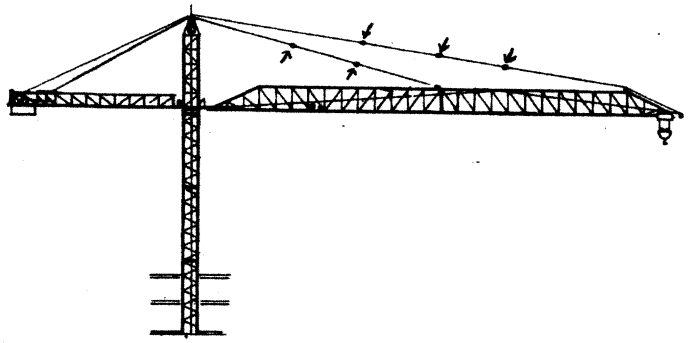

Figure 2. Pins (indicated by arrows) are not to be removed while pendants remain in tension.

(b) None of the pins (top and bottom) on boom sections located between the pendant attachment points and the crane/derrick body are to be removed (partly or completely) when the pendants are in tension. See, for example, Figures 3 and 4.

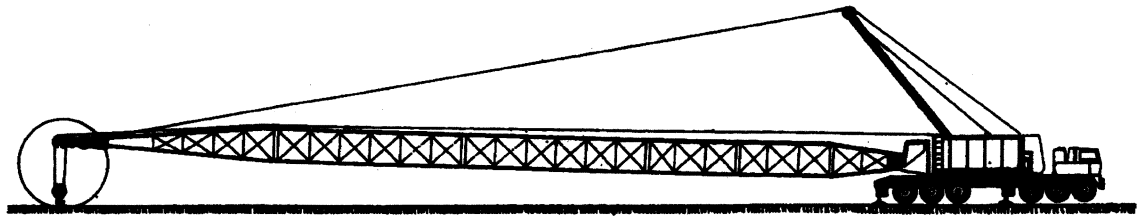

Figure 3. Pendant is in tension while connected to uppermost boom section, and no pins are to be removed.

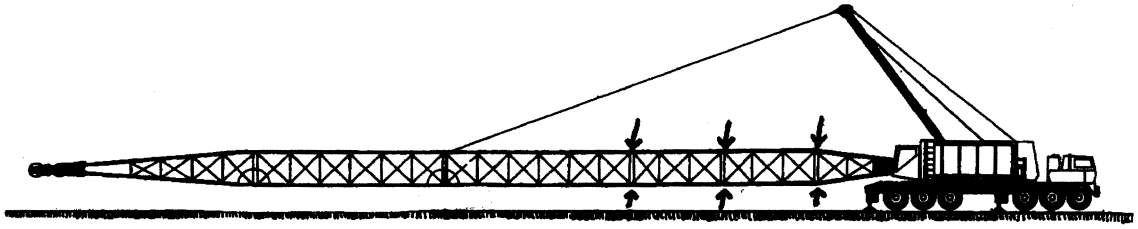

Figure 4. Pendant is in tension, and pins between pendant attachment point and crane body (indicated by arrows) are not to be removed. Note that, because the cantilevered portion of the boom is not supported, only the bottom pins ahead of the pendant may be removed. See Figure 6.

(c) None of the pins (top and bottom) on boom sections located between the uppermost boom section and the crane/derrick body are to be removed (partly or completely) when the boom is being supported by the uppermost boom section resting on the ground (or other support). See, for example, Figure 5.

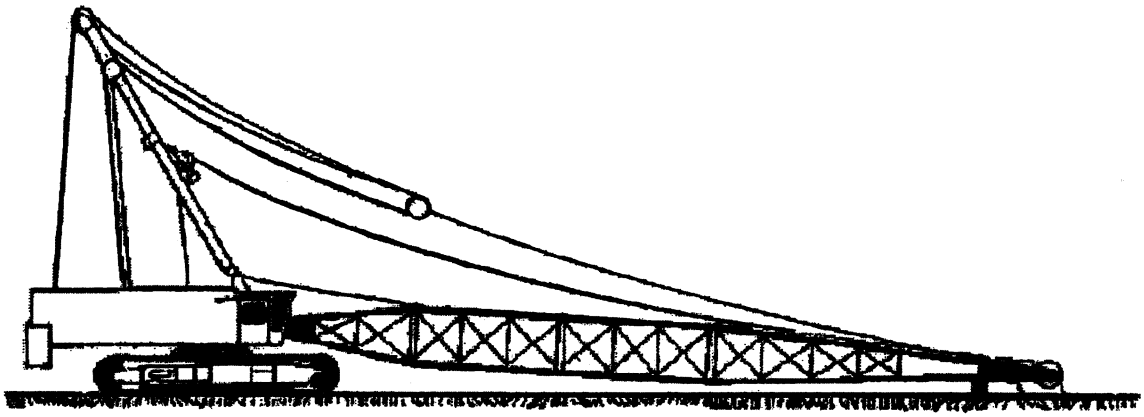

Figure 5. Uppermost boom section is resting on ground, and no pins between uppermost boom section and crane body are to be removed.

(d) None of the top pins on boom sections located on the cantilevered portion of the boom being removed (the portion being removed ahead of the pendant attachment points) are to be removed (partly or completely) until the cantilevered section to be removed is fully supported. See, for example, Figures 6 and 7.

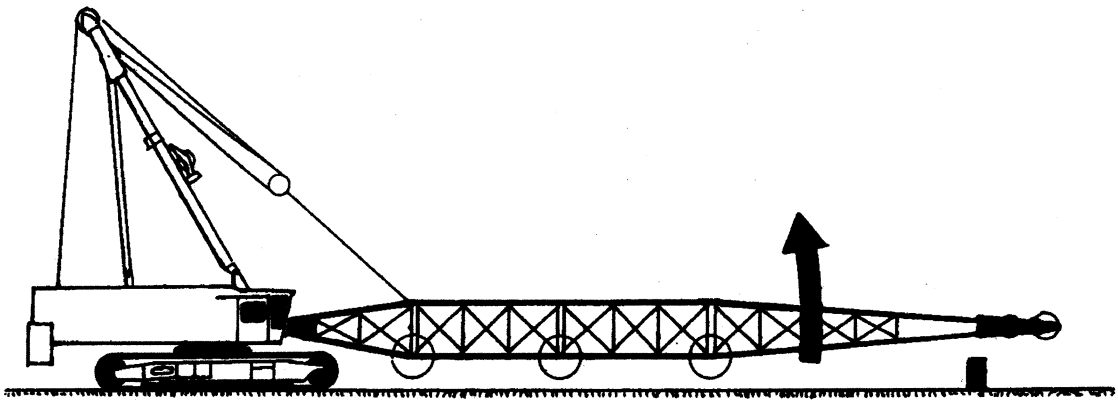

Figure 6. Cantilevered portion of boom is not supported, and top pins therefore are not to be removed. Bottom pins (circled) may be removed.

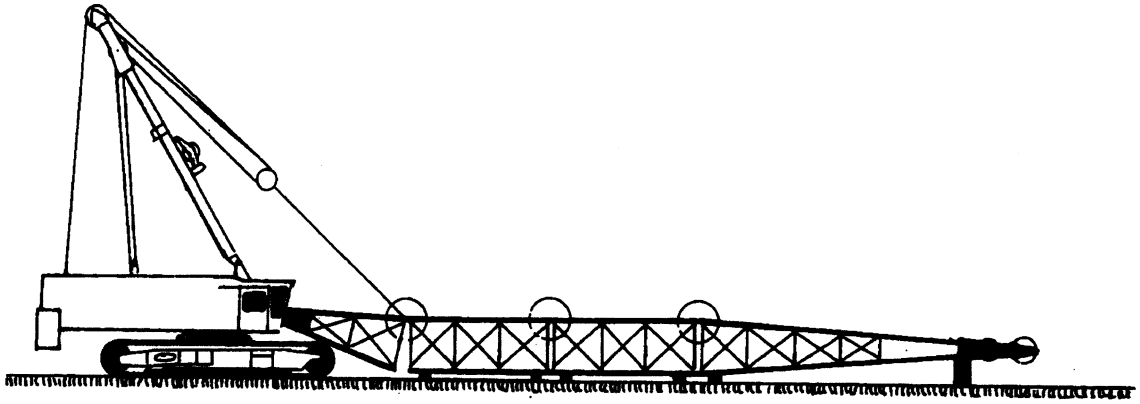

Figure 7. Cantilevered portion of boom is supported, and top pins (circled) may therefore be removed.

§ 1926.1406 Assembly/disassembly—employer procedures—general requirements.

(a) When using employer procedures instead of manufacturer procedures for assembling or disassembling, the employer shall ensure that the procedures are designed to:

(1) Prevent unintended dangerous movement, and to prevent collapse, of all parts of the equipment.

(2) Provide adequate support and stability of all parts of the equipment during the assembly/disassembly process.

(3) Position employees involved in the assembly/disassembly operation so that their exposure to unintended movement or collapse of part or all of the equipment is minimized.

(b) *Qualified person.* Employer procedures must be developed by a qualified person.

§ 1926.1407 Power line safety (up to 350 kV)—assembly and disassembly.

(a) Before assembling or disassembling equipment, the employer must determine if any part of the equipment, load line, or load (including rigging and lifting accessories) could get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) (see paragraphs (a)(1), (a)(2) and (a)(3) of this section), as follows:

(1) *Option (1)—Deenergize and ground.* Confirm from the utility owner/operator that the power line has been deenergized and visibly grounded at the worksite.

(2) *Option (2)—20 foot clearance.* Ensure that no part of the equipment, load line or load (including rigging and lifting accessories), gets closer than 20 feet to the power line by implementing the measures specified in paragraph (b) of this section.

(3) *Option (3)—Table A clearance.*

(i) Determine the line's voltage and the minimum clearance distance permitted under Table A (see § 1926.1408).

(ii) Determine if any part of the equipment, load line, or load (including rigging and lifting accessories), could get closer than the minimum approach distance to the power line permitted under Table A (see § 1926.1408). If so, then the employer must follow the requirements in paragraph (b) to ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer to the line than the minimum approach distance.

(b) *Preventing encroachment/electrocution.* Where encroachment precautions are required under Option (2), or Option (3) (see paragraphs (a)(2) or (a)(3) of this section), the following requirements must be met:

(1) Conduct a planning meeting with the Assembly/Disassembly supervisor (A/D supervisor), operator, assembly/disassembly crew and the other workers who will be in the assembly/disassembly area to review the location of the power line(s) and the steps that will be implemented to prevent encroachment/electrocution.

(2) If tag lines are used, they must be non-conductive.

(3) At least one of the following additional measures must be in place:

(i) Use a dedicated spotter who is in continuous contact with the equipment operator. The dedicated spotter must:

(A) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: a clearly visible line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(B) Be positioned to effectively gauge the clearance distance.

(C) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator, in accordance with § 1926.1420 (Radio, telephone, or other electronic transmission of signals).

(D) Give timely information to the operator so that the required clearance distance can be maintained.

(ii) A proximity alarm set to give the operator sufficient warning to prevent encroachment.

(iii) A device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment.

(iv) A device that automatically limits range of movement, set to prevent encroachment.

(v) An elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings.

(c) *Assembly/disassembly below power lines prohibited.* No part of a crane/derrick, load line, or load

(including rigging and lifting accessories), whether partially or fully assembled, is allowed below a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

(d) *Assembly/disassembly inside Table A clearance prohibited.* No part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, is allowed closer than the minimum approach distance under Table A (see § 1926.1408) to a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

(e) *Voltage information.* Where Option (3) (see paragraph (a)(3) of this section) is used, the utility owner/operator of the power lines must provide the requested voltage information within two working days of the employer's request.

(f) *Power lines presumed energized.* The employer must assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite.

(g) *Posting of electrocution warnings.* There must be at least one electrocution hazard warning conspicuously posted in the cab so that it is in view of the operator and (except for overhead gantry and tower cranes) at least two on the outside of the equipment.

§ 1926.1408 Power line safety (up to 350 kV)—equipment operations.

(a) *Hazard assessments and precautions inside the work zone.* Before beginning equipment operations, the employer must:

(1) *Identify the work zone by either:*

(i) Defining a work zone by demarcating boundaries (such as with flags, or a device such as a range limit device or range control warning device) and prohibit the operator from operating the equipment past those boundaries, or

(ii) Defining the work zone as the area 360 degrees around the equipment, up to the equipment's maximum working radius.

(2) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone, could get closer than 20 feet to a power line. If so, the employer must meet the requirements in Option (1), Option (2), or Option (3) (see paragraph (a)(2)(i), (a)(2)(ii), and (a)(2)(iii) of this section), as follows:

(i) *Option (1)—Deenergize and ground.* Confirm from the utility owner/operator that the power line has been deenergized and visibly grounded at the worksite.

(ii) *Option (2)—20 foot clearance.* Ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer than 20 feet to the power line by implementing the measures specified in paragraph (b) of this section.

(iii) *Option (3)—Table A clearance.*

(A) Determine the line's voltage and the minimum approach distance permitted under Table A (see § 1926.1408).

(B) Determine if any part of the equipment, load line or load (including rigging and lifting accessories), while operating up to the equipment's maximum working radius in the work zone, could get closer than the minimum approach distance of the power line permitted under Table A (see § 1926.1408). If so, then the employer must follow the requirements in paragraph (b) of this section to ensure that no part of the equipment, load line, or load (including rigging and lifting accessories), gets closer to the line than the minimum approach distance.

(b) *Preventing encroachment/electrocution.* Where encroachment precautions are required under Option (2) or Option (3) (see paragraphs (a)(2)(ii) and (a)(2)(iii) of this section), the following requirements must be met:

(1) Conduct a planning meeting with the operator and the other workers who will be in the area of the equipment or load to review the location of the power line(s), and the steps that will be implemented to prevent encroachment/electrocution.

(2) If tag lines are used, they must be non-conductive.

(3) Erect and maintain an elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings, at 20 feet from the power line (if using Option (2) (see paragraph (a)(2)(ii) of this section)) or at the minimum approach distance under Table A (see § 1926.1408) (if using Option (3) (see paragraph (a)(2)(iii) of this section)).

(4) Implement at least one of the following measures:

(i) A proximity alarm set to give the operator sufficient warning to prevent encroachment.

(ii) A dedicated spotter who is in continuous contact with the operator. Where this measure is selected, the dedicated spotter must:

(A) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: A clearly visible line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(B) Be positioned to effectively gauge the clearance distance.

(C) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(D) Give timely information to the operator so that the required clearance distance can be maintained.

(iii) A device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment.

(iv) A device that automatically limits range of movement, set to prevent encroachment.

(v) An insulating link/device installed at a point between the end of the load line (or below) and the load.

(5) The requirements of paragraph (b)(4) of this section do not apply to work covered by subpart V of this part.

(c) *Voltage information.* Where Option (3) of this section is used, the utility owner/operator of the power lines must provide the requested voltage information within two working days of the employer's request.

(d) *Operations below power lines.*

(1) No part of the equipment, load line, or load (including rigging and lifting accessories) is allowed below a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line, except where one of the exceptions in paragraph (d)(2) of this section applies.

(2) *Exceptions.* Paragraph (d)(1) of this section is inapplicable where the employer demonstrates that one of the following applies:

(i) The work is covered by subpart V of this part.

(ii) For equipment with non-extensible booms: The uppermost part of the equipment, with the boom at true vertical, would be more than 20 feet below the plane of the power line or more than the Table A (of this section) minimum clearance distance below the plane of the power line.

(iii) For equipment with articulating or extensible booms: The uppermost part of the equipment, with the boom in the fully extended position, at true vertical, would be more than 20 feet below the plane of the power line or more than the Table A (of this section)

minimum clearance distance below the plane of the power line.

(iv) The employer demonstrates that compliance with paragraph (d)(1) of this section is infeasible and meets the requirements of § 1926.1410.

(e) *Power lines presumed energized.* The employer must assume that all power lines are energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite.

(f) When working near transmitter/communication towers where the equipment is close enough for an electrical charge to be induced in the equipment or materials being handled, the transmitter shall be deenergized or the following precautions shall be taken when necessary to dissipate induced voltages:

(1) The equipment shall be provided with an electrical ground.

(2) Non-conductive rigging or an insulating link/device shall be used.

(g) *Training.*

(1) Operators and crew assigned to work with the equipment shall be trained on the following:

(i) The procedures to be followed in the event of electrical contact with a power line. Such training shall include:

(A) Information regarding the danger of electrocution from the operator simultaneously touching the equipment and the ground.

(B) The importance to the operator's safety of remaining inside the cab except where there is an imminent danger of fire, explosion, or other emergency that necessitates leaving the cab.

(C) The safest means of evacuating from equipment that may be energized.

(D) The danger of the potentially energized zone around the equipment.

(E) The need for crew in the area to avoid approaching or touching the equipment.

(F) Safe clearance distance from power lines.

(ii) Power lines are presumed to be energized unless the utility owner/operator confirms that the power line has been and continues to be deenergized and visibly grounded at the worksite.

(iii) Power lines are presumed to be uninsulated unless the utility owner/operator or a registered engineer who is a qualified person with respect to electrical power transmission and distribution confirms that a line is insulated.

(iv) The limitations of an insulating link/device, proximity alarm, and range control (and similar) device, if used.

(2) Employees working as dedicated spotters shall be trained to enable them to effectively perform their task, including training on the applicable requirements of this section.

(h) Devices originally designed by the manufacturer for use as: a safety device (see § 1926.1415), operational aid, or a means to prevent power line contact or electrocution, when used to comply with this section, shall meet the manufacturer's procedures for use and conditions of use.

TABLE A—MINIMUM CLEARANCE DISTANCES

Voltage (nominal, kV, alternating current)	Minimum clearance distance (feet)
up to 50	10
over 50 to 200	15
over 200 to 350	20
over 350 to 500	25
over 500 to 750	35
over 750 to 1,000	45
over 1,000	(as established by the utility owner/operator or registered professional engineer who is a qualified person with respect to electrical power transmission and distribution).

Note: The value that follows ''to'' is up to and includes that value. For example, over 50 to 200 means up to and including 200kV.

§ 1926.1409 Power line safety (over 350 kV).

The requirements of § 1926.1407 and § 1926.1408 apply to power lines over 350 kV, except that wherever the distance ''20 feet'' is specified, the distance ''50 feet'' shall apply in its place.

§ 1926.1410 Power line safety (all voltages)—equipment operations closer than the Table A zone.

Equipment operations in which any part of the equipment, load line, or load (including rigging and lifting accessories) is closer than the minimum approach distance under Table A of § 1926.1408 to an energized power line is prohibited, except where the employer demonstrates that the following requirements are met:

(a) The employer determines that it is infeasible to do the work without breaching the minimum approach distance under Table A of § 1926.1408.

(b) The employer determines that, after consultation with the utility owner/operator, it is infeasible to deenergize and ground the power line or relocate the power line.

(c) *Minimum clearance distance.*

(1) The power line owner/operator or registered professional engineer who is a qualified person with respect to electrical power transmission and distribution determines the minimum clearance distance that must be maintained to prevent electrical contact in light of the on-site conditions. The factors that must be considered in making this determination include, but are not limited to: conditions affecting atmospheric conductivity; time necessary to bring the equipment, load line, and load (including rigging and lifting accessories) to a complete stop; wind conditions; degree of sway in the power line; lighting conditions, and other conditions affecting the ability to prevent electrical contact.

(2) Paragraph (c)(1) of this section does not apply to work covered by subpart V of this part; instead, for such work, the minimum clearance distances specified in § 1926.950 Table V–1 apply. Employers engaged in subpart V of this part work are permitted to work closer than the distances in § 1926.950 Table V–1 where both the requirements of this section and § 1926.952(c)(2)(iii) or (iv) are met.

(d) A planning meeting with the employer and utility owner/operator (or registered professional engineer who is a qualified person with respect to electrical power transmission and distribution) is held to determine the procedures that will be followed to prevent electrical contact and electrocution. At a minimum these procedures shall include:

(1) If the power line is equipped with a device that automatically reenergizes

the circuit in the event of a power line contact, the automatic reclosing feature of the circuit interrupting device must be made inoperative before work begins.

(2) A dedicated spotter who is in continuous contact with the operator. The dedicated spotter must:

(i) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: A line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(ii) Be positioned to effectively gauge the clearance distance.

(iii) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(iv) Give timely information to the operator so that the required clearance distance can be maintained.

(3) An elevated warning line, or barricade (not attached to the crane), in view of the operator (either directly or through video equipment), equipped with flags or similar high-visibility markings, to prevent electrical contact. However, this provision does not apply to work covered by subpart V of this part.

(4) *Insulating link/device.*

(i) An insulating link/device installed at a point between the end of the load line (or below) and the load.

(ii) For work covered by subpart V of this part, the requirement in paragraph (d)(4)(i) of this section applies only when working inside the § 1926.950 Table V–1 clearance distances.

(5) Non-conductive rigging if the rigging may be within the Table A (of § 1926.1408) distance during the operation.

(6) If the equipment is equipped with a device that automatically limits range of movement, it must be used and set to prevent any part of the equipment, load line, or load (including rigging and lifting accessories) from breaching the minimum approach distance established under paragraph (c) of this section.

(7) If a tag line is used, it must be of the non-conductive type.

(8) Barricades forming a perimeter at least 10 feet away from the equipment to prevent unauthorized personnel from entering the work area. In areas where obstacles prevent the barricade from being at least 10 feet away, the barricade shall be as far from the equipment as feasible.

(9) Workers other than the operator must be prohibited from touching the load line above the insulating link/device and crane.

(10) Only personnel essential to the operation shall be permitted to be in the area of the crane and load.

(11) The equipment must be properly grounded.

(12) Insulating line hose or cover-up shall be installed by the utility owner/operator except where such devices are unavailable for the line voltages involved.

(e) The procedures developed to comply with paragraph (d) of this section are documented and immediately available on-site.

(f) The equipment user and utility owner/operator meet with the equipment operator and the other workers who will be in the area of the equipment or load to review the procedures that will be implemented to prevent breaching the minimum approach distance established in paragraph (c) of this section and prevent electrocution.

(g) The procedures developed to comply with paragraph (d) of this section are implemented.

(h) The utility owner/operator and all employers of employees involved in the work shall identify one person who will direct the implementation of the procedures. The person identified in accordance with this paragraph shall direct the implementation of the procedures and shall have the authority to stop work at any time to ensure safety.

(i) [*Reserved.*]

(j) If a problem occurs implementing the procedures being used to comply with paragraph (d) of this section, or indicating that those procedures are inadequate to prevent electrocution, the employer shall safely stop operations and either develop new procedures to comply with paragraph (d) of this section or have the utility owner/operator deenergize and visibly ground or relocate the power line before resuming work.

(k) Devices originally designed by the manufacturer for use as: A safety device (see § 1926.1415), operational aid, or a means to prevent power line contact or electrocution, when used to comply with this section, shall meet the manufacturer's procedures for use and conditions of use.

§ 1926.1411 Power line safety—while traveling.

(a) This section establishes procedures and criteria that must be met for equipment traveling under a power line on the construction site with no load.

(b) The employer shall ensure that:

(1) The boom/mast and boom/mast support system are lowered sufficiently to meet the requirements of this paragraph.

(2) The clearances specified in Table T of this section are maintained.

(3) The effects of speed and terrain on equipment movement (including movement of the boom/mast) are considered so that those effects do not cause the minimum clearance distances specified in Table T of this section to be breached.

(4) *Dedicated spotter.* If any part of the equipment while traveling will get closer than 20 feet to the power line, the employer shall ensure that a dedicated spotter who is in continuous contact with the operator is used. The dedicated spotter must:

(i) Be positioned to effectively gauge the clearance distance.

(ii) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(iii) Give timely information to the operator so that the required clearance distance can be maintained.

(5) *Additional precautions for traveling in poor visibility.* When traveling at night, or in conditions of poor visibility, in addition to the measures specified in paragraphs (b)(1) through (4) of this section, the employer shall ensure that:

(i) The power lines are illuminated or another means of identifying the location of the lines shall be used.

(ii) A safe path of travel is identified and used.

TABLE T—MINIMUM CLEARANCE DISTANCES WHILE TRAVELING WITH NO LOAD AND BOOM/MAST LOWERED

Voltage (nominal, kV, alternating current)	While traveling—minimum clearance distance (feet)
up to 0.75	4 (while traveling/boom lowered).
over .75 to 50	6 (while traveling/boom lowered).
over 50 to 345	10 (while traveling/boom lowered).
over 345 to 750	16 (while traveling/boom lowered).

TABLE T—MINIMUM CLEARANCE DISTANCES WHILE TRAVELING WITH NO LOAD AND BOOM/MAST LOWERED—Continued

Voltage (nominal, kV, alternating current)	While traveling—minimum clearance distance (feet)
Over 750 to 1,000	20 (while traveling/boom lowered).
Over 1,000	(as established by the utility owner/operator or registered professional engineer who is a qualified person with respect to electrical power transmission and distribution)

§ 1926.1412 Inspections.

(a) *Modified equipment.*

(1) Equipment that has had modifications or additions which affect the safe operation of the equipment (such as modifications or additions involving a safety device or operator aid, critical part of a control system, power plant, braking system, load-sustaining structural components, load hook, or in-use operating mechanism) or capacity shall be inspected by a qualified person after such modifications/additions have been completed, prior to initial use. The inspection shall meet the following requirements:

(i) The inspection shall assure that the modifications or additions have been done in accordance with the approval obtained pursuant to § 1926.1434 (Equipment modifications).

(ii) The inspection shall include functional testing.

(2) Equipment shall not be used until an inspection under this paragraph demonstrates that the requirements of paragraph (a)(1)(i) of this section have been met.

(b) *Repaired/adjusted equipment.*

(1) Equipment that has had a repair or adjustment that relates to safe operation (such as: A repair or adjustment to a safety device or operator aid, or to a critical part of a control system, power plant, braking system, load-sustaining structural components, load hook, or in-use operating mechanism), shall be inspected by a qualified person after such a repair or adjustment has been completed, prior to initial use. The inspection shall meet the following requirements:

(i) The qualified person shall determine if the repair/adjustment meets manufacturer equipment criteria (where applicable and available).

(ii) Where manufacturer equipment criteria are unavailable or inapplicable, the qualified person shall:

(A) Determine if a registered professional engineer (RPE) is needed to develop criteria for the repair/adjustment. If an RPE is not needed, the employer shall ensure that the criteria are developed by the qualified person. If an RPE is needed, the employer shall ensure that they are developed by an RPE.

(B) Determine if the repair/adjustment meets the criteria developed in accordance with paragraph (b)(1)(ii)(A) of this section.

(iii) The inspection shall include functional testing.

(2) Equipment shall not be used until an inspection under this paragraph demonstrates that the repair/adjustment meets the requirements of paragraph (b)(1)(i) of this section (or, where applicable, (b)(1)(ii) of this section).

(c) *Post-assembly.*

(1) Upon completion of assembly, the equipment shall be inspected by a qualified person to assure that it is configured in accordance with manufacturer equipment criteria.

(2) Where manufacturer equipment criteria are unavailable, a qualified person shall:

(i) Determine if a registered professional engineer (RPE) familiar with the type of equipment involved is needed to develop criteria for the equipment configuration. If an RPE is not needed, the employer shall ensure that the criteria are developed by the qualified person. If an RPE is needed, the employer shall ensure that they are developed by an RPE.

(ii) Determine if the equipment meets the criteria developed in accordance with paragraph (c)(2)(i) of this section.

(3) Equipment shall not be used until an inspection under this paragraph demonstrates that the equipment is configured in accordance with the applicable criteria.

(d) *Each shift.*

(1) A competent person shall begin a visual inspection prior to each shift, which shall be completed before or during that shift. The inspection shall consist of observation for apparent deficiencies. Disassembly is not required as part of this inspection unless the results of the visual inspection or trial operation indicate that further investigation necessitating disassembly is needed. Determinations made in conducting the inspection shall be reassessed in light of observations made during operation. At a minimum the inspection shall include the following:

(i) Control mechanisms for maladjustments interfering with proper operation.

(ii) Control and drive mechanisms for apparent excessive wear of components and contamination by lubricants, water or other foreign matter.

(iii) Air, hydraulic, and other pressurized lines for deterioration or leakage, particularly those which flex in normal operation.

(iv) Hydraulic system for proper fluid level.

(v) Hooks and latches for deformation, cracks, excessive wear, or damage such as from chemicals or heat.

(vi) Wire rope reeving for compliance with the manufacturer's specifications.

(vii) Wire rope, in accordance with § 1926.1413(a).

(viii) Electrical apparatus for malfunctioning, signs of apparent excessive deterioration, dirt or moisture accumulation.

(ix) Tires (when in use) for proper inflation and condition.

(x) Ground conditions around the equipment for proper support, including ground settling under and around outriggers and supporting foundations, ground water accumulation, or similar conditions.

(xi) The equipment for level position, both shift and after each move and setup.

(xii) Operator cab windows for significant cracks, breaks, or other deficiencies that would hamper the operator's view.

(xiii) Rails, rail stops, rail clamps and supporting surfaces when the equipment has rail traveling.

(xiv) Safety devices and operational aids for proper operation.

(2) If any deficiency in paragraphs (d)(1)(i) through (xiv) of this section (or in additional inspection items required to be checked for specific types of equipment in accordance with other sections of this standard) is identified, an immediate determination shall be made by the competent person as to whether the deficiency constitutes a safety hazard. If the deficiency is determined to constitute a safety hazard, the equipment shall be removed from service until it has been corrected.

(3) If any deficiency in paragraph (d)(1)(xiv) of this section (safety devices/operational aids) is identified, the action specified in § 1926.1415 and § 1926.1416 shall be taken prior to using the equipment.

(e) *Monthly.*

(1) Each month the equipment is in service it shall be inspected in accordance with paragraph (d) (each shift) of this section.

(2) Equipment shall not be used until an inspection under this paragraph demonstrates that no corrective action under paragraphs (d)(2) and (3) of this section is required.

(3) *Documentation.*

(i) The following information shall be documented by the employer that conducts the inspection:

(A) The items checked and the results of the inspection.

(B) The name and signature of the person who conducted the inspection and the date.

(ii) This document shall be retained for a minimum of three months.

(f) *Annual/comprehensive.*

(1) At least every 12 months the equipment shall be inspected by a qualified person in accordance with paragraph (d) (each shift) of this section except that the corrective action set forth in this paragraph (f), *Annual/comprehensive,* of this section shall apply.

(2) In addition, at least every 12 months, the equipment shall be inspected by a qualified person for the following:

(i) Equipment structure (including the boom and, if equipped, the jib):

(A) Structural members: Deformed, cracked, or significantly corroded.

(B) Bolts, rivets and other fasteners: loose, failed or significantly corroded.

(C) Welds for cracks.

(ii) Sheaves and drums for cracks or significant wear.

(iii) Parts such as pins, bearings, shafts, gears, rollers and locking devices for distortion, cracks or significant wear.

(iv) Brake and clutch system parts, linings, pawls and ratchets for excessive wear.

(v) Safety devices and operational aids for proper operation (including significant inaccuracies).

(vi) Gasoline, diesel, electric, or other power plants for safety-related problems (such as leaking exhaust and emergency shut-down feature) and conditions, and proper operation.

(vii) Chains and chain drive sprockets for excessive wear of sprockets and excessive chain stretch.

(viii) Travel steering, brakes, and locking devices, for proper operation.

(ix) Tires for damage or excessive wear.

(x) Hydraulic, pneumatic and other pressurized hoses, fittings and tubing, as follows:

(A) Flexible hose or its junction with the fittings for indications of leaks.

(B) Threaded or clamped joints for leaks.

(C) Outer covering of the hose for blistering, abnormal deformation or other signs of failure/impending failure.

(D) Outer surface of a hose, rigid tube, or fitting for indications of excessive abrasion or scrubbing.

(xi) Hydraulic and pneumatic pumps and motors, as follows:

(A) Performance indicators: unusual noises or vibration, low operating speed, excessive heating of the fluid, low pressure.

(B) Loose bolts or fasteners.

(C) Shaft seals and joints between pump sections for leaks.

(xii) Hydraulic and pneumatic valves, as follows:

(A) Spools: sticking, improper return to neutral, and leaks.

(B) Leaks.

(C) Valve housing cracks.

(D) Relief valves: failure to reach correct pressure (if there is a manufacturer procedure for checking pressure, it must be followed).

(xiii) Hydraulic and pneumatic cylinders, as follows:

(A) Drifting caused by fluid leaking across the piston.

(B) Rod seals and welded joints for leaks.

(C) Cylinder rods for scores, nicks, or dents.

(D) Case (barrel) for significant dents.

(E) Rod eyes and connecting joints: loose or deformed.

(xiv) Outrigger pads/floats for excessive wear or cracks.

(xv) Slider pads for excessive wear or cracks

(xvi) Electrical components and wiring for cracked or split insulation and loose or corroded terminations.

(xvii) Warning labels and decals originally supplied with the equipment by the manufacturer or otherwise required under this standard: missing or unreadable.

(xviii) Originally equipped operator seat: missing.

(xix) Operator seat: unusable.

(xx) Originally equipped steps, ladders, handrails, guards: missing.

(xxi) Steps, ladders, handrails, guards: in unusable/unsafe condition.

(3) This inspection shall include functional testing to determine that the equipment as configured in the inspection is functioning properly.

(4) If any deficiency is identified, an immediate determination shall be made by the qualified person as to whether the deficiency constitutes a safety hazard or, though not yet a safety hazard, needs to be monitored in the monthly inspections.

(5) If the qualified person determines that a deficiency is a safety hazard, the equipment shall be removed from service until it has been corrected.

(6) If the qualified person determines that, though not presently a safety hazard, the deficiency needs to be monitored, the employer shall ensure that the deficiency is checked in the monthly inspections.

(7) *Documentation of annual/comprehensive inspection.* The following information shall be documented and maintained by the employer that conducts the inspection:

(i) The items checked and the results of the inspection.

(ii) The name and signature of the person who conducted the inspection and the date.

(iii) This document shall be retained for a minimum of 12 months.

(g) *Severe service.* Where the severity of use/conditions is such that there is a reasonable probability of damage or excessive wear (such as loading that may have exceeded rated capacity, shock loading that may have exceeded rated capacity, prolonged exposure to a corrosive atmosphere), the employer shall stop using the equipment and a qualified person shall:

(1) Inspect the equipment for structural damage.

(2) In light of the use/conditions determine whether any items/conditions listed in paragraph (f) of this section need to be inspected; if so, the qualified person shall inspect those items/conditions.

(3) If a deficiency is found, the employer shall follow the requirements in paragraphs (f)(4) through (6) of this section.

(h) *Equipment not in regular use.* Equipment that has been idle for 3 months or more shall be inspected by a qualified person in accordance with the requirements of paragraph (e) (Monthly) of this section before initial use.

(i) [*Reserved.*]

(j) Any part of a manufacturer's procedures regarding inspections that relate to safe operation (such as to a safety device or operator aid, critical part of a control system, power plant, braking system, load-sustaining structural components, load hook, or in-use operating mechanism) that is more comprehensive or has a more frequent schedule than the requirements of this section shall be followed. Additional documentation requirements by the manufacturer are not required.

§ 1926.1413 Wire rope—inspection.

(a) *Shift inspection.*

(1) A competent person shall begin a visual inspection prior to each shift, which shall be completed before or during that shift. The inspection shall

consist of observation of wire ropes (running and standing) that are reasonably likely to be in use during the shift for apparent deficiencies, including those listed in paragraph (a)(2) of this section. Untwisting (opening) of wire rope or booming down is not required as part of this inspection.

(2) *Apparent deficiencies.*

(i) *Category I.* Apparent deficiencies in this category include the following:

(A) Significant distortion of the wire rope structure such as kinking, crushing, unstranding, birdcaging, signs of core failure or steel core protrusion between the outer strands.

(B) Significant corrosion.

(C) Electric arc (from a source other than power lines) or heat damage.

(D) Improperly applied end connections.

(E) Significantly corroded, cracked, bent, or worn end connections (such as from severe service).

(ii) *Category II.* Apparent deficiencies in this category are:

(A) Visible broken wires, as follows:

(1) In running wire ropes: Six randomly distributed broken wires in one rope lay or three broken wires in one strand in one rope lay, where a rope lay is the length along the rope in which one strand makes a complete revolution around the rope.

(2) In rotation resistant ropes: Two randomly distributed broken wires in six rope diameters or four randomly distributed broken wires in 30 rope diameters.

(3) In pendants or standing wire ropes: More than two broken wires in one rope lay located in rope beyond end connections and/or more than one broken wire in a rope lay located at an end connection.

(B) A diameter reduction of more than 5% from nominal diameter.

(iii) *Category III.* Apparent deficiencies in this category include the following:

(A) In rotation resistant wire rope, core protrusion or other distortion indicating core failure.

(B) Electrical contact with a power line.

(C) A broken strand.

(3) *Critical review items.* The competent person shall give particular attention to:

(i) Rotation resistant wire rope in use.

(ii) Wire rope being used for boom hoists and luffing hoists, particularly at reverse bends.

(iii) Wire rope at flange points, crossover points and repetitive pickup points on drums.

(iv) Wire rope adjacent to end connections.

(v) Wire rope at and on equalizer sheaves.

(4) *Removal from service.*

(i) If a deficiency in Category I (see paragraph (a)(2)(i) of this section) is identified, an immediate determination shall be made by the competent person as to whether the deficiency constitutes a safety hazard. If the deficiency is determined to constitute a safety hazard, operations involving use of the wire rope in question shall be prohibited until:

(A) The wire rope is replaced, or

(B) If the deficiency (other than power line contact) is localized, the problem is corrected by severing the wire rope in two; the undamaged portion may continue to be used. Joining lengths of wire rope by splicing is prohibited. Repair of wire rope that contacted an energized power line is also prohibited.

(ii) If a deficiency in Category II (see paragraph (a)(2)(ii) of this section) is identified, the employer shall comply with *Option A* (see paragraph (a)(2)(ii)(A) of this section) or *Option B* (see paragraph (a)(2)(ii)(B) of this section), as follows:

(A) *Option A.* Consider the deficiency to constitute a safety hazard where it meets the wire rope manufacturer's established criterion for removal from service or meets a different criterion that the wire rope manufacturer has approved in writing for that specific wire rope. If the deficiency is considered a safety hazard, operations involving use of the wire rope in question shall be prohibited until the wire rope is replaced, or the damage is removed in accordance with all of the requirements and restrictions in paragraph (a)(4)(i)(B) of this section.

(B) *Option B.* Institute the alternative measures specified in paragraph (a)(4)(iii) of this section.

(iii) *Alternative measures for a Category II deficiency.* The wire rope may continue to be used if the employer ensures that the following measures are implemented:

(A) A qualified person assesses the deficiency in light of the load and other conditions of use and determines it is safe to continue to use the wire rope as long as the conditions established under this paragraph are met.

(B) A qualified person establishes the parameters for the use of the equipment with the deficiency, including a reduced maximum rated capacity.

(C) A qualified person establishes a specific number of broken wires, or diameter reduction that, when reached, will require the equipment to be taken out of service until the wire rope is replaced, or the damage is removed in accordance with all of the requirements and restrictions in paragraph (a)(4)(i)(B) of this section.

(D) A qualified person sets a time limit, not to exceed 30 days from the date the deficiency is first identified, by which the wire rope must be replaced, or the damage removed in accordance with all of the requirements and restrictions in paragraph (a)(4)(i)(B) of this section.

(E) The workers who will conduct the shift inspections are informed of this deficiency and the measures taken under this paragraph.

(F) The qualified person's findings and procedures in paragraphs (a)(4)(iii)(A) through (D) of this section are documented.

(iv) If a deficiency in Category III is identified, operations involving use of the wire rope in question shall be prohibited until:

(A) The wire rope is replaced, or

(B) If the deficiency (other than power line contact) is localized, the problem is corrected by severing the wire rope in two; the undamaged portion may continue to be used. Joining lengths of wire rope by splicing is prohibited. Repair of wire rope that contacted an energized power line is also prohibited.

(v) Where a wire rope is required to be removed from service under this section, either the equipment (as a whole) or the hoist with that wire rope shall be tagged-out, in accordance with § 1926.1417(f)(1), until the wire rope is repaired or replaced.

(b) *Monthly inspection.*

(1) Each month an inspection shall be conducted in accordance with paragraph (a) (shift inspection) of this section.

(2) Wire ropes on equipment shall not be used until an inspection under this paragraph demonstrates that no corrective action under paragraph (a)(4) of this section is required.

(3) The inspection shall be documented according to § 1926.1412(e)(3) (monthly inspection documentation).

(c) *Annual/comprehensive.*

(1) At least every 12 months, wire ropes in use on equipment shall be inspected by a qualified person in accordance with paragraph (a) (shift inspection) of this section.

(2) In addition, at least every 12 months, the wire ropes in use on equipment shall be inspected by a qualified person, as follows:

(i) The inspection shall be for deficiencies of the types listed in paragraph (a)(2) of this section.

(ii) The inspection shall be complete and thorough, covering the surface of the entire length of the wire ropes, with particular attention given to:

(A) Critical review items listed in paragraph (a)(3) of this section.

(B) Those sections that are normally hidden during shift and monthly inspections.

(C) Wire rope in contact with saddles, equalizer sheaves or other sheaves where rope travel is limited.

(D) Wire rope subject to reverse bends.

(E) Wire rope passing over sheaves.

(F) Wire rope at or near terminal ends.

(iii) *Exception:* In the event an inspection under paragraph (c)(2) of this section is not feasible due to existing set-up and configuration of the equipment (such as where an assist crane is needed) or due to site conditions (such as a dense urban setting), such inspections shall be conducted as soon as it becomes feasible, but no longer than an additional 6 months for running ropes and, for standing ropes, at the time of disassembly.

(3) If a deficiency is identified, an immediate determination shall be made by the qualified person as to whether the deficiency constitutes a safety hazard.

(i) If the deficiency is determined to constitute a safety hazard, operations involving use of the wire rope in question shall be prohibited until:

(A) The wire rope is replaced, or

(B) If the deficiency is localized, the problem is corrected by severing the wire rope in two; the undamaged portion may continue to be used. Joining lengths of wire rope by splicing is prohibited.

(ii) If the qualified person determines that, though not presently a safety hazard, the deficiency needs to be monitored, the employer shall ensure that the deficiency is checked in the monthly inspections.

(4) The inspection shall be documented according to § 1926.1412(f)(7) (annual/comprehensive inspection documentation).

(d) Rope lubricants that are of the type that hinder inspection shall not be used.

§ 1926.1414 Wire rope—selection and installation criteria.

(a) Selection of replacement wire rope shall be in accordance with the requirements of this section and the recommendations of the wire rope manufacturer, the equipment manufacturer, or a qualified person.

(b) *Boom hoist reeving.*

(1) Fiber core ropes shall not be used for boom hoist reeving, except for derricks.

(2) Rotation resistant ropes shall be used for boom hoist reeving only where the requirements of paragraph (c) of this section are met.

(c) *Rotation resistant ropes.*

(1) *Definitions.*

(i) *Type I rotation resistant wire rope (‘‘ Type I’’).* Type I rotation resistant rope is stranded rope constructed to have little or no tendency to rotate or, if guided, transmits little or no torque. It has at least 15 outer strands and comprises an assembly of at least three layers of strands laid helically over a center in two operations. The direction of lay of the outer strands is opposite to that of the underlying layer.

(ii) *Type II rotation resistant wire rope (‘‘Type II’’).* Type II rotation resistant rope is stranded rope constructed to have significant resistance to rotation. It has at least 10 outer strands and comprises an assembly of two or more layers of strands laid helically over a center in two or three operations. The direction of lay of the outer strands is opposite to that of the underlying layer.

(iii) *Type III rotation resistant wire rope (‘‘Type III’’).* Type III rotation resistant rope is stranded rope constructed to have limited resistance to rotation. It has no more than nine outer strands, and comprises an assembly of two layers of strands laid helically over a center in two operations. The direction of lay of the outer strands is opposite to that of the underlying layer.

(2) *Requirements.*

(i) Types II and III with an operating design factor of less than 5 shall not be used for duty cycle or repetitive lifts.

(ii) Rotation resistant ropes (including Types I, II and III) shall have an operating design factor of no less than 3.5.

(iii) Type I shall have an operating design factor of no less than 5, except where the wire rope manufacturer and the equipment manufacturer approves the design factor, in writing.

(iv) Types II and III shall have an operating design factor of no less than 5, except where the requirements of paragraph (c)(3) of this section are met.

(3) When Types II and III with an operating design factor of less than 5 are used (for non-duty cycle, non-repetitive lifts), the following requirements shall be met for each lifting operation:

(i) A qualified person shall inspect the rope in accordance with § 1926.1413(a). The rope shall be used only if the qualified person determines that there are no deficiencies constituting a hazard. In making this determination, more than one broken wire in any one rope lay shall be considered a hazard.

(ii) Operations shall be conducted in such a manner and at such speeds as to minimize dynamic effects.

(iii) Each lift made under these provisions shall be recorded in the monthly and annual inspection documents. Such prior uses shall be considered by the qualified person in determining whether to use the rope again.

(4) *Additional requirements for rotation resistant ropes for boom hoist reeving.*

(i) Rotation resistant ropes shall not be used for boom hoist reeving, except where the requirements of paragraph (c)(4)(ii) of this section are met.

(ii) Rotation resistant ropes may be used as boom hoist reeving when load hoists are used as boom hoists for attachments such as luffing attachments or boom and mast attachment systems. Under these conditions, the following requirements shall be met:

(A) The drum shall provide a first layer rope pitch diameter of not less than 18 times the nominal diameter of the rope used.

(B) The requirements in § 1926.1426(a) (irrespective of the date of manufacture of the equipment), and § 1926.1426(b).

(C) The requirements in ASME B30.5–2004, section 5–1.3.2 (a), (a)(2) through (a)(4), (b) and (d), except that the minimum pitch diameter for sheaves used in multiple rope reeving is 18 times the nominal diameter of the rope used instead of the value of 16 specified in section 5–1.3.2(d).

(D) All sheaves used in the boom hoist reeving system shall have a rope pitch diameter of not less than 18 times the nominal diameter of the rope used.

(E) The operating design factor for the boom hoist reeving system shall be not less than five.

(F) The operating design factor for these ropes shall be the total minimum breaking force of all parts of rope in the system divided by the load imposed on the rope system when supporting the static weights of the structure and the load within the equipment’s rated capacity.

(G) When provided, a power-controlled lowering system shall be capable of handling rated capacities and speeds as specified by the manufacturer.

(d) Wire rope clips used in conjunction with wedge sockets shall be attached to the unloaded dead end of the rope only, except that the use of devices specifically designed for dead-ending rope in a wedge socket is permitted.

(e) Socketing shall be done in the manner specified by the manufacturer of the wire rope or fitting.

(f) Prior to cutting a wire rope, seizings shall be placed on each side of the point to be cut. The length and number of seizings shall be in accordance with the wire rope manufacturer’s instructions.

§ 1926.1415 Safety devices.

(a) *Safety devices.* The following safety devices are required on all equipment covered by this subpart, unless otherwise specified:

(1) *Crane level indicator.*

(i) The equipment shall have a crane level indicator that is either built into the equipment or is available on the equipment.

(ii) If a built-in crane level indicator is not working properly, it shall be tagged-out or removed.

(iii) This requirement does not apply to portal cranes, derricks, floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation.

(2) Boom stops, except for derricks and hydraulic booms.

(3) Jib stops (if a jib is attached), except for derricks.

(4) Equipment with foot pedal brakes shall have locks, except for portal cranes and floating cranes.

(5) Hydraulic outrigger jacks shall have an integral holding device/check valve.

(6) Equipment on rails shall have rail clamps and rail stops, except for portal cranes.

(b) *Proper operation required.* Operations shall not begin unless the devices listed in this section are in proper working order. If a device stops working properly during operations, the operator shall safely stop operations. Operations shall not resume until the device is again working properly. Alternative measures are not permitted to be used.

§ 1926.1416 Operational aids.

(a) The devices listed in this section (''listed operational aids'') are required on all equipment covered by this subpart, unless otherwise specified.

(b) Operations shall not begin unless the listed operational aids are in proper working order, except where the employer meets the specified temporary alternative measures. More protective alternative measures specified by the crane/derrick manufacturer, if any, shall be followed.

(c) If a listed operational aid stops working properly during operations, the operator shall safely stop operations until the temporary alternative measures are implemented or the device is again working properly. If a replacement part is no longer available, the use of a substitute device that performs the same type of function is permitted and is not considered a modification under § 1926.1434.

(d) *Category I operational aids and alternative measures.* Operational aids listed in this paragraph that are not working properly shall be repaired no later than 7 days after the deficiency occurs. Exception: If the employer documents that it has ordered the necessary parts within 7 days of the occurrence of the deficiency, the repair shall be completed within 7 days of receipt of the parts.

(1) *Boom hoist limiting device.*

(i) For equipment manufactured after December 16, 1969, a boom hoist limiting device is required. *Temporary alternative measures (use at least one)*:

(A) Use a boom angle indicator.

(B) Clearly mark the boom hoist cable (so that it can easily be seen by the operator) at a point that will give the operator sufficient time to stop the hoist to keep the boom within the minimum allowable radius. In addition, install mirrors or remote video cameras and displays if necessary for the operator to see the mark.

(C) Clearly mark the boom hoist cable (so that it can easily be seen by a spotter) at a point that will give the spotter sufficient time to signal the operator and have the operator stop the hoist to keep the boom within the minimum allowable radius.

(ii) If the equipment was manufactured on or before December 16, 1969, and was not originally equipped with a boom hoist limiting device, at least one of the measures in paragraphs (d)(1)(i)(A) through (C) of this section shall be used, on a permanent basis.

(2) *Luffing jib limiting device.* Equipment with a luffing jib shall have a luffing jib limiting device. Temporary alternative measures are the same as in paragraph (d)(1)(i) of this section, except to limit the movement of the luffing jib.

(3) *Anti two-blocking device.*

(i) Telescopic boom cranes manufactured after February 28, 1992, shall be equipped with a device which automatically prevents damage from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component). The device(s) must prevent such damage at all points where two-blocking could occur.

Temporary alternative measures: Clearly mark the cable (so that it can easily be seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, and use a spotter when extending the boom.

(ii) *Lattice boom cranes.*

(A) Lattice boom cranes manufactured after Feb 28, 1992, shall be equipped with a device that either automatically prevents damage and load failure from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component), or warns the operator in time for the operator to prevent two-blocking. The device(s) must prevent such damage/failure or provide adequate warning for all points where two-blocking could occur.

(B) Lattice boom cranes, and derricks, manufactured one year after the effective date of this standard shall be equipped with a device which automatically prevents damage and load failure from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component). The device(s) must prevent such damage/failure at all points where two-blocking could occur.

(C) *Exception.* The requirements in paragraphs (d)(3)(ii)(A) and (B) of this section do not apply to such lattice boom equipment when used for dragline, clamshell (grapple), magnet, drop ball, container handling, concrete bucket, marine operations that do not involve hoisting personnel, and pile driving work.

(D) *Temporary alternative measures.* Clearly mark the cable (so that it can easily be seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter.

(e) *Category II operational aids and alternative measures.* Operational aids listed in this paragraph that are not working properly shall be repaired no later than 30 days after the deficiency occurs. Exception: If the employer documents that it has ordered the necessary parts within 7 days of the occurrence of the deficiency, and the part is not received in time to complete the repair in 30 days, the repair shall be completed within 7 days of receipt of the parts.

(1) *Boom angle or radius indicator.* The equipment shall have a boom angle or radius indicator readable from the operator's station. *Temporary alternative measures:* Radii or boom angle shall be determined by measuring the radii or boom angle with a measuring device.

(2) Jib angle indicator if the equipment has a luffing jib. *Temporary alternative measures:* Radii or jib angle shall be determined by ascertaining the main boom angle and then measuring the radii or jib angle with a measuring device.

(3) Boom length indicator if the equipment has a telescopic boom, except where the rated capacity is independent of the boom length. *Temporary alternative measures:* One of the following methods shall be used:

(i) Mark the boom with measured marks to calculate boom length; or

(ii) Calculate boom length from boom angle and radius measurements; or

(iii) Measure the boom with a measuring device.

(4) *Load weighing and similar devices.* Equipment (other than derricks) manufactured after March 29, 2003 with a rated capacity over 6,000 pounds shall have at least one of the following: Load weighing device, load moment (or rated capacity) indicator, or load moment (or rated capacity) limiter. *Temporary alternative measures:* The weight of the load shall be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information shall be provided to the operator prior to the lift.

(5) The following devices are required on equipment manufactured after January 1, 2008:

(i) Outrigger position (horizontal beam extension) sensor/monitor if the equipment has outriggers. *Temporary alternative measures:* the operator shall verify that the position of the outriggers is correct (in accordance with manufacturer procedures) before beginning operations requiring outrigger deployment.

(ii) Hoist drum rotation indicator if the drum is not visible from the operator's station. *Temporary alternative measures:* Mark the drum. In addition, install mirrors or remote video cameras and displays if necessary for the operator to see the mark.

§ 1926.1417 Operation.

(a) The employer shall comply with all manufacturer procedures applicable to the operational functions of equipment, including its use with attachments.

(b) *Unavailable operation procedures.*

(1) Where the manufacturer procedures are unavailable, the employer shall develop and ensure compliance with all procedures necessary for the safe operation of the equipment and attachments.

(2) Procedures for the operational controls must be developed by a qualified person.

(3) Procedures related to the capacity of the equipment must be developed and signed by a registered professional engineer familiar with the equipment.

(c) *Accessibility of procedures.*

(1) The procedures applicable to the operation of the equipment, including rated capacities (load charts), recommended operating speeds, special hazard warnings, instructions, and operator's manual, shall be readily available in the cab at all times for use by the operator.

(2) Where rated capacities are available in the cab only in electronic form: In the event of a failure which makes the rated capacities inaccessible, the operator must immediately cease operations or follow safe shut-down procedures until the rated capacities (in electronic or other form) are available.

(d) The operator shall not engage in any practice that diverts his/her attention while actually engaged in operating the crane, such as the use of cell phones (other than when used for signal communications) or other attention-diverting activities.

(e) *Leaving the equipment unattended.*

(1) The operator shall not leave the controls while the load is suspended, except where the following are met:

(i) The operator remains adjacent to the equipment and is not engaged in any other duties.

(ii) The load is to be held suspended for a period of time exceeding normal lifting operations.

(iii) The competent person determines that it is safe to do so and implements measures necessary to restrain the boom hoist and telescoping, load, swing, and outrigger functions.

(iv) Barricades or caution lines, and notices, are erected to prevent all employees from entering the fall zone. No employees, including those listed in § 1926.1425(b)(1) through (3), § 1926.1425(d) or § 1926.1425(e), shall be permitted in the fall zone.

(2) The provisions in paragraph (e) of this section do not apply to working gear (such as slings, spreader bars, ladders, and welding machines) where the load is not suspended over an entrance or exit.

(f) *Tag-out.*

(1) *Tagging out of service equipment/functions.* Where the employer has taken the equipment out of service, a tag shall be placed in the cab stating that the equipment is out of service and is not to be used. Where the employer has taken a function(s) out of service, a tag shall be placed in a conspicuous position stating that the function is out of service and is not to be used.

(2) *Response to ''do not operate''/tag-out signs.*

(i) If there is a warning (tag-out or maintenance/do not operate) sign on the equipment or starting control, the operator shall not activate the switch or start the equipment until the sign has been removed by a person authorized to remove it, or until the operator has verified that:

(A) No one is servicing, working on, or otherwise in a dangerous position on the machine.

(B) The equipment has been repaired and is working properly.

(ii) If there is a warning (tag-out or maintenance/do not operate) sign on any other switch or control, the operator shall not activate that switch or control until the sign has been removed by a person authorized to remove it, or until the operator has verified that the requirements in paragraphs (f)(2)(i)(A) and (B) of this section have been met.

(g) Before starting the engine, the operator shall verify that all controls are in the proper starting position and that all personnel are in the clear.

(h) *Storm warning.* When a local storm warning has been issued, the competent person shall determine whether it is necessary to implement manufacturer recommendations for securing the equipment.

(i) [*Reserved.*]

(j) The operator shall be familiar with the equipment and its proper operation. If adjustments or repairs are necessary, the operator shall promptly inform the person designated by the employer to receive such information and, where there are successive shifts, to the next operator.

(k) Safety devices and operational aids shall not be used as a substitute for the exercise of professional judgment by the operator.

(l) [*Reserved.*]

(m) If the competent person determines that there is a slack rope condition requiring re-spooling of the rope, it shall be verified (before starting to lift) that the rope is seated on the drum and in the sheaves as the slack is removed.

(n) The competent person shall consider the effect of wind, ice, and snow on equipment stability and rated capacity.

(o) *Compliance with rated capacity.*

(1) The equipment shall not be operated in excess of its rated capacity.

(2) The operator shall not be required to operate the equipment in a manner that would violate paragraph (o)(1) of this section.

(3) *Load weight.* The operator shall verify that the load is within the rated capacity of the equipment by at least one of the following methods:

(i) The weight of the load shall be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. In addition, when requested by the operator, this information shall be

provided to the operator prior to the lift; or

(ii) The operator shall begin hoisting the load to determine, using a load weighing device, load moment indicator, rated capacity indicator, or rated capacity limiter, if it exceeds 75 percent of the maximum rated capacity at the longest radius that will be used during the lift operation. If it does, the operator shall not proceed with the lift until he/she verifies the weight of the load in accordance with paragraph (o)(3)(i) of this section.

(p) The boom or other parts of the equipment shall not contact any obstruction.

(q) The equipment shall not be used to drag or pull loads sideways.

(r) On wheel-mounted equipment, no loads shall be lifted over the front area, except as permitted by the manufacturer.

(s) The operator shall test the brakes each time a load that is 90% or more of the maximum line pull is handled by lifting the load a few inches and applying the brakes. In duty cycle and repetitive lifts where each lift is 90% or more of the maximum line pull, this requirement applies to the first lift but not to successive lifts.

(t) Neither the load nor the boom shall be lowered below the point where less than two full wraps of rope remain on their respective drums.

(u) *Traveling with a load.*

(1) Traveling with a load is prohibited if the practice is prohibited by the manufacturer.

(2) Where traveling with a load, the employer shall ensure that:

(i) A competent person supervises the operation, determines if it is necessary to reduce rated capacity, and makes determinations regarding load position, boom location, ground support, travel route, overhead obstructions, and speed of movement necessary to ensure safety.

(ii) The determinations of the competent person required in paragraph (u)(2)(i) of this section are implemented.

(iii) For equipment with tires, tire pressure specified by the manufacturer is maintained.

(v) Rotational speed of the equipment shall be such that the load does not swing out beyond the radius at which it can be controlled.

(w) A tag or restraint line shall be used if necessary to prevent rotation of the load that would be hazardous.

(x) The brakes shall be adjusted in accordance with manufacturer procedures to prevent unintended movement.

(y) The operator shall obey a stop (or emergency stop) signal, irrespective of who gives it.

(z) *Swinging locomotive cranes.* A locomotive crane shall not be swung into a position where it is reasonably foreseeable that railway cars on an adjacent track could strike it, until it is determined that cars are not being moved on the adjacent track and that proper flag protection has been established.

(aa) *Counterweight/ballast.*

(1) The following applies to equipment other than tower cranes:

(i) Equipment shall not be operated without the counterweight or ballast in place as specified by the manufacturer.

(ii) The maximum counterweight or ballast specified by the manufacturer for the equipment shall not be exceeded.

(2) Counterweight/ballast requirements for tower cranes are specified in § 1926.1435(b)(8).

§ 1926.1418 Authority to stop operation.

Whenever there is a concern as to safety, the operator shall have the authority to stop and refuse to handle loads until a qualified person has determined that safety has been assured.

§ 1926.1419 Signals—general requirements.

(a) A signal person must be provided in each of the following situations:

(1) The point of operation, meaning the load travel or the area near or at load placement, is not in full view of the operator.

(2) When the equipment is traveling, the view in the direction of travel is obstructed.

(3) Due to site specific safety concerns, either the operator or the person handling the load determines that it is necessary.

(b) *Types of signals.* Signals to operators must be by hand, voice, audible, or new signals.

(c) *Hand signals.*

(1) When using hand signals, the Standard Method must be used (see Appendix A of this subpart). Exception: where use of the Standard Method for hand signals is infeasible, or where an operation or use of an attachment is not covered in the Standard Method, non-standard hand signals may be used in accordance with paragraph (c)(2) of this section (see Appendix B of this subpart for an example). The following requirements apply to the use of non-standard hand signals:

(2) *Non-standard hand signals.* When using non-standard hand signals, the signal person, operator, and lift supervisor (where there is one) shall contact each other prior to the operation and agree on the non-standard hand signals that will be used.

(d) *New signals.* Signals other than hand, voice or audible signals may be used where the employer demonstrates that:

(1) The new signals provide at least equally effective communication as voice, audible, or Standard Method hand signals, or

(2) There is a national consensus standard for the new signals.

(e) *Suitability.* The signals used (hand, voice, audible, or new), and means of transmitting the signals to the operator (such as direct line of sight, video, radio, etc.), must be appropriate for the site conditions.

(f) During operations requiring signals, the ability to transmit signals between the operator and signal person shall be maintained. If that ability is interrupted at any time, the operator shall safely stop operations requiring signals until it is reestablished and a proper signal is given and understood.

(g) If the operator becomes aware of a safety problem and needs to communicate with the signal person, the operator must safely stop operations. Operations shall not resume until the operator and signal person agree that the problem has been resolved.

(h) Only one person gives signals to a crane/derrick at a time, except in circumstances covered by paragraph (j) of this section.

(i) [*Reserved.*]

(j) Anyone who becomes aware of a safety problem must alert the operator or signal person by giving the stop or emergency stop signal. (**Note:** § 1926.1417(y) requires the operator to obey a stop or emergency stop signal).

(k) All directions given to the operator by the signal person shall be given from the operator's direction perspective.

(l) [*Reserved.*]

(m) *Communication with multiple cranes/derricks.* Where a signal person(s) is in communication with more than one crane/derrick, a system for identifying the crane/derrick each signal is for must be used, as follows:

(1) For each signal, prior to giving the function/direction, the signal person shall identify the crane/derrick the signal is for, or

(2) An equally effective method of identifying which crane/derrick the signal is for must be used.

§ 1926.1420 Signals—radio, telephone or other electronic transmission of signals.

(a) The device(s) used to transmit signals shall be tested on site before beginning operations to ensure that the signal transmission is clear and reliable.

(b) Signal transmission must be through a dedicated channel. Exception: Multiple cranes/derricks and one or more signal persons may share a dedicated channel for the purpose of coordinating operations.

(c) The operator's reception of signals must be by a hands-free system.

§ 1926.1421 Signals—voice signals—additional requirements.

(a) Prior to beginning operations, the operator, signal person and lift supervisor (if there is one), shall contact each other and agree on the voice signals that will be used. Once the voice signals are agreed upon, these workers need not meet again to discuss voice signals unless another worker is substituted, there is confusion about the voice signals, or a voice signal is to be changed.

(b) Each voice signal shall contain the following three elements, given in the following order: function (such as hoist, boom, etc.), direction; distance and/or speed; function, stop command.

(c) The operator, signal person and lift supervisor (if there is one), shall be able to effectively communicate in the language used.

§ 1926.1422 Signals—hand signal chart.

Hand signal charts must be either posted on the equipment or readily available at the site.

§ 1926.1423 Fall protection.

(a) *Application.*

(1) Paragraphs (b), (c)(2), (d) and (e) of this section apply to all equipment covered by this subpart except tower cranes.

(2) Paragraph (c)(1), (f) and (h) of this section applies to all equipment covered by this subpart.

(3) Paragraph (g) of this section applies only to tower cranes.

(b) *Boom walkways.*

(1) Equipment manufactured more than one year after the effective date of this standard with lattice booms shall be equipped with walkways on the boom(s) if the vertical profile of the boom (from cord centerline to cord centerline) is 6 or more feet.

(2) *Boom walkway criteria.*

(i) The walkways shall be at least 12 inches wide.

(ii) *Guardrails, railings and other permanent fall protection attachments along walkways are:*

(A) Not required.

(B) Prohibited on booms supported by pendant ropes or bars if the guardrails/railings/attachments could be snagged by the ropes or bars.

(C) Prohibited if of the removable type (designed to be installed and removed each time the boom is assembled/disassembled).

(D) Where not prohibited, guardrails or railings may be of any height up to, but not more than, 45 inches.

(c) *Steps, handholds, grabrails, guardrails and railings.*

(1) The employer shall maintain originally equipped steps, handholds, ladders and guardrails/railings/grabrails in good condition.

(2) Equipment manufactured more than one year after the effective date of this standard shall be equipped so as to provide safe access and egress between the ground and the operator work station(s), including the forward and rear positions, by the provision of devices such as steps, handholds, ladders, and guardrails/railings/grabrails. These shall meet the following criteria:

(i) Steps, ladders and guardrails/railings/grabrails shall meet the requirements of SAE J185 (May 2003) or ISO 11660–2 (1994), except where infeasible.

(ii) Walking/stepping surfaces, except for crawler treads, shall have slip-resistant features/properties (such as diamond plate metal, strategically placed grip tape, expanded metal, or slip-resistant paint).

(d) For non-assembly/disassembly work, the employer shall provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 6 feet above a lower level as follows:

(1) When moving point-to-point:

(i) On non-lattice booms (whether horizontal or not horizontal).

(ii) On lattice booms that are not horizontal.

(2) While at a work station on any part of the equipment (including the boom, of any type), except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

(e) For assembly/disassembly work, the employer shall provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level, except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

(f) *Anchorage criteria.*

(1) *Anchorages for fall arrest and positioning device systems.*

(i) Personal fall arrest systems and positioning systems shall be anchored to any apparently substantial part of the equipment unless a competent person, from a visual inspection, without an engineering analysis, would conclude that the applicable criteria in § 1926.502 would not be met.

(ii) Attachable anchor devices (portable anchor devices that are attached to the equipment) shall meet the applicable anchorage criteria in § 1926.502.

(2) *Anchorages for restraint systems.* Restraint systems shall be anchored to any part of the equipment that is capable of withstanding twice the maximum load that an employee may impose on it during reasonably anticipated conditions of use.

(g) *Tower cranes.*

(1) For non-erecting/dismantling work, the employer shall provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 6 feet above a lower level, except when the employee is at or near draw-works (when the equipment is running), in the cab, or on the deck.

(2) For erecting/dismantling work, the employer shall provide and ensure the use of fall protection equipment for employees who are on a walking/working surface with an unprotected side or edge more than 15 feet above a lower level.

(h) *Anchoring to the load line.* A fall arrest system is permitted to be anchored to the crane/derrick's hook (or other part of the load line) where the following requirements are met:

(1) A qualified person has determined that the set-up and rated capacity of the crane/derrick (including the hook, load line and rigging) meets or exceeds the requirements in § 1926.502(d)(15).

(2) The equipment operator shall be at the work site and informed that the equipment is being used for this purpose.

§ 1926.1424 Work area control.

(a) *Swing radius hazards.*

(1) The requirements in paragraph (a)(2) of this section apply where there are accessible areas in which the equipment's rotating superstructure (whether permanently or temporarily mounted) poses a reasonably foreseeable risk of:

(i) Striking and injuring an employee; or

(ii) Pinching/crushing an employee against another part of the equipment or another object.

(2) To prevent employees from entering these hazard areas, the employer shall:

(i) Instruct employees assigned to work on or near the equipment (''authorized personnel'') in how to recognize struck-by and pinch/crush hazard areas posed by the rotating superstructure.

(ii) Erect and maintain control lines, warning lines, railings or similar barriers to mark the boundaries of the hazard areas. Exception: where it is

neither feasible to erect such barriers on the ground nor on the equipment, the hazard areas shall be clearly marked by a combination of warning signs (such as ''Danger—Swing/Crush Zone'' or ''Danger—This Thing's Gonna Swing and Crunch You—Zone'') and high visibility markings on the equipment that identify the hazard areas. In addition, the employer shall train the employees to understand what these markings signify.

(3) *Protecting employees in the hazard area.*

(i) Before an employee goes to a location in the hazard area that is out of view of the operator, the employee (or someone instructed by the employee) must ensure that the operator is informed that he/she is going to that location.

(ii) Where the operator knows that an employee went to a location covered by paragraph (a)(1) of this section, the operator shall not rotate the superstructure until the operator:

(A) Gives a warning that is understood by the employee as a signal that the superstructure is about to be rotated and allows time for the employee to get to a safe position, or

(B) Is informed in accordance with a pre-arranged system of communication that the employee is in a safe position.

(b) *Multiple equipment coordination.* Where any part of a crane/derrick is within the working radius of another crane/derrick, the controlling entity shall institute a system to coordinate operations. If there is no controlling entity, the employers shall institute such a system.

§ 1926.1425 Keeping clear of the load.

(a) Where available, hoisting routes that minimize the exposure of employees to hoisted loads shall be used, to the extent consistent with public safety.

(b) While the operator is not moving a suspended load, no employee shall be within the fall zone, except for employees:

(1) Engaged in hooking, unhooking or guiding a load, or

(2) Engaged in the initial attachment of the load to a component or structure, or

(3) Operating a concrete hopper or concrete bucket.

(c) When employees are engaged in hooking, unhooking, or guiding the load, or in the initial connection of a load to a component or structure and are within the fall zone, the following criteria shall be met:

(1) The materials being hoisted shall be rigged to prevent unintentional displacement.

(2) Hooks with self-closing latches or their equivalent shall be used. Exception: ''J'' hooks are permitted to be used for setting wooden trusses.

(3) The materials shall be rigged by a qualified rigger.

(d) Receiving a load. Only employees needed to receive a load shall be permitted to be within the fall zone when a load is being landed.

(e) During a tilt-up or tilt-down operation:

(1) No employee shall be directly under the load.

(2) Only employees essential to the operation shall be in the fall zone (but not directly under the load).

Note to § 1926.1425: Boom free fall is prohibited when an employee is in the fall zone of the boom or load, and load line free fall is prohibited when an employee is directly under the load; see § 1926.1426.

§ 1926.1426 Free fall and controlled load lowering.

(a) *Boom free fall prohibitions.*

(1) The use of equipment in which the boom is designed to free fall (live boom) is prohibited in each of the following circumstances:

(i) An employee is in the fall zone of the boom or load.

(ii) An employee is being hoisted.

(iii) The load or boom is directly over a power line, or over any part of the area extending the Table A (of § 1926.1408) clearance distance to each side of the power line.

(iv) The load is over a shaft.

(v) The load is over a cofferdam, except where there are no employees in the fall zone.

(vi) Lifting operations are taking place in a refinery or tank farm.

(2) The use of equipment in which the boom is designed to free fall (live boom) is permitted only where none of the circumstances listed in paragraph (a)(1) of this section are present and:

(i) The equipment was manufactured prior to October 31, 1984, or

(ii) The equipment is a floating crane/derrick or a land crane/derrick on a vessel/flotation device.

(b) *Preventing boom free fall.* Where the use of equipment with a boom that is designed to free fall (live boom) is prohibited (see paragraph (a)(1) of this section), the boom hoist shall have a secondary mechanism or device designed to prevent the boom from falling in the event the primary system used to hold or regulate the boom hoist fails, as follows:

(1) Friction drums shall have:

(i) A friction clutch and, in addition, a braking device, to allow for controlled boom lowering.

(ii) A secondary braking or locking device, which is manually or automatically engaged, to back-up the primary brake while the boom is held (such as a secondary friction brake or a ratchet and pawl device).

(2) Hydraulic drums shall have an integrally mounted holding device or internal static brake to prevent boom hoist movement in the event of hydraulic failure.

(3) Neither clutches nor hydraulic motors shall be considered brake or locking devices for purposes of this subpart.

(4) Hydraulic boom cylinders shall have an integrally mounted holding device.

(c) *Preventing uncontrolled retraction.* Hydraulic telescoping booms shall have an integrally mounted holding device to prevent the boom from retracting in the event of hydraulic failure.

(d) *Load line free fall.* In each of the following circumstances, controlled load lowering is required and free fall of the load line hoist is prohibited:

(1) An employee is directly under the load.

(2) An employee is being hoisted.

(3) The load is directly over a power line, or over any part of the area extending the Table A clearance distance to each side of the power line.

(4) The load is over a shaft or cofferdam.

§ 1926.1427 Operator qualification and certification.

(a) The employer must ensure that, prior to operating any equipment covered under § 1926.1400, the operator is either qualified or certified to operate the equipment in accordance with one of the options in paragraphs (b) through (e) of this section, or is operating the equipment during a training period in accordance with paragraph (f) of this section. Exceptions: Operator qualification or certification under this section is not required for operators of derricks (see § 1926.1436), sideboom cranes (see § 1926.1440), and equipment with a rated hoisting/lifting capacity of 2,000 pounds or less (see § 1926.1441).

(b) *Option 1: Certification by an accredited crane/derrick operator testing organization.*

(1) For a testing organization to be considered accredited to certify operators under this subpart, it must:

(i) Be accredited by a nationally recognized accrediting agency based on that agency's determination that industry recognized criteria for written testing materials, practical examinations, test administration, grading, facilities/equipment and personnel have been met.

(ii) Administer written and practical tests that:

(A) Assess the operator applicant regarding, at a minimum, the knowledge and skills listed in paragraphs (j)(1) and (2) of this section.

(B) Provide different levels of certification based on equipment capacity and type.

(iii) Have procedures for operators to re-apply and be re-tested in the event an operator applicant fails a test or is decertified.

(iv) Have testing procedures for re-certification designed to ensure that the operator continues to meet the technical knowledge and skills requirements in paragraphs (j)(1) and (2) of this section.

(v) Have its accreditation reviewed by the nationally recognized accrediting agency at least every three years.

(2) A certification issued under this option is portable.

(3) A certification issued under this paragraph (b) is valid for 5 years.

(c) *Option 2: Qualification by an audited employer program.* The employer's qualification of its employee shall meet the following requirements:

(1) The written and practical tests shall be either:

(i) Developed by an accredited crane/derrick operator testing organization (see paragraph (b) of this section), or

(ii) Approved by an auditor in accordance with the following requirements:

(A) The auditor is certified to evaluate such tests by an accredited crane/derrick operator testing organization (see paragraph (b) of this section).

(B) The auditor is not an employee of the employer.

(C) The approval shall be based on the auditor's determination that the written and practical tests meet nationally recognized test development criteria and are valid and reliable in assessing the operator applicants regarding, at a minimum, the knowledge and skills listed in paragraphs (j)(1) and (2) of this section.

(2) *Administration of tests.*

(i) The written and practical tests shall be administered under circumstances approved by the auditor as meeting nationally recognized test administration standards.

(ii) The auditor shall be certified to evaluate the administration of the written and practical tests by an accredited crane/derrick operator testing organization (see paragraph (b) of this section).

(iii) The auditor shall not be an employee of the employer.

(iv) The audit shall be conducted in accordance with nationally recognized auditing standards.

(3) The employer program shall be audited within 3 months of the beginning of the program and every 3 years thereafter.

(4) The employer program shall have testing procedures for re-qualification designed to ensure that the operator continues to meet the technical knowledge and skills requirements in paragraphs (j)(1) and (2) of this section. The re-qualification procedures shall be audited in accordance with paragraphs (c)(1) and (2) of this section.

(5) *Deficiencies.* If the auditor determines that there is a significant deficiency (''deficiency'') in the program, the employer shall ensure that:

(i) No operator is qualified until the auditor confirms that the deficiency has been corrected.

(ii) The program is audited again within 180 days of the confirmation that the deficiency was corrected.

(iii) The auditor files a documented report of the deficiency to the appropriate Regional Office of the Occupational Safety and Health Administration within 15 days of the auditor's determination that there is a deficiency.

(iv) Records of the audits of the employer's program are maintained by the auditor for three years and are made available by the auditor to the Secretary of Labor or her designated representative upon request.

(6) A qualification under this paragraph (c) is:

(i) Not portable.

(ii) Valid for 5 years.

(d) *Option 3. Qualification by the U.S. military.*

(1) For purposes of this section, an operator is considered qualified if he/she has a current operator qualification issued by the U.S. military for operation of the equipment.

(2) A qualification under this paragraph (d) is:

(i) Not portable.

(ii) Valid for the period of time stipulated by the issuing entity.

(e) *Option 4. Licensing by a government entity.*

(1) For purposes of this section, a government licensing department/office that issues operator licenses for operating equipment covered by this standard is considered a government accredited crane/derrick operator testing organization if the criteria in paragraph (e)(2) of this section are met.

(2) *Licensing criteria.*

(i) The requirements for obtaining the license include an assessment, by written and practical tests, of the operator applicant regarding, at a minimum, the knowledge and skills listed in paragraphs (j)(1) and (2) of this section.

(ii) The testing meets industry recognized criteria for written testing materials, practical examinations, test administration, grading, facilities/equipment and personnel.

(iii) The government authority that oversees the licensing department/office, has determined that the requirements in paragraphs (e)(2)(i) and (ii) of this section have been met.

(iv) The licensing department/office has testing procedures for re-licensing designed to ensure that the operator continues to meet the technical knowledge and skills requirements in paragraphs (j)(1) and (2) of this section.

(3) A license issued by a government accredited crane/derrick operator testing organization that meets the requirements of this option:

(i) Meets the operator qualification requirements of this section for operation of equipment only within the jurisdiction of the government entity.

(ii) Is valid for the period of time stipulated by the licensing department/office, but no longer than 5 years.

(f) *Pre-qualification/certification training period.*

(1) An employee who is not qualified or certified under this section is permitted to operate equipment where the requirements of paragraph (f)(2) of this section are met.

(2) An employee who has not passed both the written and practical tests required under this section is permitted to operate equipment as part of his/her training where the following requirements are met:

(i) The employee (''trainee/apprentice'') shall be provided with sufficient training prior to operating the equipment to enable the trainee to operate the equipment safely under limitations established by this section (including continuous supervision) and any additional limitations established by the employer.

(ii) The tasks performed by the trainee/apprentice while operating the equipment shall be within the trainee's ability.

(iii) *Supervisor.* While operating the equipment, the trainee/apprentice shall be continuously supervised by an individual (''operator's supervisor'') who meets the following requirements:

(A) The operator's supervisor is an employee or agent of the trainee's/apprentice's employer.

(B) The operator's supervisor is either a certified operator under this section, or has passed the written portion of a certification test under one of the options in paragraphs (b) through (e) of this section, and is familiar with the proper use of the equipment's controls.

(C) While supervising the trainee/apprentice, the operator's supervisor performs no tasks that detract from the

supervisor's ability to supervise the trainee/apprentice.

(D) For equipment other than tower cranes: the operator's supervisor and the trainee/apprentice shall be in direct line of sight of each other. In addition, they shall communicate verbally or by hand signals. For tower cranes: the operator's supervisor and the trainee/apprentice shall be in direct communication with each other.

(iv) *Continuous supervision.* The trainee/apprentice shall be supervised by the operator's supervisor at all times, except for short breaks where the following are met:

(A) The break lasts no longer than 15 minutes and there is no more than one break per hour.

(B) Immediately prior to the break the operator's supervisor informs the trainee/apprentice of the specific tasks that the trainee/apprentice is to perform and limitations that he/she is to adhere to during the operator supervisor's break.

(C) The specific tasks that the trainee/apprentice will perform during the operator supervisor's break are within the trainee's/apprentice's abilities.

(v) The trainee/apprentice shall not operate the equipment in any of the following circumstances:

(A) If any part of the equipment, load line or load (including rigging and lifting accessories), if operated up to the equipment's maximum working radius in the work zone (see § 1926.1408(a)(1)), could get within 20 feet of a power line that is up to 350 kV, or within 50 feet of a power line that is over 350 kV.

(B) If the equipment is used to hoist personnel.

(C) In multiple-equipment lifts.

(D) If the equipment is used over a shaft, cofferdam, or in a tank farm.

(E) For multiple-lift rigging, except where the operator's supervisor determines that the trainee's/apprentice's skills are sufficient for this high-skill work.

(g) Under this section, a testing entity is permitted to provide training as well as testing services as long as the criteria of the applicable accrediting agency (in the option selected) for an organization providing both services are met.

(h) Written tests under this section are permitted to be administered verbally, with answers given verbally, where the operator candidate:

(1) Passes a written demonstration of literacy relevant to the work.

(2) Demonstrates the ability to use the type of written manufacturer procedures applicable to the class/type of equipment for which the candidate is seeking certification.

(i) [*Reserved.*]

(j) *Certification criteria.* Qualifications and certifications must be based, at a minimum, on the following:

(1) A determination through a written test that:

(i) The individual knows the information necessary for safe operation of the specific type of equipment the individual will operate, including the following:

(A) The controls and operational/performance characteristics.

(B) Use of, and the ability to calculate (manually or with a calculator), load/capacity information on a variety of configurations of the equipment.

(C) Procedures for preventing and responding to power line contact.

(D) Technical knowledge similar to the subject matter criteria listed in Appendix E of this subpart applicable to the specific type of equipment the individual will operate. Use of the Appendix E of this subpart criteria meets the requirements of this provision.

(E) Technical knowledge applicable to:

(*1*) The suitability of the supporting ground and surface to handle expected loads.

(*2*) Site hazards.

(*3*) Site access.

(F) This subpart, including applicable incorporated materials.

(ii) The individual is able to read and locate relevant information in the equipment manual and other materials containing information referred to in paragraph (j)(1)(i) of this section.

(2) A determination through a practical test that the individual has the skills necessary for safe operation of the equipment, including the following:

(i) Ability to recognize, from visual and audible observation, the items listed in § 1926.1412(d) (shift inspection).

(ii) Operational and maneuvering skills.

(iii) Application of load chart information.

(iv) Application of safe shut-down and securing procedures.

(k) *Phase-in.*

(1) As of the effective date of this subpart, until four years after the effective date of the subpart, the following requirements apply:

(i) Operators of equipment covered by this standard are required to be competent to operate the equipment safely.

(ii) Where an employee assigned to operate machinery does not have the required knowledge or ability to operate the equipment safely, the employee shall be provided with the necessary training prior to operating the equipment. The employer shall ensure that the operator is evaluated to confirm that he/she understands the information provided in the training.

(2) The effective date of paragraphs (a) through (j) and (m) of this section is [4 YEARS AFTER THE EFFECTIVE DATE OF THE FINAL RULE].

(l) [*Reserved.*]

(m) *Definitions.*

(1) ''*Portable.*'' Any employer of an operator with a certification that is portable under this section meets the requirements of paragraph (a) of this section with respect to that operator.

(2) ''*Not portable.*'' Where an operator has a qualification that is not portable under this section, the qualification meets the requirements of paragraph (a) of this section only where the operator is employed by (and operating the equipment for) the employer that issued the qualification.

§ 1926.1428 Signal person qualifications.

(a) The employer of the signal person shall ensure that each signal person meets the Qualification Requirements (paragraph (c) of this section) prior to giving any signals. This requirement shall be met by using either Option (1) or Option (2) (see paragraphs (a)(1) and (a)(2) of this section).

(1) *Option (1)—Third party qualified evaluator.* The signal person has documentation from a third party qualified evaluator showing that the signal person meets the Qualification Requirements (see paragraph (c) of this section).

(2) *Option (2)—Employer's qualified evaluator.* The employer has its qualified evaluator assess the individual and determine that the individual meets the Qualification Requirements (see paragraph (c) of this section) and provides documentation of that determination. An assessment by an employer's qualified evaluator under this option is not portable—other employers are not permitted to use it to meet the requirements of this section.

(3) The documentation for whichever option is used shall be available while the signal person is employed by the employer.

(b) If subsequent actions by the signal person indicate that the individual may not meet the Qualification Requirements (see paragraph (c) of this section), the employer must not allow the individual to continue working as a signal person until retraining is provided and a reassessment is made in accordance with paragraph (a) of this section that confirms that the individual meets the Qualification Requirements.

(c) *Qualification Requirements.* Each signal person must:

(1) Know and understand the type of signals used. If hand signals are used, the signal person must know and understand the Standard Method for hand signals.

(2) Be competent in the application of the type of signals used.

(3) Have a basic understanding of equipment operation and limitations, including the crane dynamics involved in swinging and stopping loads and boom deflection from hoisting loads.

(4) Know and understand the relevant requirements of § 1926.1419 through § 1926.1422 and § 1926.1428.

(5) Demonstrate that he/she meets the requirements in paragraph (c)(1) through (4) of this section through a verbal or written test, and through a practical test.

§ 1926.1429 Qualifications of maintenance & repair employees.

(a) Maintenance, inspection and repair personnel are permitted to operate the equipment only where the following requirements are met:

(1) The operation is limited to those functions necessary to perform maintenance, inspect or verify the performance of the equipment.

(2) The personnel either:

(i) Operate the equipment under the direct supervision of an operator who meets the requirements of § 1926.1427 (Operator qualification and certification), or

(ii) Are familiar with the operation, safe limitations, characteristics and hazards associated with the type of equipment.

(b) Maintenance and repair personnel shall meet the definition of a qualified person with respect to the equipment and maintenance/repair tasks performed.

§ 1926.1430 Training.

The employer shall provide training as follows:

(a) *Overhead powerlines.* Employees specified in § 1926.1408(g) (Power line safety; training) shall be trained in accordance with the requirements of that paragraph.

(b) *Signal persons.* Employees who will be assigned to work as signal persons who do not meet the requirements of § 1926.1428(c) shall be trained in the areas addressed in that paragraph.

(c) *Operators.*

(1) Operators who are not qualified or certified under § 1926.1427 shall be trained in the areas addressed in § 1926.1427(j). Retraining shall be provided if necessary for re-qualification or re-certification or if the operator does not pass a qualification or certification test.

(2) Operators shall be trained in the following practices:

(i) On friction equipment, whenever moving a boom off a support, first raise the boom a short distance (sufficient to take the load of the boom) to determine if the boom hoist brake needs to be adjusted. On other types of equipment, the same practice is applicable, except that typically there is no means of adjusting the brake; if the brake does not hold, a repair is necessary.

(ii) Where available, the manufacturer's emergency procedures for halting unintended equipment movement.

(d) *Competent persons and qualified persons.* Competent persons and qualified persons shall be trained regarding the requirements of this subpart applicable to their respective roles.

(e) *Crush/pinch points.* Employees who work with the equipment shall be instructed to keep clear of holes, and crush/pinch points and the hazards addressed in § 1926.1424 (Work area control).

(f) *Tag-out.* Operators and other employees authorized to start/energize equipment or operate equipment controls (such as maintenance and repair employees), shall be trained in the tag-out procedures in § 1926.1417(f).

(g) *Training administration.*

(1) The employer shall ensure that employees required to be trained under this subpart are evaluated to confirm that they understand the information provided in the training.

(2) Refresher training in relevant topics shall be provided when, based on the conduct of the employee or an evaluation of the employee's knowledge, there is an indication that retraining is necessary.

§ 1926.1431 Hoisting personnel.

The requirements of this section are supplemental to the other requirements in this subpart and apply when one or more employees are hoisted.

(a) The use of equipment to hoist employees is prohibited except where the employer demonstrates that the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform, or scaffold, would be more hazardous, or is not possible because of the project's structural design or worksite conditions. This paragraph does not apply to work covered by subpart R (Steel Erection) of this part.

(b) *Use of personnel platform.*

(1) When using equipment to hoist employees, the employees shall be in a personnel platform that meets the requirements of paragraph (e) of this section.

(2) *Exceptions:* A personnel platform is not required for hoisting employees:

(i) Into and out of drill shafts that are up to and including 8 feet in diameter (see paragraph (o) of this section for requirements for hoisting these employees).

(ii) In pile driving operations (see paragraph (p) of this section for requirements for hoisting these employees).

(iii) Solely for transfer to or from a marine worksite in a marine hoisted personnel transfer device (see paragraph (r) of this section for requirements for hoisting these employees).

(iv) In storage tank (steel or concrete), shaft and chimney operations (see paragraph (s) of this section for requirements for hoisting these employees).

(c) *Equipment set-up.*

(1) The equipment shall be uniformly level, within one percent of level grade, and located on footing that a qualified person has determined to be sufficiently firm and stable.

(2) Equipment with outriggers shall have them all extended and locked. The amount of extension shall be the same for all outriggers and in accordance with manufacturer procedures and load charts.

(d) *Equipment criteria.*

(1) Capacity: use of suspended personnel platforms. The total load (with the platform loaded, including the hook, load line and rigging) shall not exceed 50 percent of the rated capacity for the radius and configuration of the equipment, except during proof testing.

(2) *Capacity: use of boom-attached personnel platforms.* The total weight of the loaded personnel platform shall not exceed 50 percent of the rated capacity for the radius and configuration of the equipment (except during proof testing).

(3) *Capacity: hoisting personnel without a personnel platform.* When hoisting personnel without a personnel platform pursuant to paragraph (b)(2) of this section, the total load (including the hook, load line, rigging and any other equipment that imposes a load) shall not exceed 50 percent of the rated capacity for the radius and configuration of the equipment, except during proof testing.

(4) When the occupied personnel platform is in a stationary working position, the load and boom hoist brakes, swing brakes, and operator actuated secondary braking and locking features (such as pawls or dogs) or automatic secondary brakes shall be engaged.

(5) *Devices.*

(i) Equipment (except for derricks) with a variable angle boom shall be equipped with:

(A) A boom angle indicator, readily visible to the operator.

(B) A boom hoist limiting device.

(ii) Equipment with a luffing jib shall be equipped with:

(A) A jib angle indicator, readily visible to the operator.

(B) A jib hoist limiting device.

(iii) Equipment with telescoping booms shall be equipped with a device to indicate the boom's extended length clearly to the operator, or shall have measuring marks on the boom.

(iv) *Anti two-block.* A device which automatically prevents damage and load failure from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component) shall be used. The device(s) must prevent such damage/failure at all points where two-blocking could occur. Exception: this device is not required when hoisting personnel in pile driving operations. Instead, paragraph (p)(2) of this section specifies how to prevent two-blocking during such operations.

(v) *Controlled load lowering.* The load line hoist drum shall have a system, other than the load line hoist brake, which regulates the lowering rate of speed of the hoist mechanism. This system or device must be used when hoisting personnel.

Note to paragraph (d)(2)(v): free fall of the load line hoist is prohibited (see § 1926.1426(d); the use of equipment in which the boom hoist mechanism can free fall is also prohibited (see § 1926.1426(a)(1)

(vi) *Proper operation required.* Personnel hoisting operations shall not begin unless the devices listed in this section are in proper working order. If a device stops working properly during such operations, the operator shall safely stop operations. Personnel hoisting operations shall not resume until the device is again working properly. Alternative measures are not permitted.

(6) Direct attachment of a personnel platform to a luffing jib is prohibited.

(e) *Personnel platform criteria.*

(1) The personnel platform and attachment/suspension system shall be designed for hoisting personnel by a qualified person familiar with structural design.

(2) The system used to connect the personnel platform to the equipment shall allow the platform to remain within 10 degrees of level, regardless of boom angle.

(3) The suspension system shall be designed to minimize tipping of the platform due to movement of employees occupying the platform.

(4) The personnel platform itself (excluding the guardrail system and personal fall arrest system anchorages), shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load.

(5) All welding of the personnel platform and its components shall be performed by a certified welder familiar with the weld grades, types and material specified in the platform design.

(6) The personnel platform shall be equipped with a guardrail system which meets the requirements of subpart M of this part, and shall be enclosed at least from the toeboard to mid-rail with either solid construction material or expanded metal having openings no greater than ½ inch (1.27cm). Points to which personal fall arrest systems are attached must meet the anchorage requirements in subpart M of this part.

(7) A grab rail shall be installed inside the entire perimeter of the personnel platform except for access gates/doors.

(8) *Access gates/doors.* If installed, access gates/doors of all types (including swinging, sliding, folding, or other types) shall:

(i) Not swing outward.

(ii) Be equipped with a device that prevents accidental opening.

(9) Headroom shall be sufficient to allow employees to stand upright in the platform.

(10) In addition to the use of hard hats, employees shall be protected by overhead protection on the personnel platform when employees are exposed to falling objects. The platform overhead protection shall not obscure the view of the operator or platform occupants (such as wire mesh that has up to 1/2 inch openings), unless full protection is necessary.

(11) All edges exposed to employee contact shall be smooth enough to prevent injury.

(12) The weight of the platform and its rated capacity shall be conspicuously posted on the platform with a plate or other permanent marking.

(f) *Personnel platform loading.*

(1) The personnel platform shall not be loaded in excess of its rated capacity.

(2) *Use.*

(i) Personnel platforms shall be used only for employees, their tools, and the materials necessary to do their work. Platforms shall not be used to hoist materials or tools when not hoisting personnel.

(ii) *Exception:* materials and tools to be used during the lift, if secured and distributed in accordance with paragraph (f)(3) of this section may be in the platform for trial lifts.

(3) Materials and tools shall be:

(i) Secured to prevent displacement.

(ii) Evenly distributed within the confines of the platform while it is suspended.

(4) The number of employees occupying the personnel platform shall not exceed the maximum number the platform was designed to hold or the number required to perform the work, whichever is less.

(g) *Attachment and rigging.*

(1) *Hooks and other detachable devices.*

(i) Hooks used in the connection between the hoist line and the personnel platform (including hooks on overhaul ball assemblies, lower load blocks, bridle legs, or other attachment assemblies or components) shall be:

(A) Of a type that can be closed and locked, eliminating the throat opening.

(B) Closed and locked when attached.

(ii) Shackles used in place of hooks must be of the alloy anchor type, with either:

(A) A bolt, nut and retaining pin, in place, or

(B) Of the screw type, with the screw pin secured from accidental removal.

(iii) Where other detachable devices are used, they must be of the type that can be closed and locked to the same extent as the devices addressed in paragraphs (g)(1)(i) and (ii) of this section. Such devices must be closed and locked when attached.

(2) *Rope bridle.* When a rope bridle is used to suspend the personnel platform, each bridle leg shall be connected to a master link or shackle (see paragraph (g) of this section) in a manner that ensures that the load is evenly divided among the bridle legs.

(3) Rigging hardware (including wire rope, shackles, rings, master links, and other rigging hardware) and hooks must be capable of supporting, without failure, at least five times the maximum intended load applied or transmitted to that component. Where rotation resistant rope is used, the slings shall be capable of supporting without failure at least ten times the maximum intended load.

(4) Eyes in wire rope slings shall be fabricated with thimbles.

(5) Bridles and associated rigging for suspending the personnel platform shall be used only for the platform and the necessary employees, their tools and materials necessary to do their work, and shall not be used for any other purpose when not hoisting personnel.

(h) *Trial lift and inspection.*

(1) A trial lift with the unoccupied personnel platform loaded at least to the anticipated liftweight shall be made from ground level, or any other location

where employees will enter the platform, to each location at which the platform is to be hoisted and positioned. Where there is more than one location to be reached from a single set-up position, either individual trial lifts for each location, or a single trial lift for all locations, shall be performed.

(2) The trial lift shall be performed immediately prior to each shift in which personnel will be hoisted. In addition, the trial lift shall be repeated prior to hoisting employees in each of the following circumstances:

(i) The equipment is moved and set up in a new location or returned to a previously used location.

(ii) The lift route is changed, unless the competent person determines that the new route presents no new factors affecting safety.

(3) The competent person shall determine that:

(i) Safety devices and operational aids required by this section are activated and functioning properly. Other safety devices and operational aids must meet the requirements of § 1926.1415 and § 1926.1416.

(ii) Nothing interferes with the equipment or the personnel platform in the course of the trial lift.

(iii) The lift will not exceed 50 percent of the equipment's rated capacity at any time during the lift.

(iv) The load radius to be used during the lift has been accurately determined.

(4) Immediately after the trial lift, the competent person shall:

(i) Conduct a visual inspection of the equipment, base support or ground, and personnel platform, to determine whether the trial lift has exposed any defect or problem or produced any adverse effect.

(ii) Confirm that, upon the completion of the trial lift process, the test weight has been removed.

(5) Immediately prior to each lift:

(i) The platform shall be hoisted a few inches and inspected by a competent person to ensure that it is secure and properly balanced.

(ii) The following conditions must be determined by a competent person to exist before the lift of personnel proceeds:

(A) Hoist ropes shall be free of deficiencies in accordance with § 1926.1413(a).

(B) Multiple part lines shall not be twisted around each other.

(C) The primary attachment shall be centered over the platform.

(D) If the load rope is slack, the hoisting system shall be inspected to ensure that all ropes are properly seated on drums and in sheaves.

(6) Any condition found during the trial lift and subsequent inspection(s) that fails to meet a requirement of this standard or otherwise creates a safety hazard shall be corrected before hoisting personnel.

(i) [*Reserved.*]

(j) *Proof testing.*

(1) At each jobsite, prior to hoisting employees on the personnel platform, and after any repair or modification, the platform and rigging shall be proof tested to 125 percent of the platform's rated capacity. The proof test may be done concurrently with the trial lift.

(2) The platform shall be lowered by controlled load lowering, braked, and held in a suspended position for a minimum of five minutes with the test load evenly distributed on the platform.

(3) After proof testing, a competent person shall inspect the platform and rigging to determine if the test has been passed. If any deficiencies are found that pose a safety hazard, the platform and rigging shall not be used to hoist personnel unless the deficiencies are corrected, the test is repeated, and a competent person determines that the test has been passed.

(4) Personnel hoisting shall not be conducted until the competent person determines that the platform and rigging have successfully passed the proof test.

(k) *Work practices.*

(1) Hoisting of the personnel platform shall be performed in a slow, controlled, cautious manner, with no sudden movements of the equipment or the platform.

(2) Platform occupants shall:

(i) Keep all parts of the body inside the platform during raising, lowering, and horizontal movement. This provision does not apply to an occupant of the platform when necessary to position the platform or while performing the duties of a signal person.

(ii) Not stand, sit on, or work from the top or intermediate rail or toeboard, or use any other means/device to raise their working height.

(iii) Not pull the platform out of plumb in relation to the hoisting equipment.

(3) Before employees exit or enter a hoisted personnel platform that is not landed, the platform shall be secured to the structure where the work is to be performed, unless securing to the structure would create a greater hazard.

(4) If the platform is tied to the structure, the operator shall not move the platform until the operator receives confirmation that it is freely suspended.

(5) Tag lines shall be used when necessary to control the platform.

(6) *Platforms without controls.* Where the platform is not equipped with controls, the equipment operator shall remain at the equipment controls at all times while the platform is occupied.

(7) *Platforms with controls.* Where the platform is equipped with controls, the following must be met at all times while the platform is occupied:

(i) The occupant using the controls in the platform must be a qualified person with respect to their use, including the safe limitations of the equipment and hazards associated with its operation.

(ii) The equipment operator must be at the equipment controls, or in the personnel platform, or on site and in view of the equipment.

(iii) The platform operating manual must be in the platform or on the equipment.

(8) *Environmental conditions.*

(i) *Wind.* When wind speed (sustained or gusts) exceeds 20 mph at the personnel platform, a qualified person shall determine if, in light of the wind conditions, it is not safe to lift personnel. If it is not, the lifting operation shall not begin (or, if already in progress, shall be terminated).

(ii) *Other weather and environmental conditions.* A qualified person shall determine if, in light of indications of dangerous weather conditions, or other impending or existing danger, it is not safe to lift personnel. If it is not, the lifting operation shall not begin (or, if already in progress, shall be terminated).

(9) Employees being hoisted shall remain in direct communication with the signal person (where used), or the operator.

(10) *Fall protection.*

(i) Except over water, employees occupying the personnel platform shall be provided and use a personal fall arrest system. The system shall be attached to a structural member within the personnel platform.

(ii) The fall arrest system, including the attachment point (anchorage) used to comply with paragraph (k)(10)(i) of this section, shall meet the requirements in § 1926.502.

Note to paragraph (k)(10): When working over or near water, the requirements of § 1926.106 apply.

(11) *Other load lines.*

(i) No lifts shall be made on any other of the equipment's load lines while personnel are being hoisted, except in pile driving operations.

(ii) *Factory-produced boom-mounted personnel platforms that incorporate a winch as original equipment:* Loads are permitted to be hoisted by such a winch while employees occupy the personnel platform only where the load on the winch line does not exceed 500 pounds and does not exceed the rated capacity of the winch and platform.

(12) *Traveling—equipment other than derricks.*

(i) Hoisting of employees while the equipment is traveling is prohibited, except for:

(A) Equipment that travels on fixed rails, or

(B) Where the employer demonstrates that there is no less hazardous way to perform the work.

(C) This exception does not apply to rubber-tired equipment.

(ii) Where employees are hoisted while the equipment is traveling, the following criteria shall be met:

(A) Equipment travel shall be restricted to a fixed track or runway.

(B) Where a runway is used, it shall be a firm, level surface designed, prepared and designated as a path of travel for the weight and configuration of the equipment being used to lift and travel with the personnel platform. An existing surface may be used as long as it meets these criteria.

(C) Travel shall be limited to boom length.

(D) The boom shall be parallel to the direction of travel, except where it is safer to do otherwise.

(E) A complete trial run shall be performed to test the route of travel before employees are allowed to occupy the platform. This trial run can be performed at the same time as the trial lift required by paragraph (h) of this section which tests the lift route.

(13) *Traveling—derricks.* Derricks are prohibited from traveling while personnel are hoisted.

(l) [*Reserved.*]

(m) *Pre-lift meeting.* A pre-lift meeting shall be:

(1) Held to review the applicable requirements of this section and the procedures that will be followed.

(2) Attended by the equipment operator, signal person (if used for the lift), employees to be hoisted, and the person responsible for the task to be performed.

(3) Held prior to the trial lift at each new work location, and shall be repeated for any employees newly assigned to the operation.

(n) *Hoisting personnel near power lines.* Hoisting personnel within 20 feet of a power line that is up to 350 kV, and hoisting personnel within 50 feet of a power line that is over 350 kV, is prohibited, except for work covered by subpart V of this part (Power Transmission and Distribution).

(o) *Hoisting personnel in drill shafts.* When hoisting employees into and out of drill shafts that are up to and including 8 feet in diameter, the following requirements shall be met:

(1) The employee shall be in either a personnel platform or on a boatswain's chair.

(2) If using a personnel platform, paragraphs (a) through (n) of this section apply.

(3) If using a boatswain's chair:

(i) The following paragraphs of this section apply: (a), (c), (d)(1), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (f)(1), (f)(2)(i), (f)(3)(i), (g), (h), (k)(1), (k)(6), (k)(8), (k)(9), (k)(11)(i), (m), (n). Where the terms ''personnel platform'' or ''platform'' are used in these paragraphs, the term ''boatswain's chair'' applies in their place.

(ii) A signal person shall be stationed at the shaft opening.

(iii) The employee shall be hoisted in a slow, controlled descent and ascent.

(iv) The employee shall use personal fall protection equipment, including a full body harness, attached independent of the crane/derrick.

(v) The fall protection equipment shall meet the applicable requirements in § 1926.502.

(vi) The boatswain's chair itself (excluding the personal fall arrest system anchorages), shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load.

(vii) No more than one person shall be hoisted at a time.

(p) *Hoisting personnel for pile driving operations.* When hoisting an employee in pile driving operations, the following requirements shall be met:

(1) The employee shall be in a personnel platform or boatswain's chair.

(2) For lattice boom cranes: Clearly mark the cable (so that it can easily be seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter. For telescopic boom cranes: Clearly mark the cable (so that it can be easily seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, and use a spotter.

(3) If using a personnel platform, paragraphs (b) through (n) of this section apply.

(4) If using a boatswain's chair:

(i) The following paragraphs of this section apply: (a), (c), (d)(1), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (f)(1), (f)(2)(i), (f)(3)(i), (g), (h), (j), (k)(1), (k)(6), (k)(8), (k)(9), (k)(11)(i), (m), and (n). Where the terms ''personnel platform'' or ''platform'' are used in these paragraphs, the term ''boatswain's chair'' applies in their place.

(ii) The employee shall be hoisted in a slow, controlled descent and ascent.

(iii) The employee shall use personal fall protection equipment, including a full body harness, independently attached to the lower load block or overhaul ball.

(iv) The fall protection equipment shall meet the applicable requirements in § 1926.502.

(q) [*Reserved.*]

(r) *Hoisting personnel for marine transfer.* When hoisting employees solely for transfer to or from a marine worksite, the following requirements shall be met:

(1) The employee shall be in either a personnel platform or a marine hoisted personnel transfer device.

(2) If using a personnel platform, paragraphs (a) through (n) of this section apply.

(3) If using a marine hoisted personnel transfer device:

(i) The following paragraphs of this section apply: (a), (c)(2), (d)(1), (d)(3), (d)(4), (e)(1) through (5), (e)(12), (f)(1), (g), (h), (j), (k)(1), (k)(8), (k)(9), (k)(10)(ii), (k)(11)(i), (k)(12), (m), and (n). Where the terms ''personnel platform'' or ''platform'' are used in these paragraphs, the term ''marine hoisted personnel transfer device'' applies in their place.

(ii) The transfer device shall be used only for transferring workers.

(iii) The number of workers occupying the transfer device shall not exceed the maximum number it was designed to hold.

(iv) Each employee shall wear a U.S. Coast Guard personal flotation device approved for industrial use.

(s) *Hoisting personnel for storage tank (steel or concrete), shaft and chimney operations.* When hoisting an employee in storage tank (steel or concrete), shaft and chimney operations, the following requirements shall be met:

(1) The employee shall be in a personnel platform except where use of a personnel platform is infeasible; in such a case, a boatswain's chair shall be used.

(2) If using a personnel platform, paragraphs (a) through (n) of this section apply.

(3) If using a boatswain's chair:

(i) The following paragraphs of this section apply: (a), (c), (d)(1), (d)(3), (d)(4), (e)(1), (e)(2), (e)(3), (f)(1), (f)(2)(i), (f)(3)(i), (g), (h), (k)(1), (k)(6), (k)(8), (k)(9), (k)(11)(i), (m), (n). Where the terms ''personnel platform'' or ''platform'' are used in these paragraphs, the term ''boatswain's chair'' applies in their place.

(ii) The employee shall be hoisted in a slow, controlled descent and ascent.

(iii) The employee shall use personal fall protection equipment, including a full body harness, attached independent of the crane/derrick.

(iv) The fall protection equipment shall meet the applicable requirements in § 1926.502.

(v) The boatswain's chair itself (excluding the personal fall arrest

system anchorages), shall be capable of supporting, without failure, its own weight and at least five times the maximum intended load.

(vi) No more than one person shall be hoisted at a time.

§ 1926.1432 Multiple-crane/derrick lifts—supplemental requirements.

(a) *Plan development.* Before beginning a crane/derrick operation in which more than one crane/derrick will be supporting the load, the operation must be planned. The planning must meet the following requirements:

(1) The plan must be developed by a qualified person.

(2) The plan must be designed to ensure that the requirements of this subpart are met.

(3) Where the qualified person determines that engineering expertise is needed for the planning, the employer must ensure that it is provided.

(b) *Plan implementation.*

(1) The multiple-crane/derrick lift must be supervised by a person who meets the criteria for both a competent person and a qualified person, or by a competent person who is assisted by one or more qualified persons.

(2) The supervisor must review the plan with all workers who will be involved with the operation.

§ 1926.1433 Design, construction and testing.

The following requirements apply to equipment that has a manufacturer-rated hoisting/lifting capacity of more than 2,000 pounds.

(a) Crawler, truck and locomotive cranes manufactured prior to [EFFECTIVE DATE OF THE FINAL RULE] shall meet the applicable requirements for design, construction, and testing as prescribed in ANSI B30.5–1968, ''Crawler, Locomotive, and Truck Cranes,'' ''PCSA Standard No. 2,'' the requirements in paragraph (b) of this section, or the applicable DIN standards that were in effect at the time of manufacture.

(b) Mobile (including crawler and truck) and locomotive cranes manufactured on or after [EFFECTIVE DATE OF THE FINAL RULE] shall meet the following portions of ASME B30.5–2004, ''Mobile and Locomotive Cranes,'' as applicable:

(1) In section 5–1.1.1 (''Load Ratings—Where Stability Governs Lifting Performance''), paragraphs (a)–(d) (including subparagraphs).

(2) In section 5–1.1.2 (''Load Ratings—Where Structural Competence Governs Lifting Performance''), paragraph (b).

(3) Section 5–1.2 (''Stability (Backward and Forward)'').

(4) In section 5–1.3.1 (''Boom Hoist Mechanism''), paragraphs (a), (b)(1) and (b)(2), except that when using rotation resistant rope, § 1926.1414(c)(4)(ii)(A) applies.

(5) In section 5–1.3.2 (''Load Hoist Mechanism''), paragraphs (a)(2) through (a)(4) (including subparagraphs), (b) (including subparagraphs), (c) (first sentence only) and (d).

(6) Section 5–1.3.3 (''Telescoping Boom'').

(7) Section 5–1.4 (''Swing Mechanism'').

(8) In section 5–1.5 (''Crane Travel''), all provisions except 5–1.5.3(d).

(9) In section 5–1.6 (''Controls''), all provisions except 5–1.6.1(c).

(10) Section 5–1.7.4 (''Sheaves'').

(11) Section 5–1.7.5 (''Sheave sizes'').

(12) In section 5–1.9.1 (''Booms''), paragraph (f).

(13) Section 5–1.9.3 (''Outriggers'').

(14) Section 5–1.9.4 (''Locomotive Crane Equipment'').

(15) Section 5–1.9.7 (''Clutch and Brake Protection'').

(16) In section 5–1.9.11 (''Miscellaneous equipment''), paragraphs (a), (c), (e), and (f).

(c) Prototype testing: Mobile (including crawler and truck) and locomotive cranes manufactured on or after [EFFECTIVE DATE OF THE FINAL RULE] shall meet the prototype testing requirements in Test Option A or Test Option B (see paragraphs (c)(1) and (c)(2) of this section).

Note to paragraph (c) introductory text: Prototype testing of crawler, locomotive and truck cranes manufactured prior to the effective date of this subpart must conform to paragraph (a) of this section.

(1) *Test Option A.*

(i) The following applies to equipment with cantilevered booms (such as hydraulic boom cranes): All the tests listed in SAE J1063, Table 1, shall be performed to load all critical structural elements to their respective limits. All the strength margins listed in SAE J1063, Table 2 shall be met.

(ii) The following applies to equipment with pendant supported lattice booms: All the tests listed in SAE J987, Table 1, shall be performed to load all critical structural elements to their respective limits. All the strength margins listed in SAE J987, Table 2 shall be met.

(2) *Test Option B.* The testing and verification requirements of CEN's EN 13000 (2004) shall be met. In applying the CEN standard, the following additional requirements shall be met:

(i) The following applies to equipment with cantilevered booms (such as hydraulic boom cranes): The analysis methodology (computer modeling) must demonstrate that all load cases listed in SAE J1063 meet the strength margins listed in SAE J1063 Table 2.

(ii) The following applies to equipment with pendant supported lattice booms: The analysis methodology (computer modeling) must demonstrate that all load cases listed in SAE J987 meet the strength margins listed in SAE J987 Table 2.

(iii) *Analysis verification.* The physical testing requirements under SAE J1063 and SAE J987 must be met unless the reliability of the analysis methodology (computer modeling) has been demonstrated by a documented history of verification through strain gauge measuring or strain gauge measuring in combination with other physical testing.

(d) All equipment covered by this subpart shall meet the following requirements:

(1) *Rated capacity and related information.* The information available in the cab (see § 1926.1417(c)) regarding ''rated capacity'' and related information shall include, at a minimum, the following information:

(i) A complete range of the manufacturer's equipment rated capacities, as follows:

(A) At all manufacturer approved operating radii, boom angles, work areas, boom lengths and configurations, jib lengths and angles (or offset).

(B) Alternate ratings for use and nonuse of option equipment which affects rated capacities, such as outriggers and extra counterweights.

(ii) A work area chart for which capacities are listed in the load chart.

(Note: An example of this type of chart is in ASME B30.5–2004, section 5–1.1.3, Figure 11).

(iii) The work area figure and load chart shall clearly indicate the areas where no load is to be handled.

(iv) Recommended reeving for the hoist lines shall be shown.

(v) Recommended parts of hoist reeving, size, and type of wire rope for various equipment loads.

(vi) Recommended boom hoist reeving diagram, where applicable; size, type and length of wire rope.

(vii) Tire pressure (where applicable).

(viii) Caution or warnings relative to limitations on equipment and operating procedures, including an indication of the least stable direction.

(ix) Position of the gantry and requirements for intermediate boom suspension (where applicable).

(x) Instructions for boom erection and conditions under which the boom, or

boom and jib combinations, may be raised or lowered.

(xi) Whether the hoist holding mechanism is automatically or manually controlled, whether free fall is available, or any combination of these.

(xii) The maximum telescopic travel length of each boom telescopic section.

(xiii) Whether sections are telescoped manually or with power.

(xiv) The sequence and procedure for extending and retracting the telescopic boom section.

(xv) Maximum loads permitted during the boom extending operation, and any limiting conditions or cautions.

(xvi) Hydraulic relief valve settings specified by the manufacturer.

(2) Load hooks (including latched and unlatched types), ball assemblies and load blocks shall be of sufficient weight to overhaul the line from the highest hook position for boom or boom and jib lengths and the number of parts of the line in use.

(3) Hook and ball assemblies and load blocks shall be marked with their rated capacity and weight.

(4) *Latching hooks.*

(i) Hooks shall be equipped with latches, except where the requirements of paragraph (d)(4)(ii) of this section are met.

(ii) Hooks without latches, or with latches removed or disabled, shall not be used unless:

(A) A qualified person has determined that it is safer to hoist and place the load without latches (or with the latches removed/tied-back).

(B) Routes for the loads are pre-planned to ensure that no employee is required to work in the fall zone except for employees necessary for the hooking or unhooking of the load.

(iii) The latch shall close the throat opening and be designed to retain slings or other lifting devices/accessories in the hook when the rigging apparatus is slack.

(5) *Posted warnings.* Posted warnings required by this subpart as well as those originally supplied with the equipment by the manufacturer shall be maintained in legible condition.

(6) An accessible fire extinguisher shall be on the equipment.

(7) *Cabs.* Equipment with cabs shall meet the following requirements:

(i) Cabs shall be designed with a form of adjustable ventilation and method for clearing the windshield for maintaining visibility and air circulation. Examples of means for adjustable ventilation include air conditioner or window that can be opened (for ventilation and air circulation); examples of means for maintaining visibility include heater (for preventing windshield icing), defroster, fan, windshield wiper.

(ii) Cab doors (swinging, sliding) shall be designed to prevent inadvertent opening or closing while traveling or operating the machine. Swinging doors adjacent to the operator shall open outward. Sliding operator doors shall open rearward.

(iii) *Windows.*

(A) The cab shall have windows in front and on both sides of the operator. Forward vertical visibility shall be sufficient to give the operator a view of the boom point at all times.

(B) Windows may have sections designed to be opened or readily removed. Windows with sections designed to be opened shall be designed so that they can be secured to prevent inadvertent closure.

(C) Windows shall be of safety glass or material with similar optical and safety properties, that introduce no visible distortion or otherwise obscure visibility that interferes with the safe operation of the equipment.

(iv) A clear passageway shall be provided from the operator's station to an exit door on the operator's side.

(v) Areas of the cab roof that serve as a workstation for rigging, maintenance or other equipment-related tasks shall be capable of supporting 250 pounds without permanent distortion.

(8) Belts, gears, shafts, pulleys, sprockets, spindles, drums, fly wheels, chains, and other parts or components that reciprocate, rotate or otherwise move shall be guarded where contact by employees (except for maintenance and repair employees) is possible in the performance of normal duties.

(9) All exhaust pipes, turbochargers, and charge air coolers shall be insulated or guarded where contact by employees (except for maintenance and repair employees) is possible in the performance of normal duties.

(10) Hydraulic and pneumatic lines shall be protected from damage to the extent feasible.

(11) The equipment shall be designed so that exhaust fumes are not discharged in the cab and are discharged in a direction away from the operator.

(12) *Friction mechanisms.* Where friction mechanisms (such as brakes and clutches) are used to control the boom hoist or load line hoist, they shall be:

(i) Of a size and thermal capacity sufficient to control loads with the minimum recommended reeving.

(ii) Adjustable to permit compensation for lining wear to maintain proper operation.

(13) *Hydraulic load hoists.* Hydraulic drums shall have an integrally mounted holding device or internal static brake to prevent load hoist movement in the event of hydraulic failure.

(e) The employer's obligations under paragraphs (a) through (c) and (d)(7) through (13) of this section are met where the equipment has not changed (except in accordance with § 1926.1434 (Equipment modifications)) and it can refer to documentation from the manufacturer showing that the equipment has been designed, constructed and tested in accordance with those paragraphs.

§ 1926.1434 Equipment modifications.

(a) Modifications or additions which affect the capacity or safe operation of the equipment are prohibited except where the requirements of paragraph (a)(1), (a)(2), or (a)(3) of this section are met.

(1) *Manufacturer review and approval.*

(i) The manufacturer approves the modifications/additions in writing.

(ii) The load charts, procedures, instruction manuals and instruction plates/tags/decals are modified as necessary to accord with the modification/addition.

(iii) The original safety factor of the equipment is not reduced.

(2) *Manufacturer refusal to review request.* The manufacturer is provided a detailed description of the proposed modification/addition, is asked to approve the modification/addition, but it declines to review the technical merits of the proposal or fails, within 30 days, to acknowledge the request or initiate the review, and all of the following are met:

(i) A registered professional engineer who is a qualified person with respect to the equipment involved:

(A) Approves the modification/addition and specifies the equipment configurations to which that approval applies, and

(B) Modifies load charts, procedures, instruction manuals and instruction plates/tags/decals as necessary to accord with the modification/addition.

(ii) The original safety factor of the equipment is not reduced.

(3) *Unavailable manufacturer.* The manufacturer is unavailable and the requirements of paragraphs (a)(2)(i) and (ii) of this section are met.

(b) Modifications or additions which affect the capacity or safe operation of the equipment are prohibited where the manufacturer, after a review of the technical safety merits of the proposed modification/addition, rejects the proposal and explains the reasons for the rejection in a written response. If the manufacturer rejects the proposal but does not explain the reasons for the rejection in writing, the employer may treat this as a manufacturer refusal to

review the request under paragraph (a)(2) of this section.

(c) The provisions in paragraphs (a) and (b) of this section do not apply to modifications made or approved by the U.S. military.

§ 1926.1435 Tower cranes.

(a) This section contains supplemental requirements for tower cranes; all sections of this subpart apply to tower cranes unless specified otherwise.

(b) *Erecting, climbing and dismantling.*

(1) Section 1926.1403 (Assembly/Disassembly—selection of manufacturer or employer procedures), § 1926.1404 (Assembly/Disassembly—general requirements (applies to all assembly and disassembly operations)), § 1926.1405 (Disassembly—additional requirements for dismantling of booms and jibs (applies to both the use of manufacturer procedures and employer procedures)), and § 1926.1406 (Assembly/Disassembly—employer procedures—general requirements), apply to tower cranes (except as otherwise specified), except that the term ''assembly/disassembly'' is replaced by ''erecting, climbing and dismantling,'' and the term ''disassembly'' is replaced by ''dismantling.''

(2) *Dangerous areas (self-erecting tower cranes).* In addition to the requirements in § 1926.1404(e), for self-erecting tower cranes, the following applies: Employees shall not be in or under the tower, jib, or rotating portion of the crane during erecting, climbing and dismantling operations until the crane is secured in a locked position and the competent person in charge indicates it is safe to enter this area, unless the manufacturer's instructions direct otherwise and only the necessary personnel are permitted in this area.

(3) *Foundations and structural supports.* Tower crane foundations and structural supports shall be designed by the manufacturer or a registered professional engineer.

(4) *Addressing specific hazards.* The requirements in § 1926.1404(h)(1) through (9) apply. In addition, the A/D supervisor shall address the following:

(i) *Foundations and structural supports.* The A/D supervisor shall verify that tower crane foundations and structural supports are installed in accordance with their design.

(ii) *Loss of backward stability.* Backward stability must be considered before swinging self erecting cranes or cranes on traveling or static undercarriages.

(iii) *Wind speed.* Wind must not exceed the speed recommended by the manufacturer or, where manufacturer does not specify this information, the speed determined by a qualified person.

(5) *Plumb tolerance.* Towers shall be erected plumb to the manufacturer's tolerance and verified by a qualified person. Where the manufacturer does not specify plumb tolerance, the crane tower shall be plumb to a tolerance of at least 1:500 (approximately 1 inch in 40 feet).

(6) *Multiple tower crane jobsites.* On jobsites where more than one fixed jib (hammerhead) tower crane is installed, the cranes shall be located such that no crane may come in contact with the structure of another crane. Cranes are permitted to pass over one another.

(7) *Climbing procedures.* Prior to, and during, all climbing procedures (including inside climbing and top climbing), the employer shall:

(i) Comply with all manufacturer prohibitions.

(ii) Have a registered professional engineer verify that the host structure is strong enough to sustain the forces imposed through the braces, brace anchorages and supporting floors.

(iii) Ensure that no part of the climbing procedure takes place when wind exceeds the speed recommended by the manufacturer or, where the manufacturer does not specify this information, the speed determined by a qualified person.

(8) *Counterweight/ballast.*

(i) Equipment shall not be erected, dismantled or operated without the amount and position of counterweight and/or ballast in place as specified by the manufacturer or a registered professional engineer familiar with the equipment.

(ii) The maximum counterweight and/or ballast specified by the manufacturer or registered professional engineer familiar with the equipment shall not be exceeded.

(c) *Signs.* The size and location of signs installed on tower cranes must be in accordance with manufacturer specifications. Where these are unavailable, a registered professional engineer familiar with the type of equipment involved must approve in writing the size and location of any signs.

(d) *Safety devices.*

(1) Section 1926.1415 does not apply to tower cranes.

(2) The following safety devices are required on all tower cranes unless otherwise specified:

(i) Boom stops on luffing boom type tower cranes.

(ii) Jib stops on luffing boom type tower cranes if equipped with a jib attachment.

(iii) Travel rail end stops at both ends of travel rail.

(iv) Travel rail clamps on all travel bogies.

(v) Integrally mounted check valves on all load supporting hydraulic cylinders.

(vi) Hydraulic system pressure limiting device.

(vii) The following brakes, which shall automatically set in the event of pressure loss or power failure, are required:

(A) A hoist brake on all hoists.

(B) Swing brake.

(C) Trolley brake.

(D) Rail travel brake.

(viii) Deadman control or forced neutral return control (hand) levers.

(ix) Emergency stop switch at the operator's station.

(x) Trolley end stops shall be provided at both ends of travel of the trolley.

(3) *Proper operation required.* Operations shall not begin unless the devices listed in this section are in proper working order. If a device stops working properly during operations, the operator shall safely stop operations. Operations shall not resume until the device is again working properly. Alternative measures are not permitted to be used.

(e) *Operational aids.*

(1) Section 1926.1416 does not apply to tower cranes.

(2) The devices listed in this section (''operational aids'') are required on all tower cranes covered by this subpart, unless otherwise specified.

(3) Operations shall not begin unless the operational aids are in proper working order, except where the employer meets the specified temporary alternative measures. More protective alternative measures specified by the tower crane manufacturer, if any, shall be followed.

(4) If an operational aid stops working properly during operations, the operator shall safely stop operations until the temporary alternative measures are implemented or the device is again working properly. If a replacement part is no longer available, the use of a substitute device that performs the same type of function is permitted and is not considered a modification under § 1926.1434.

(5) *Category I operational aids and alternative measures.* Operational aids listed in this paragraph that are not working properly shall be repaired no later than 7 days after the deficiency occurs. Exception: If the employer

documents that it has ordered the necessary parts within 7 days of the occurrence of the deficiency, the repair shall be completed within 7 days of receipt of the parts.

(i) *Trolley travel limiting device.* The travel of the trolley shall be restricted at both ends of the jib by a trolley travel limiting device to prevent the trolley from running into the trolley end stops. *Temporary alternative measures:*

(A) *Option A.* The trolley rope shall be marked (so it can be seen by the operator) at a point that will give the operator sufficient time to stop the trolley prior to the end stops.

(B) *Option B.* A spotter shall be used when operations are conducted within 10 feet of the outer or inner trolley end stops.

(ii) *Boom hoist limiting device.* The range of the boom shall be limited at the minimum and maximum radius. *Temporary alternative measures:* Clearly mark the cable (so it can be seen by the operator) at a point that will give the operator sufficient time to stop the boom hoist within the minimum and maximum boom radius, or use a spotter.

(iii) *Anti two-blocking device.* The tower crane shall be equipped with a device which automatically prevents damage from contact between the load block, overhaul ball, or similar component, and the boom tip (or fixed upper block or similar component). The device(s) must prevent such damage at all points where two-blocking could occur. *Temporary alternative measures:* Clearly mark the cable (so it can be seen by the operator) at a point that will give the operator sufficient time to stop the hoist to prevent two-blocking, or use a spotter.

(iv) *Hoist drum lower limiting device.* Tower cranes manufactured more than one year after the effective date of this standard shall be equipped with a device that prevents the last 2 wraps of hoist cable from being spooled off the drum. *Temporary alternative measures:* Mark the cable (so it can be seen by the operator) at a point that will give the operator sufficient time to stop the hoist prior to last 2 wraps of hoist cable being spooled off the drum, or use a spotter.

(v) *Load moment limiting device.* The tower crane shall have a device that prevents moment overloading. *Temporary alternative measures:* A radius indicating device shall be used (if the tower crane is not equipped with a radius indicating device, the radius shall be measured to ensure the load is within the rated capacity of the crane). In addition, the weight of the load shall be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information shall be provided to the operator prior to the lift.

(vi) *Hoist line pull limiting device.* The capacity of the hoist shall be limited to prevent overloading, including each individual gear ratio if equipped with a multiple speed hoist transmission. *Temporary alternative measures:* The operator shall ensure that the weight of the load does not exceed the capacity of the hoist (including for each individual gear ratio if equipped with a multiple speed hoist transmission).

(vii) *Rail travel limiting device.* The travel distance in each direction shall be limited to prevent the travel bogies from running into the end stops or buffers. *Temporary alternative measures:* A spotter shall be used when operations are conducted within 10 feet of either end of the travel rail end stops.

(viii) *Boom hoist drum positive locking device.* The boom hoist drum shall be equipped with a device to positively lock the boom hoist drum. *Temporary alternative measures:* The device shall be manually set when required if an electric, hydraulic or automatic type is not functioning.

(6) *Category II operational aids and alternative measures.* Operational aids listed in this paragraph that are not working properly shall be repaired no later than 30 days after the deficiency occurs. Exception: If the employer documents that it has ordered the necessary parts within 7 days of the occurrence of the deficiency, and the part is not received in time to complete the repair in 30 days, the repair shall be completed within 7 days of receipt of the parts.

(i) *Boom angle or hook radius indicator.*

(A) Luffing boom tower cranes shall have a boom angle indicator readable from the operator's station.

(B) Hammerhead tower cranes manufactured more than one year after the effective date of this subpart shall have a hook radius indicator readable from the operator's station.

(C) *Temporary alternative measures:* Hook radii or boom angle shall be determined by measuring the hook radii or boom angle with a measuring device.

(ii) *Trolley travel deceleration device.* The trolley speed shall be automatically reduced prior to the trolley reaching the end limit in both directions. *Temporary alternative measure:* The operator shall reduce the trolley speed when approaching the trolley end limits.

(iii) *Boom hoist deceleration device.* The boom speed shall be automatically reduced prior to the boom reaching the minimum or maximum radius limit. *Temporary alternative measure:* The operator shall reduce the boom speed when approaching the boom maximum or minimum end limits.

(iv) *Load hoist deceleration device.* The load speed shall be automatically reduced prior to the hoist reaching the upper limit. *Temporary alternative measure:* The operator shall reduce the hoist speed when approaching the upper limit.

(v) *Wind speed indicator.* A device shall be provided to display the wind speed and shall be mounted above the upper rotating structure on tower cranes. On self erecting cranes, it shall be mounted at or above the jib level. *Temporary alternative measures:* Use of wind speed information from a properly functioning indicating device on another tower crane on the same site, or a qualified person estimates the wind speed.

(vi) *Load indicating device.* Cranes manufactured more than one year after the effective date of this standard, shall have a device that displays the magnitude of the load on the hook. Displays that are part of load moment limiting devices that display the load on the hook meet this requirement. *Temporary alternative measures:* The weight of the load shall be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information shall be provided to the operator prior to the lift.

(f) *Inspections.*

(1) Section 1926.1412 (Inspections) applies to tower cranes, except that the term ''assembly'' is replaced by ''erection.''

(2) *Post-erection inspection.* In addition to the requirements in § 1926.1412(c), the following requirements shall be met:

(i) A load test using certified weights, or scaled weights using a certified scale with a current certificate of calibration, shall be conducted after each erection.

(ii) The load test shall be conducted in accordance with the manufacturer's instructions. Where these instructions are unavailable, a registered professional engineer familiar with the type of equipment involved shall develop written load test procedures.

(3) *Monthly.* The following additional items shall be included:

(i) Tower (mast) bolts and other structural bolts (for loose or dislodged condition) from the base of the tower crane up or, if the crane is tied to or

braced by the structure, those above the upper-most brace support.

(ii) The upper-most tie-in, braces, floor supports and floor wedges where the tower crane is supported by the structure, for loose or dislodged components.

§ 1926.1436 Derricks.

(a) This section contains supplemental requirements for derricks, whether temporarily or permanently mounted; all sections of this subpart apply to derricks unless specified otherwise. A derrick is powered equipment consisting of a mast or equivalent member that is held at or near the end by guys or braces, with or without a boom, and its hoisting mechanism. The mast/equivalent member and/or the load is moved by the hoisting mechanism (typically base-mounted) and operating ropes. Derricks include: A-frame, basket, breast, Chicago boom, gin pole (except gin poles used for erection of communication towers), guy, shearleg, stiffleg, and variations of such equipment.

(b) *Operation—procedures.*

(1) Section 1926.1417 (Operation) applies except for § 1926.1417(c) (accessibility of procedures).

(2) *Load chart contents.* Load charts shall contain at least the following information:

(i) Rated capacity at corresponding ranges of boom angle or operating radii.

(ii) Specific lengths of components to which the rated capacities apply.

(iii) Required parts for hoist reeving.

(iv) Size and construction of rope shall be included on the load chart or in the operating manual.

(3) *Load chart location.*

(i) *Permanent installations.* For permanently installed derricks with fixed lengths of boom, guy, and mast, a load chart shall be posted where it is visible to personnel responsible for the operation of the equipment.

(ii) *Non-permanent installations.* For derricks that are not permanently installed, the load chart shall be readily available at the job site to personnel responsible for the operation of the equipment.

(c) Construction.

(1) *General requirements.*

(i) Derricks shall be constructed to meet all stresses imposed on members and components when installed and operated in accordance with the manufacturer's/ builder's procedures and within its rated capacity.

(ii) Welding of load sustaining members shall conform to recommended practices in ANSI/AWS D14.3–94 or D1.1–02.

(2) *Guy derricks.*

(i) The minimum number of guys shall be 6, with equal spacing, except where a qualified person or derrick manufacturer approves variations from these requirements and revises the rated capacity to compensate for such variations.

(ii) Guy derricks shall not be used unless the employer has the following guy information:

(A) The number of guys.

(B) The spacing around the mast.

(C) The size, grade, and construction of rope to be used for each guy.

(iii) For guy derricks manufactured after December 18, 1970, in addition to the information required in paragraph (c)(2)(ii) of this section, the employer shall have the following guy information:

(A) The amount of initial sag or tension.

(B) The amount of tension in guy line rope at anchor.

(iv) The mast base shall permit the mast to rotate freely with allowance for slight tilting of the mast caused by guy slack.

(v) The mast cap shall:

(A) Permit the mast to rotate freely.

(B) Withstand tilting and cramping caused by the guy loads.

(C) Be secured to the mast to prevent disengagement during erection.

(D) Be provided with means for attaching guy ropes.

(3) *Stiffleg derricks.*

(i) The mast shall be supported in the vertical position by at least two stifflegs; one end of each shall be connected to the top of the mast and the other end securely anchored.

(ii) The stifflegs shall be capable of withstanding the loads imposed at any point of operation within the load chart range.

(iii) The mast base shall:

(A) Permit the mast to rotate freely (when necessary).

(B) Permit deflection of the mast without binding.

(iv) The mast shall be prevented from lifting out of its socket when the mast is in tension.

(v) The stiffleg connecting member at the top of the mast shall:

(A) Permit the mast to rotate freely (when necessary).

(B) Withstand the loads imposed by the action of the stifflegs.

(C) Be secured so as to oppose separating forces.

(4) *Gin pole derricks.*

(i) Guy lines shall be sized and spaced so as to make the gin pole stable in both boomed and vertical positions. Exception: Where the size and/or spacing of guy lines do not result in the gin pole being stable in both boomed and vertical positions, the employer shall ensure that the derrick is not used in an unstable position.

(ii) The base of the gin pole shall permit movement of the pole (when necessary).

(iii) The gin pole shall be anchored at the base against horizontal forces (when such forces are present).

(5) *Chicago boom derricks.* The fittings for stepping the boom and for attaching the topping lift shall be arranged to:

(i) Permit the derrick to swing at all permitted operating radii and mounting heights between fittings.

(ii) Accommodate attachment to the upright member of the host structure.

(iii) Withstand the forces applied when configured and operated in accordance with the manufacturer's/ builder's procedures and within its rated capacity.

(iv) Prevent the boom or topping lift from lifting out under tensile forces.

(d) *Anchoring and guying.*

(1) Load anchoring data developed by the manufacturer or a qualified person shall be used.

(2) *Guy derricks.*

(i) The mast base shall be anchored.

(ii) The guys shall be secured to the ground or other firm anchorage.

(iii) The anchorage and guying shall be designed to withstand maximum horizontal and vertical forces encountered when operating within rated capacity with the particular guy slope and spacing specified for the application.

(3) *Stiffleg derricks.*

(i) The mast base and stifflegs shall be anchored.

(ii) The mast base and stifflegs shall be designed to withstand maximum horizontal and vertical forces encountered when operating within rated capacity with the particular stiffleg spacing and slope specified for the application.

(e) *Swingers and hoists.*

(1) The boom, swinger mechanisms and hoists shall be suitable for the derrick work intended and shall be anchored to prevent displacement from the imposed loads.

(2) Base-mounted drum hoists.

(i) Base mounted drum hoists shall meet the requirements in the following sections of ASME B30.7–2001:

(A) Sections 7–1.1 (Load ratings and markings).

(B) Section 7–1.2 (Construction), except: 7–1.2.13 (Operator's cab); 7–1.2.15 (Fire extinguishers).

(C) Section 7–1.3 (Installation).

(D) Applicable terms in section 7–0.2 (Definitions).

(ii) *Load tests for new hoists.* The employer shall ensure that new hoists are load tested to a minimum of 110% of rated capacity, but not more than 125% of rated capacity, unless otherwise recommended by the manufacturer. This requirement is met where the manufacturer has conducted this testing.

(iii) *Repaired or modified hoists.* Hoists that have had repairs, modifications or additions affecting their capacity or safe operation shall be evaluated by a qualified person to determine if a load test is necessary. If it is, load testing shall be conducted in accordance with paragraphs (e)(2)(ii) and (iv) of this section.

(iv) *Load test procedure.* Load tests required by paragraphs (e)(2)(ii) or (e)(2)(iii) of this section shall be conducted as follows:

(A) The test load shall be hoisted a vertical distance to assure that the load is supported by the hoist and held by the hoist brake(s).

(B) The test load shall be lowered, stopped and held with the brake(s).

(C) The hoist shall not be used unless a competent person determines that the test has been passed.

(f) *Operational aids.*

(1) Section 1926.1416 (Operational aids) applies, except for § 1926.1416 (d)(1) (Boom hoist limiting device) and § 1926.1416(e)(1) (Boom angle or radius indicator) and § 1926.1416(e)(4) (Load weighing and similar devices).

(2) *Boom angle aid.* The employer shall ensure that either:

(i) The boom hoist cable shall be marked with caution and stop marks. The stop marks shall correspond to maximum and minimum allowable boom angles. The caution and stop marks shall be in view of the operator, or a spotter who is in direct communication with the operator, or

(ii) An electronic or other device that signals the operator in time to prevent the boom from moving past its maximum and minimum angles, or automatically prevents such movement, is used.

(3) *Load weight/capacity devices.* Derricks manufactured more than one year after the effective date of this standard with a maximum rated capacity over 6,000 pounds shall have at least one of the following: load weighing device, load moment indicator, rated capacity indicator, or rated capacity limiter. *Temporary alternative measures:* The weight of the load shall be determined from a reliable source (such as the load's manufacturer), by a reliable calculation method (such as calculating a steel beam from measured dimensions and a known per foot weight), or by other equally reliable means. This information shall be provided to the operator prior to the lift.

(g) *Post-assembly approval and testing—new or reinstalled derricks.*

(1) *Anchorages.*

(i) Anchorages, including the structure to which the derrick is attached (if applicable), shall be approved by a qualified person.

(ii) If using a rock or hairpin anchorage, the qualified person shall determine if any special testing of the anchorage is needed. If so, it shall be tested accordingly.

(2) *Functional test.* Prior to initial use, new or reinstalled derricks shall be tested by a competent person with no hook load to verify proper operation. This test shall include:

(i) Lifting and lowering the hook(s) through the full range of hook travel.

(ii) Raising and lowering the boom through the full range of boom travel.

(iii) Swinging in each direction through the full range of swing.

(iv) Actuating the anti two-block and boom hoist limit devices (if provided).

(v) Actuating locking, limiting and indicating devices (if provided).

(3) *Load test.* Prior to initial use, new or reinstalled derricks shall be load tested by a competent person. The test load shall meet the following requirements:

(i) Test loads shall be at least 100% and no more than 110% of the rated capacity, unless otherwise recommended by the manufacturer or qualified person, but in no event shall the test load be less than the maximum anticipated load.

(ii) The test shall consist of:

(A) Hoisting the test load a few inches and holding to verify that the load is supported by the derrick and held by the hoist brake(s).

(B) Swinging the derrick, if applicable, the full range of its swing, at the maximum allowable working radius for the test load.

(C) Booming the derrick up and down within the allowable working radius for the test load.

(D) Lowering, stopping and holding the load with the brake(s).

(iii) The derrick shall not be used unless the competent person determines that the test has been passed.

(4) *Documentation.* Tests conducted under this paragraph shall be documented. The document shall contain the date, test results and the name of the tester. The document shall be retained until the derrick is re-tested or dismantled, whichever occurs first.

(h) *Load testing repaired or modified derricks.* Derricks that have had repairs, modifications or additions affecting the derrick's capacity or safe operation shall be evaluated by a qualified person to determine if a load test is necessary. If it is, load testing shall be conducted and documented in accordance with paragraph (g) of this section.

(i) [*Reserved.*]

(j) *Power failure procedures.* If power fails during operations, the derrick operator shall safely stop operations. This shall include:

(1) Setting all brakes or locking devices.

(2) Moving all clutch and other power controls to the off position.

(k) *Use of winch heads.*

(1) Ropes shall not be handled on a winch head without the knowledge of the operator.

(2) While a winch head is being used, the operator shall be within reach of the power unit control lever.

(l) [*Reserved.*]

(m) *Securing the boom.*

(1) When the boom is being held in a fixed position, dogs, pawls, or other positive holding mechanisms on the boom hoist shall be engaged.

(2) When taken out of service for 30 days or more, the boom shall be secured by one of the following methods:

(i) Laid down.

(ii) Secured to a stationary member, as nearly under the head as possible, by attachment of a sling to the load block.

(iii) For guy derricks, lifted to a vertical position and secured to the mast.

(iv) For stiffleg derricks, secured against the stiffleg.

(n) The process of jumping the derrick shall be supervised by the A/D supervisor.

(o) Derrick operations shall be supervised by a competent person.

(p) *Inspections.* In addition to the requirements in § 1926.1412, the following additional items shall be included in the inspections:

(1) *Daily:* Guys for proper tension.

(2) *Annual.*

(i) Gudgeon pin for cracks, wear, and distortion.

(ii) Foundation supports for continued ability to sustain the imposed loads.

(q) Section 1926.1427 (Operator qualification and certification) does not apply.

§ 1926.1437 Floating cranes/derricks and land cranes/derricks on barges.

(a) This section contains supplemental requirements for floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation (vessel/flotation device); all sections of this subpart apply to floating cranes/derricks and

land cranes/derricks on barges, pontoons, vessels or other means of flotation, unless specified otherwise. The requirements of this section do not apply when using jacked barges when the jacks are deployed to the river/lake/sea bed and the barge is fully supported by the jacks.

(b) *General requirements.* The requirements in paragraphs (c) through (k) of this section apply to both floating cranes/derricks and land cranes/derricks on barges, pontoons, vessels or other means of flotation.

(c) *Work area control.*

(1) The requirements of § 1926.1424 (Work area control) apply, except for § 1926.1416 (a)(2)(ii).

(2) The employer shall either:

(i) Erect and maintain control lines, warning lines, railings or similar barriers to mark the boundaries of the hazard areas, or

(ii) The hazard areas shall be clearly marked by a combination of warning signs (such as ''Danger—Swing/Crush Zone'' or ''Danger—This Thing's Gonna Swing and Crunch You—Zone'') and high visibility markings on the equipment that identify the hazard areas. In addition, the employer shall train the employees to understand what these markings signify.

(d) *Keeping clear of the load.* Section 1926.1425 does not apply.

(e) *Additional Safety devices.* In addition to the safety devices listed in § 1926.1415, the following safety devices are required:

(1) Barge, pontoon, vessel or other means of flotation list and trim device. This shall be located in the cab or, where there is no cab, at the operator's station.

(2) Horn.

(3) Positive equipment house lock.

(4) *Wind speed and direction indicator.* A competent person shall determine if wind is a factor that needs to be considered; if it needs to be considered, a wind speed and direction indicator shall be used.

(f) *Operational aids.*

(1) An anti two-block device is required only when hoisting personnel or hoisting over an occupied cofferdam or shaft.

(2) Section 1926.1416(e)(4) (load weighing and similar devices) does not apply to dragline, clamshell (grapple), magnet, drop ball, container handling, concrete bucket, and pile driving work.

(g) *Accessibility of procedures applicable to equipment operation.* If the crane/derrick has a cab, the requirements of § 1926.1417(c) apply. If the crane/derrick does not have a cab:

(1) Rated capacities (load charts) shall be posted at the operator's station. If the operator's station is moveable (such as with pendant-controlled equipment), the load charts shall be posted on the equipment.

(2) Procedures applicable to the operation of the equipment (other than load charts), recommended operating speeds, special hazard warnings, instructions and operators manual, shall be readily available on board.

(h) *Inspections.* In addition to meeting the requirements of § 1926.1412 for inspecting the crane/derrick, the employer shall ensure that the barge, pontoons, vessel or other means of flotation used to support a floating crane/derrick or land crane/derrick is inspected as follows:

(1) *Shift.* The means used to secure/attach the equipment to the vessel/flotation device shall be inspected for proper condition, including wear, corrosion, loose or missing fasteners, defective welds, and (where applicable) insufficient tension.

(2) *Monthly.* The vessel/ flotation device used shall be inspected for the following:

(i) The means used to secure/attach the equipment to the vessel/flotation device shall be inspected for proper condition, including wear, corrosion and (where applicable) insufficient tension.

(ii) Taking on water.

(iii) Deckload for proper securing.

(iv) Chain lockers, storage, fuel compartments and battening of hatches for serviceability as a water-tight appliance.

(v) Firefighting and lifesaving equipment in place and functional.

(3) The shift and monthly inspections shall be conducted by a competent person. If any deficiency is identified, an immediate determination shall be made by a qualified person as to whether the deficiency constitutes a hazard. If the deficiency is determined to constitute a hazard, the vessel/flotation device shall be removed from service until it has been corrected.

(4) *Annual: External vessel/flotation device inspection.*

(i) The external portion of the barge, pontoons, vessel or other means of flotation used shall be inspected annually by a qualified person who has expertise with respect to vessels/flotation devices. The inspection shall include the following items:

(A) The items identified in paragraphs (h)(1)(*Shift*) and (h)(2)(*Monthly*) of this section.

(B) Cleats, bitts, chocks, fenders, capstans, ladders, and stanchions, for significant: Corrosion, wear, deterioration, and deformation.

(C) External evidence of leaks and structural damage.

(D) Four-corner draft readings.

(E) Firefighting equipment for serviceability.

(ii) Rescue skiffs, lifelines, work vests, life preservers and ring buoys shall be inspected for proper condition.

(iii) If any deficiency is identified, an immediate determination shall be made by the qualified person as to whether the deficiency constitutes a hazard or, though not yet a hazard, needs to be monitored in the monthly inspections. If the deficiency is determined to constitute a hazard, the vessel/flotation device shall be removed from service until it has been corrected.

(iv) If the qualified person determines that, though not presently a hazard, the deficiency needs to be monitored, the employer shall ensure that the deficiency is checked in the monthly inspections.

(5) *Quadrennial: Internal vessel/flotation device inspection.*

(i) The internal portion of the barge, pontoons, vessel or other means of flotation used shall be surveyed once every 4 years by a marine engineer, marine architect, licensed surveyor, or other qualified person who has expertise with respect to vessels/flotation devices.

(ii) If any deficiency is identified, an immediate determination shall be made by the surveyor as to whether the deficiency constitutes a hazard or, though not yet a hazard, needs to be monitored in the monthly or annual inspections, as appropriate.

(iii) If the deficiency is determined to constitute a hazard, the vessel/flotation device shall be removed from service until it has been corrected.

(iv) If the surveyor determines that, though not presently a hazard, the deficiency needs to be monitored, the employer shall ensure that the deficiency is checked in the monthly or annual inspections, as appropriate.

(6) *Documentation.* The monthly and annual inspections required in paragraphs (h)(2) and (h)(4) of this section shall be documented in accordance with §§ 1926.1412 (e)(3) and 1926.1412(f)(7), respectively. The quadrennial inspection required in paragraph (h)(5) of this section shall be documented in accordance with § 1926.1412(f)(7), except that the documentation for that inspection shall be retained for a minimum of 4 years.

(i) [*Reserved.*]

(j) *Working with a diver.* The following additional requirements apply when working with a diver in the water:

(1) If a crane/derrick is used to get a diver into and out of the water, it shall

not be used for any other purpose until the diver is back on board. When used for more than one diver, it shall not be used for any other purpose until all divers are back on board.

(2) The operator shall remain at the controls of the crane/derrick at all times.

(3) In addition to the requirements in §§ 1926.1419 through 1422 (Signals), either:

(i) A clear line of sight shall be maintained between the operator and tender, or

(ii) The signals between the operator and tender shall be transmitted electronically.

(4) The means used to secure the crane/derrick to the vessel/flotation device (see paragraph (n)(5) of this section) shall not allow any amount of shifting in any direction.

(k) The employer shall ensure that the manufacturer's specifications and limitations with respect to environmental, operational and in-transit loads for the barge, pontoons, vessel or other means of flotation are not exceeded or violated.

(l) [*Reserved*.]

(m) *Floating cranes/derricks*. For equipment designed by the manufacturer (or employer) for marine use by permanent attachment to barges, pontoons, vessels or other means of flotation:

(1) *Load charts*.

(i) The manufacturer load charts applicable to operations on water shall not be exceeded. When using these charts, the employer shall comply with all parameters and limitations (such as dynamic/environmental parameters) applicable to the use of the charts.

(ii) The load charts shall take into consideration a minimum wind speed of 40 miles per hour.

(2) The requirements for maximum allowable list and maximum allowable trim as specified in Table M1 of this section shall be met.

TABLE M1

Rated capacity	Maximum allowable list	Maximum allowable trim
Equipment designed for marine use by permanent attachment (other than derricks):		
25 tons or less	5 degrees	5 degrees.
Over 25 tons	7 degrees	7 degrees.
Derricks designed for marine use by permanent attachment:		
Any rated capacity	10 degrees	10 degrees.

(3) The equipment shall be stable under the conditions specified in Tables M2 and M3 of this section.

TABLE M2

Operated at	Wind speed (mph)	Minimum freeboard (ft)
Rated capacity	60	2
Rated capacity plus 25%	60	1
High boom, no load	60	2

TABLE M3

Operated at	Wind speed
For backward stability of the boom:	
High boom, no load, full back list (least stable condition).	90 mph.

(4) If the equipment is employer-made, it shall not be used unless the employer has documents demonstrating that the load charts and applicable parameters for use meet the requirements of paragraphs (m)(1) through (3) of this section. Such documents shall be signed by a registered professional engineer who is a qualified person with respect to the design of this type of equipment (including the means of flotation).

(5) The barge, pontoons, vessel or other means of flotation used shall:

(i) Be structurally sufficient to withstand the static and dynamic loads of the crane/derrick when operating at the crane/derrick's maximum rated capacity with all anticipated deck loads and ballasted compartments.

(ii) Have a subdivided hull with one or more longitudinal watertight bulkheads for reducing the free surface effect.

(iii) Have access to void compartments to allow for inspection and pumping.

(n) *Land cranes/derricks*. For land cranes/derricks used on barges, pontoons, vessels or other means of flotation:

(1) The rated capacity of the equipment (load charts) applicable for use on land shall be reduced to:

(i) Account for increased loading from list, trim, wave action, and wind.

(ii) Be applicable to a specified location(s) on the specific barge, pontoons, vessel or other means of flotation that will be used, under the expected environmental conditions.

(iii) Ensure that the conditions required in paragraphs (n)(3) and (n)(4) of this section are met.

(2) The rated capacity modification required in paragraph (n)(1) of this section shall be done by the equipment manufacturer, or a qualified person who has expertise with respect to both land crane/derrick capacity and the stability of vessels/flotation devices.

(3) *List and trim*.

(i) The maximum allowable list and the maximum allowable trim for the barge, pontoon, vessel or other means of flotation shall not exceed the amount necessary to ensure that the conditions in paragraph (n)(4) of this section are met. In addition, the maximum allowable list and the maximum allowable trim shall not exceed the least of the following: 5 degrees, the amount

specified by the crane/derrick manufacturer, or where an amount is not so specified, the amount specified by the qualified person.

(ii) The maximum allowable list and the maximum allowable trim for the land crane/derrick shall not exceed the amount specified by the crane/derrick manufacturer, or where an amount is not so specified, the amount specified by the qualified person.

(4) The following conditions shall be met:

(i) All deck surfaces of the barge, pontoons, vessel or other means of flotation used shall be above water.

(ii) The entire bottom area of the barge, pontoons, vessel or other means of flotation used shall be submerged.

(5) *Physical attachment, corralling, rails system and centerline cable system.* The employer shall meet the requirements in Option (1), Option (2), Option (3), or Option (4) (see paragraphs (n)(4)(i), (ii), (iii), and (iv) of this section). Whichever option is used, the requirements of paragraph (v) must also be met.

(i) *Option (1)—Physical attachment.* The crane/derrick shall be physically attached to the barge, pontoons, vessel or other means of flotation. Methods of physical attachment include crossed-cable systems attached to the crane/derrick and vessel/flotation device (this type of system allows the crane/derrick to lift up slightly from the surface of the vessel/means of flotation), bolting or welding the crane/derrick to the vessel/flotation device, strapping the crane/derrick to the vessel/flotation device with chains, or other methods of physical attachment.

(ii) *Option (2)—Corralling.* The crane/derrick shall be prevented from shifting by installing barricade restraints (a corralling system). Corralling systems shall not allow any amount of shifting in any direction by the equipment.

(iii) *Option (3)—Rails.* The crane/derrick shall be prevented from shifting by being mounted on a rail system. Rail clamps and rail stops are required unless the system is designed to prevent movement during operation by other means.

(iv) *Option (4)—Centerline cable system.* The crane/derrick shall be prevented from shifting by being mounted to a wire rope system. The wire rope system shall meet the following requirements:

(A) The wire rope and attachments shall be of sufficient size/strength to support the side load of crane/derrick.

(B) The wire rope shall be physically attached to the vessel/flotation device.

(C) The wire rope shall be attached to the crane/derrick by appropriate attachment methods (such as shackles or sheaves) on the undercarriage which will allow the crew to secure the crane/derrick from movement during operation and to move the crane/derrick longitudinally along the vessel/flotation device for repositioning.

(D) Means shall be installed to prevent the crane/derrick from passing the forward or aft end of the wire rope attachments.

(E) The crane/derrick shall be secured from movement during operation.

(v) The systems/means used to comply with Option (1), Option (2), Option (3), or Option (4) (see paragraphs (n)(4)(i), (ii), (iii), and (iv) of this section) shall be designed by a marine engineer, registered professional engineer familiar with floating crane/derrick design, or qualified person familiar with floating crane/derrick design.

(vi) *Exception.* For mobile auxiliary cranes used on the deck of a floating crane/derrick, the requirement to use Option (1), Option (2), Option (3), or Option (4) of this section does not apply where the employer demonstrates implementation of a plan and procedures that meet the following requirements:

(A) A marine engineer or registered professional engineer familiar with floating crane/derrick design develops and signs a written plan for the use of the mobile auxiliary crane.

(B) The plan shall be designed so that the applicable requirements of this section will be met despite the position, travel, operation, and lack of physical attachment (or corralling, use of rails or cable system) of the mobile auxiliary crane.

(C) The plan shall specify the areas of the deck where the mobile auxiliary crane is permitted to be positioned, travel, and operate and the parameters/limitations of such movements and operation.

(D) The deck shall be marked to identify the permitted areas for positioning, travel, and operation.

(E) The plan shall specify the dynamic/environmental conditions that must be present for use of the plan.

(F) If the dynamic/environmental conditions in paragraph (n)(5)(vi)(E) of this section are exceeded, the mobile auxiliary crane shall be physically attached or corralled in accordance with Option (1), Option (2) or Option (4) (see paragraphs (n)(4)(i), (ii), and (iv) of this section).

(6) The barge, pontoons, vessel or other means of flotation used shall:

(i) Be structurally sufficient to withstand the static and dynamic loads of the crane/derrick when operating at the crane/derrick's maximum rated capacity with all anticipated deck loads and ballasted compartments.

(ii) Have a subdivided hull with one or more longitudinal watertight bulkheads for reducing the free surface effect.

(iii) Have access to void compartments to allow for inspection and pumping.

§ 1926.1438 Overhead & gantry cranes.

(a) *Permanently installed overhead and gantry cranes.*

(1) This paragraph applies to the following equipment when used in construction and permanently installed in a facility: Overhead and gantry cranes, including semigantry, cantilever gantry, wall cranes, storage bridge cranes, and others having the same fundamental characteristics.

(2) The requirements of § 1910.179, except for § 1910.179(b)(1), apply to the equipment identified in paragraph (a)(1) of this section.

(b) *Overhead and gantry cranes that are not permanently installed in a facility.*

(1) This paragraph applies to the following equipment when used in construction and not permanently installed in a facility: Overhead and gantry cranes, overhead/bridge cranes, semigantry, cantilever gantry, wall cranes, storage bridge cranes, launching gantry cranes, and similar equipment, irrespective of whether it travels on tracks, wheels, or other means.

(2) The following requirements apply to equipment identified in paragraph (b)(1) of this section:

(i) Sections 1926.1400 through 1414; §§ 1926.1417 through 1425; § 1926.1426(d), §§ 1926.1427 through 1434; § 1926.1437, § 1926.1439, and § 1926.1441.

(ii) The following portions of § 1910.179:

(A) Paragraphs (b)(5),(6),(7); (e)(1),(3),(5),(6); (f)(1),(4); (g); (h)(1),(3); (k); and (n) of § 1910.179.

(B) The definitions in § 1910.179(a) except for ''hoist'' and ''load.'' For those words, the definitions in § 1926.1401 apply.

(C) Section 1910.179 (b)(2) applies only to equipment identified in paragraph (b)(1) of this section manufactured before September 19, 2001.

(iii) For equipment manufactured on or after September 19, 2001, the following sections of ASME B.30.2–2005 apply: 2–1.3.1; 2–1.3.2; 2–1.4.1; 2–1.6; 2–1.7.2; 2–1.8.2; 2–1.9.1; 2–1.9.2; 2–1.11; 2–1.12.2; 2–1.13.7; 2–1.14.2; 2–1.14.3; 2–1.14.5; 2–1.15.; 2–2.2.2; 2–3.2.1.1. In addition, 2–3.5 applies,

except in 2–3.5.1(b), ''29 CFR 1910.147'' applies in place of ''ANSI Z244.1.''

§ 1926.1439 Dedicated pile drivers.

(a) The provisions of this standard apply to dedicated pile drivers, except as specified in this section.

(b) Section 1926.1416(d)(3) (anti two-block device) does not apply.

(c) Section 1926.1416(e)(4) (Load weight/capacity devices) applies only to dedicated pile drivers manufactured more than one year after the effective date of this standard.

(d) In § 1926.1433, only §§ 1926.1433(e) and (f) apply to dedicated pile drivers.

(e) Section 1926.1427 (Operator qualification and certification) applies, except that the qualification or certification shall be for operation of either dedicated pile drivers or equipment that is the most similar to dedicated pile drivers.

§ 1926.1440 Sideboom cranes.

(a) The provisions of this subpart apply, except § 1926.1402 (Ground conditions), § 1926.1415 (Safety devices), § 1926.1416 (Operational aids), and § 1926.1427 (Operator qualification and certification).

(b) Section 1926.1426 (Free fall and controlled load lowering) applies, except § 1926.1426(a)(2)(i). Sideboom cranes in which the boom is designed to free fall (live boom) are permitted only if manufactured prior to [effective date of this subpart].

(c) Sideboom cranes mounted on wheel or crawler tractors shall meet the following requirements of ASME B30.14–2004 (Side Boom Tractors):

(1) Section 14–1.1 (''Load Ratings'').

(2) Section 14–1.3 (''Side Boom Tractor Travel'').

(3) Section 14–1.5 (''Ropes and Reeving Accessories'').

(4) Section 14–1.7.1 (''Booms'').

(5) Section 14–1.7.2 (''General Requirements—Exhaust Gases'').

(6) Section 14–1.7.3 (''General Requirements—Stabilizers (Wheel-Type Side Boom Tractors)'').

(7) Section 14–1.7.4 (''General Requirements—Welded Construction'').

(8) Section 14–1.7.6 (''General Requirements—Clutch and Brake Protection'').

(9) Section 14–2.2.2 (''Testing—Rated Load Test''), except that it applies only to equipment that has been modified or repaired.

(10) In section 14–3.1.2 (''Operator Qualifications''), paragraph (a), except the phrase ''When required by law.''

(11) In section 14–3.1.3 (''Operating Practices''), paragraphs (e), (f)(1)—(4), (6), (7); (h), and (i).

(12) In section 14–3.2.3 (''Moving the Load''), paragraphs (j), (l), and (m).

§ 1926.1441 Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less.

For equipment with a maximum manufacturer-rated hoisting/lifting capacity of 2,000 pounds or less:

(a) The following sections of this subpart apply: § 1926.1400 (Scope); § 1926.1401 (Definitions); § 1926.1402 (Ground conditions); §§ 1926.1407 through 1411 (Power line safety); §§ 1926.1413 through 1414 (Wire rope); § 1926.1418 (Authority to stop operation); §§ 1926.1419 through 1422 (Signals); § 1926.1423 (Fall protection); § 1926.1426 (Free fall and controlled load lowering); § 1926.1432 (Multiple crane/derrick lifts—supplemental requirements); § 1926.1434 (Equipment modifications); § 1926.1435 (Tower cranes); § 1926.1436 (Derricks); § 1926.1437 (Floating cranes/derricks and land cranes/derricks on barges); § 1926.1438 (Overhead & gantry cranes).

Note to paragraph (a): Under paragraph (b)(1) of this section, § 1926.1403 (Assembly/Disassembly—selection of manufacturer or employer procedures) and § 1926.1406 (Assembly/Disassembly—employer procedures—general requirements) also apply.

(b) *Assembly/disassembly.*

(1) Sections 1926.1403 (Assembly/Disassembly—Selection of manufacturer or employer procedures) and 1926.1406 (Assembly/Disassembly—employer procedures) apply.

(2) *Components and configuration.*

(i) The selection of components and configuration of the equipment that affect the capacity or safe operation of the equipment must be in accordance with:

(A) Manufacturer instructions, recommendations, limitations, and specifications. Where these are unavailable, a registered professional engineer familiar with the type of equipment involved must approve, in writing, the selection and configuration of components; or

(B) Approved modifications that meet the requirements of § 1926.1434 (Equipment modifications).

(ii) *Post-assembly inspection.* Upon completion of assembly, the equipment must be inspected to ensure compliance with paragraph (b)(2)(i) of this section (see § 1926.1412(c) for post-assembly inspection requirements).

(3) *Manufacturer prohibitions.* The employer must comply with applicable manufacturer prohibitions.

(c) *Operation—procedures.*

(1) The employer shall comply with all manufacturer procedures applicable to the operational functions of the equipment, including its use with attachments.

(2) *Unavailable operation procedures.*

(i) Where the manufacturer procedures are unavailable, the employer shall develop and ensure compliance with all procedures necessary for the safe operation of the equipment and attachments.

(ii) Procedures for the operational controls must be developed by a qualified person.

(iii) Procedures related to the capacity of the equipment must be developed and signed by a registered professional engineer familiar with the equipment.

(3) *Accessibility.*

(i) The load chart shall be available to the operator at the control station.

(ii) Procedures applicable to the operation of the equipment, recommended operating speeds, special hazard warnings, instructions and operator's manual, shall be readily available for use by the operator.

(iii) Where rated capacities are available at the control station only in electronic form: In the event of a failure which makes the rated capacities inaccessible, the operator must immediately cease operations or follow safe shut-down procedures until the rated capacities (in electronic or other form) are available.

(d) *Safety devices and operational aids.*

(1) Originally-equipped safety devices and operational aids shall be maintained in accordance with manufacturer procedures.

(2) *Anti two-blocking.* Equipment covered by this section manufactured more than one year after the effective date of this standard shall have either an anti two-block device that meets the requirements of § 1926.1416(d)(3), or shall be designed so that, in the event of a two-block situation, no damage will occur and there will be no load failure (such as where the power unit will stall in the event of a two-block).

(e) *Operator qualifications.* The employer shall ensure that, prior to operating the equipment, the operator is trained on the safe operation of the type of equipment the operator will be using.

(f) *Signal person qualifications.* The employer shall ensure that signal persons are trained in the proper use of signals applicable to the use of the equipment.

(g) *Keeping clear of the load.* Section 1926.1425 applies, except for § 1926.1425(c)(3) (qualified rigger).

(h) *Inspections.* The equipment shall be inspected in accordance with manufacturer procedures.

(i) [*Reserved.*]

(j) *Hoisting personnel.* Hoisting personnel using equipment covered by this section is prohibited.

(k) *Design.* The equipment shall be designed by a qualified engineer.

Appendix A to Subpart CC of Part 1926—Standard Hand Signals

[Illustration to be added with final rule.] STOP—With arm extended horizontally to the side, palm down, arm is swung back and forth.

[Illustration to be added with final rule.] HOIST—With upper arm extended to the side, forearm and index finger pointing straight up, hand and finger make small circles.

[Illustration to be added with final rule.] RAISE BOOM—With arm extended horizontally to the side, thumb points up with other fingers closed.

[Illustration to be added with final rule.] SWING—With arm extended horizontally, index finger points in direction that boom is to swing.

[Illustration to be added with final rule.] RETRACT TELESCOPING BOOM—With hands to the front at waist level, thumbs point at each other with other fingers closed.

[Illustration to be added with final rule.] RAISE THE BOOM AND LOWER THE LOAD—With arm extended horizontally to the side and thumb pointing up, fingers open and close while load movement is desired.

[Illustration to be added with final rule.] DOG EVERYTHING—Hands held together at waist level.

[Illustration to be added with final rule.] LOWER—With arm and index finger pointing down, hand and finger make small circles.

[Illustration to be added with final rule.] LOWER BOOM—With arm extended horizontally to the side, thumb points down with other fingers closed.

[Illustration to be added with final rule.] EXTEND TELESCOPING BOOM—With hands to the front at waist level, thumbs point outward with other fingers closed.

[Illustration to be added with final rule.] TRAVEL—With all fingers pointing up, arm is extended horizontally out and back to make a pushing motion in the direction of travel.

[Illustration to be added with final rule.] LOWER THE BOOM AND RAISE THE LOAD—With arm extended horizontally to the side and thumb pointing down, fingers open and close while load movement is desired.

[Illustration to be added with final rule.] MOVE SLOWLY—A hand is placed in front of the hand that is giving the action signal

[Illustration to be added with final rule.] USE AUXILIARY HOIST (whipline)—With arm bent at elbow and forearm vertical, elbow is tapped with other hand. Then regular signal is used to indicate desired action.

[Illustration to be added with final rule.] CRAWLER CRANE TRAVEL, BOTH TRACKS—Rotate fists around each other in front of body; direction of rotation away from body indicates travel forward; rotation towards body indicates travel backward.

[Illustration to be added with final rule.] USE MAIN HOIST—A fist taps on top of the head. Then regular signal is given to indicate desired action.

[Illustration to be added with final rule.] CRAWLER CRANE TRAVEL, ONE TRACK—Indicate track to be locked by raising fist on that side. Rotate other fist in front of body in direction that other track is to travel.

Appendix B to Subpart CC of Part 1926—Use of Non-Standard Signals

The follow is an example of a situation where the use of the Standard Method for hand signals is infeasible: Due to background lighting conditions behind the signal person, there is insufficient contrast between the person's hand and the sky color. This prevents the operator from being able to clearly see the signal person's hand and fingers when extended out to either side.

Appendix C to Subpart CC of Part 1926—Checklist for Determining if Hoisting Personnel is Permissible

A. HOISTING PERSONNEL IS PERMITTED: When the employer can show that the erection, use, and dismantling of conventional means of reaching the worksite, such as a personnel hoist, ladder, stairway, aerial lift, elevating work platform, or scaffold, would be more hazardous, or is not possible because of the project's structural design or worksite conditions. See § 1926.1431(a). However, the employer may hoist personnel without showing that the erection, use, and dismantling of conventional means of reaching the worksite would be more hazardous, or is not possible because of the project's structural design or worksite conditions:

(1) When engaged in work covered by subpart R (Steel Erection) of this part. See § 1926.1431(a);

(2) When using a personnel platform to hoist personnel for pile driving operations. See § 1926.1431(p)(3).

B. HOISTING PERSONNEL IS ALWAYS PROHIBITED: Even if hoisting personnel is otherwise permitted, it is prohibited:

(1) When any part of the equipment would get closer than 20 feet to a power line that is 350 kV or less or 50 feet to a power line over 350 kV, unless the employer is engaged in Subpart V work. See § 1926.1431(n);

(2) When equipment is traveling unless the equipment travels on fixed rails or the employer can demonstrate that there is no less hazardous way to perform the work. See § 1926.1431(k)(12). However, when the equipment is a derrick, it may not be used to hoist personnel while traveling under any circumstances. See § 1926.1431(k)(13);

(3) When the equipment has a rated hoisting/lifting capacity of 2,000 pounds or less. See § 1926.1441(j).

C. WHEN HOISTING PERSONNEL IS PERMITTED, A PERSONNEL PLATFORM MEETING THE REQUIREMENTS OF § 1431 MUST BE USED, EXCEPT:

(1) When hoisting personnel in drill shafts 8 feet or less in diameter, the employer may instead use either a personnel platform or a boatswain's chair. See § 1926.1431(o);

(2) When hoisting personnel for pile driving operations the employer may instead use a boatswain's chair. See § 1926.1431(p);

(3) When hoisting personnel for marine transfer, the employer may instead use a marine hoisted personnel transfer device. See § 1926.1431(r);

(4) When hoisting personnel for storage tank, shaft, and chimney operations, the employer may instead use a boatswain's chair, but only if use of a personnel platform is infeasible. See § 1926.1431(s).

Appendix D to Subpart CC of Part 1926—Assembly/Disassembly: Sample Procedures for Minimizing the Risk of Unintended Dangerous Boom Movement

1. a. Section 1926.1404(f)(1) provides that when pins (or similar devices) are being removed, employees must not be under the boom, jib, or other components, except where the requirements of § 1926.1404(f)(2) are met. The exception in § 1926.1404(f)(2) applies when the employer demonstrates that site constraints require one or more employees to be under the boom, jib, or other components when pins (or similar devices) are being removed. In such a situation, the A/D supervisor must implement procedures that minimize the risk of unintended dangerous movement and minimize the duration and extent of exposure under the boom.

b. The following scenario is an example of how the exception applies: A boom cannot be disassembled on the ground because of aboveground piping (as might be found, for example, in an oil refinery) that precludes lowering the boom to the ground. The boom must therefore be disassembled in the air, and the employees who remove the pins must perform that work from an aerial lift whose base is positioned on one side (the near side) of the boom. To gain access to the pins on the far side, the aerial lift basket must move under the boom, since, due to lack of room, the aerial lift cannot be repositioned on the far side.

c. To minimize the risk of unintended dangerous movement while the pins are removed, the A/D supervisor uses an assist crane that is rigged to support the boom section that is being detached, using particular care to ensure that the section end that is near the employee(s) removing the pins is well supported. The duration and extent of exposure is minimized by removing the far side pins first, moving the aerial lift basket as soon as possible to the near side so that the employees are no longer under the boom, and then removing the near side pins.

2. a. Section 1926.1404(h)(6)(i) provides that, during assembly/disassembly, the center of gravity of the load must be identified if that is necessary for the method used for maintaining stability. Section 1926.1404(h)(6)(ii) states that, where there is insufficient information to accurately identify the center of gravity, measures designed to prevent unintended dangerous movement resulting from an inaccurate identification of the center of gravity must be used.

b. An example of the application of § 1926.1404(h)(6)(ii) is as follows. The boom is assembled by lowering boom sections

sequentially into place using an assist crane. The A/D supervisor's plan is to keep the boom sections stable while they are lowered into place by attaching the assist crane hoist line above the center of gravity of each section. However, in assembling the non-symmetrical top section of the boom, the A/D supervisor is not able to determine where to attach the assist crane hoist line so that it is above the center of gravity. In this situation, before raising the section, all personnel are kept clear of the section and the section is first raised a few inches to determine whether it tips when raised (if it did tip, it would indicate it is not rigged over the center of gravity). If this occurs, the hoist line is repositioned and the procedure repeated (with employees kept clear of the section while it is raised) until the A/D supervisor determines that it is rigged over the center of gravity and can be moved into place without dangerous movement.

Appendix E to Subpart CC of Part 1926—Operator Certification: Written Examination: Technical Knowledge Criteria

This appendix contains information for employers, accredited testing organizations, auditors and government entities developing criteria for a written examination to test an individual's technical knowledge relating to the operation of cranes.

(a) General technical information.

(1) The functions and limitations of the crane and attachments.

(2) Wire rope:

(i) Background information necessary to understand the inspection and removal from service criteria in § 1926.1413 and § 1926.1414.

(ii) Capacity and when multi-part rope is needed.

(iii) Relationship between line pull and safe working load.

(iv) How to determine the manufacturer's recommended rope for the crane.

(3) Rigging devices and their use, such as:

(i) Slings.

(ii) Spreaders.

(iii) Lifting beams.

(iv) Wire rope fittings, such as clips, shackles and wedge sockets.

(v) Saddles (softeners).

(vi) Clamps (beams).

(4) The technical limitations of protective measures against electrical hazards:

(i) Grounding.

(ii) Proximity warning devices.

(iii) Insulated links.

(iv) Boom cages.

(v) Proximity to electric power lines, radii, and microwave structures.

(5) The effects of load share and load transfer in multi-crane lifts.

(6) Basic crane terms.

(7) The basics of machine power flow systems.

(i) Mechanical.

(ii) Electrical.

(iii) Pneumatic.

(iv) Hydraulic.

(v) Combination.

(8) The significance of the instruments and gauge readings.

(9) The effects of thermal expansion and contraction in hydraulic cylinders.

(10) Background information necessary to understand the requirements of pre-operation and inspection.

(11) How to use the safety devices and operational aids required under § 1926.1415 and § 1926.1416.

(12) The difference between duty-cycle and lifting operations.

(13) How to calculate net capacity for every possible configuration of the equipment using the manufacturer's load chart.

(14) How to use manufacturer-approved attachments and their effect on the equipment.

(15) How to obtain dimensions, weight, and center of gravity of the load.

(16) The effects of dynamic loading from:

(i) Wind.

(ii) Stopping and starting.

(iii) Impact loading.

(iv) Moving with the load.

(17) The effect of side loading.

(18) The principles of backward stability.

(b) Site information.

(1) How to identify the suitability of the supporting ground/surface to support the expected loads of the operation. Elements include:

(i) Weaknesses below the surface (such as voids, tanks, loose fill).

(ii) Weaknesses on the surface (such as retaining walls, slopes, excavations, depressions).

(2) Proper use of mats, blocking/cribbing and outriggers or crawlers.

(3) Identification of site hazards such as power lines, piping, and traffic.

(4) How to review operation plans with supervisors and other workers (such as the signal person), including how to determine working height, boom length, load radius, and travel clearance.

(5) How to determine if there is adequate room for extension of crawlers or outriggers/stabilizers and counterweights.

(c) Operations.

(1) How to pick, carry, swing and place the load smoothly and safely on rubber tires and on outriggers/stabilizers or crawlers (where applicable).

(2) How to communicate at the site with supervisors, the crew and the signal person.

(3) Proper procedures and methods of reeving wire ropes and methods of reeving multiple-part lines and selecting the proper load block and/or ball.

(4) How to react to changes in conditions that affect the safe operation of the equipment.

(5) How to shut down and secure the equipment properly when leaving it unattended.

(6) Know how to apply the manufacturer's specifications for operating in various weather conditions, and understand how environmental conditions affect the safe operation of the equipment.

(7) How to properly level the equipment.

(8) How to verify the weight of the load and rigging prior to initiating the lift.

(9) How to determine where the load is to be picked up and placed and how to verify the radii.

(10) Know basic rigging procedures.

(11) How to carry out the shift inspection required in this subpart.

(12) Know that the following operations require specific procedures and skill levels:

(i) Multi-crane lifts.

(ii) Hoisting personnel.

(iii) Clamshell/dragline operations.

(iv) Pile driving and extracting.

(v) Concrete operations, including poured-in-place and tilt-up.

(vi) Demolition operations.

(vii) Operations on water.

(viii) Magnet operations.

(ix) Multi-drum operations.

(13) Know the proper procedures for operating safely under the following conditions:

(i) Traveling with suspended loads.

(ii) Approaching a two-block condition.

(iii) Operating near power lines.

(iv) Hoisting personnel.

(v) Using other than full outrigger/crawler extensions.

(vi) Lifting loads from beneath the surface of the water.

(vii) Using various approved counterweight configurations.

(viii) Handling loads out of the operator's vision (''operating in the blind'').

(ix) Using electronic communication systems for signal communication.

(14) Know the proper procedures for load control and the use of hand-held tag lines.

(15) Know the emergency response procedure for:

(i) Fires.

(ii) Power line contact.

(iii) Loss of stability.

(iv) Control malfunction.

(v) Two-blocking.

(vi) Overload.

(vii) Carrier or travel malfunction.

(16) Know how to properly use outriggers in accordance with manufacturer specifications.

(d) Use of load charts.

(1) Know the terminology necessary to use load charts.

(2) Know how to ensure that the load chart is the appropriate chart for the equipment in its particular configuration and application.

(3) Know how to use load charts. This includes knowing:

(i) The operational limitations of load charts and footnotes.

(ii) How to relate the chart to the configuration of the crane, crawlers, or outriggers extended or retracted, jib erected or offset, and various counterweight configurations.

(iii) The difference between structural capacity and capacity limited by stability.

(iv) What is included in capacity ratings.

(v) The range diagram and its relationship to the load chart.

(vi) The work area chart and its relationship to the load chart.

(vii) Where to find and how to use the ''parts-of-line'' information.

(4) Know how to use the load chart together with the load indicators and/or load moment devices.

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Thursday,
October 9, 2008

Part III

Environmental Protection Agency

40 CFR Parts 60, 61, and 63

Standards of Performance for New Stationary Sources; National Emission Standards for Hazardous Air Pollutants; and National Emission Standards for Hazardous Air Pollutants for Source Categories; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 61, and 63

[EPA–HQ–OAR–2006–0640; FRL–8721–4]

RIN 2060–AJ86

Performance Specification and Quality Assurance Requirements for Continuous Parameter Monitoring Systems and Amendments to Standards of Performance for New Stationary Sources; National Emission Standards for Hazardous Air Pollutants; and National Emission Standards for Hazardous Air Pollutants for Source Categories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes Performance Specification 17, ''Specifications and Test Procedures for Continuous Parameter Monitoring Systems at Stationary Sources'' and Procedure 4, ''Quality Assurance Requirements for Continuous Parameter Monitoring Systems at Stationary Sources.'' The proposed performance specification and quality assurance requirements establish procedures and other requirements to ensure that the systems are properly selected, installed, and placed into operation. This action also proposes minor amendments to Procedure 1 of the ''Quality Assurance Requirements for Gas Continuous Emission Monitoring Systems Used for Compliance Determinations'' to address continuous emissions monitoring systems that are used for monitoring multiple pollutants. Minor changes to the General Provisions for the Standards of Performance for New Stationary Sources, the National Emission Standards for Hazardous Air Pollutants, and the National Emission Standards for Hazardous Air Pollutants for Source Categories are also proposed to ensure consistency between the proposed Performance Specification 17, Procedure 4, and the General Provisions and to clarify that Performance Specification 17 and Procedure 4 apply instead of requirements that pertain specifically to continuous parameter monitoring systems. Finally, this action proposes amendments to the current national emission standards for closed vent systems, control devices and recovery systems to ensure consistency with Performance Specification 17 and Procedure 4. These actions are needed to establish consistent requirements for ensuring and assessing the quality of data measured by continuous parameter monitoring systems and to provide quality assurance procedures for continuous emission monitoring systems used to monitor multiple pollutants.

DATES: Comments must be received on or before December 8, 2008. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by the Office of Management and Budget (OMB) on or before November 10, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0640, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* Performance Specification 17 and Procedure 4 for Continuous Parameter Monitoring Systems Docket, Docket No. EPA–HQ–OAR–2006–0640, Environmental Protection Agency, EPA Docket Center, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, Public Reading Room, EPA West, Room 3334, 1301 Constitution Avenue, 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: Direct your comments to Docket ID No. EPA–HQ–OAR–2006–0640. 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.

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 EPA Air Docket, 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.

FOR FURTHER INFORMATION CONTACT: Mr. Barrett Parker, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–05), Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number: (919) 541–5635; e-mail address: *parker.barrett@epa.gov.*

SUPPLEMENTARY INFORMATION:

Outline. The information presented in this preamble is organized as follows:

I. General Information
  A. Does this action apply to you?
  B. What should you consider as you prepare your comments to EPA?
  C. Where can you get a copy of this document and other related information?
  D. Will there be a public hearing?
II. Background
  A. What is the regulatory history of the proposed PS–17 and Procedure 4?
  B. What is the regulatory history of the proposed amendments to Procedure 1?
  C. What is the regulatory history of the proposed amendments to the General Provisions to parts 60, 61, and 63?
  D. What is the regulatory history of the proposed amendments to 40 CFR part 63, subpart SS?

III. Summary of Proposed Performance Specification 17
A. What is the purpose of PS–17?
B. Who must comply with PS–17?
C. When must owners or operators of affected CPMS comply with PS–17?
D. What are the basic requirements of PS–17?
E. What initial performance criteria must be demonstrated to comply with PS–17?
F. What are the reporting and recordkeeping requirements for PS–17?
IV. Summary of Proposed Procedure 4
A. What is the purpose of Procedure 4?
B. Who must comply with Procedure 4?
C. When must owners or operators of affected CPMS comply with Procedure 4?
D. What are the basic requirements of Procedure 4?
E. How often must accuracy audits and other QA/QC procedures be performed?
F. What are the reporting and recordkeeping requirements for Procedure 4?
V. Summary of Proposed Amendments to Procedure 1
A. What is the purpose of the amendments?
B. To whom do the amendments apply?
C. How do the amendments address CEMS that are subject to PS–9?
D. How do the amendments address CEMS that are subject to PS–15?
VI. Summary of Proposed Amendments to the General Provisions to Parts 60, 61, and 63
A. What is the purpose of the amendments to the General Provisions to parts 60, 61, and 63?
B. What specific changes are we proposing to the General Provisions to parts 60, 61, and 63?
VII. Summary of the Proposed Amendments to 40 CFR Part 63, Subpart SS
A. What is the purpose of the amendments to subpart SS?
B. What specific changes are we proposing to subpart SS?
VIII. Rationale for Selecting the Proposed Requirements of Performance Specification 17
A. What information did we use to develop PS–17?
B. How did we select the applicability criteria for PS–17?
C. How did we select the parameters that are addressed by PS–17?
D. Why did we include requirements for flow CPMS in PS–17 if PS–6 already specifies requirements for flow sensors?
E. How did we select the equipment requirements?
F. How did we select the installation and location requirements?
G. How did we select the initial QA measures?
H. How did we select the methods for performing the initial validation check?
I. How did we select the performance criteria for the initial validation check?
J. How did we select the recordkeeping requirements?
IX. Rationale for Selecting the Proposed Requirements of Procedure 4
A. What information did we use to develop Procedure 4?
B. Why did we decide to apply Procedure 4 to all CPMS that are subject to PS–17?
C. How did we select the accuracy audit procedures?
D. How did we select the accuracy audit frequencies?
E. How did we select the performance criteria for accuracy audits?
F. How did we select the recordkeeping requirements?
X. Rationale for Selecting the Proposed Amendments to Procedure 1
A. How did we select the amendments to Procedure 1 that apply to PS–9?
B. How did we select the amendments to Procedure 1 that apply to PS–15?
XI. Rationale for Selecting the Proposed Amendments to the General Provisions to Parts 60, 61, and 63
A. How did we select the amendments to the General Provisions to parts 60, 61, and 63?
XII. Rationale for Selecting the Proposed Amendments to 40 CFR Part 63, Subpart SS
A. How did we select the amendments to subpart SS?
XIII. Summary of Environmental, Energy, and Economic Impacts
A. What are the impacts of PS–17 and Procedure 4?
B. What are the impacts of the amendments to Procedure 1?
C. What are the impacts of the amendments to the General Provisions to parts 60, 61, and 63?
D. What are the impacts of the amendments to subpart SS?
XIV. Solicitation of Comments and Public Participation
XV. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045, Protection of Children From Environmental Health Risks & Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does this action apply to you?

The proposed Performance Specification 17 (PS–17) and Procedure 4 would apply to any facility that is required to install a new continuous parameter monitoring system (CPMS), relocate an existing CPMS, or replace an existing CPMS under any applicable subpart of 40 CFR parts 60, 61, or 63, with certain exceptions. Moreover, the proposed PS–17 and Procedure 4 would become effective upon permit renewal (or within 5 years for area sources that are exempt from title V permitting) for any affected facility subject to an applicable subpart of 40 CFR parts 60, 61, or 63, with certain exceptions. Table 1 of this preamble lists the applicable rules by subpart and the corresponding source categories to which the proposed PS–17 and Procedure 4 would apply.

TABLE 1—SOURCE CATEGORIES THAT WOULD BE SUBJECT TO PS–17 AND PROCEDURE 4

Subpart(s)	Source category
40 CFR part 63	
O	Commercial Ethylene Oxide Sterilization/Fumigation Facilities.
R	Gasoline Distribution Facilities (Bulk Gasoline Terminals and Pipeline Breakout Stations).
S	Pulp and Paper—Process Operations.
X	Secondary Lead Smelters.
EE	Magnetic Tape Manufacturing Operations.
GG	Aerospace Manufacturing and Rework.
HH	Oil and Natural Gas Production Facilities.
JJ	Wood Furniture Manufacturing Operations.
KK	Printing and Publishing.
MM	Combustion Sources at Kraft, Soda & Sulfite Pulp & Paper Mills.

TABLE 1—SOURCE CATEGORIES THAT WOULD BE SUBJECT TO PS–17 AND PROCEDURE 4—Continued

Subpart(s)	Source category
YY	Spandex.
YY	Cyanide Chemical Manufacture.
YY	Carbon Black Production.
CCC	Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration Plants.
EEE	Hazardous Waste Combustors.
GGG	Pharmaceuticals Production.
HHH	Natural Gas Transmission and Storage Facilities.
MMM	Pesticide Active Ingredient Production.
NNN	Wool Fiberglass Manufacturing.
RRR	Secondary Aluminum Production.
UUU	Petroleum Refineries: Catalytic Cracking Units, Catalytic Reforming Units, and Sulfur Recovery Units.
DDDD	Plywood & Composite Wood Products.
EEEE	Organic Liquids Distribution (non-gasoline).
FFFF	Miscellaneous Organic Chemical Manufacturing.
HHHH	Wet-Formed Fiberglass Mat Production.
IIII	Surface Coating of Automobiles and Light Duty Trucks.
JJJJ	Paper & Other Web (surface coating).
KKKK	Surface Coating of Metal Cans.
PPPP	Surface Coating of Plastic Parts & Products.
QQQQ	Surface Coating of Wood Building Products.
RRRR	Surface Coating of Metal Furniture.
SSSS	Surface Coating of Metal Coil.
UUUU	Cellulose Products Manufacturing.
VVVV	Boat Manufacturing.
WWWW	Reinforced Plastics Composites Production.
XXXX	Rubber Tire Manufacturing.
YYYY	Stationary Combustion Turbines.
ZZZZ	Reciprocating Internal Combustion Engines.
CCCCC	Coke Ovens: Pushing, Quenching, & Battery Stacks.
DDDDD	Industrial/Commercial/Institutional Boilers and Process Heaters.
EEEEE	Iron and Steel Foundries.
FFFFF	Integrated Iron and Steel Manufacturing Facilities.
GGGGG	Site Remediation.
HHHHH	Miscellaneous Coating Manufacturing.
MMMMM	Flexible Polyurethane Foam Fabrication Operations.
NNNNN	Hydrochloric Acid Production.
PPPPP	Engine Test Cells/Stands.
QQQQQ	Friction Materials.
RRRRR	Taconite Iron Ore Processing.
TTTTT	Primary Magnesium Refining.
ZZZZZ	Iron and Steel Foundries Area Sources.
LLLLLL	Acrylic and Modacrylic Fibers Production Area Sources.
OOOOOO	Flexible Polyurethane Foam Production and Fabrication Area Sources.
PPPPPP	Lead Acid Battery Manufacturing Area Sources.
SSSSSS	Glass Manufacturing Area Sources.
40 CFR part 60	
Ea	Municipal Waste Combustors after December 20, 1989 and on or before September 20, 1994.
Ec	Hospital, Medical, and Infectious Waste Incinerators.
J	Petroleum Refineries.
O	Sewage Treatment Plants.
T, U, V, W, X	Phosphate Fertilizer Industry.
Y	Coal Preparation Plants (>200 tons per day).
Z	Ferroalloy Production Facilities.
AA	Steel Plants: EAF's and Oxygen Decarburization Vessels after October 21, 1974 and on or before August 17, 1983.
BB	Kraft Pulp Mills.
HH	Lime Manufacturing Plants.
LL	Metallic Mineral Processing Plants.
NN	Phosphate rock plants (with prod. capacity >4 ton/hr).
PP	Ammonium Sulfate Manufacture.
RR	Pressure Sensitive Tape and Label Surface Coating Operations.
FFF	Flexible Vinyl and Urethane Coating and Printing.
LLL	Onshore Natural Gas Processing: SO_2 Emissions.

TABLE 1—SOURCE CATEGORIES THAT WOULD BE SUBJECT TO PS–17 AND PROCEDURE 4—Continued

Subpart(s)	Source category
UUU	Calciners and Dryers in Mineral Industries.
VVV	Polymeric Coating of Supporting Substrates Facilities.
AAAA	Small Municipal Waste Combustion Units Constructed after August 30, 1999.
40 CFR part 61	
K	Radionuclide Emissions from Elemental Phosphorus Plants.
L	Benzene from Coke By-Product Recovery Plants.
BB	Benzene Emissions from Benzene Transfer Operations.

The requirements of the proposed PS–17 and Procedure 4 may also apply to stationary sources located in a State, District, Reservation, or Territory that adopts PS–17 or Procedure 4 in its implementation plan. The exceptions to the applicability criteria for PS–17 and Procedure 4 are those source categories that are subject to part 63 rules that specify that § 63.8(a)(2) of the General Provisions for the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Source Categories in 40 CFR part 63, subpart A does not apply to the source category. Section 63.8(a)(2) specifies that rules promulgated under part 63 are subject to the monitoring provisions of § 63.8 upon promulgation of performance specifications (i.e., the proposed PS–17). Consequently, rules which specify that § 63.8(a)(2) does not apply, are not subject to PS–17 or Procedure 4. Table 2 of this preamble lists the part 63 rules that require CPMS but would not be subject to PS–17 or Procedure 4 for this reason.

TABLE 2—PART 63 RULES NOT SUBJECT TO PS–17 OR PROCEDURE 4

[§ 63.8(a)(2) does not apply]

Subpart(s)	Source category
F, G, H, I	Hazardous Organic NESHAP.
U	Polymers and Resins (Group I).
AA	Phosphoric Acid Plants.
BB	Phosphate Fertilizer Production.
CC	Petroleum Refineries.
DD	Offsite Waste and Recovery Operations.
DDD	Mineral Wool.
III	Flexible Polyurethane Foam Production.
JJJ	Polymers and Resins (Group IV).
LLL	Portland Cement Manufacturing.
OOO	Amino/Phenolic Resins Production.
PPP	Polyether Polyols Production.
AAAA	Municipal Solid Waste Landfills.
TTTT	Leather Tanning and Finishing Operations.
IIIII	Mercury Cell Chlor-Alkali Plants.
LLLLL	Asphalt Roofing and Processing.

The standard industrial classification (SIC) codes and North American Industry Classification System (NAICS) codes that correspond to potentially regulated entities are listed in Tables 3 and 4 of this preamble, respectively. To determine the specific types of industry referenced by the SIC or NAICS codes, go to *http://www.osha.gov/pls/imis/sic_manual.html* or *http://www.osha.gov/oshstats/naics-manual.html*, respectively.

TABLE 3—SIC CODES FOR POTENTIALLY REGULATED ENTITIES

SIC code
12, 42, 44, 47, 109, 279, 281, 282, 283, 284, 285, 286, 287, 289, 386, 1011, 1021, 1031, 1041, 1044, 1051, 1061, 1099, 1311, 1321, 1411, 1422, 1423, 1429, 1442, 1445, 1446, 1454, 1455, 1459, 1474, 1475, 1479, 1492, 1496, 1499, 2034, 2035, 2046, 2099, 2211, 2241, 2295, 2296, 2392, 2394, 2396, 2399, 2421, 2426, 2429, 2431, 2435, 2436, 2439, 2441, 2448, 2449, 2451, 2452, 2491, 2493, 2499, 2514, 2522, 2531, 2542, 2599, 2611, 2621, 2631, 2652, 2653, 2655, 2656, 2657, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2711, 2721, 2741, 2754, 2759, 2761, 2771, 2812, 2813, 2816, 2819, 2821, 2822, 2823, 2824, 2832, 2833, 2834, 2835, 2836, 2841, 2842, 2843, 2844, 2851, 2861, 2865, 2869, 2873, 2874, 2875, 2879, 2891, 2892, 2893, 2895, 2899, 2911, 2951, 2952, 2992, 2999, 3011, 3021, 3052, 3053, 3061, 3069, 3074, 3079, 3081, 3082, 3083, 3084, 3085, 3086, 3087, 3088, 3089, 3111, 3131, 3142, 3143, 3144, 3149, 3161, 3171, 3172, 3199, 3211, 3221, 3229, 3274, 3281, 3291, 3292, 3295, 3296, 3299, 3312, 3313, 3315, 3316, 3317, 3321, 3322, 3324, 3325, 3329, 3331, 3334, 3339, 3341, 3351, 3353, 3354, 3355, 3356, 3357, 3363, 3364, 3365, 3366, 3369, 3398, 3399, 3411, 3412, 3421, 3423, 3425, 3429, 3431, 3432, 3441, 3442, 3443, 3444, 3446, 3448, 3449, 3451, 3452, 3462, 3463, 3465, 3466, 3469, 3471, 3479, 3482, 3483, 3484, 3489, 3491, 3492, 3493, 3494, 3495, 3497, 3499, 3511, 3519, 3523, 3524, 3531, 3537, 3543, 3545, 3559, 3562, 3566, 3568, 3569, 3579, 3585, 3592, 3599, 3621, 3634, 3639, 3644, 3645, 3646, 3647, 3663, 3677, 3691, 3693, 3694, 3695, 3711, 3713, 3714, 3715, 3716, 3720, 3721, 3724, 3726, 3728, 3731, 3732, 3743, 3751, 3760, 3761, 3764, 3765, 3769, 3792, 3795, 3799, 3821, 3829, 3841, 3842, 3843, 3851, 3861, 3911, 3914, 3915, 3931, 3942, 3944, 3949, 3951, 3952, 3953, 3955, 3961, 3965, 3991, 3993, 3995, 3996, 3999, 4225, 4226, 4512, 4581, 4612, 4911, 4922, 4923, 4924, 4925, 4931, 4932, 4939, 4941, 4952, 4953, 4961, 4971, 5086, 5122, 5149, 5169, 5171, 5172, 5541, 5995, 7218, 7231, 7241, 7391, 7397, 7399, 7534, 7538, 7539, 7641, 7699, 7911, 7999, 8062, 8063, 8069, 8071, 8072, 8091, 8211, 8221, 8222, 8231, 8243, 8244, 8249, 8299, 8411, 8711, 8731, 8734, 8741, 8748, 8922, 9511, 9661, 9711

TABLE 4—NAICS CODES FOR POTENTIALLY REGULATED ENTITIES

NAICS code
211, 221, 316, 321, 322, 324, 325, 326, 331, 332, 336, 339, 611, 622, 2123, 2211, 3231, 3241, 3251, 3252, 3253, 3254, 3255, 3256, 3259, 3271, 3273, 3274, 3279, 3327, 3328, 3329, 3332, 3335, 3339, 3341, 3342, 3343, 3344, 3361, 3362, 3363, 4227, 5622, 5629, 21221, 22121, 22132, 31332, 32211, 32222, 32411, 32613, 32614, 32615, 32791, 33422, 33634, 33992, 33995, 42269, 42271, 45431, 48611, 48621, 49311, 49319, 51113, 51114, 51223, 54171, 56220, 56221, 56292, 81142, 92411, 92711, 92811, 111998, 112519, 112910, 112990, 211111, 211112, 212111, 212112, 212113, 212210, 212221, 212222, 212231, 212234, 212299, 212319, 212322, 212324, 212325, 212393, 212399, 213113, 221112, 221320, 238910, 311211, 311212, 311221, 311225, 311340, 311421, 311423, 311823, 311830, 311911, 311920, 311941, 311942, 311991, 311999, 313210, 313320, 314911, 314992, 315299, 315999, 321211, 321212, 321213, 321214, 321219, 321911, 321918, 321999, 322110, 322121, 322122, 322130, 322211, 322212, 322213, 322215, 322221, 322222, 322223, 322224, 322225, 322226, 322231, 322291, 322299, 323111, 323112, 323116, 323119, 324121, 324199, 325131, 325181, 325182, 325188, 325192, 325199, 325211, 325221, 325222, 325311, 325312, 325320, 325411, 325412, 325991, 326111, 326113, 326121, 326122, 326150, 326191, 326192, 326199, 326211, 326212, 326299, 327211, 327212, 327213, 327410, 327991, 327992, 327993, 327999, 331111, 331112, 331210, 331221, 331222, 331312, 331315, 331316, 331319, 331419, 331492, 331511, 331512, 331513, 331521, 331524, 332115, 332116, 332212, 332431, 332612, 332618, 332812, 332912, 332951, 332999, 333111, 333112, 333120, 333313, 333319, 333611, 333612, 333613, 333618, 334613, 335121, 335122, 335312, 335911, 336111, 336112, 336120, 336211, 336213, 336214, 336312, 336350, 336399, 336411, 336412, 336413, 336414, 336415, 336419, 336612, 336992, 336999, 337124, 337127, 337214, 337215, 339111, 339112, 339114, 339911, 339912, 339914, 339999, 424690, 424720, 425110, 425120, 481111, 483111, 483112, 483113, 483114, 483211, 483212, 484110, 484121, 484122, 484210, 484220, 484230, 487210, 488111, 488119, 488190, 488310, 488320, 488330, 488390, 488490, 492110, 492210, 493110, 493120, 493130, 493190, 511199, 531130, 532411, 541380, 541710, 541990, 561720, 562111, 562112, 562119, 562213, 562219, 611310, 611692, 622110, 622310, 713930, 811111, 811118, 811310, 811411, 811420, 924110, 928110

The proposed amendments to Procedure 1 (40 CFR part 60, appendix F) would apply to any facility that operates a continuous emission monitoring system (CEMS) that is subject to PS–9 or PS–15 (40 CFR part 60, appendix B) and also must comply with 40 CFR part 60, appendix F. The proposed amendments to the General Provisions to 40 CFR parts 60, 61, and 63 would apply to the same facilities that the proposed PS–17 and Procedure 4 would apply. The proposed amendments to 40 CFR part 63, subpart SS, would apply to producers and coproducers of hydrogen cyanide; sodium cyanide; carbon black by thermal-oxidative decomposition in a closed system, thermal decomposition in a cyclic process, or thermal decomposition in a continuous process; ethylene from refined petroleum or liquid hydrocarbons; and spandex by reaction spinning.

To determine whether your facility would be regulated by this action, you should examine the applicability criteria in section 1.2 of proposed PS–17 and the applicability criteria in the part 60, 61, or 63 standard to which your facility is subject. If you have any questions regarding the applicability of this action to a particular entity, consult either the air permit authority for the entity or your EPA regional representative as listed in § 63.13 of the General Provisions to part 63 (40 CFR part 63, subpart A).

B. What should you consider as you prepare your comments for EPA?

Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Attention Docket ID EPA–HQ–OAR–2006–0640. 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.

C. Where can you get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of these proposed actions will also be available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). A copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: *http://www.epa.gov/ttn/oarpg/*. The TTN provides information and technology exchange in various areas of air pollution control.

D. Will there be a public hearing?

The EPA will hold a public hearing on this proposed rule only if requested by November 10, 2008. The request for a public hearing should be made in writing and addressed to Mr. Barrett Parker, Sector Policies and Programs Division, Office of Air Quality Planning and Standards (D243–05), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. The hearing, if requested, will be held on a date and at a place published in a separate **Federal Register** notice.

II. Background

A. What is the regulatory history of the proposed PS–17 and Procedure 4?

Monitoring of emissions, control device operating parameters, and process operations has been a requirement of many of the emission standards that we have promulgated under the authority of the Clean Air Act (CAA). Recognizing the need for good quality data, we initially developed performance specifications for CEMS. These performance specifications stipulate CEMS equipment design, location, and installation requirements and focus on the initial performance of CEMS. To address the ongoing performance of CEMS, we developed quality assurance (QA) procedures.

The basis for performance specifications for CPMS was initially established by the General Provisions for Standards of Performance for New Stationary Sources in 40 CFR part 60, subpart A. Section 60.13(a), which addresses monitoring requirements, states that ''* * * all continuous monitoring systems required under applicable subparts shall be subject to the provisions of this section upon promulgation of performance specifications for continuous monitoring systems under appendix B to this part * * *'' As defined in § 60.2, these ''continuous monitoring systems'' include those systems that are used to measure and record process parameters. Section 60.13 specifies basic requirements for the installation, validation, and operation of continuous monitoring systems, including CPMS. General recordkeeping requirements for CPMS required under part 60 are specified in § 60.7(f).

Section 61.14 of the NESHAP General Provisions in 40 CFR part 61, subpart A also addresses CPMS, although in less detail than does § 60.13. Included in the requirements for CPMS under part 61 are provisions for the general operation and maintenance of continuous monitoring systems, monitoring system performance evaluations, and recordkeeping.

With the enactment of the Clean Air Act Amendments of 1990 (1990 Amendments), we have placed increased emphasis on the collection and use of monitoring data as a means of ensuring continuous compliance with emission standards. In response to the mandates of the 1990 Amendments, we incorporated into the General Provisions to part 63, basic requirements for all continuous monitoring systems (CMS). Section 63.2 broadly defines CMS to include CPMS, as well as CEMS and other forms of monitoring that are used to demonstrate compliance with applicable regulations. In § 63.8(a)(2), the General Provisions specify that, ''* * * all CMS required under relevant standards shall be subject to the provisions of this section upon promulgation of performance specifications for CMS as specified in the relevant standard or otherwise by the Administrator.'' As is the case for part 60, the General Provisions to part 63 establish the need for performance specifications for CPMS.

Rules promulgated under parts 60, 61, and 63 generally require owners or operators of affected sources to use CPMS to monitor the performance of emission control devices associated with those sources. Although many of these standards specify general design, installation, and calibration requirements for CPMS, these rules do not include specific performance requirements for CPMS. In addition, neither the General Provisions nor the subparts to parts 60, 61, and 63 fully specify procedures and criteria for ensuring that CPMS provide good quality data initially and on an ongoing basis. By proposing a new performance specification and QA procedure specifically for CPMS, we would be establishing standards for the design, installation, operation, and maintenance of CPMS that will help to ensure the generation of good quality data on a consistent basis.

The proposed requirements for CPMS also reflect EPA's commitment to improving the quality of data collected and disseminated by the Agency. Although we have always recognized its importance, there has been increased emphasis on ensuring data quality in response to section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554), which directs the OMB to issue guidelines that ''provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information * * * disseminated by Federal agencies.'' On September 28, 2001, OMB issued final Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies (66 FR 49718). These guidelines require Federal agencies to adopt ''* * * a basic standard of quality (including objectivity, utility, and integrity) as a performance goal and should take appropriate steps to incorporate information quality criteria into agency dissemination practices.'' The guidelines also require agencies to ''* * * develop a process for reviewing the quality (including objectivity, utility, and integrity) of information before it is disseminated * * *'' and that the process must ''* * * enable the agency to substantiate the quality of the information it has disseminated through documentation or other means appropriate to the information.''

In response to the OMB guidelines, we developed ''Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency'' (EPA/260R–02–008, October 2002). As noted in these guidelines, we are committed to ensuring the quality control of information collected through regulatory requirements, such as this proposed rule, by specifying analytical procedures for data collection and sample analysis that will produce good quality data. We believe the procedures specified in the proposed PS–17 and Procedure 4 will help to ensure the quality of data measured and recorded by affected CPMS, which may subsequently be collected and disseminated by EPA.

This proposed rule also represents an important part of our efforts to implement the recommendations developed by the Air Quality Management Work Group in response to the National Research Council (NRC) report on Air Quality Management in the United States. Specifically, the

recommendations developed by the Work Group call for improving emissions factors and other emissions estimation methods and reducing the uncertainty in emissions inventories and air quality modeling applications. When emissions factors and other methods are used to estimate emissions from controlled sources, the assumption is that the control device is operating properly. The improved monitoring of air pollution control device parameters that would be achieved by the proposed PS–17 and Procedure 4 would help to ensure that affected control devices are operated properly, and, when problems arise, corrective action is taken in a timely manner. Furthermore, the improved monitoring will help to reduce the uncertainty and improve the reliability of emission estimates that typically are based on the assumptions that emission controls are being operated properly and are performing as designed.

B. What is the regulatory history of the proposed amendments to Procedure 1?

Quality Assurance Procedure 1 of 40 CFR part 60, appendix F, specifies QA procedures for CEMS. At the time that Procedure 1 was promulgated, affected CEMS were designed to monitor a single gaseous pollutant. Since that time, emission standards have been promulgated under parts 60, 61, and 63 that require the installation and operation of CEMS that monitor multiple pollutants. Although most of the provisions of Procedure 1 can be applied directly to multiple pollutant CEMS, there are differences in how multiple pollutant CEMS operate and how their performance should be assessed. We are proposing amendments to Procedure 1 to address those differences.

C. What is the regulatory history of the proposed amendments to the General Provisions to parts 60, 61, and 63?

The only purpose of these proposed amendments to the General Provisions to parts 60 and 61 is to ensure consistency between those provisions, the applicable subparts to parts 60 and 61 that require the use of CPMS, and the requirements of the proposed PS–17 and Procedure 4. As this is the initial proposal of PS–17 and Procedure 4, there is no regulatory history to these proposed amendments to the General Provisions to parts 60 and 61.

We proposed amendments to the monitoring requirements of the General Provisions to part 63 on March 23, 2001 (66 FR 16318) and promulgated those amendments on April 5, 2002 (67 FR 16582). At the time we proposed those amendments, we had not yet developed PS–17 or Procedure 4. As a result, the amendments to the General Provisions, which were incorporated into § 63.8, are not consistent with the requirements of PS–17 and Procedure 4 that we are now proposing. With this proposal of PS–17 and Procedure 4, we decided that additional amendments to the General Provisions to part 63 were needed to ensure consistency between subpart A of part 63, PS–17, Procedure 4, and the applicable subparts to part 63 that require CPMS.

D. What is the regulatory history of the proposed amendments to 40 CFR part 63, subpart SS?

On June 29, 1999, we promulgated the consolidated rulemaking proposal for the ''generic MACT standards'' program (64 FR 34866). The generic MACT program established an alternative methodology for making maximum achievable control technology (MACT) determinations for appropriate small categories by referring to previous MACT standards that have been promulgated for similar sources in other categories. Initially, the generic MACT standards applied to four source categories: Acetal Resins Production, Acrylic and Modacrylic Fibers Production, Hydrogen Fluoride Production, and Polycarbonate Production. We included in the consolidated rulemaking package general control requirements for certain types of hazardous air pollutant (HAP) emissions from storage vessels containing organic materials, process vents emitting organic vapors, and leaks from equipment components. We also established a separate subpart SS, which specifies requirements for closed vent systems, control devices, recovery devices and routing emissions to fuel gas systems or a process. We included in § 63.996 of subpart SS general monitoring requirements for control and recovery devices. On December 6, 2000, we proposed revisions to the monitoring requirements of subpart SS (65 FR 76444). Those proposed revisions specified in greater detail the requirements for CPMS that are used to monitor temperature, pressure, or pH. At the time these revisions to subpart SS were proposed, we were in the early stages of developing PS–17 and Procedure 4 and had not yet refined many of the requirements for CPMS that we are proposing today. However, with this proposal of PS–17 and Procedure 4, we concluded that it would be appropriate to propose further amendments to subpart SS to ensure consistency with PS–17 and Procedure 4.

III. Summary of Proposed Performance Specification 17

A. What is the purpose of PS–17?

The purpose of PS–17 is to establish the initial installation and performance procedures that are required for evaluating the acceptability of a CPMS that is used to monitor specific process or control device parameters. The specific parameters that would be addressed by the proposed PS–17 are temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, and conductivity. Mass flow rate includes the mass flow of liquids as well as solids, such as the flow of powders or dry solid material into a processing unit. As proposed, the requirements for the selection, installation, and validation of CPMS specified in PS–17 would apply instead of the corresponding requirements in an applicable subpart to parts 60, 61, or 63 that requires the use of CPMS for monitoring temperature, pressure, flow rate, pH, or conductivity.

B. Who must comply with PS–17?

The proposed PS–17 would apply to CPMS that are used to monitor temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, or conductivity as indicators of good control device performance or emission source operation. If adopted as a final rule, owners and operators of emission sources that would be required to install and operate any such CPMS under any subpart of parts 60, 61, or 63 (listed in Table 1 of this preamble) would be required to comply with PS–17, with the exception of facilities that are subject to the part 63 rules that are listed in Table 2 of this preamble. In addition to new CPMS that are installed after the proposed effective date of PS–17, existing CPMS that are required under parts 60, 61, or 63 also would be required to comply with PS–17.

C. When must owners or operators of affected CPMS comply with PS–17?

Owners and operators of affected existing CPMS that were installed prior to the effective date of this rule and are located at facilities that are required to obtain a title V operating permit would be required to comply with PS–17 when they renew their title V permit, or when they replace any key components of an affected CPMS. The key components of a CPMS are the sensors, data recorders, and any other parts of the CPMS that affect overall system accuracy, measurement range, or measurement resolution. Owners and operators of affected existing CPMS that were installed prior to the effective date of this rulemaking and are located at area

source facilities that are exempt from obtaining a title V operating permit would be required to comply with PS–17 within 5 years of the effective date of this rule, or when they replace any key components of an affected CPMS. Owners and operators of new affected CPMS would have to comply with the proposed PS–17 when they install and place into operation the affected CPMS.

D. What are the basic requirements of PS–17?

The proposed PS–17 would require owners and operators of affected CPMS to: (1) Select a CPMS that satisfies basic equipment design criteria; (2) install their CPMS according to standard procedures; (3) validate their CPMS prior to placing it into operation; and (4) record and maintain information on their CPMS and its operation. The technical rationales for proposed criteria, specifications, and other related requirements of PS–17 are described in section VIII of this document.

1. Equipment Selection

Two types of equipment would be needed for complying with PS–17: (1) the components that comprise the CPMS, and (2) the equipment that is used to validate the CPMS. For CPMS components, PS–17 would require the selection of equipment that can satisfy basic criteria for measurement range, resolution, and overall system accuracy.

For CPMS components, PS–17 does not specify sensor design criteria, allowing affected owners and operators to select any equipment, provided the CPMS meets the accuracy requirements for the initial validation. However, PS–17 would identify voluntary consensus standards that can be used as guidelines for selecting specific types of sensors.

For a temperature CPMS, PS–17 would require a sensor that is consistent with one of the following standards: (1) ASTM E235–06, ''Specification for Thermocouples, Sheathed, Type K, for Nuclear or Other High-Reliability Applications''; (2) ASTM E585/E585M–04, ''Specification for Compacted Mineral-Insulated, Metal-Sheathed Base Metal Thermocouple Cables''; (3) ASTM E608/E608M–06, ''Specification for Mineral-Insulated, Metal-Sheathed Base Metal Thermocouples''; (4) ASTM E696–07, ''Specification for Tungsten-Rhenium Alloy Thermocouple Wire''; (5) ASTM E1129/E1129M–98 (2002), ''Standard Specification for Thermocouple Connectors''; (6) ASTM E 1159–98 (2003), ''Specification for Thermocouple Materials, Platinum-Rhodium Alloys, and Platinum''; (7) ISA–MC96.1–1982, ''Temperature Measurement Thermocouples''; or (8) ASTM E 1137/E 1137M–04, ''Standard Specification for Industrial Platinum Resistance Thermometers'' (incorporated by reference-see § 60.17)

For a pressure CPMS that uses a pressure gauge as the sensor, PS–17 would require a gauge that conforms to the design requirements of ASME B40.100–2005, ''Pressure Gauges and Gauge Attachments'' (incorporated by reference-see § 60.17).

2. Range

With respect to measurement range, this proposed rule would require that temperature, pressure, flow rate, and conductivity CPMS be capable of measuring the appropriate parameter over a range that extends at least 20 percent beyond the normal expected operating range of values for that parameter. For example, if the pressure drop measurement across a scrubber typically ranges from 5.0 to 7.5 kilopascals (kPa) (20 to 30 inches of water column (in. wc)), the range of the data recorder for a CPMS that monitors that pressure drop would have to extend from at least 4.0 to 9.0 kPa (16 to 36 in. wc). For pH CPMS, the proposed PS–17 would require that the CPMS data recorder range covers the entire pH scale from 0 to 14.

3. Resolution

The data recording system associated with affected CPMS would require a resolution that is equal to or better than one-half of the required system accuracy. For example, if a temperature CPMS is required to have an accuracy of 1 °C, the required resolution for the CPMS would be 0.5 °C, or better.

4. Accuracy

The accuracy criteria for CPMS, which are a function of the parameter that is measured by the CPMS, are described in detail in section II.E of this document.

For devices or instruments that are used to validate or check the initial accuracy of a temperature, pressure, or flow CPMS, PS–17 generally would require an accuracy hierarchy of three. In other words, the ratio of the required accuracy of the CPMS to the accuracy of the calibrated validation device would have to be at least three. For example, if the required accuracy of a temperature CPMS is ±1.0 percent, to satisfy the accuracy hierarchy of three criterion, the calibrated validation device would need an accuracy of ±0.33 percent or better (1.0 ÷ 0.33 = 3). A CPMS with an accuracy of 0.25 percent would satisfy the accuracy hierarchy criterion, but a CPMS with an accuracy of 0.5 percent would not satisfy the accuracy hierarchy criterion in this example. The accuracy of the equipment used to validate the CPMS also would have to be traceable to National Institute of Standards and Technology (NIST) standards. We have incorporated into the proposed PS–17 two exceptions to the accuracy requirements for instruments that are used to validate CPMS. First, a mercury-in-glass or water-in-glass U-tube manometer could be used instead of a calibrated pressure measurement device with NIST-traceable accuracy when validating a pressure CPMS or a flow CPMS that uses a differential pressure flow meter. Secondly, for instruments and reagents that are used to validate a pH CPMS, the performance specification would require NIST-traceable accuracy of 0.02 pH units or better, rather than an accuracy hierarchy of three.

5. Installation

The PS–17 would require each CPMS sensor to be located so as to provide representative measurements of the appropriate parameter. The proposed PS–17 also lists voluntary consensus standards that could serve as guidelines for installing specific types of sensors. Voluntary consensus standards are technical standards that are developed or adopted by one or more voluntary consensus standards bodies, such as the American Society for Testing and Materials (ASTM) or the American Society of Mechanical Engineers (ASME).

If required to install a flow CPMS and the sensor of the flow CPMS is a differential pressure device, turbine flow meter, rotameter, vortex formation flow meter or Coriolis mass flow meter, PS–17 would allow one of the following standards to be used as guidance: (1) ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi''; (2) ANSI/ASME MFC–7M–1987 (R2001), ''Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles''; (3) ANSI/ISA RP 31.1–1977, ''Recommended Practice: Specification, Installation, and Calibration of Turbine Flowmeters''; (4) ANSI/ASME MFC 4M–1986 (R2003), ''Measurement of Gas Flow by Turbine Meters'' (if used for gas flow measurement); (5) ISA RP 16.5–1961, ''Installation, Operation, and Maintenance Instructions for Glass Tube Variable Area Meters (Rotameters)''; (6) ISO 10790:1999(E), ''Measurement of Fluid Flow in Closed Conduits-Guidance to the Selection, Installation and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements); or (7) ANSI/ASME MFC–6M–1998 (R2005) ''Measurement

of Fluid Flow in Pipes Using Vortex Flow Meters'' (incorporated by reference—see § 60.17).

There are also several voluntary consensus standards that can be used as alternative methods for checking the accuracy of specific types of CPMS sensors. Prior to validating the performance of a CPMS, owners and operators would be required to install work platforms, test ports, taps, valves, or any other equipment needed to perform the initial validation check.

6. CPMS Validation

Under this proposed rule, we would require owners and operators of affected CPMS to demonstrate that affected CPMS meet a minimum overall system accuracy. Several methods are specified for checking CPMS accuracy, and owners and operators of affected CPMS could choose among the methods specified for each type of CPMS. These validation methods generally would involve either: (1) Comparing measurements made by the affected CPMS to measurements made by a calibrated measurement device, or (2) simulating the signal generated by the CPMS sensor using a calibrated simulation device. Table 5 of this preamble lists the CPMS validation methods specified in the proposed PS–17 and their applicability. As part of specific validation methods, the proposed PS–17 specifies several voluntary consensus standards as alternative methods for checking sensor accuracy.

TABLE 5—CPMS INITIAL VALIDATION METHODS

If your CPMS measures . . .	You can validate your CPMS by . . .	If the sensor of your CPMS is . . .
1. Temperature	a. Comparison to a calibrated temperature measurement device.	Thermocouple, RTD, or any other type of temperature sensor.
	b. Temperature simulation	Thermocouple, RTD, or any other type of sensor that generates an electronic signal that can be related to temperature magnitude.
2. Pressure	a. Comparison to a calibrated pressure measurement device.	Pressure transducer, pressure gauge, or any other type of pressure sensor.
	b. Pressure simulation procedure using a calibrated pressure source.	Pressure transducer, pressure gauge, or any other type of pressure sensor.
	c. Pressure simulation using a pressure source and a calibrated pressure measurement device.	Pressure transducer, pressure gauge, or any other type of pressure sensor.
3. Liquid flow rate	a. Volumetric method	Any type of liquid flow meter.
	b. Gravimetric method	Any type of liquid flow meter.
	c. Differential pressure measurement method	Orifice plate, flow nozzle, or other type of differential pressure liquid flow meter.
	d. Pressure source flow simulation method	Orifice plate, flow nozzle, or other type of differential pressure liquid flow meter.
	e. Electronic signal simulation method	Turbine flow meter, vortex shedding flow meter, or any other type of liquid flow meter that generates an electronic signal that can be related to flow rate magnitude.
4. Gas flow rate	a. Differential pressure measurement method	Orifice plate, flow nozzle, or any other type of differential pressure gas flow meter other than a differential pressure tube.
	b. Pressure source flow simulation method	Orifice plate, flow nozzle, or any other type of differential pressure gas flow meter other than a differential pressure tube.
	c. Electronic signal simulation method	Any type of gas flow meter that generates an electronic signal that can be related to flow rate magnitude.
	d. Relative accuracy test	Any type of gas flow meter.
5. Liquid mass flow rate	Gravimetric method	Any type of liquid flow meter.
6. Solid mass flow rate	a. Gravimetric method	Any type of solid mass flow meter.
	b. Material weight comparison method	Belt conveyor with weigh scale, equipped with a totalizer.
7. pH	a. Comparison to calibrated pH meter	Any type of pH meter.
	b. Single point calibration	Any type of pH meter.
8. Conductivity	a. Comparison to calibrated conductivity meter.	Any type of conductivity meter.
	b. Single point calibration	Any type of conductivity meter.

7. Temperature CPMS Validation

Under this proposed rule, the performance of a temperature CPMS could be validated by comparing measured values to a calibrated temperature measurement device or by simulating a typical operating temperature using a calibrated temperature simulation device. When the calibrated temperature measurement device method is used, the sensor of the calibrated device would have to be located adjacent to the CPMS sensor and must be subjected to the same

environmental conditions as the CPMS sensor. In addition, the measurements made using the CPMS and calibrated temperature measurement device would have to be concurrent. The method is based on ASTM E 220–07e1, ''Standard Test Methods for Calibration of Thermocouples by Comparison Techniques'' (incorporated by reference—see § 60.17).

An alternative method for thermocouples is ASTM E 452–02 (2007), ''Standard Test Method for Calibration of Refractory Metal Thermocouples Using an Optical Pyrometer'' and an alternative method for resistance temperature detectors is ASTM E 644–06, ''Standard Test Methods for Testing Industrial Resistance Thermometers'' (incorporated by reference—see § 60.17).

8. Pressure CPMS Validation

To validate the performance of a pressure CPMS, owners and operators could choose from one of three methods: (1) Comparison to a calibrated pressure measurement device, (2) pressure simulation using a calibrated pressure source, or (3) pressure simulation using a pressure source and calibrated pressure measurement device. Prior to performing the initial validation check of a pressure CPMS, PS–17 would require a leak test on all connections between the process line that is monitored, the CPMS, and the calibrated device that is used as the basis for comparison. If the calibrated pressure measurement device comparison were used, the measurements by the CPMS and calibrated device would have to be concurrent.

As an alternative to the initial validation check, PS–17 would allow the user to check the accuracy of the pressure sensor associated with the pressure CPMS using one of the following methods: (1) ASME B40.100–2005, ''Pressure Gauges and Gauge Attachments'' or (2) ASTM E 251–92 (2003), ''Standard Test Methods for Performance Characteristics of Metallic Bonded Resistance Strain Gages'' (incorporated by reference—see § 60.17). Users would also be required to check the accuracy of the overall CPMS.

9. Flow CPMS Validation

Under the proposed PS–17, the performance of a flow CPMS could be validated using one of seven methods. However, none of the methods could be applied universally to all types of flow CPMS; there would be limitations on the use of each specific method. The volumetric method, which could be used to validate any liquid flow rate measurement device, would entail collecting a volume of liquid for a timed period, then calculating the flow rate based on the volume collected and the length of the time period over which the liquid was collected. The gravimetric method is similar to the volumetric method except that the material collected would be weighed. The gravimetric method could be used to validate any liquid flow CPMS, liquid mass flow CPMS, and solid mass flow CPMS. Liquid mass flow rates and solid mass flow rates would be calculated based on the weight of the liquid or solid and the length of the time period over which the liquid or solid was collected. Liquid flow rate would be calculated based on the weight and density of the liquid and the length of the time period over which the liquid was collected.

The volumetric and gravimetric methods are based on voluntary consensus standards and could be used to validate liquid flow CPMS. Both methods are described in the following standards: (1) ISA RP 16.6–1961, ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''; (2) ISA RP 31.1–1977, ''Specification, Installation, and Calibration of Turbine Flow Meters''; and (3) ISO 8316:1987, ''Measurement of Liquid Flow in Closed Conduits-Method by Collection of Liquid in a Volumetric Tank'' (incorporated by reference-see § 60.17). The gravimetric method also is described in the following standards: (1) ANSI/ASME MFC–9M–1988, ''Measurement of Liquid Flow in Closed Conduits by Weighing Method''; and (2) ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters'' (incorporated by reference-see § 60.17). The gravimetric method also could be used to validate liquid mass flow or solid mass flow CPMS.

The differential pressure measurement method and the pressure source flow simulation method could be used to validate any flow CPMS that uses a differential pressure measurement flow device, such as an orifice plate, flow nozzle, or venturi tube. Both methods would entail measuring the differential pressure across a flow constriction, then calculating the corresponding flow rate based on the measured differential pressure using the manufacturer's literature or the procedures specified in ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi'' (incorporated by reference—see § 60.17), the characteristics of the liquid, and the dimensions and design of the flow constriction. For CPMS that use an orifice flow meter, the flow rate can be calculated using procedures specified in ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flowmeters'' (incorporated by reference—see § 60.17).

In addition, prior to the validation check, both methods would require a leak test on all connections associated with the process line, CPMS, and pressure connections. Neither the differential pressure measurement method nor the pressure source flow simulation method could be used to validate a gas flow CPMS that uses one or more differential pressure tubes as the flow sensor. A differential pressure tube is defined as a device, such as a pitot tube, that consists of one or more pairs of tubes that are oriented to measure the velocity pressure and static pressure at one of more fixed points within a duct for the purpose of determining gas velocity.

The electronic signal simulation method could be used to validate any flow CPMS that operates with a sensor that generates an electronic signal, provided the electronic signal can be simulated and is related to the magnitude of the flow rate. Examples of this type of flow sensor are turbine meters and vortex shedding flow meters. The electronic signal simulation method would entail simulating an electronic signal using a calibrated signal simulator, then calculating the flow rate that corresponds to the value of the simulated signal.

Owners or operators of flow CPMS that are used for monitoring gas flow rate could validate their CPMS by performing a relative accuracy (RA) test using Reference Methods 2, 2A, 2B, 2C, 2D, or 2F (40 CFR part 60, appendix A–1), or 2G (40 CFR part 60, appendix A–2). The RA test is the only method specified in the proposed PS–17 for validating a gas flow CPMS that incorporates a differential pressure tube.

Finally, the material weight comparison method could be used to validate a solid mass flow CPMS that uses a combination belt conveyor and weigh scale equipped with a totalizer. The method is based on the Belt-Conveyor Scale Systems Method, which is described in NIST Handbook 44—2002 Edition, ''Specifications, Tolerances, And Other Technical Requirements for Weighing and Measuring Devices'' (incorporated by reference—see § 60.17) as adopted by the 86th National Conference on Weights and Measures in 2001.

10. pH CPMS Validation

To validate the performance of a pH CPMS, two methods are specified in the proposed PS–17. In the first method, the pH measured by the CPMS would be compared to the pH measured by a calibrated pH meter. In the second method, the single point calibration method, the value measured by the CPMS would be compared to the pH measurement of a certified buffer solution. If the CPMS did not satisfy the accuracy requirement, a two-point calibration method, based on ASTM D 1293–99 (2005), ''Standard Test Methods for pH of Water'' (incorporated by reference—see § 60.17), would be suggested.

11. Conductivity CPMS Validation

The proposed PS–17 would specify two methods for validating conductivity CPMS. The two methods parallel the methods for validating pH CPMS: comparison to a calibrated conductivity meter and the single point calibration method using a standard conductivity solution.

If the conductivity CPMS did not satisfy the accuracy requirement, calibration based on the procedures specified in the manufacturer's owner's manual would be suggested. If the manufacturer's owner's manual does not specify a calibration procedure, calibration should be performed based on one of the following standards: (1) ASTM D 1125–95 (2005), ''Standard Test Methods for Electrical Conductivity and Resistivity of Water''; or (2) ASTM D 5391–99 (2005), ''Standard Test Method for Electrical conductivity and Resistivity of a Flowing High Purity Water Sample'' (incorporated by reference—see § 60.17).

12. Alternative Methods of CPMS Validation

Owners and operators of affected CPMS could have the option of using alternative methods for validating their CPMS, provided the alternative method has been approved by us or by a delegated authority. In all cases, owners and operators of affected CPMS would be required to take corrective action if the initial validation check indicates that the CPMS does not satisfy the accuracy requirement. Alternative monitoring methods are addressed under the General Provisions to parts 60, 61, and 63 in §§ 60.13(i), 61.14(g), and 63.8(f), respectively. Alternative monitoring methods also are addressed in the applicable subparts for each rule.

E. What initial performance criteria must be demonstrated to comply with PS–17?

Owners or operators of affected CPMS would be required to demonstrate that their CPMS meet a minimum system accuracy. Table 6 of this preamble summarizes the required accuracies. These minimum accuracies would pertain to the overall CPMS and not simply the sensor.

TABLE 6—ACCURACY CRITERIA FOR INITIAL VALIDATION CHECK

If the CPMS measures . . .	The accuracy criteria for the initial validation check are . . .
1. Temperature (in a non-cryogenic environment).	System accuracy of ±1.0 percent of the temperature or 2.8 °C (5 °F), whichever is greater.
2. Temperature (in a cryogenic environment)	System accuracy of ±2.5 percent of the temperature or 2.8 °C (5 °F), whichever is greater.
3. Pressure	System accuracy of ±5 percent or 0.12 kPa (0.5 in. wc), whichever is greater.
4. Liquid flow rate	System accuracy of ±5 percent or 1.9 L/min (0.5 gal/min), whichever is greater.
5. Gas flow rate	a. Relative accuracy of ±20 percent, if the relative accuracy test is used to demonstrate compliance, OR. b. System accuracy of ±10 percent, if the CPMS measures steam flow rate, OR. c. System accuracy of ±5 percent or 280 L/min (10 ft^3/min), whichever is greater, for all other gases and validation test methods.
6. Mass flow rate	System accuracy of ±5 percent.
7. pH	System accuracy of 0.2 pH units.
8. Conductivity	System accuracy percentage of ±5 percent.

In most cases, the required accuracies are expressed both as accuracy percentages and as accuracy values; for a specific parameter value, the accuracy criterion that results in the greater value would apply (i.e., the less stringent criterion would apply). For example, for liquid flow rate, the accuracy percentage would be ±5 percent, and the accuracy value would be 1.9 liters per minute (L/min) (0.5 gallons per minute (gal/min)). If the actual flow rate were 30 L/min (7.9 gal/min), the accuracy percentage criterion would result in a value of 1.5 L/min (0.4 gal/min). Therefore, the accuracy value criterion of 1.9 L/min (0.5 gal/min) would apply because 1.9 L/min is greater than 1.5 L/min.

For temperature CPMS, the proposed PS–17 would make a distinction between cryogenic and non-cryogenic environments; cryogenic environments are those characterized by a temperature less than 0 °C (32 °F), and non-cryogenic environments are those with a temperature of at least 0 °C (32 °F). The minimum accuracy for a temperature CPMS used in a non-cryogenic application would be the greater of ±1.0 percent of the temperature measured on the Celsius scale (°C) and ±2.8 °C (5 °F). For example, for a temperature CPMS that is used to monitor a thermal oxidizer operating at 760 °C (1400 °F), the 1 percent accuracy criterion would require the CPMS to be accurate to within ±7.6 °C (±14 °F). Because 7.6 °C (±14 °F) is greater than 2.8 °C (5 °F), the 1 percent accuracy criterion would apply. The minimum accuracy of a temperature CPMS used in a cryogenic application would be ±2.8 °C (5 °F) or ±2.5 percent of the temperature measured on the Celsius scale, whichever is greater. For a temperature CPMS that is used to monitor a condenser operating with an outlet temperature of −12 °C (10 °F), the temperature value criterion would apply; the CPMS would have to be accurate to ±2.8 °C (±5 °F) because 2.8 °C (5 °F) is greater than 2.5 percent of −12 °C (10 °F), which is ±0.3 °C (±0.5 °F). These criteria translate to the accuracies listed in Table 7 of this preamble.

TABLE 7—SUMMARY OF TEMPERATURE CPMS ACCURACY REQUIREMENTS

For temperatures that are . . .	The required temperature CPMS accuracy is . . .
1. Greater than 280 °C (540 °F)	±1 percent of temperature.
2. Between −112 and 280 °C (−170 and 540 °F)	±2.8 °C (5 °F).
3. Less than −112 °C (−170 °F)	±2.5 percent of temperature.

The proposed PS–17 would require pressure CPMS to be accurate to within ±5 percent or 0.12 kPa (0.5 in. wc), whichever is greater. For example, a CPMS that is used to monitor a venturi scrubber with a pressure drop of 7.5 kPa (30 in. wc) would have to be accurate to 0.37 kPa (1.5 in. wc) or better, based on the ±5 percent criterion because 0.37 kPa (1.5 in. wc) is greater than 0.12 kPa (0.5 in. wc). On the other hand, the required accuracy for a CPMS that monitored a pressure drop of 1.0 kPa (4 in. wc) across a fabric filter would be 0.12 kPa (0.5 in. wc), or better, because the ±5 percent criterion would result in an accuracy of 0.05 kPa (0.2 in. wc).

The required accuracy for flow CPMS would depend on the material that is being monitored. For liquid flow rate CPMS, the minimum accuracy would be 1.9 L/min (0.5 gal/min) or ±5 percent, whichever is greater. For example, to monitor a scrubber liquid flow rate of 300 L/min (80 gal/min), the required CPMS accuracy would be 15 L/min (4 gal/min) or better. For gas flow rate CPMS, PS–17 would require a minimum accuracy of 280 L/min (10 cubic feet per minute (ft^3/min)) or ±5 percent, whichever is greater. Therefore, a fuel flow meter on a natural gas-fired 8 MMBtu/hr incinerator with a gas flow rate of 3,700 L/min (130 ft^3/min) would have to be accurate to 280 L/min (10 ft^3/min) or better. An exception to these accuracy requirements for flow meters would apply if an RA test is used to validate a gas flow CPMS. In such cases, the required RA would be 20 percent of the mean value of the reference method test data, or better. An exception to the gas flow CPMS accuracy requirements would also apply for steam flow rate CPMS. The proposed PS–17 stipulates the minimum accuracy for a CPMS that is used for monitoring steam flow rate would have to be ±10 percent or better. The minimum accuracy specified in the proposed PS–17 for mass flow CPMS would be ±5 percent. We would require pH CPMS to be accurate to within ±0.2 pH units. Finally, conductivity CPMS would have to be accurate to ±5 percent.

F. What are the reporting and recordkeeping requirements for PS–17?

The proposed PS–17 does not specify reporting requirements but would require owners and operators of affected CPMS to record and maintain information that identifies the CPMS, including the location of the CPMS, identification number assigned by the owner or operator, the manufacturer's name and model number, and the typical operating range for each parameter that is monitored. In addition, owners and operators of affected CPMS would be required to document performance demonstrations.

IV. Summary of Proposed Procedure 4

A. What is the purpose of Procedure 4?

The proposed Procedure 4 would have two primary purposes. First, the procedure would be used for evaluating the quality of data produced by CPMS on an ongoing basis. Second, the procedure would help evaluate the effectiveness of the QA and quality control (QC) programs that owners and operators develop for CPMS. As proposed, Procedure 4 would apply instead of the requirements for evaluating the operation and quality of the data produced by CPMS specified in an applicable subpart to parts 60, 61, or 63 that requires the use of CPMS for monitoring temperature, pressure, flow rate, pH, or conductivity.

B. Who must comply with Procedure 4?

This procedure would apply to any CPMS that is subject to PS–17. That is, any owner or operator who would be required under an applicable subpart to parts 60, 61, or 63 to install and operate a CPMS that is used to monitor temperature, pressure, flow rate, pH, or conductivity would be subject to both PS–17 and Procedure 4.

C. When must owners or operators of affected CPMS comply with Procedure 4?

Owners and operators of affected CPMS would have to comply with Procedure 4 when they install and place into operation a CPMS that is subject to PS–17 or when an existing CPMS becomes subject to PS–17.

D. What are the basic requirements of Procedure 4?

The proposed Procedure 4 would require owners or operators to perform periodic accuracy audits, perform visual inspections and other operational checks, and develop and implement a QA/QC program for each affected CPMS. The technical rationales for specific proposed requirements of Procedure 4 are described in section IX of this document.

1. Accuracy Audits

The requirements for periodic accuracy audits would consist of equipment requirements and procedural requirements. As is the case for equipment used to perform initial validations under the proposed PS–17, the specific equipment required to perform an accuracy audit would depend on the type of CPMS and the method selected for evaluating the accuracy of the CPMS. However, all such equipment would have to be calibrated and would have to meet the same two general requirements for accuracy: (1) An accuracy hierarchy of at least three, and (2) an accuracy that is NIST-traceable.

We have incorporated into the proposed Procedure 4 three exceptions to the accuracy requirements for instruments that are used to audit the accuracy of CPMS: (1) When performing an accuracy audit using a redundant sensor, the redundant sensor would have to have an accuracy equal to or better than the accuracy of your primary sensor; (2) a mercury-in-glass or water-in-glass U-tube manometer could be used instead of a calibrated pressure measurement device with NIST-traceable accuracy when auditing the accuracy of a pressure CPMS or a flow CPMS that uses a differential pressure flow meter; and (3) when performing an accuracy audit of a flow CPMS using the volumetric or gravimetric methods, the container that is used to collect the liquid or solid material would not be required to have NIST-traceable accuracy.

The procedural requirements for performing accuracy audits of a CPMS would depend on the type of CPMS. Owners or operators of affected CPMS generally could choose among several methods for performing CPMS accuracy audits. Many of these methods are identical to the methods for performing the initial validation check of CPMS, as specified in the proposed PS–17 and

described in section III.D of this document. However, one significant difference between the initial validation methods specified in the proposed PS–17 and the accuracy audit methods specified in the proposed Procedure 4 is that the accuracy audit methods would require you to check the accuracy of each primary sensor, either separately or as part of the overall system accuracy audit. For PS–17, we assumed that newly installed sensors are calibrated, and a separate check of sensor accuracy would be unnecessary. However, for assessing ongoing QA, affected owners and operators would be required to perform accuracy audits on CPMS that have been in service, and the audit procedure would have to verify that the entire system, including the sensor, meets the accuracy criteria. Table 8 of this document lists the CPMS accuracy audit methods specified in the proposed Procedure 4 and the associated applicability.

TABLE 8—ACCURACY AUDIT METHODS

If your CPMS measures . . .	You can perform the accuracy audit of your CPMS by . . .	If the sensor of your CPMS is . . .
1. Temperature	a. Comparison to redundant temperature CPMS.	Any type of temperature sensor.
	b. Comparison to calibrated temperature measurement device.	Thermocouple, RTD, or any other type of temperature sensor.
	c. Separate sensor check and system check by temperature simulation.	Thermocouple or RTD.
2. Pressure	a. Comparison to redundant pressure sensor.	Any type of pressure sensor.
	b. Comparison to calibrated pressure measurement device.	Pressure transducer, pressure gauge, or any other type of pressure sensor.
	c. Separate sensor check and system check by pressure simulation using a calibrated pressure source.	Pressure gauge or metallic-bonded resistance strain gauge.
	d. Separate sensor check and system check by pressure simulation using a pressure source and a calibrated pressure measurement device.	Pressure gauge or metallic-bonded resistance strain gauge.
3. Liquid flow rate	a. Comparison to redundant flow sensor	Any type of liquid flow meter.
	b. Volumetric method	Any type of liquid flow meter.
	c. Gravimetric method	Any type of liquid flow meter.
	d. Separate sensor check and system check by differential pressure measurement method.	Orifice plate, flow nozzle, or other type of differential pressure liquid flow meter.
	e. Separate sensor check and system check by pressure source flow simulation method.	Orifice plate, flow nozzle, or other type of differential pressure liquid flow meter.
4. Gas flow rate	a. Comparison to redundant flow sensor	Any type of gas flow meter.
	b. Separate sensor check and system check by differential pressure measurement method.	Orifice plate, flow nozzle, or any other type of differential pressure gas flow meter other than a differential pressure tube.
	c. Separate sensor check and system check by pressure source flow simulation method.	Orifice plate, flow nozzle, or any other type of differential pressure gas flow meter.
	d. Relative accuracy test	Any type of gas flow meter.
5. Liquid mass flow rate	a. Comparison to redundant flow sensor	Any type of liquid mass flow meter.
	b. Gravimetric method	Any type of liquid mass flow meter.
6. Solid mass flow rate	a. Comparison to redundant flow sensor	Any type of liquid mass flow meter.
	b. Gravimetric method	Any type of solid mass flow meter.
	c. Material weight comparison method	Combination belt conveyor, weigh scale, and totalizer.
7. pH	a. Comparison to redundant pH meter	Any type of pH meter.
	b. Comparison to calibrated pH meter	Any type of pH meter.
	c. Single point calibration	Any type of pH meter.
8. Conductivity	a. Comparison to redundant conductivity meter.	Any type of conductivity meter.
	b. Comparison to calibrated conductivity meter.	Any type of conductivity meter.
	c. Single point calibration	Any type of conductivity meter.

2. Temperature CPMS Accuracy Audit Methods

To perform an accuracy audit of a temperature CPMS, owners and operators of affected CPMS could choose from three methods. The first method would apply to CPMS with redundant temperature sensors and would entail comparing the temperature measured by the primary sensor of your CPMS to that of the redundant temperature sensor. The second method would consist of comparing the temperature measured by the CPMS to

a separate calibrated temperature measurement device. The third method would require checking the temperature sensor independent of the other components of the CPMS. The temperature sensor could be checked using methods specified in any of the following voluntary consensus standards: (1) ASTM E 220–07e1, ''Standard Test Methods for Calibration of Thermocouples by Comparison Techniques'' (for thermocouples); (2) ASTM E 452–02 (2007), ''Standard Test Method for Calibration of Refractory Metal Thermocouples Using an Optical Pyrometer'' (for thermocouples); or (3) ASTM E 644–06, ''Standard Test Methods for Testing Industrial Resistance Thermometers'' (for resistance temperature detectors) (incorporated by reference—see § 60.17). The other components of the CPMS could be checked by simulating a temperature, then comparing the temperature recorded by the CPMS to the simulated temperature. Because the voluntary consensus standards specified in the proposed Procedure 4 would apply only to thermocouples and resistance temperature detectors (RTDs), this accuracy audit method would apply only to CPMS that use those types of temperature sensors.

3. Pressure CPMS Accuracy Audit Methods

For an accuracy audit of a pressure CPMS, the proposed Procedure 4 would specify four methods. The first method would apply to CPMS with redundant pressure sensors and would entail comparing the pressure measured by the primary pressure sensor of your CPMS to the pressure measured by the redundant pressure sensor. The second method would consist of comparing the pressure measured by your CPMS to the pressure measured by a separate calibrated pressure measurement device. The other two methods would involve checking the accuracies of the pressure sensor independent of the other components of the CPMS. For checking sensor accuracy, the proposed Procedure 4 would reference voluntary consensus standards. Because we were able to identify voluntary consensus standards only for pressure gauges (ASME B40.100–2005, ''Pressure Gauges and Gauge Attachments'') and metallic-bonded resistance strain gauges (ASTM E 251–92 (2003), ''Standard Test Methods for Performance Characteristics of Metallic Bonded Resistance Strain Gages'') (incorporated by reference—see § 60.17), these other two pressure CPMS accuracy audit methods would apply only to CPMS that use pressure gauge or metallic-bonded resistance strain gauge sensors.

After checking sensor accuracy, the accuracy of the other components of the CPMS could be checked by either: (1) Pressure simulation using a calibrated pressure source, or (2) pressure simulation using a pressure source and a calibrated pressure measurement device. In either method, a simulated pressure would be compared to a calibrated pressure to determine accuracy.

4. Liquid Flow CPMS Accuracy Audit Methods

To perform an accuracy audit of a liquid flow CPMS, five methods are specified in the proposed Procedure 4. As is the case with other types of CPMS, owners and operators of affected CPMS could choose among the methods specified. The first method would apply to CPMS with redundant flow sensors and would entail comparing the flow rate measured by the primary flow sensor of your CPMS to the flow rate measured by the redundant flow sensor. The next two methods—the volumetric and gravimetric methods—are the same methods as specified for the initial CPMS validation in the proposed PS–17 and described in section III.D of this document. The volumetric and gravimetric methods are based on voluntary consensus standards and could be used to validate liquid flow CPMS. Both methods are described in the following standards: (1) ISA RP 16.6–1961, ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''; (2) ISA RP 31.1–1977, ''Specification, Installation, and Calibration of Turbine Flow Meters''; (3) ISO 10790:1999, ''Measurement of Fluid Flow in Closed Conduits—Guidance to the Selection, Installation and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements)''; and (4) ISO 8316:1987, ''Measurement of Liquid Flow in Closed Conduits—Method by Collection of Liquid in a Volumetric Tank'' (incorporated by reference—see § 60.17). The gravimetric method also is described in the following standards: (1) ANSI/ASME MFC–9M–1988, ''Measurement of Liquid Flow in Closed Conduits by Weighing Method''; and (2) ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flowmeters'' (incorporated by reference—see § 60.17). The gravimetric method also could be used to validate liquid mass flow or solid mass flow CPMS.

For liquid flow CPMS that use a differential pressure meter, such as an orifice plate, venturi tube, or flow nozzle, two accuracy audit methods are specified in the proposed Procedure 4. Both of these methods would require a separate visual inspection of the flow constriction and a check of the accuracy of the other components of the system. The accuracy of the other components would have to be checked by pressure simulation, using either a calibrated differential pressure source or a differential pressure source in combination with a calibrated differential pressure measurement device. The required pressure drop that corresponds to the normal operating flow rate expected for the flow CPMS can be calculated using ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi'' (incorporated by reference, see § 60.17). For CPMS that use an orifice flow meter, the pressure drop can be calculated using ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flowmeters'' (incorporated by reference—see § 60.17).

5. Gas Flow CPMS Accuracy Audit Methods

The proposed Procedure 4 specifies four methods for checking the accuracy of a gas flow CPMS. One method would entail comparison to a redundant flow sensor and could be used with any gas flow CPMS. Two methods would apply only to gas flow CPMS that incorporate differential pressure meters. These are the same two methods that would apply to differential pressure liquid flow meter systems described in the previous paragraph. The final method specified in the proposed Procedure 4 for checking the accuracy of a gas flow CPMS is the RA test using Reference Methods 2, 2A, 2B, 2C, 2D, or 2F (40 CFR part 60, appendix A–1), or 2G (40 CFR part 60, appendix A–2). This is the only method specified in Procedure 4 that could be used to check the accuracy of gas flow CPMS that use differential flow tubes.

6. Mass Flow CPMS Accuracy Audit Methods

The accuracy of CPMS that measure either liquid mass flow or solid mass flow could be checked using the redundant sensor method and the gravimetric method, both of which are described in the previous section for liquid flow CPMS. The same two methods could be used for checking the accuracy of solid mass flow CPMS. The accuracy of solid mass flow CPMS also could be evaluated using the material weight comparison method, which is based on the Belt-Conveyor Scale Systems Method, described in NIST

Handbook 44—2002 Edition, ''Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices'' (incorporated by reference—see § 60.17), as adopted by the 86th National Conference on Weights and Measures in 2001.

7. pH CPMS Accuracy Audit Methods

To check the accuracy of pH CPMS, owners and operators of affected CPMS could choose between three methods: (1) Comparison to a redundant pH sensor, (2) comparison to a calibrated pH meter calibrated according to ASTM D1293–99 (2005), ''Standard Test Methods for pH of Water'' (incorporated by reference—see § 60.17), and (3) single point calibration. The redundant sensor method would require you to compare the pH measured by the primary pH sensor of your pH CPMS to that of a redundant pH sensor. The other two methods are the same as specified in the proposed PS–17 for the initial validation check.

8. Conductivity CPMS Accuracy Audit Methods

The proposed Procedure 4 specifies three methods for checking the accuracy of a conductivity CPMS. These methods (comparison to redundant conductivity sensor, comparison to calibrated conductivity meter, and single point calibration) are based on the same principles as the methods specified for pH CPMS accuracy audits in this proposed rule.

Calibration of the conductivity CPMS should be performed according to the manufacturer's owner's manual. If not specified, calibration must be performed based on one of the following standards: (1) ASTM D 1125–95 (2005), ''Standard Test Methods for Electrical Conductivity and Resistivity of Water''; or (2) ASTM D 5391–99 (2005), ''Standard Test Method for Electrical Conductivity and Resistivity of a Flowing High Purity Water Sample'' (incorporated by reference—see § 60.17).

9. Other Operational Checks

In addition to accuracy audits, owners or operators of affected CPMS that do not use redundant sensors would be required to perform visual inspections and other checks of the operation of each affected CPMS. These checks would include such activities as inspecting the physical appearance of the CPMS for damage or wear and checking the electrical components for corrosion.

10. QA/QC Program

The Procedure 4 would require CPMS owners or operators to develop QA/QC programs for each affected CPMS. The QA/QC programs would have to address procedures for accuracy audits, system calibration, preventive maintenance, recordkeeping, and corrective action.

E. How often must accuracy audits and other QA/QC procedures be performed?

Table 9 of this document summarizes the required frequencies for accuracy audits and other QA/QC procedures that would be required under the proposed Procedure 4.

TABLE 9—FREQUENCY OF ACCURACY AUDITS AND OTHER QC PROCEDURES

If your CPMS measures . . .	You must perform . . .	At least . . .
1. Temperature	a. Accuracy audits	i. Quarterly; AND ii. Following any period of more than 24 hours throughout which the temperature exceeded the maximum rated temperature of the sensor, or the data recorder was off scale.
	b. Visual inspections and checks of CPMS operation.	Quarterly, unless the CPMS has a redundant temperature sensor.
2. Pressure	a. Accuracy audits	i. Quarterly; AND ii. Following any period of more than 24 hours throughout which the pressure exceeded the maximum rated pressure of the sensor, or the data recorder was off scale.
	b. Checks of all mechanical connections for leakage.	Monthly.
	c. Visual inspections and checks of CPMS operation.	Quarterly, unless the CPMS has a redundant pressure sensor.
3. Flow rate (liquid, gas, mass)	a. Accuracy audits	i. Quarterly; AND ii. Following any period of more than 24 hours throughout which the flow rate exceeded the maximum rated flow rate of the sensor, or the data recorder was off scale.
	b. Checks of all mechanical connections for leakage.	Monthly.
	c. Visual inspections and checks of CPMS operation.	Quarterly, unless the CPMS has a redundant flow sensor.
4. pH	a. Accuracy audits	Weekly.
	b. Visual inspections and checks of CPMS operation.	Monthly, unless the CPMS has a redundant pH sensor.
5. Conductivity	a. Accuracy audits	Quarterly.
	b. Visual inspections and checks of CPMS operation.	Quarterly, unless the CPMS has a redundant conductivity sensor.

For affected CPMS that are used to monitor temperature, pressure, or flow rate, owners and operators would be required to perform accuracy audits on a quarterly basis. For pH CPMS, accuracy audits would have to be performed weekly, and, for conductivity CPMS, monthly accuracy audits would be required. In addition, for temperature, pressure, and flow CPMS, an accuracy audit would be required following any periods of 24 hours or more, throughout which either: (1) The measured value exceeded the operating limit for the sensor, based on the manufacturer's recommendations, or (2) the parameter value remained off the scale of the CPMS data recorder. As an example of the first condition, consider a Type J thermocouple with a rated operating temperature limit of 760 °C (1400 °F). If a temperature CPMS that uses a Type J thermocouple records a temperature in excess of 760 °C (1400 °F) for more than 24 hours, an accuracy audit of the CPMS would have to be performed within 48 hours.

Visual inspections and other operational checks of temperature, pressure, and flow CPMS would be required quarterly, unless the CPMS is equipped with a redundant sensor. In addition, mechanical connections associated with pressure or flow CPMS would have to be checked monthly for leakage. For pH and conductivity CPMS that are not equipped with redundant sensors, owners or operators of affected units would have to visually inspect and perform operational checks of the affected CPMS on a monthly basis.

F. What are the reporting and recordkeeping requirements for Procedure 4?

The proposed Procedure 4 does not specify reporting requirements but would require owners and operators of affected CPMS to maintain records of all accuracy audits and corrective actions taken to return the CPMS to normal operation. These records would have to be maintained for a period of at least 5 years. For the first 2 years, the records would have to be kept onsite.

V. Summary of Proposed Amendments to Procedure 1

A. What is the purpose of the amendments?

The purpose of the amendments to Procedure 1 of 40 CFR part 60, appendix F is to revise the procedure to address CEMS that must comply with PS–9 or PS–15 (40 CFR part 60, appendix B). Procedure 1 was developed for CEMS that are used to monitor a single pollutant or diluent. As a result, there may be some questions on how to apply Procedure 1 to CEMS subject to PS–9 or PS–15 that measure more than one pollutant. In addition, both PS–9 and PS–15 partially specify ongoing QA procedures. By amending the QA procedure, we are clarifying what owners or operators of CEMS subject to PS–9 or PS–15 must do to comply with Procedure 1 to ensure the quality of the data produced by these CEMS. The technical rationale for proposed changes to Procedure 1 is discussed further in section X of this document.

B. To whom do the amendments apply?

The amendments to Procedure 1 (40 CFR part 60, appendix F) would apply to owners or operators of CEMS that are subject to PS–9 or PS–15 (40 CFR part 60, appendix B) and are used to demonstrate compliance on a continuous basis. Several subparts to parts 60, 61, and 63 require that owners and operators of affected sources demonstrate that those sources are in continuous compliance with the applicable emission standard. Any such standard that requires the use of gas chromatographic CEMS subject to PS–9 or extractive Fourier Transfer Infrared (FTIR) CEMS subject to PS–15 would also require compliance with Procedure 1, and these proposed amendments to Procedure 1 would apply specifically to such sources.

C. How do the amendments address CEMS that are subject to PS–9?

These proposed amendments would address CEMS that are subject to PS–9 (40 CFR part 60, appendix B) by clarifying that the procedure can be used for multiple-pollutant CEMS and by modifying the requirements for daily calibration drift (CD) and data accuracy assessments so that the procedure can be applied specifically to CEMS that are subject to PS–9. The proposed amendments to section 4.1.1 of Procedure 1 specify that the daily CD can be performed using any of the target pollutants that are monitored by the CEMS. For example, if a CEMS is subject to PS–9 and is used to monitor benzene and toluene, the CD check could be performed using either benzene or toluene.

The PS–9 requires neither relative accuracy test audits (RATA's) nor relative accuracy assessments (RAA's). Instead, PS–9 requires cylinder gas audits (CGA's) every calendar quarter. To address data accuracy assessments for CEMS subject to PS–9, the amendments would add section 5.1.5 to Procedure 1. The new section would specify that the requirements for RATA's and RAA's do not apply to CEMS subject to PS–9. Instead, quarterly CGA's of each target pollutant would be required. The amendments further would specify that the quarterly CGA's are to be performed according to the procedure described in PS–9, except that the CGA's would have to be performed at two points rather than the single point requirement of PS–9. Finally, the amendments would clarify that the CGA's performed under the revised Procedure 1 satisfy the quarterly performance audit requirement of PS–9.

D. How do the amendments address CEMS that are subject to PS–15?

These proposed amendments would address extractive FTIR CEMS that are subject to PS–15 (40 CFR part 60, appendix B) by modifying the requirements for checking daily CD, data recording, and data accuracy assessments so that the procedure could be applied specifically to CEMS that are subject to PS–15. The amendments also would clarify what constitutes excessive CD for CEMS subject to PS–15 and the criteria for determining when the CEMS is ''out of control.'' These modifications would be addressed in the amendments by adding sections 4.1.2, 4.3.3, 4.4.1, and 5.1.6 to Procedure 1. Proposed section 4.1.2 of Procedure 1 would specify that the daily CD requirement must be satisfied by performing a daily Calibration Transfer Standards (CTS) Check, Analyte Spike Check, and Background Deviation Check. For the specific procedures to be followed, the amendments would reference the appropriate sections of PS–15, which describe how to perform these system assessments.

Proposed section 4.3.3 of Procedure 1 would specify the criteria for determining when a CEMS subject to PS–15 is out of control. The CEMS would be out of control under either of two conditions. The first condition would occur when the CTS Check, Analyte Spike Check, or Background Deviation Check exceeds twice the drift specification of ±5 percent for five consecutive daily periods. The second condition would occur when the CTS Check, Analyte Spike Check, or Background Deviation Check exceeds four times the drift specification of ±5 percent during any daily check.

Proposed section 4.4.1 of Procedure 1 would specify data storage criteria for CEMS subject to PS–15. In addition to the recordkeeping requirements specified in section 4.4 of Procedure 1, the proposed amended procedure would require owners or operators of affected CEMS to satisfy the data storage requirements of section 6.3 of PS–15. That is, the data storage system would

have to have capacity sufficient to store all data collected over the course of one week. The data would have to be stored on either a write-protected medium or to a password-protected remote storage location.

Proposed section 5.1.6 of Procedure 1 would specify the criteria for data accuracy assessments of CEMS subject to PS–15. Instead of requiring data accuracy assessments by RATA's, CGA's, or RAA's, as required for other types of CEMS, the amended Procedure 1 would require quarterly data accuracy assessments according to the three audit procedures specified in section 9 of PS–15. The Audit Sample Check, which is specified in section 9.1 of PS–15, would be required at least once every four calendar quarters. The Audit Spectra Check, which is specified in section 9.2 of PS–15, could be used to satisfy the data accuracy assessment requirement no more than once every four calendar quarters. The Submit Audit for Independent Analysis, which is specified in section 9.3 of PS–15, could be used to satisfy the data accuracy assessment in no more than three of every four consecutive calendar quarters. Proposed section 5.1.6(3) of Procedure 1 also would stipulate that the data accuracy audits performed under the QA procedure satisfy the PS–15 requirement for quarterly or semiannual QA/QC checks on the operation of the CEMS.

VI. Summary of Proposed Amendments to the General Provisions to Parts 60, 61, and 63

A. What is the purpose of the amendments to the General Provisions to parts 60, 61, and 63?

The purpose of the proposed amendments to the General Provisions to parts 60, 61, and 63 is to ensure that the monitoring requirements specified in the General Provisions that apply to CPMS are consistent with the requirements in the proposed PS–17 and Procedure 4 and the requirements specified in the applicable subparts that require the use of the CPMS that are affected by this proposed rule.

B. What specific changes are we proposing to the General Provisions to parts 60, 61, and 63?

These proposed amendments to the General Provisions to part 60 would redesignate § 60.13(a) as § 60.13(a)(1) and would add § 60.13(a)(2). The new paragraph would state that performance specifications and QA procedures for CPMS, promulgated under part 60, appendices B and F, respectively, apply instead of requirements for CPMS specified in applicable subparts to part 60.

These proposed amendments to the General Provisions to part 61 would redesignate § 61.14(a) as § 61.14(a)(1) and would add § 61.14(a)(2). The new paragraph would state that performance specifications and QA procedures for CPMS, promulgated under part 60, appendices B and F, respectively, apply instead of requirements for CPMS specified in applicable subparts to part 61.

These proposed amendments to the General Provisions to part 63 would make several changes to § 63.8(c). Section 63.8(a)(2) would be revised to include new paragraph § 63.8(a)(2)(ii). The new paragraph would state that performance specifications and QA procedures for CPMS, promulgated under part 60, appendices B and F, respectively, apply instead of the requirements for CPMS specified in applicable subparts to part 63.

Under these proposed amendments, the installation requirements of § 63.8(c)(2) would apply to all CMS, including CPMS.

Section 63.8(c)(4) addresses continuous operation and cycle time for CEMS and COMS. These proposed amendments would expand the requirement of § 63.8(c)(4) to require that all CPMS also must be in continuous operation. These proposed amendments also would add paragraph § 63.8(c)(4)(iii) to require that all CPMS complete one cycle of operation within the time period specified in the applicable rule.

Section 63.8(c)(6) addresses daily drift checks. In this proposal, we would delete the last three sentences of paragraph (c)(6) that apply specifically to CPMS because the proposed PS–17 and Procedure 4 would specify the applicable criteria.

Section 63.8(c)(7) defines when a CMS is out of control. The proposed amendments would clarify in § 63.8(c)(7)(i)(A) that the term ''out of control'', when defined in terms of excessive calibration drift, applies to CEMS and COMS and not to CPMS. We also would revise § 63.8(c)(7)(i)(B), which relates out of control to failed performance test audits, relative accuracy audits, relative accuracy test audits, and linearity test audits. In these proposed amendments, § 63.8(c)(7)(i)(A) and (B) would apply only to CEMS and COMS. These proposed amendments would add § 63.8(c)(7)(i)(D) to clarify that a CPMS is out of control when the system fails an accuracy audit.

Quality control programs for CMS are addressed in § 63.8(d). We are proposing to revise § 63.8(d)(2)(ii) to clarify that written protocols for calibration drift determinations and adjustments would not necessarily apply to CPMS.

Finally, we are proposing changes to § 63.8(e), which address CMS performance evaluations. We are proposing to amend § 63.8(e)(2) and (3)(i) to clarify that prior written notice of performance evaluations and performance evaluation test plans are required for CEMS or COMS only. In addition, we are proposing to revise § 63.8(e)(4) to clarify that CPMS performance evaluations must be performed in accordance with the applicable QA procedure (i.e., Procedure 4).

VII. Summary of the Proposed Amendments to 40 CFR Part 63, Subpart SS.

A. What is the purpose of the amendments to subpart SS?

We are proposing to amend subpart SS to ensure that the monitoring requirements for CPMS specified in subpart SS are consistent with the proposed PS–17 and Procedure 4.

B. What specific changes are we proposing to subpart SS?

We are proposing several changes to the general monitoring requirements for control and recovery devices specified in § 63.996. The purpose of these changes is to clarify CPMS monitoring requirements and ensure that the requirements of subpart SS are consistent with the proposed PS–17 and Procedure 4.

Under § 63.996(c)(7), we are proposing to require that you satisfy the requirements of applicable performance specifications and QA procedures established under 40 CFR part 60. In addition, the amended subpart SS would require a CPMS cycle time of no longer than 15 minutes and at least four equally-spaced measurements for each valid hour of data for all CPMS. Any device that is used to perform an initial validation or an accuracy audit of a CPMS would have to have NIST-traceable accuracy and an accuracy hierarchy of at least three.

Section 63.996(c)(8), (9), and (10) of the amended subpart SS would specify requirements for temperature, pressure, and pH CPMS, respectively. Specific requirements would include the same minimum accuracies and data recording system resolution specified in the proposed PS–17 for the same type of CPMS. The proposed amendments to subpart SS would require owners or operators of affected CPMS to perform initial calibrations and initial validations of each CPMS. The initial

validation of a temperature or pressure CPMS could be performed by comparison to a calibrated measurement device or by any other method specified in applicable performance specifications for CPMS established under 40 CFR part 60, appendix B. The initial validation of a pH CPMS could be performed using a single point calibration or by any other method specified in applicable performance specifications for CPMS established under 40 CFR part 60, appendix B.

The proposed amendments to subpart SS also would require accuracy audits at the same frequencies that would be required by proposed Procedure 4: quarterly for temperature and pressure CPMS, and weekly for pH CPMS. Accuracy audits also would be required for temperature and pressure CPMS following any period of 24 hours throughout which the measured value (temperature or pressure) exceeded the manufacturer's recommended maximum operating value. Owners or operators of affected temperature or pressure CPMS could perform accuracy audits by the redundant sensor method, by comparison to a calibrated measurement device, or by any other accuracy audit method specified in applicable QA procedures established under 40 CFR part 60, appendix F. For pH CPMS, owners or operators could perform accuracy audits by the redundant sensor method, single point calibration method, or by any other accuracy audit method specified in applicable QA procedures established under 40 CFR part 60, appendix F. In addition, quarterly visual inspections would be required for any temperature or pressure CPMS not equipped with a redundant sensor; for pH CPMS not equipped with a redundant sensor, monthly visual inspections would be required.

VIII. Rationale for Selecting the Proposed Requirements of Performance Specification 17

A. What information did we use to develop PS–17?

To develop proposed PS–17, we considered the requirements of emission standards promulgated under 40 CFR parts 60, 61, and 63; State agency requirements for CPMS; manufacturer and vendor recommendations; and current operational and design practices in industry. To the extent possible, we also considered voluntary consensus standards for CPMS specifications and requirements, and this proposed rule lists several voluntary consensus standards that can be used as alternative methods for checking instrument sensor accuracies. Our review of voluntary consensus standards that apply to parameter monitoring devices is summarized in section XV.I of this document.

To obtain information on current practices and recommendations regarding CPMS design, installation and operation, we developed three separate surveys (hereafter referred to as the CPMS surveys). We sent one survey to nine State agencies, one survey to nine CPMS manufacturers and vendors, and the third survey to nine companies with facilities that currently are subject to emission standards. Although the responses to the CPMS survey were far from complete, the surveys did provide useful information on equipment accuracies, operation and maintenance procedures, and calibration frequencies. To the extent possible, we used the information presented in the CPMS survey responses in the selection of the requirements for PS–17.

B. How did we select the applicability criteria for PS–17?

To select the applicability criteria for PS–17, we considered the current parameter monitoring requirements that are now in effect under 40 CFR parts 60, 61, and 63. The General Provisions to parts 60 and 63 clearly establish the need for performance specifications for CPMS. Although the monitoring provisions of the part 61 General Provisions are not as detailed as the General Provisions requirements of parts 60 and 63, we believe that the need for performance specifications for part 61 is also warranted. The need for CPMS performance specifications is most evident for part 63 in that standards promulgated under part 63 establish enforceable operating limits for parameter monitoring systems. As stated in § 63.6(e)(iii), operation and maintenance requirements, which include parameter monitor operating limits, ''* * * are enforceable independent of emissions limitations or other requirements in relevant standards.'' As a result, there is a need for additional QA and QC for part 63 rules to ensure that the equipment used to comply with those operating limits is properly designed, installed, operated, and maintained.

We recognize that parameter monitoring data for sources subject to part 60 and 61 rules are not in themselves the basis for compliance determinations with the applicable rules, as is the case for sources subject to part 63 rules. Despite that, we believe that there still is a strong need for performance specifications to help ensure the quality of those monitoring system data. In addition, many of the sources regulated under parts 60 and 61 are also regulated under part 63. For these reasons, and to achieve consistency among the requirements for all of our emission standards, we have decided to require PS–17 to apply uniformly to all sources for which CPMS are required under parts 60, 61, or 63. It should be noted that the proposed requirements for CPMS would not be retroactive, but would apply only to the operation, use, and maintenance of CPMS following promulgation of the final PS–17 and Procedure 4 for CPMS.

C. How did we select the parameters that are addressed by PS–17?

The parameters that currently are addressed by proposed PS–17 (temperature, pressure, flow rate, pH, and conductivity) were selected primarily for two reasons: (1) These parameters are generally accepted as reliable indicators of the performance of many types of emission control devices, and (2) most part 60, 61, and 63 emission standards require continuous monitoring of one or more of these parameters. Temperature often is monitored as an indicator of the performance of incineration devices, such as thermal oxidizers, catalytic oxidizers, boilers, and process heaters used for the control of organic emissions. In addition, several part 60, 61, and 63 standards require the monitoring of condenser outlet temperature or carbon adsorber bed regeneration temperature. Monitoring of the temperature of scrubber liquid also is required by some part 60, 61, and 63 standards. Several existing standards require monitoring of pressure drop across control devices, such as wet scrubbers, mist eliminators, and baghouses. Several rules also require CPMS for monitoring scrubber liquid supply pressure. A number of part 60, 61, and 63 standards require monitoring of gas or liquid flow rates. Gas flow rate generally is an indicator of residence time in control devices. The gas and liquid flow rates through a wet scrubber are used to determine the liquid-to-gas ratio, and several promulgated rules require wet scrubber liquid flow rate monitoring. Many standards require mass flow CPMS for monitoring process feed or production rates. In addition, some existing standards require monitoring of carbon adsorber regeneration steam flow rate. Scrubber liquid pH is an important indicator of the performance of acid gas control. Finally, monitoring wet scrubber liquid conductivity provides a good indication of the solids content of the scrubber liquid and the need for blowdown. We recognize that other parameters also are

used to indicate control device performance or to monitor process operations, but we believed it less critical to address those other parameters at this time. However, we intend to address additional parameters in PS–17 as the need arises and resources permit.

D. Why did we include requirements for flow CPMS in PS–17 if PS–6 already specifies requirements for flow sensors?

The requirements of PS–6 (40 CFR part 60, appendix B) apply specifically to continuous emission rate monitoring systems (CERMS), which generally include one or more sensors to measure exhaust gas flow rate in addition to the sensor for measuring the concentration of the target pollutant. The proposed PS–17 would have much broader application, such as natural gas flow, steam flow through a carbon bed adsorber, and exhaust gas flow through an emission control device. The proposed PS–17 also would apply to liquid flow and mass flow rate monitoring. In addition to applicability, there are other significant differences in the requirements for flow rate sensors under PS–6 and flow CPMS under the proposed PS–17. The PS–6 specifies CD and RA test requirements for the flow sensor component of CERMS and generally references PS–2 for other requirements. Specifying CD requirements for CERMS in PS–6 is appropriate because PS–6 is meant to apply to monitoring systems that are used for calculating emission rates for determining compliance with emission limits or caps. The proposed PS–17 would have no provisions for checking CD because it is intended primarily for monitoring indicators of control device performance and process parameters rather than emission rates. Consequently, we believe that less rigorous performance assessments are appropriate for CPMS that would be subject to PS–17. Finally, unlike PS–6, PS–17 was developed specifically for CPMS. As a result, we were able to incorporate into the proposed PS–17 more specific design, installation, and evaluation criteria than are provided in PS–6.

E. How did we select the equipment requirements?

In selecting the equipment requirements for PS–17, our intent was to specify criteria that would allow flexibility in the equipment that owners and operators of affected CPMS choose, without compromising the quality of data produced by that equipment. The proposed PS–17 would specify two types of equipment: (1) The components that comprise a CPMS, and (2) the equipment needed to validate that CPMS.

1. CPMS Equipment Requirements

For CPMS components, we selected equipment criteria for overall system accuracy and compatibility. The equipment requirements also would address the measurement range and resolution of the data recording system. The criterion for accuracy would simply be that the equipment must have a demonstrable capability of satisfying the accuracy requirement for the initial validation. We considered, but decided against, specifying sensor design criteria. By not specifying design criteria, we incorporated a considerable amount of flexibility into proposed PS–17 by allowing affected owners and operators to select any equipment, provided they can demonstrate that the CPMS meets the accuracy requirements for the initial validation. However, we do identify voluntary consensus standards that can be used as guidelines for selecting specific types of sensors.

The proposed PS–17 would require a resolution of one-half the accuracy requirement or better to ensure that the accuracy of the CPMS can be calculated to at least the minimum number of significant figures for the data accuracy assessment to be meaningful. For example, if the data recorder of a pressure CPMS had a resolution of 0.24 kPa (1.0 in. wc), it would not be possible to determine that the CPMS is satisfying the required accuracy of 0.12 kPa (0.5 in. wc). Selecting a resolution of one-half the required accuracy ensures that measurements made during validation checks can be readily compared to the accuracy requirement. Furthermore, based on our review of equipment vendor catalogues, most CPMS on the market easily satisfy this minimum resolution. The requirements for measurement range were selected to ensure that the CPMS can detect and record measurements beyond the normal operating range. We believe that requiring a range of at least ±20 percent beyond the normal operating range is reasonable and the minimum measurement range needed to encompass most excursions. Owners and operators may want to select equipment with even wider ranges if it is likely that measurements beyond ±20 percent of the normal operating range will occur. We made an exception to the measurement range requirement for pH CPMS by requiring the range of pH CPMS data recorders to cover the entire pH scale of 0 to 14 pH units. Our review of vendor literature indicates that, with few exceptions, pH CPMS are designed to record over the entire pH scale.

Finally, the proposed PS–17 would require the electronic components of any CPMS to be internally compatible. We believe that internal compatibility is essential for ensuring the accuracy and durability of a CPMS.

2. CPMS Validation Equipment Requirements

Two types of equipment would be needed to perform the initial validation check of a CPMS: (1) A device that is used to directly check the accuracy of the CPMS, and (2) work platforms, test ports, fittings, valves, and other equipment that are needed to conduct the initial validation. For the devices used to check CPMS accuracy, we would require NIST-traceable accuracy and an accuracy hierarchy of at least three. We would require that the accuracy of the device be NIST-traceable as a way of ensuring the accuracy of the test device. We incorporated into PS–17 two exceptions to the NIST-traceability requirement. First, a mercury-in-glass or water-in-glass U-tube manometer could be used instead of a calibrated pressure measurement device with NIST-traceable accuracy when validating a pressure CPMS or a flow CPMS that uses a differential pressure flow meter. The reason for making this exception is that the accuracy of such manometers can be confirmed onsite by a simple measurement of the manometer scale. We also included an exception to the NIST-traceable accuracy and accuracy hierarchy for containers used to validate flow CPMS by either the volumetric or gravimetric methods. In such cases, the volume of the container could be determined onsite with sufficient accuracy to provide a reliable assessment of flow CPMS accuracy.

In selecting the accuracy hierarchy for validation devices, we reviewed the requirements for existing standards and manufacturers' recommendations. Several voluntary consensus standards, such as ISA–S37.3–1982 (R1995) and ISA–S37.6–1982 (R1995), which apply to pressure transducers, require that the testing or calibration device have an accuracy at least five times that of the device that is to be tested (i.e., an accuracy hierarchy of five). Other standards developed by the American Society of Mechanical Engineers (ASME) and Military Specifications (MIL–SPEC) require an accuracy of four times that of the equipment being tested, which establishes an accuracy hierarchy of four. At least one equipment owner's manual specifies that testing devices have an accuracy of at least three times that of the

equipment being tested. We believe that requiring an accuracy hierarchy of three is adequate for the purposes of PS–17. Furthermore, a review of manufacturers' literature indicates that calibration devices with accuracies that would satisfy the accuracy hierarchy of the proposed PS–17 are readily available at reasonable cost.

We decided to require owners and operators of affected CPMS to install work platforms, test ports, and other equipment needed for the initial validation check to ensure that the validation check and ongoing accuracy audits can be conducted properly. It is not necessary that a permanent work platform be installed.

F. How did we select the installation and location requirements?

In the proposed PS–17, we would require owners and operators of affected CPMS to locate CPMS sensors where they will provide measurements representative of the parameter that is being monitored. The objective of this requirement is to help ensure that affected CPMS produce quality data. The location and installation requirements specified in the proposed PS–17 are generally consistent with the requirements of rules promulgated under parts 60, 61, and 63.

G. How did we select the initial QA measures?

The initial QA measures specified in the proposed PS–17 include an electronic calibration and an initial validation check. The initial calibration generally is included as part of the manufacturer's recommended procedures for the installation and startup of CPMS; we would require these initial calibrations as a means of further ensuring that the CPMS is placed into operation correctly. We consider the initial validation necessary for demonstrating that the CPMS is providing quality data from the outset.

H. How did we select the methods for performing the initial validation check?

In selecting the methods for validating CPMS, we considered existing voluntary consensus standards, State agency requirements, manufacturers' and vendors' recommendations, and practices used by industry. We tried to identify all methods that would provide a reliable measure of CPMS accuracy to allow owners and operators of affected CPMS as much flexibility as possible in choosing how to comply with PS–17. In general, the validation methods specified in the proposed PS–17 involve comparison of measurements made by the subject CPMS to measurements made using a calibrated device that measures or simulates the same parameter that is measured by the subject CPMS. A primary objective in selecting these methods is to identify procedures that assess the overall accuracy of the CPMS while assuring the quality of data that are used to assess compliance. The initial validation methods that rely on simulating sensor output actually measure how well the rest of the system responds to a simulated sensor signal and do not check the accuracy of the sensor itself. However, we believe that these methods are reliable because the sensors used in new CPMS are factory-calibrated and, therefore, should be accurate.

Two general consensus standards were located, but they were rejected for use with the proposed PS–17 because they are general references for safe practices while working with electronics. The two standards are: (1) ANSI/ISA S82.02.01–1999, ''Electric and Electronic Test, Measuring, Controlling, and Related Equipment: General Requirements''; and (2) ANSI/ISA S82.03–1988, ''Safety Standard for Electrical and Electronic Test, Measuring, Controlling, and Related Equipment (Electrical and Electronic Process Measurement and Control Equipment).''

1. Temperature CPMS Validation Methods

For validating temperature CPMS, the proposed PS–17 would specify two methods: (1) Comparison to a calibrated temperature measurement device, and (2) temperature simulation using a calibrated simulation device. The first method is based on ASTM E 220–07e1, ''Standard Test Methods for Calibration of Thermocouples by Comparison Techniques'' (incorporated by reference—see § 60.17). Although the ASTM E220–07e1 was developed for thermocouples, it should be applicable to other types of temperature measurement devices. Handheld and otherwise portable temperature measurement devices with NIST-traceable accuracy are available from many equipment manufacturers and suppliers.

The second validation method for temperature CPMS would involve the use of calibrated temperature simulators. Although this simulation method is not based on an existing standard method, calibrated simulators with NIST-traceable accuracy are readily available and often are used to check the accuracy of thermocouples and RTD's. Therefore, we believe this method is appropriate for the initial validation of thermocouple-based or RTD-based temperature CPMS, as well as for any other type of CPMS for which the sensor response can be simulated.

Two other consensus standards relating to temperature measurement were located, but they were both rejected for use with the proposed PS–17. The first standard, ASTM E839–05, ''Standard Test Methods for Sheathed Thermocouples and Sheathed Thermocouple Material'' specifies tests that pertain to material quality and instrument assembly rather than direct indicators of instrument performance; many of the tests specified are either destructive or impractical to perform at the installation site. The second standard, ASTM E1350–07, ''Standard Guide for Testing Sheathed Thermocouples, Thermocouple assemblies, and Connecting Wires Prior to, and After Installation or Service'' specifies tests to determine if specific components of thermocouple assembly were damaged during storage, shipment, or installation, but the tests specified do not provide a measure of accuracy.

2. Pressure CPMS Validation Methods

For validating pressure CPMS, the proposed PS–17 would specify three methods for performing the initial validation check. The first method would involve comparison to a calibrated pressure measurement device. This method is based on the same principle as is the temperature CPMS comparison method. Handheld and portable pressure measurement devices with NIST-traceable accuracy are available from many equipment suppliers. Therefore, we believe this method is appropriate for validating pressure CPMS. The other two pressure CPMS validation methods in the proposed PS–17 are similar to the simulation method for validating temperature CPMS and are based on the same principle. The difference between the temperature simulation method and the two pressure simulation methods is that the latter generate pressures instead of electronic signals. One pressure simulation method uses a calibrated pressure source with NIST-traceable accuracy. These devices can simulate a range of pressures to high degrees of accuracy. The other pressure simulation method allows the use of any pressure source. The pressure applied by the pressure source is measured concurrently by the subject CPMS and a separate calibrated pressure measurement device. We believe these methods also can provide reliable assessments of pressure CPMS accuracy.

Two other voluntary consensus standards relating to pressure

measurement were located, but they were both rejected for use with the proposed PS–17. Both standards (ISA–S37.6–1982 (R1995), ''Specifications and Tests for Potentiometric Pressure Transducers'' and ISA–S37.3–1982 (R1995), ''Specifications and Tests for Strain Gage Pressure Transducers'') provide general calibration procedures, but neither specifies criteria for evaluating performance.

3. Flow CPMS Validation Methods

For validating flow CPMS, the proposed PS–17 would specify seven methods. The volumetric and gravimetric methods are based on voluntary consensus standards and could be used to validate liquid flow CPMS. Both methods are described in ISA RP 16.6–1961, ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters),'' and ISA RP 31.1–1977, ''Specification, Installation, and Calibration of Turbine Flow Meters'' (incorporated by reference—see § 60.17). The gravimetric method also is described in ANSI/ASME MFC–9M–1988, ''Measurement of Liquid Flow in Closed Conduits by Weighing Method,'' and ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters'' (incorporated by reference—see § 60.17). These methods are relatively simple to perform provided that the process flow that is monitored can be diverted easily to a suitable container for measurement. The gravimetric method also could be used to validate liquid mass flow or solid mass flow CPMS.

The differential pressure measurement and pressure flow source simulation methods for validating liquid or gas flow CPMS would apply to flow CPMS that use differential pressure meters. These methods would require accurate pressure measurements and are based on the same principles as are the methods used for validating pressure CPMS. The primary difference between the pressure CPMS methods and these flow CPMS methods is that the flow CPMS would require the calculation of flow rates based on the pressure differentials measured. The flow calculation methods are described in ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi'' (incorporated by reference—see § 60.17). The calibrated pressure measurement devices and calibrated pressure sources with NIST-traceable accuracy needed for these validation methods are readily available. Therefore, we believe these methods are appropriate for validating flow CPMS accuracy.

The electronic simulation method is identical to the simulation methods described in this section for temperature and pressure CPMS. This method would apply only to flow CPMS that use flow sensors that generate electronic signals, which can be simulated. Examples of flow CPMS that can be validated using this method are CPMS that use turbine meters or vortex shedding flow meters.

To validate flow CPMS that measure gas flow, PS–17 also would specify the RA test using Reference Method 2, 2A, 2B, 2C, 2D, or 2F (40 CFR part 60, appendix A–1), or 2G (40 CFR part 60, appendix A–2), as appropriate. The RA test for flow CPMS is similar to the RA test procedures specified in other performance specifications. We selected this method because it may be the method of choice for facilities that perform their own emissions testing, have the emissions test equipment, and are familiar with the procedures of the reference methods for determining stack gas velocity and volumetric flow rate.

Finally, the proposed PS–17 would specify the material weight comparison method for validating solid mass flow CPMS. This method would apply only to CPMS that incorporate a belt conveyor, weigh scale, and totalizer. The method is based on the Belt-Conveyor Scale Systems Method, which is described in NIST Handbook 44—2002 Edition: Specifications, Tolerances, And Other Technical Requirements for Weighing and Measuring Devices (incorporated by reference—see § 60.17), as adopted by the 86th National Conference on Weights and Measures 2001. We selected this method because it is relatively simple and is the only method we could identify that applies specifically to belt conveyors systems, which are often used to monitor process raw material feed rates and/or production rates.

Five other voluntary consensus standards relating to flow measurement were located, but they were rejected for use with the proposed PS–17. The first standard, ASTM D 3195–90 (2004), ''Standard Practice for Rotameter Calibration,'' specifies calibration procedures for rotameters used to determine air sample volumes, but applies only to air at ambient temperature and pressure. The second standard, ANSI/ASME MFC–8M–2001, ''Fluid Flow in Closed Conduits—Connections for Pressure Signal Transmissions between Primary and Secondary Devices,'' only applies to installations where very high accuracy is required. The third standard, ASTM D 3464–96 (2007), ''Standard Test Method for Average Velocity in a Duct Using a Thermal Anemometer,'' refers to another ASTM standard for calibration procedures. The fourth standard, ASTM D5540–94a (2003), ''Standard Practice for Flow Control and Temperature Control for On-Line Water Sampling and Analysis,'' details the sampling of the stream, but provides no information on the calibration of the flow. The fifth standard, ''Process Monitors in the Portland Cement Industry'' (published by the EPA) notes that nuclear weigh belts have 0.5 percent operational accuracy, while gravimetric and impaction plate weigh belts have 1 percent accuracy; these accuracies may not hold true for all industries or applications.

4. pH CPMS Validation Methods

For validating pH CPMS, the proposed PS–17 would specify two methods. The first method would entail comparison to a calibrated pH meter and is similar to the comparison methods specified for temperature and pressure CPMS. The second method would be a single point calibration method using a standard buffer solution. We selected these methods because they are relatively simple and are in common use by many facilities to calibrate pH meters.

5. Conductivity CPMS Validation Methods

The proposed PS–17 would specify two methods for validation conductivity CPMS: Comparison to a calibrated conductivity meter and single point calibration. These methods are essentially the same as those used for validating pH CPMS, the only differences being the types of calibrated instrument and standard solutions used. We selected these methods because both are reliable, yet relatively simple to perform.

Four other voluntary consensus standards relating to conductivity measurement were located, but they were rejected for use with the proposed PS–17. The first and second standards, ASTM E1511–93 (2005), ''Standard Practice for Testing Conductivity Detectors Used in Liquid and Ion Chromatography,'' and ASTM D3370–95a (2003)e1, ''Standard Practices for Sampling Water from Closed Conduits,'' detail the mixing of conductivity standards, so they are good calibration methods, but far more time-consuming than using readily available pre-mixed conductivity standards as specified in PS–17. The third standard, ASTM D6504–07, ''Standard Practice for On-Line Determination of Cation Conductivity in High Purity Water,'' references other standards for

calibration procedures. The fourth standard, ASTM D3864–06, ''Standard Guide for Continual On-Line Monitoring Systems for Water Analysis,'' contains statistical methods that are more rigorous than needed.

I. How did we select the performance criteria for the initial validation check?

In selecting the performance criteria for the initial validation checks of CPMS, we considered the accuracies required by existing rules and the capabilities of off-the-shelf equipment available from the manufacturers and vendors of CPMS components. Based on our review of CPMS manufacturer and vendor literature, equipment that satisfies the accuracy requirements specified in this proposed rule is readily available.

Existing rules that require the use of CPMS specify a range of instrument or system accuracies. For some of the affected source categories, the proposed PS–17 would specify a higher minimum accuracy than is specified in the applicable subpart. However, this proposed rule would not increase the stringency of the underlying emission standards in such cases. Instead, the proposed PS–17 would improve the accuracy and reliability of, and reduce the uncertainty in, data used to demonstrate compliance with those emission standards.

1. Temperature CPMS Accuracy

Several rules promulgated under parts 60, 61, and 63 specify an accuracy requirement for temperature CPMS. Most of these rules specify temperature accuracy in units of temperature (°C) and as a percentage of the measured temperature. For example, 40 CFR part 60, subpart EE, requires thermal incinerator temperature CPMS to have an accuracy of 2.5 °C or 0.75 percent. Although there is a wide range of accuracies specified in these rules, the accuracy required for temperature CPMS associated with high temperature applications, such as thermal oxidizers or boilers, generally range from 0.75 to 1.0 percent or from 0.5 °C to 2.5 °C (0.9 °F to 4.5 °F). For lower temperature applications, such as wet scrubbers, the specified percent accuracies often are not as stringent; that is, accuracies are specified as a higher percentage of the measured temperature. This distinction between low and high temperature applications is consistent with ANSI specifications for thermocouples. The minimum standard accuracies for ANSI Type J and K thermocouples in non-cryogenic applications are °0.75 percent or ±2.2 °C (±4 °F), whichever is greater; for cryogenic applications, the minimum standard accuracies are ±2.0 percent or ±2.2 °C (±4 °F), whichever is greater. The reason for specifying a higher percentage accuracy for lower temperature ranges is to offset the fact that the accuracy percentage applies to a lower value. In selecting the temperature accuracy requirements for the proposed PS–17, we decided to incorporate a similar distinction between higher temperatures (non-cryogenic applications) and lower temperatures (cryogenic applications). Our selection of temperature accuracies of 2.8 °C (5 °F) or °1 percent for non-cryogenic applications, and 2.8 °C (5 °F) or ±2.5 percent for cryogenic applications is consistent with the required accuracies for most standards, and we believe that the accuracies specified in proposed PS–17 are adequate for ensuring good quality data. In addition, our review of vendor literature indicates that temperature CPMS that satisfy these accuracy requirements are readily available at reasonable costs.

2. Pressure CPMS Accuracy

Among the part 60, 61, and 63 rules that require pressure monitoring and also specify a minimum accuracy, the accuracy specified generally is either 0.25 to 0.5 kPa (1 to 2 in. wc) or 5 percent for pressure drop, and 5 to 15 percent for liquid supply pressure. These accuracies are easily achievable because most pressure transducers are accurate to 0.25 to 1.0 percent, and all but the lowest grade (Grade D) of ANSI-rated pressure gauges have accuracies better than 5 percent. For the proposed PS–17, we selected an accuracy requirement of 0.12 kPa (0.5 in. wc) or ±5 percent, whichever is greater. The 0.12 kPa criterion would apply only in low pressure applications. Some existing rules require pressure CPMS to have accuracies of 0.24 kPa (1.0 in. wc) or better. However, those accuracies generally do not apply to pressure CPMS in low pressure applications, where the 0.12 kPa accuracy would apply. We believe this level of accuracy specified for pressure CPMS is appropriate, considering that some control devices operate with pressure drops of less than 1.2 kPa (5 in. wc). For applications with pressures in excess of 2.5 kPa (10 in. wc), the 5 percent accuracy criterion would apply. This criterion is consistent with most rules that specify pressure device accuracies, and CPMS that are capable of achieving this accuracy are readily available.

3. Flow CPMS Accuracy

Rules promulgated under parts 60, 61, and 63 that require flow rate monitoring all specify flow rate accuracy in terms of percent. For liquid flow rate measurement, these rules generally require accuracies of ±5 percent, and rules that require steam flow rate monitoring generally require an accuracy of ±10 percent or better. We believe that these accuracies are reasonable, and we have incorporated them into the proposed PS–17. According to our review of vendor literature, flow CPMS that can achieve these accuracies are readily available.

Unlike rules that address temperature and pressure monitoring, most existing rules that require continuous flow rate monitoring do not specify flow rate monitoring device accuracies in units of flow rate. However, there is an advantage to specifying accuracy in units of measurement as well as a percent; in low flow rate applications, an accuracy criterion based solely on percent can result in an unreasonably stringent accuracy requirement. For that reason, we have incorporated into the proposed PS–17 accuracy criteria as a percent of flow rate and in units of flow rate. The exceptions are the accuracy criteria for liquid mass flow rate and solid mass flow rate, both of which would be specified only as a percentage (i.e., ±5 percent). We concluded that it would not be reasonable to specify accuracy criteria for mass flow in units of mass flow because of the wide range of flow rates that could be monitored (e.g., carbon injection rate vs. rotary kiln raw material feed rate). We based the 5 percent accuracy criterion primarily on vendor literature.

Recognizing the differences in the relative magnitudes and the commonly used units of flow rate measurement for liquids and gases, we have specified in the proposed PS–17 separate accuracy criteria for liquid and gas flow rates. For liquid flow rate CPMS, which typically are associated with wet scrubber operation, the minimum accuracy would be 1.9 L/min (0.5 gal/min) or ±5 percent, whichever is greater. For gas flow rate CPMS, which often are used to monitor stack gas flow rate or natural gas fuel flow rate, PS–17 would require a minimum accuracy of 280 L/min (10 ft^3/min) or ±5 percent, whichever is greater.

The proposed PS–17 also would specify a relative accuracy criterion for owners or operators who choose to validate a gas flow rate CPMS using the RA test, which is specified in section 8.6(6) of PS–17. In such cases, owners or operators would have to demonstrate that the affected CPMS achieves a relative accuracy of 20 percent or better. The relative accuracy criterion of 20 percent was selected because that value

is consistent with the relative accuracy required by most performance specifications promulgated under 40 CFR part 60.

4. pH CPMS Accuracy

Although several subparts of 40 CFR parts 60, 61, and 63 require pH monitoring, the only rule to specify an accuracy requirement for pH CPMS is 40 CFR part 61, subpart E; the accuracy required by that rule for pH measurement devices is ±10 percent. Our review of manufacturer and vendor literature indicates that pH CPMS generally have accuracies of ±0.01 to ±0.15 pH units. Based largely on the vendor literature, we decided to require pH CPMS to have accuracies of 0.2 pH units or better. An accuracy of ±0.2 pH units should allow most facilities that currently monitor pH to continue using their pH CPMS, provided the CPMS satisfies the other equipment criteria specified in PS–17.

5. Conductivity CPMS Accuracy

Because none of the part 60, 61, or 63 rules specify accuracy requirements for conductivity CPMS, we reviewed manufacturer and vendor literature, which indicates that conductivity CPMS generally have accuracies of ±1 to ±2 percent. Conductivity measurements range from 0.1 to 200,000 micromhos per centimeter (µmhos/cm) (0.1 to 200,000 microsiemens per centimeter (µS/cm)) at 25 °C (77 °F). To account for this large range and the accuracies that can be met by most available instruments, we decided to require conductivity CPMS to have accuracies of ±5 percent. An accuracy requirement of ±5 percent should allow most facilities that currently monitor conductivity to continue using their conductivity CPMS, provided their CPMS satisfies the other equipment criteria specified in PS–17.

J. How did we select the recordkeeping requirements?

The proposed PS–17 would require owners or operators of affected CPMS to maintain records that identify their CPMS and document performance evaluations, and to retain those records for a period of at least 5 years. These requirements are consistent with the recordkeeping requirements specified in § 63.10 of the General Provisions to part 63.

IX. Rationale for Selecting the Proposed Requirements of Procedure 4

A. What information did we use to develop Procedure 4?

The information used to develop Procedure 4 is essentially the same information used to develop PS–17 and includes information from existing standards, manufacturer and vendor recommendations, and current practices in industry. Section VIII.A of this document provides additional details on how this information was obtained.

B. Why did we decide to apply Procedure 4 to all CPMS that are subject to PS–17?

Rules promulgated under part 63 establish enforceable operating limits for parameter monitoring systems. As is the case for CEMS that are used to demonstrate continuous compliance and are subject to Procedure 1 of 40 CFR part 60, appendix F, there is a need for ongoing QA requirements to ensure that the data generated by CPMS are reliable and accurate. Although the data generated by CPMS that are required under parts 60 and 61 are not used directly to demonstrate compliance, we believe there still is a need to ensure the quality of those data is maintained. For that reason, we believe it is warranted to require that all part 60, 61, and 63 sources that are required to install and operate CPMS be subject to PS–17 and Procedure 4.

C. How did we select the accuracy audit procedures?

With the exception of audit procedures for CPMS with redundant sensors, the accuracy audit procedures specified in the proposed Procedure 4 would essentially be the same procedures that could be used to perform the initial validation checks that would be required by PS–17. For CPMS with redundant sensors, we selected the accuracy audit procedure of comparing the values of the parameter measured by the two sensors because that method currently is used by many industrial facilities to ensure the accuracy of their parameter monitoring systems. The most significant distinction between the audit procedures specified in the proposed Procedure 4 and the initial validation procedures specified in the proposed PS–17 is that the accuracy audit procedures address sensor accuracy, whereas some of the initial validation procedures do not address sensor accuracy. When CPMS are first installed, we assume sensors to have been manufactured and factory-calibrated under stringent QC requirements. Consequently, the proposed PS–17 does not require the initial validation check procedures to include sensor accuracy assessments. However, after a CPMS has been placed into operation, and the sensor is subjected to process environments, loss of calibration can occur quickly. Recognizing that possibility, we have incorporated a check of sensor accuracy into the accuracy audit procedures of the proposed Procedure 4. Some audit procedures assess the accuracy of the overall CPMS, including the sensor. For those procedures, a separate accuracy assessment of the sensor would not be necessary. For those audit procedures that do not assess the accuracy of the entire CPMS, we have incorporated into the proposed Procedure 4 a separate accuracy check of the CPMS sensor. These sensor accuracy assessments are based on voluntary consensus standards.

D. How did we select the accuracy audit frequencies?

To determine the appropriate audit frequencies, we reviewed the requirements of existing rules, the procedures practiced by industry, and vendor recommendations. Most of the rules promulgated under 40 CFR parts 60, 61, and 63 do not specify calibration or audit frequencies. Those rules that do specify accuracy audit frequencies usually require annual calibrations; a few rules require semi-annual or quarterly calibrations of CPMS. The information provided by industry in its responses to the CPMS survey indicated that the typical calibration frequency for most CPMS is once per year. Two facilities perform calibrations on thermocouples semiannually. One of those facilities also checks pressure meter calibration semiannually. Another facility reported that it checks and calibrates its pH CPMS on a weekly basis. With the exception of pH CPMS, Procedure 4 would require quarterly accuracy audits. This frequency is comparable to the audit frequencies required for CEMS specified in many part 60, 61, and 63 standards, and we believe that quarterly accuracy assessments are warranted for CPMS to ensure that monitoring data are accurate. The available information indicates that pH sensors require more frequent calibration than do other types of sensors, and weekly calibration of pH CPMS is common. Therefore, we believe that weekly accuracy audits are warranted for pH CPMS.

E. How did we select the performance criteria for accuracy audits?

The performance criteria for the accuracy audits specified in Procedure 4 are identical to those specified for the initial validation check required by PS–17. The rationale for the validation check accuracy requirements is described in section VIII.H of this document.

F. How did we select the recordkeeping requirements?

The proposed Procedure 4 would require owners or operators of affected CPMS to maintain records of all accuracy audits and corrective actions taken to return the CPMS to normal operation and to retain those records for a period of at least 5 years. These requirements are consistent with the recordkeeping requirements specified in § 63.10 of the General Provisions to part 63.

X. Rationale for Selecting the Proposed Amendments to Procedure 1

A. How did we select the amendments to Procedure 1 that apply to PS–9?

Before drafting the proposed amendments to Procedure 1 (40 CFR part 60, appendix F), we reviewed the procedure and PS–9 (40 CFR part 60, appendix B) to identify those sections of Procedure 1 that did not address, or were inconsistent with, the specific requirements of PS–9. We identified three such sections of Procedure 1: section 1, Applicability and Principle; section 4, CD Assessment; and section 5, Data Accuracy Assessment. The applicability section of Procedure 1 applies to CEMS that are used for monitoring a single pollutant or diluent. The section does not address CEMS that can be used for monitoring more than one pollutant, such as those that are subject to PS–9. Therefore, it is necessary to amend section 1 to clarify that Procedure 1 would apply to single and multiple pollutant CEMS.

Section 4.1 of Procedure 1 requires owners or operators of affected CEMS to check the daily CD at two concentration values. In the case of a single pollutant CEMS, there is no ambiguity in this requirement. However, for multiple pollutant CEMS, Procedure 1 is unclear as to which pollutant can or must be used for the daily CD check. We are proposing to amend Procedure 1 to allow owners and operators of affected CEMS to perform the CD check using any of the target pollutants specified in the applicable subpart.

Section 5 of Procedure 1, which addresses data accuracy audits, is inconsistent with the requirements of PS–9. Procedure 1 requires RATA's at least once every four calendar quarters; the accuracy audit requirement for the other three calendar quarters can be satisfied by performing either RATA's, CGA's, or RAA's. However, PS–9 requires quarterly CGA's and does not address RATA's or RAA's. To resolve this inconsistency in Procedure 1, these proposed amendments would add section 5.1.5, which would clarify that owners and operators of CEMS subject to PS–9 are not required to perform RATA's; the accuracy audit requirement would have to be satisfied by performing quarterly CGA's. The CGA's would have to be conducted at two points for each target pollutant specified in the applicable subpart. Finally, the proposed new section would clarify that these quarterly CGA's satisfy the quarterly CGA requirement of PS–9.

B. How did we select the amendments to Procedure 1 that apply to PS–15?

After reviewing Procedure 1, we identified three sections that either were inconsistent with the requirements of PS–15 (40 CFR part 60, appendix B) or did not address the unique characteristics of CEMS that are subject to PS–15. The sections identified were section 1, Applicability and Principle; section 4, CD Assessment; and section 5, Data Accuracy Assessment. As explained in the section X.A of this document, these proposed amendments to section 1 of Procedure 1 would clarify that the procedure also applies to CEMS that are used for monitoring more than one pollutant or diluent. To address the CD assessment of CEMS subject to PS–15, we are proposing to add three paragraphs to section 4 of Procedure 1. Unlike other types of CEMS, extractive FTIR CEMS are not generally checked for CD. Instead, PS–15 specifies other procedures for checking these instruments on a daily basis. In these proposed amendments we are adding section 4.1.2 to Procedure 1 to specify the proper procedures for checking FTIR CEMS performance that are comparable to the CD checks of other types of CEMS. These daily assessments serve the same purpose as do the daily CD check requirements for other types of CEMS. We also recognize that the term ''excessive CD,'' as defined in section 4.3 of Procedure 1, needs to be clarified for CEMS subject to PS–15. To address this need, we are proposed to add section 4.3.3 to Procedure 1. Section 4.3.3 would clarify how excessive CD is defined for CEMS subject to PS–15 and also would specify when such CEMS are out of control.

Section 4.4 of Procedure 1 addresses CEMS data reporting and recordkeeping. Because of the unique data storage requirements for PS–15, we believe adding another paragraph to section 4.4 of Procedure 1 is warranted. The new paragraph in section 4.4 essentially would reference the data storage requirements specified in PS–15.

The Procedure 1 specifies three methods for assessing data accuracy: RATA's, CGA's, and RAA's. On the other hand, PS–15 specifies a different set of accuracy audit procedures: audit sample checks, audit spectra checks, and an independent accuracy assessment performed by us. Consequently, there is an obvious need to amend Procedure 1 if we were to extend the applicability of Procedure 1 to include CEMS subject to PS–15. To resolve this inconsistency, we would add section 5.1.6 to Procedure 1. We modeled section 5.1.6 after the accuracy audit requirements that were already incorporated in Procedure 1. The most rigorous of the accuracy assessment methods specified in PS–15 is the audit sample check. In this respect, the audit sample check is analogous to the RATA. For consistency with the requirements for other types of CEMS, we would require audit sample checks for CEMS subject to PS–15 to be performed at least once every four calendar quarters, as is the case for RATA's for other types of CEMS. For the other three calendar quarters, we would allow owners and operators of CEMS subject to PS–15 to perform any of the three audit procedures specified in PS–15 (audit sample check, audit spectra check, and submitting spectra for independent analysis), with one exception. The audit spectra check assesses the accuracy of the analytical measurement but not the sampling system measurement. Therefore, we would allow owners and operators of CEMS subject to PS–15 to use the audit spectra check only once every four quarters to satisfy the accuracy audit requirement of Procedure 1. Finally, proposed section 5.1.6 of Procedure 1 would clarify that the quarterly accuracy assessments required by Procedure 1 satisfy the quarterly or semiannual QA/QC checks required by PS–15.

XI. Rationale for Selecting the Proposed Amendments to the General Provisions to Parts 60, 61, and 63

A. How did we select the amendments to the General Provisions to parts 60, 61, and 63?

The proposed PS–17 and Procedure 4 would specify CPMS accuracies, audit frequencies, and other requirements that differ from some of the requirements for CPMS specified in applicable subparts to parts 60, 61, and 63. Eliminating the resulting discrepancies would require either amending each of the applicable subparts or amending the General Provisions to those parts. We concluded that amending the General Provisions would be the preferred approach for avoiding such conflicts or discrepancies.

After reviewing the General Provisions to parts 60 and 61 that apply

specifically to monitoring (i.e., §§ 60.13 and 61.14), we decided to amend only the applicability sections of those parts. By stating that, upon promulgation, performance specifications and QA procedures for CPMS (i.e., the proposed PS–17 and Procedure 4) apply to CPMS instead of requirements in the applicable subparts to parts 60 and 61, we believe we can eliminate any discrepancies between the applicable subparts and the proposed PS–17 and Procedure 4. We concluded that this proposed rule would not conflict with the monitoring requirements specified in subsequent sections of the General Provisions to parts 60 and 61, and further amendments to those General Provisions were unnecessary.

With respect to the General Provisions to part 63, we identified several inconsistencies between the requirements specified in § 63.8 and the requirements in the proposed PS–17 and Procedure 4. In this action, we are proposing several changes to § 63.8 to eliminate those inconsistencies.

We believe that the installation requirement of § 63.8(c)(2) should apply to all CMS, and not simply CEMS; we are proposing to amend § 63.8(c)(2) accordingly. We believe that the requirement for continuous operation specified in § 63.8(c)(4) should apply to all CMS, and not just CEMS and COMS as now specified in the General Provisions.

Section 63.8(c)(4) addresses cycle time for CEMS and COMS, but not for CPMS. We believe it is necessary to address CPMS cycle time also. Consequently, we are proposing to add § 63.8(c)(4)(iii) for that purpose.

The last three sentences of § 63.8(c)(6) address calibration and daily checks of CPMS. We are proposing to delete these provisions because the proposed PS–17 and Procedure 4 would address CPMS operation and maintenance more thoroughly.

Section 63.8(c)(7) of the General Provisions defines CMS that are out of control in terms of excessive calibration drift checks and periodic audits that apply to CEMS and COMS, but not to CPMS. Consequently, we are proposing to amend § 63.8(c)(7) to clarify that, for CPMS, out of control is defined in terms of failed accuracy audits only. The proposed amendments would clarify in § 63.8(c)(7)(i)(A) that out of control, when defined in terms of excessive calibration drift, applies to CEMS and COMS and not CPMS. We also would revise § 63.8(c)(7)(i)(B), which relates out of control to failed performance test audits, relative accuracy audits, relative accuracy test audits, and linearity test audits that apply to CEMS and COMS, but not to CPMS. We propose adding § 63.8(c)(7)(i)(D) to clarify that a CPMS is out of control when it fails an accuracy audit.

Quality control programs for CMS are addressed in § 63.8(d). We are proposing to revise § 63.8(d)(2)(ii) to clarify that the requirement for written protocols for calibration drift determinations and adjustments would apply only to applicable CMS; that is, the requirement would apply to CEMS and COMS, but not to CPMS because calibration drift is not relevant to many CPMS.

Finally, we are proposing changes to § 63.8(e), which address CMS performance evaluations. We are proposing to amend § 63.8(e)(2) and (3)(i) to clarify that prior written notice of performance evaluations and performance evaluation test plans are required for CEMS or COMS only. Under the proposed PS–17 and Procedure 4, CPMS initial validations and/or accuracy audits would be required at least quarterly using procedures that are much simpler than those required for CEMS or COMS performance tests. Consequently, we believe that requiring written notifications and test plans is unnecessary for CPMS performance evaluations. We also are proposing to revise § 63.8(e)(4), which addresses conducting CMS performance evaluations during any required performance test. Currently, § 63.8(e)(4) states that CMS performance evaluations must be conducted in accordance to the applicable performance specification. We are proposing to clarify paragraph (e)(4) to state that such evaluations of CMS performance should be conducted in accordance with the applicable performance specification or QA procedure because procedures for performing CPMS accuracy audits would be specified in the proposed Procedure 4.

XII. Rationale for Selecting the Proposed Amendments to 40 CFR Part 63, Subpart SS

Our proposed amendments to subpart SS (65 FR 76444, December 6, 2000) included revisions to the general monitoring requirements specified in § 63.996. At that time, we had not completed our development of performance specifications and QA procedures for CPMS, which we are now proposing as PS–17 and Procedure 4, respectively. After reviewing the public comments on the December 6, 2000 proposal and comparing the requirements of PS–17 and Procedure 4 to the proposed changes to § 63.996, we decided that further revisions to § 63.996 are warranted to ensure consistency between the monitoring requirements of subpart SS, PS–17, and Procedure 4. We identified the requirements of the proposed PS–17 and Procedure 4 that were most relevant to the generic MACT source categories and incorporated those requirements into the amendments that we are proposing for subpart SS. We believe that these proposed amendments would ensure consistency with PS–17, Procedure 4, and subpart SS.

XIII. Summary of Environmental, Energy, and Economic Impacts

A. What are the impacts of PS–17 and Procedure 4?

The proposed PS–17 and Procedure 4 would apply only to CPMS that are required under an applicable subpart to 40 CFR parts 60, 61, or 63; that is, this proposed rulemaking would not require the installation or operation of CPMS, other than those already required by rule. The cost and economic impact analyses that are completed as part of the rulemaking process for any part 60, 61, or 63 rule account for the costs associated with any required CPMS that would be subject to PS–17 and Procedure 4. Those costs, which are not attributable to this proposed rulemaking, include the capital costs for equipment, installation costs, the costs for operating and maintaining the CPMS, and the costs for maintaining records and reporting CPMS data. However, in some cases, the proposed PS–17 and Procedure 4 would require more accurate sensors and more frequent accuracy audits and inspections than would be required otherwise for some source categories. Therefore, the incremental costs associated with replacing those sensors and conducting additional audits and inspections can be attributed to the proposed PS–17 and Procedure 4. Because the applicability of the proposed PS–17 and Procedure 4 will be phased in over a 5-year period, we estimated the costs for each of those initial 5 years. Based on those estimates, the nationwide additional annualized costs to implement the proposed PS–17 and Procedure 4 amount to $17.7 million for the first year, $26.4 million for the second, $35.0 million for the third year, $43.7 million for the fourth year, and $52.3 million for the fifth year of this proposed rule. The average annualized cost per source is estimated to be $320, $470, $610, $740, and $870 for the first through fifth years, respectively. These costs are based on the assumption that affected facilities would not choose to use redundant

sensors. If facilities elected to use redundant sensors, the estimated compliance costs for the proposed PS–17 and Procedure 4 would be reduced.

The proposed PS–17 and Procedure 4 would improve the quality of the data measured and recorded by CPMS and thereby would also reduce the uncertainty in those data. However, this proposed rulemaking would not require the installation or operation of additional CPMS. Therefore, with respect to other potential impacts associated with this proposed rulemaking, we have concluded that PS–17 and Procedure 4, as proposed, would have no energy or environmental impacts beyond those that have already been attributed by to the various part 60, 61, and 63 rules that require the use of CPMS.

B. What are the impacts of the amendments to Procedure 1?

The proposed amendments to Procedure 1 clarify how owners and operators of CEMS subject to PS–9 or PS–15 must satisfy the requirements already established by Procedure 1. Therefore, we have determined that there are no additional impacts that should be attributed to these proposed amendments to Procedure 1.

C. What are the impacts of the amendments to the General Provisions to parts 60, 61, and 63?

The proposed amendments to 40 CFR 60.13 and 40 CFR 61.14 would eliminate any discrepancies between the requirements for CPMS specified in an applicable subpart to parts 60 or 61 and requirements for CPMS specified in the proposed PS–17 and Procedure 4. The amendments to 40 CFR 63.8 that we are proposing clarify how the monitoring requirements of the General Provisions to part 63 apply to CPMS. These proposed amendments do not add any additional requirements to what is already required by the General Provisions to parts 60, 61, and 63. Consequently, we have concluded that the proposed amendments do not have any significant environmental, energy, or economic impacts on the affected source categories.

D. What are the impacts of the amendments to subpart SS?

The proposed amendments to 40 CFR part 63, subpart SS clarify the monitoring requirements for CPMS that are required under subpart SS and the General Provisions to part 63. Furthermore, these proposed amendments provide consistency between those monitoring requirements and the proposed requirements of PS–17 and Procedure 4. For these reasons, we have concluded that there are no significant environmental, energy, or economic impacts associated with the proposed amendments.

XIV. Solicitation of Comments and Public Participation

We want to have full public participation in arriving at our final decisions, and we encourage comment on all aspects of this proposal from all interested parties. Interested parties should submit supporting data and detailed analyses with their comments so we can make maximum use of them. Information on where and when to submit comments is listed in ''Comments'' under the **DATES** and **ADDRESSES** sections.

XV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the Executive Order.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 2269.01.

The information collection requirements for the proposed PS–17 and Procedure 4 are based on the requirements in the General Provisions to parts 60, 61, and 63, which are mandatory for all operators subject to NSPS or NESHAP. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to EPA's policies set forth in 40 CFR 2, subpart B.

This proposed rule would not require any notifications or reports beyond those required by the General Provisions to parts 60, 61, and 63. The recordkeeping requirements require only the specific information needed to determine compliance.

The annual monitoring, reporting, and recordkeeping burden for this collection of information (averaged over the first 3 years after the effective date of the rule) is estimated to be 318,662 labor hours per year at a total annual cost of $23.3 million. This burden estimate includes time for the maintenance and evaluation of monitoring system operation. Total capital costs associated with the monitoring requirements over the 3-year period of the ICR are estimated at $18.2 million. Burden is defined at 5 CFR 1320.3(b).

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.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID No. EPA–HQ–OAR–2006–0640. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after October 9, 2008, a comment to OMB is best assured of having its full effect if OMB receives it by November 10, 2008. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. 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.

For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3)

a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Because of the number of different source categories involved and the small cost per facility, a case study approach was used to assess the likelihood of significant impact on small entities. A subset of source categories that most likely would be the most impacted was chosen by two criteria. The first criterion was whether or not the underlying regulation was expected to have adverse small business impacts at the time of promulgation. The second criterion was the relative magnitude of the estimated costs for complying with the CPMS Rule on a per-plant basis. In none of the case studies were costs likely to approach 1 percent of sales because the average per facility costs were always less than 3 percent of the compliance costs of underlying regulation.

We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, we generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. The nationwide additional annualized costs to implement the proposed rule are estimated to be $52.3 million in the fifth year of this proposed rule. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA.

EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. The requirements of PS–17 and Procedure 4 have already been addressed under the General Provisions to parts 60, 61, and 63, and in the applicable subparts that require the installation and operation of CPMS. Furthermore, the amendments to Procedure 1 merely clarify the applicability and requirements of the procedure. Finally, these proposed amendments to the monitoring requirements in the General Provisions to parts 60, 61, and 63, as well as to subpart SS are made to ensure consistency with PS–17 and Procedure 4.

E. Executive Order 13132: Federalism

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires us to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The requirements of PS–17 and Procedure 4 have already been addressed under the General Provisions to parts 60, 61, and 63, and in the applicable subparts that require the installation and operation of CPMS. Furthermore, these proposed amendments to Procedure 1 merely clarify the applicability and requirements of the procedure. Finally, these proposed amendments to the monitoring requirements specified in the General Provisions to parts 60, 61, and 63, as well as to subpart SS are made to ensure consistency with PS–17 and Procedure 4. Thus, Executive Order 13132 does not apply to this rule.

In the spirit of Executive Order 13132, and consistent with our policy to promote communications between us and State and local governments, we specifically solicit comment on this proposed rule from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This proposed rule does not have tribal implications, as specified in Executive Order 13175. The requirements of PS–17 and Procedure 4 have already been addressed under the General Provisions to parts 60, 61, and 63, and in the applicable subparts that require the installation and operation of CPMS. Furthermore, these proposed amendments to Procedure 1 merely clarify the applicability and requirements of the procedure. Finally, these proposed amendments to the monitoring requirements specified in the General Provisions to parts 60, 61, and 63, as well as to subpart SS are made to ensure consistency with PS–17 and Procedure 4. Thus, Executive Order 13175 does not apply to this proposed rule. EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

Executive Order 13045, ''Protection of Children from Environmental Health

Risks and Safety Risks'' (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

EPA interprets EO 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Pub. L. No. 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards (VCS).

This proposed rulemaking involves technical standards. EPA proposes to use the following VCS: American Society for Testing and Materials (ASTM) E220–07e1, ASTM D1293–99 (2005), ASTM D1125–95 (2005), ASTM D5391–99 (2005), ASTM E251–92 (2003), ASTM E452–02 (2007), ASTM E585/E 585M–04, ASTM E644–06, ASTM E235–06, ASTM E608/E 608M–06, ASTM E696–07, ASTM E1129/E1129M–98 (2002), ASTM E1137/E1137M–04, and ASTM E1159–98 (2003); International Organization for Standardization (ISO) MC96.1–1982 and ISO 10790:1999; American Society of Mechanical Engineers (ASME) B40.100–2005 and ASME MFC–3M–2004; American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) 41.8–1989; American National Standards Institute (ANSI)/ASME MFC–4M–1986 (R2003), ANSI/ASME MFC–6M–1998 (R2005), ANSI/ASME MFC–7M–1987 (R2001), ANSI/ASME MFC–9M–1988; ANSI/Instrumentation, Systems, and Automation Society (ISA) RP 31.1–1977, ISA RP 16.6–1961, ISA RP 16.5–1961, and ISA 8316:1987; and National Institute of Standards and Technology (NIST) Handbook 44—2002 Edition (incorporated by reference—see 40 CFR 60.17). The Agency conducted a search to identify potentially applicable voluntary consensus standards. While the Agency identified 15 VCS as being potentially applicable to PS–17 and Procedure 4, we do not propose to use these standards in this proposed rulemaking. The use of these VCS would be impractical for the purposes of this proposed rule. See the docket for this proposed rule for the reasons for these determinations for the standards.

EPA welcomes comments on this aspect of this proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The proposed rule will help to ensure that emission control devices are operated properly and maintained as needed, thereby helping to ensure compliance with emission standards, which benefit all affected populations.

List of Subjects

40 CFR Part 60

Environmental protection, Administrative Practice and Procedure, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements.

40 CFR Part 61

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: September 22, 2008.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of the Federal Regulations is proposed to be amended as follows:

PART 60—[AMENDED]

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

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

Subpart A—[Amended]

2. Section 60.13 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding paragraph (a)(2) to read as follows:

§ 60.13 Monitoring requirements.

(a)(1) * * *

(2) Performance specifications for continuous parameter monitoring systems (CPMS) promulgated under 40 CFR part 60, appendix B and quality assurance procedures for CPMS promulgated under 40 CFR part 60, appendix F apply instead of the requirements for CPMS specified in an applicable subpart upon promulgation of the performance specifications and quality assurance procedures for CPMS.

* * * * *

3. Section 60.17 is amended by:

a. Adding paragraphs (a)(93) through (a)(106);

b. Adding paragraphs (h)(5) through (h)(10); and

c. Adding paragraphs (o), (p) and (q) to read as follows:

§ 60.17 Incorporations by reference.

* * * * *

(a) * * *

(93) ASTM E220–07e1, ''Standard Test Methods for Calibration of Thermocouples by Comparison Techniques,'' IBR approved for Table 6 to Performance Standard 17 of appendix B to this part and Table 2 to Procedure 4 of appendix F to this part.

(94) ASTM E452–02 (2007), ''Standard Test Method for Calibration of Refractory Metal Thermocouples Using an Optical Pyrometer,'' IBR approved for Table 6 to Performance Standard 17 of appendix B to this part and Table 2 to Procedure 4 to appendix F of this part.

(95) ASTM E585/E 585M–04, ''Specification for Compacted Mineral-Insulated, Metal-Sheathed, Base Metal Thermocouple Cables,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(96) ASTM E644–06, ''Standard Test Methods for Testing Industrial Resistance Thermometers,'' IBR approved for Table 6 to Performance Standard 17 of appendix B to this part and Table 2 to Procedure 4 of appendix F to this part.

(97) ASTM E235–06, ''Specification for Thermocouples, Sheathed, Type K, for Nuclear or for Other High-Reliability Applications,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(98) ASTM E608/E 608M–06, ''Specification for Mineral-Insulated, Metal-Sheathed Base Metal Thermocouples,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(99) ASTM E696–07, ''Specification for Tungsten-Rhenium Alloy Thermocouple Wire,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(100) ASTM E1129/E 1129M–98 (2002), ''Standard Specification for Thermocouple Connectors,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(101) ASTM E1137/E 1137M–04, ''Standard Specification for Industrial Platinum Resistance Thermometers,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(102) ASTM E1159–98 (2003), ''Specification for Thermocouple Materials, Platinum-Rhodium Alloys, and Platinum,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part.

(103) ASTM E251–92 (2003), ''Standard Test Methods for Performance Characteristics of Metallic Bonded Resistance Strain Gages,'' IBR approved for Table 7 to Performance Standard 17 of appendix B to this part and Table 3 to Procedure 4 of appendix F to this part.

(104) ASTM D1293–99 (2005), ''Standard Test Methods for pH of Water,'' IBR approved for section 8.7 of Performance Standard 17 of appendix B to this part and section 8.4 of Procedure 4 of appendix F to this part.

(105) ASTM D1125–95 (2005), ''Standard Test Methods for Electrical Conductivity and Resistivity of Water,'' IBR approved for section 8.8 of Performance Standard 17 of appendix B to this part and section 8.5 of Procedure 4 of appendix F to this part.

(106) ASTM D5391–99 (2005), ''Standard Test Method for Electrical Conductivity and Resistivity of a Flowing High Purity Water Sample,'' IBR approved for section 8.8 of Performance Standard 17 of appendix B to this part and section 8.5 of Procedure 4 of appendix F to this part.

* * * * *

(h) * * *

(5) ASME B 40.100–2005, ''Pressure Gauges and Gauge Attachments,'' IBR approved for section 6.3 and Table 7 to Performance Standard 17 of appendix B to this part and Table 3 to Procedure 4 of appendix F to this part.

(6) ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi,'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part and section 8.3 of Procedure 4 to appendix F of this part.

(7) ANSI/ASME MFC–4M–1986 (R2003), ''Measurement of Gas Flow by Turbine Meters,'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part.

(8) ANSI/ASME MFC–6M–1998 (R2005), ''Measurement of Fluid Flow in Pipes Using Vortex Flow Meters,'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part.

(9) ANSI/ASME MFC–7M–1987 (R2001), ''Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles,'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part.

(10) ANSI/ASME MFC–9M–1988, ''Measurement of Liquid Flow in Closed Conduits by Weighing Method,'' IBR approved for Table 5 to Performance Standard 17 of appendix B to this part and Table 5 to Procedure 4 of appendix F to this part.

* * * * *

(o) The following material is available for purchase from the American National Standards Institute (ANSI), 25 West 43rd Street, 4th Floor, New York, NY, 10036.

(1) ISA–MC96.1–1982, ''Temperature Measurement Thermocouples,'' IBR approved for Table 2 to Performance Standard 17 of appendix B to this part and Table 5 to Procedure 4 of appendix F to this part.

(2) ASHRAE 41.8–1989, ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flowmeters,'' IBR approved for Table 5 to Performance Standard 17 of appendix B to this part and Table 5 to Procedure 4 of appendix F to this part.

(3) ANSI/ISA RP 31.1–1977, ''Recommended Practice: Specification, Installation, and Calibration of Turbine Flow Meters,'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part and Table 5 to Procedure 4 of appendix F to this part.

(p) The following material is available for purchase from the Instrumentation, Systems, and Automation Society (ISA), 67 Alexander Drive, Research Triangle Park, NC 27709.

(1) ISA RP 16.6–1961, ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters),'' IBR approved for Tables 4 and 5 to Performance Standard 17 of appendix B to this part and Tables 4 and 5 to Procedure 4 of appendix F to this part.

(2) ISA RP 16.5–1961, ''Installation, Operation, and Maintenance Instructions for Glass Tube Variable Area Meters (Rotameters),'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part.

(q) The following material is available for purchase from the International Organization for Standardization (ISO), 1, ch. de la Voie-Creuse, CH–1211 Geneva 20, Switzerland.

(1) ISO 8316:1987, ''Measurement of Liquid Flow in Closed Conduits—Method by Collection of Liquid in a Volumetric Tank,'' IBR approved for Table 4 to Performance Standard 17 of appendix B to this part and Table 4 to Procedure 4 of appendix F to this part.

(2) ISO 10790:1999, ''Measurement of Fluid Flow in Closed Conduits—Guidance to the Selection, Installation, and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements),'' IBR approved for Table 3 to Performance Standard 17 of appendix B to this part and Table 4 to Procedure 4 of appendix F to this part.

4. Appendix B to part 60 is amended by adding Performance Specification 17 in numerical order to read as follows:

Appendix B to Part 60—Performance Specifications

* * * * *

Performance Specification 17—Specifications and Test Procedures for Continuous Parameter Monitoring Systems at Stationary Sources

1.0 *What is the purpose of Performance Specification 17?*

The purpose of Performance Specification 17 (PS–17) is to establish the initial installation and performance procedures that are required for evaluating the acceptability of a continuous parameter monitoring system (CPMS). This performance specification applies instead of the requirements for applicable CPMS specified in any applicable subpart to 40 CFR part 60, 61, or 63, unless otherwise specified in the applicable subpart. This performance specification does not establish procedures or criteria for evaluating the ongoing performance of an installed CPMS over an extended period of time. Procedures for evaluating the ongoing performance of a CPMS are described in Procedure 4 of appendix F to 40 CFR part 40, Quality Assurance Procedures.

1.1 Under what circumstances does PS–17 apply to my CPMS? This performance specification applies to your CPMS if your CPMS meets the conditions specified in section 1.2 of this specification and you meet either conditions (1) or (2) of this section:

(1) You are required by any applicable subpart of 40 CFR parts 60 or 61 to install and operate the CPMS, or

(2) You are required by any applicable subpart of 40 CFR part 63 to install and operate the CPMS, and § 63.8(a)(2) of the General Provisions applies to the applicable subpart.

1.2 To what types of devices does PS–17 apply? This performance specification applies if your total equipment meets the conditions of (1) and (2) of this section:

(1) You are required by an applicable subpart to install and operate the total equipment on a continuous basis, and

(2) You, as owner or operator, use the total equipment to monitor the parameters (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, and conductivity) associated with the operation of an emission control device or process unit.

1.3 When must I comply with PS–17? You must comply with PS–17 when any of conditions (1) through (5) of this section occur:

(1) At the time you install and place into operation a CPMS that is required by the applicable subpart after 90 days following the date of publication of the final rule in the **Federal Register**, or

(2) At the time you replace or relocate the sensor of an affected CPMS after 90 days following the date of publication of the final rule in the **Federal Register**, or

(3) At the time you replace the electronic signal modifier or conditioner, transmitter, external power supply, data acquisition system, data recording system, or any other mechanical or electrical component of your CPMS that affects the accuracy, range, or resolution of your CPMS after 90 days following the date of publication of the final rule in the **Federal Register**, or

(4) For CPMS located at facilities that are required to obtain a title V permit, at the time of your title V permit renewal.

(i) Prior to submitting your title V permit renewal, you must comply with the basic requirements of this performance specification.

(5) For CPMS located at area source facilities that are exempt from obtaining a title V permit, 5 years after the date of publication of the final rule in the **Federal Register**.

2.0 *What are the basic requirements of PS–17?*

This performance specification requires you, as an owner or operator of an applicable CPMS, to perform and record initial installation and calibration procedures to confirm the acceptability of the CPMS when it is installed and placed into operation.

2.1 How does PS–17 address the installation and equipment requirements for my CPMS? This specification stipulates basic installation, location, and equipment requirements for CPMS and identifies applicable voluntary consensus standards that provide additional guidance on the selection and installation of specific types of sensors associated with CPMS. This specification also identifies the types of equipment needed to check the accuracy of your CPMS. General equipment requirements are identified in section 6 of this specification. Location and installation requirements are addressed in sections 8.1 and 8.2 of this specification.

2.2 What types of procedures must I perform to demonstrate compliance with PS–17? This specification requires you, as owner or operator of a CPMS, to demonstrate that your CPMS satisfies minimum requirements for accuracy. For each of the monitoring parameters addressed (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, and conductivity), this specification offers you the choice of two or more methods that you can use to demonstrate that your CPMS meets the specified accuracy requirements. For accuracy demonstrations that involve measurement of gas or liquid pressures, this specification also requires you to perform a leak test on any pressure connections. Accuracy demonstration methods are described in sections 8.4 through 8.8 of this specification; section 8.9 addresses alternative procedures for demonstrating compliance with this specification; and leak test procedures are described in section 8.10 of this specification.

2.3 What does PS–17 require me to do if my CPMS does not meet the specified accuracy requirements? If your CPMS does not meet the accuracy requirements, section 8 of this specification requires you to take corrective action until you can demonstrate that your CPMS meets the accuracy requirement.

2.4 What types of recordkeeping and reporting activities does PS–17 require? This specification does not have any reporting requirements but does require you to record and maintain data that identify your CPMS and show the results of any performance demonstrations of your CPMS. Recordkeeping requirements are described in section 14 of this specification.

3.0 *What special definitions apply to PS–17?*

3.1 Accuracy. A measure of the closeness of a measurement to the true or actual value.

3.2 Accuracy hierarchy. The ratio of the accuracy of a measurement instrument to the accuracy of a calibrated instrument or standard that is used to measure the accuracy of the measurement instrument. For example, if the accuracy of a calibrated temperature measurement device is 0.2 percent, and the accuracy of a thermocouple is 1.0 percent, the accuracy hierarchy is 5.0 (1.0 ÷ 0.2 = 5.0).

3.3 Conductivity CPMS. The total equipment that is used to measure and record the conductivity of a liquid on a continuous basis.

3.4 Continuous Parameter Monitoring System (CPMS). The total equipment that is used to measure and record a parameter (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, and conductivity) on a continuous basis in one or more locations.

3.5 Cryogenic Application. An application of a temperature CPMS in which the sensor is subjected to a temperature of zero degrees Celsius (32 degrees Fahrenheit) or less.

3.6 Differential pressure tube. A device, such as a pitot tube, that consists of one or more pairs of tubes that are oriented to measure the velocity pressure and static pressure at one or more fixed points within a duct for the purpose of determining gas velocity.

3.7 Electronic Components. The electronic signal modifier or conditioner, transmitter, and power supply associated with a CPMS.

3.8 Flow CPMS. The total equipment that is used to measure and record liquid flow rate, gas flow rate, or mass flow rate on a continuous basis.

3.9 Integrator. The equipment that is used to calculate the material feed rate using two inputs: weight of the load on the material transfer system (e.g. belt conveyor) and the speed of the system.

3.10 Mass flow rate. The measurement of solid, liquid, or gas flow in units of mass per time, such as kilograms per minute or tons per hour.

3.11 Mechanical Component. Any component of a CPMS that consists of or includes moving parts or that is used to apply or transfer force to another component or part of the CPMS.

3.12 pH CPMS. The total equipment that is used to measure and record the pH of a liquid on a continuous basis.

3.13 Pressure CPMS. The total equipment that is used to measure and record the pressure of a liquid or gas at any location, or the differential pressure of a liquid or gas between any two locations, on a continuous basis.

3.14 Resolution. The smallest detectable or legible increment of measurement.

3.15 Sensor. The component or set of components of a CPMS that reacts to changes in the magnitude of the parameter that is measured by the CPMS (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, or conductivity) and generates an output signal. Table 1 identifies the sensor components of some commonly used CPMS.

3.16 Solid mass flow rate. The measurement of the rate at which a solid material is processed or transferred (in units of mass per time). Examples of solid mass flow rate are the rate at which ore is fed to a material dryer or the rate at which powdered lime is injected into an exhaust duct.

3.17 Temperature CPMS. The total equipment that is used to measure and record the temperature of a liquid or gas at any location, or the differential temperature of a liquid or gas between any two locations, on a continuous basis.

3.18 Total Equipment. The sensor, mechanical components, electronic components, data acquisition system, data recording system, electrical wiring, and other components of a CPMS.

4.0 *Interferences* [Reserved]

5.0 *What do I need to know to ensure the safety of persons who perform the procedures specified in PS–17?*

The procedures required under this specification may involve hazardous materials, operations, site conditions, and equipment. This performance specification does not purport to address all of the safety issues associated with these procedures. It is the responsibility of the user to establish appropriate safety and health practices and determine the applicable regulatory limitations prior to performing these procedures.

6.0 *What equipment and supplies do I need?*

The types of equipment that you need to comply with this specification depend upon the parameter that is measured by your CPMS and upon site-specific conditions. You must select the appropriate equipment based on manufacturer's recommendations, your site-specific conditions, the parameter that your CPMS measures, and the method that you choose for demonstrating compliance with this specification. For most CPMS, you will need the two types of equipment described in paragraphs (1) and (2) of this section.

(1) The total equipment that is used to monitor and record the appropriate parameter, as defined in section 3.17 of this specification, and

(2) The equipment needed to perform the initial validation check of your CPMS, as specified in sections 8.4 through 8.8 of this specification.

6.1 What design criteria must my CPMS satisfy? You must select a CPMS that meets the design specifications in paragraphs (1) through (5) of this section.

(1) Your CPMS must satisfy the accuracy requirements of Table 8 of this specification.

(2) Your CPMS must be capable of measuring the appropriate parameter (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, or conductivity) over a range that extends from a value that is at least 20 percent less than the lowest value that you expect your CPMS to measure, to a value that is at least 20 percent greater than the highest value that you expect your CPMS to measure.

(3) The signal conditioner, wiring, power supply, and data acquisition and recording system of your CPMS must be compatible with the output signal of the sensors used in your CPMS.

(4) The data acquisition and recording system of your CPMS must be able to record values over the entire range specified in paragraph (2) of this section.

(5) The data recording system associated with your CPMS must have a resolution of one-half of the required overall accuracy of your CPMS, as specified in Table 8 of this specification, or better.

6.2 Are there any exceptions to the range requirements specified in section 6.1 of PS–17? A pH CPMS must be capable of measuring pH over the entire range of pH values from 0 to 14.

6.3 What additional guidelines should I use for selecting the sensor of my CPMS? Additional guidelines for selecting temperature and pressure sensors are listed in paragraphs (1) and (2) of this section.

(1) For a temperature CPMS, you should select a sensor that is consistent with the standards listed in Table 2 of this specification.

(2) If your pressure CPMS uses a pressure gauge as the sensor, you should select a gauge that conforms to the design requirements of ASME B40.100–2005, ''Pressure Gauges and Gauge Attachments'' (incorporated by reference—see § 60.17).

6.4 What types of equipment do I need for checking the accuracy of my CPMS? The specific types of equipment that you need for checking the accuracy of your CPMS depend on the type of CPMS and the method that you choose for conducting the initial validation check of your CPMS, as specified in sections 8.4 through 8.8 of this specification. In most cases, you will need the equipment specified in paragraphs (1) and (2) of this section.

(1) A separate device that either measures the same parameter as your CPMS, or that simulates the same electronic signal or response that your CPMS generates, and

(2) Any work platform, test ports, pressure taps, valves, fittings, or other equipment required to perform the specific procedures of the validation check method that you choose, as specified in sections 8.4 through 8.8 of this specification.

6.5 What are the accuracy requirements for the equipment that I use for checking the accuracy of my CPMS? Any measurement instrument or device that is used to conduct the initial validation check of your CPMS must have an accuracy that is traceable to National Institute of Standards and Technology (NIST) standards and must have an accuracy hierarchy of at least three. To determine if a measurement instrument or device satisfies this accuracy hierarchy requirement, follow the procedure described in section 12.1 of this specification.

6.6 Are there any exceptions to the accuracy requirement of section 6.5 of PS–17? There are two exceptions to the NIST-traceable accuracy requirement specified in section 6.5 of this specification, as described in paragraphs (1) and (2) of this section.

(1) As an alternative for a calibrated pressure measurement device with NIST-traceable accuracy specified in paragraphs (1) and (3) of section 8.5 and in paragraph (3) of section 8.6 of this specification, you can use a mercury-in-glass or water-in-glass U-tube manometer to validate your pressure CPMS.

(2) When validating a flow rate CPMS using the methods specified in paragraphs (1), (2), or (7) of section 8.6 of this specification, the container used to collect or weigh the liquid or solid is not required to have NIST-traceable accuracy.

7.0 *What reagents or standards do I need to comply with PS–17?*

The specific reagents and standards needed to demonstrate compliance with this specification depend upon the parameter that your CPMS measures and the method that you choose to check the accuracy of your CPMS. Section 8.3 of this specification identifies the specific reagents and standards needed for each initial validation check of CPMS accuracy.

8.0 *What performance demonstrations must I conduct?*

You must satisfy the installation requirements, perform an initial calibration, and perform an initial validation check of your CPMS using the procedures specified in sections 8.1 through 8.8 of this specification.

8.1 How must I install my CPMS? The installation of your CPMS must satisfy the requirements specified in paragraphs (1) and (2) of this section.

(1) You must install each sensor of your CPMS in a location that provides representative measurement of the applicable parameter over all operating conditions, taking into account the manufacturer's guidelines and any location specified in the applicable requirement.

(2) You must also install any work platforms, test ports, pressure taps, valves, fittings, or other equipment needed to perform the initial validation check, as specified in sections 8.4 through 8.8 of this specification.

8.2 What additional guidelines can I use for installing my CPMS? If you are required to install a flow CPMS and the sensor of your flow CPMS is a differential pressure device, turbine flow meter, rotameter, vortex formation flow meter or Coriolis mass flow meter, you can use the standards listed in Table 3 of this specification as guidelines for installation.

8.3 What initial quality assurance measures are required by PS–17 for my CPMS? You must perform an initial calibration of your CPMS based on the procedures specified in the manufacturer's owner's manual. You also must perform an initial validation check of the operation of your CPMS using the methods described in sections 8.4 through 8.8 of this specification.

8.4 How do I perform the initial validation check of my temperature CPMS? To perform the initial validation check of a temperature CPMS, you can choose one of

the methods described in paragraphs (1) and (2) of this section.

(1) Comparison to Calibrated Temperature Measurement Device. Place the sensor of a calibrated temperature measurement device adjacent to the sensor of your temperature CPMS so that the sensor of the calibrated test device is subjected to the same environment as the sensor of your temperature CPMS. The calibrated temperature measurement device must satisfy the accuracy requirements specified in section 6.5 of this specification. The calibrated temperature measurement device must also have a range equal to or greater than the range of your temperature CPMS. Allow sufficient time for the response of the calibrated temperature measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, concurrently record the temperatures measured by your temperature CPMS and the calibrated temperature measurement device. Using the temperature measured by the calibrated measurement device as the value for V_c, follow the procedure specified in section 12.2 to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record temperatures at multiple locations, repeat this procedure for each location.

(2) Temperature Simulation Procedure. Disconnect the sensor from your temperature CPMS and connect to your CPMS a calibrated simulation device that is designed to simulate the same type of response as the sensor of your CPMS. The calibrated simulation device must satisfy the accuracy requirements specified in section 6.5 of this specification. Simulate a typical temperature that is measured by your temperature CPMS under normal operating conditions. Allow sufficient time for the response of the calibrated simulation device to reach equilibrium. Record the temperature that is indicated by your temperature CPMS. Using the temperature simulated by the calibrated simulation device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8, the validation check is complete. If the calculated accuracy does not meet the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record temperatures at multiple locations, repeat this procedure for each location.

8.5 How do I perform an initial validation check of my pressure CPMS? To perform the initial validation check of your pressure CPMS, you can choose one of the methods described in paragraphs (1) through (3) of this section.

(1) Comparison to Calibrated Pressure Measurement Device. Connect a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or calibrated pressure measurement device to operate in parallel with your pressure CPMS so that the manometer or sensor of the calibrated pressure measurement device is subjected to the same pressure as the sensor of your pressure CPMS. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.5 of this specification. The calibrated pressure measurement device also must have a range equal to or greater than the range of your pressure CPMS. Perform a leak test on all manometer or calibrated pressure measurement device connections using the procedure specified in section 8.10 of this specification. Allow sufficient time for the response of the manometer or calibrated pressure measurement device to reach equilibrium. With the process or control device that is monitored by your pressure CPMS operating under normal conditions, concurrently record the pressures that are measured by your pressure CPMS and by the calibrated pressure measurement device. Using the pressure measured by the calibrated pressure measurement device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not meet the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

(2) Pressure Simulation Procedure Using a Calibrated Pressure Source. Disconnect or close off the process line or lines to your pressure CPMS. Connect an adjustable calibrated pressure source to your CPMS so that the pressure source applies a pressure to the sensor of your pressure CPMS. The calibrated pressure source must satisfy the accuracy requirements of section 6.5 of this specification. The calibrated pressure source also must be adjustable, either continuously or incrementally over the pressure range of your pressure CPMS. Perform a leak test on all calibrated pressure source connections using the procedure specified in section 8.10 of this specification. Using the calibrated pressure source, apply a pressure that is within ±10 percent of the normal operating pressure of your pressure CPMS. Allow sufficient time for the response of the calibrated pressure source to reach equilibrium. Record the pressure applied by the calibrated pressure source and the pressure measured by your pressure CPMS. Using the pressure applied by the calibrated pressure source as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not meet the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

(3) Pressure Simulation Procedure Using a Pressure Source and Calibrated Pressure Measurement Device. Disconnect or close off the process line or lines to your pressure CPMS. Attach a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or a calibrated pressure measurement device (the reference pressure measurement device) in parallel to your pressure CPMS. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.5 of this specification. Connect a pressure source to your pressure CPMS and the parallel reference pressure measurement device. Perform a leak test on all pressure source and parallel reference pressure measurement device connections using the procedure specified in section 8.10 of this specification. Apply pressure to your CPMS and the parallel reference pressure measurement device. Allow sufficient time for the response of your CPMS and the parallel reference pressure measurement device to reach equilibrium. Record the pressure measured by your pressure CPMS and the reference pressure measurement device. Using the pressure measured by the parallel reference pressure measurement device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not meet the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

8.6 How do I perform an initial validation check of my flow CPMS? To perform the initial validation check of your flow CPMS, you can choose any one of the methods described in paragraphs (1) through (7) of this section that is applicable to the type of

material measured by your flow CPMS and the type of sensor used in your flow CPMS.

(1) Volumetric Method. This method applies to any CPMS that is designed to measure liquid flow rate. With the process or control device that is monitored by your flow CPMS operating under normal conditions, record the flow rate measured by your flow CPMS for the subject process line. At the same time, collect the liquid that is flowing through the same process line for a measured length of time using the Volumetric Method specified in one of the standards listed in Table 4 of this specification. Using the flow rate measured by the Volumetric Method as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(2) Gravimetric Method. This method applies to any CPMS that is designed to measure liquid flow rate, liquid mass flow rate, or solid mass flow rate. With the process or control device that is monitored by your flow CPMS operating under normal conditions, record the flow rate measured by your flow CPMS for the subject process line. At the same time, collect the material (liquid or solid) that is flowing or being transferred through the same process line for a measured length of time using the Weighing, Weigh Tank, or Gravimetric Methods specified in the standards listed in Table 5. Using the flow rate measured by the Weighing, Weigh Tank, or Gravimetric Methods as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(3) Differential Pressure Measurement Method. This method applies only to flow CPMS that use a differential pressure measurement flow device, such as an orifice plate, flow nozzle, or venturi tube. This method may not be used to validate a flow CPMS that measures gas flow by means of one or more differential pressure tubes. With the process or control device that is monitored by your CPMS operating under normal conditions, record the flow rate measured by your flow CPMS. Under the same operating conditions, disconnect the pressure taps from your flow CPMS and connect the pressure taps to a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or calibrated differential pressure measurement device. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.5 of this specification. Perform a leak test on all manometer or calibrated differential pressure measurement device connections using the procedure specified in section 8.10 of this specification. Allow sufficient time for the response of the calibrated differential pressure measurement device to reach equilibrium. Within 30 minutes of measuring and recording the flow rate using your CPMS, record the pressure drop measured by the calibrated differential pressure measurement device. Using the manufacturer's literature or the procedures specified in ASME MFC–3M–2004 (incorporated by reference—see § 60.17), calculate the flow rate that corresponds to the differential pressure measured by the calibrated differential pressure measurement device. For CPMS that use an orifice flow meter, the procedures specified in ASHRAE 41.8–1989 (incorporated by reference—see § 60.17) also can be used to calculate the flow rate. Using the calculated flow rate as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(4) Pressure Source Flow Simulation Method. This method applies only to flow CPMS that use a differential pressure measurement flow device, such as an orifice plate, flow nozzle, or venturi tube. This method may not be used to validate a flow CPMS that measures gas flow by means of one or more differential pressure tubes. Disconnect your flow CPMS from the pressure taps. Connect separate pressure sources to the upstream and downstream sides of your pressure CPMS, where the pressure taps are normally connected. The pressure sources must satisfy the accuracy requirements of section 6.5 of this specification. The pressure sources also must be adjustable, either continuously or incrementally over the pressure range that corresponds to the range of your flow CPMS. Perform a leak test on all connections between the calibrated pressure sources and your flow CPMS using the procedure specified in section 8.10 of this specification. Using the manufacturer's literature or the procedures specified in ASME MFC–3M–2004 (incorporated by reference—see § 60.17), calculate the required pressure drop that corresponds to the normal operating flow rate expected for your flow CPMS. For CPMS that use an orifice flow meter, the procedures specified in ASHRAE 41.8–1989 (incorporated by reference—see § 60.17) also can be used to calculate the pressure drop. Use the calibrated pressure sources to apply the calculated pressure drop to your flow CPMS. Allow sufficient time for the responses of the calibrated pressure sources to reach equilibrium. Record the flow rate measured by your flow CPMS. Using the flow rate measured by your CPMS when the calculated pressure drop was applied as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(5) Electronic Signal Simulation Method. This method applies to any flow CPMS that uses a flow sensor that generates an electronic signal. Disconnect the sensor from your flow CPMS and connect to your CPMS a calibrated simulation device that is designed to simulate the same type of electrical response as the sensor of your CPMS. The calibrated simulation device must satisfy the accuracy requirements of section 6.5 of this specification. Perform a leak test on all connections between the calibrated simulation device and your flow CPMS using the procedure specified in section 8.10 of this specification. Simulate a typical flow rate that is monitored by your flow CPMS under normal operating conditions. Allow sufficient time for the response of the calibrated simulation device to reach equilibrium. Record the flow rate measured by your flow CPMS. Using the flow rate simulated by the calibrated simulation device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If the calculated accuracy does not meet the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(6) Relative Accuracy (RA) Test. This method applies to any flow CPMS that measures gas flow rate. If your flow CPMS uses a differential flow tube as the flow sensor, you must use this method to validate your flow CPMS. The reference methods (RM's) applicable to this test are Methods 2, 2A, 2B, 2C, 2D, 2F of 40 CFR part 60, appendix A–1 and Method 2G of 40 CFR part 60, appendix A–2. Conduct three sets of RM tests. Mark the beginning and end of each RM test period on the flow CPMS chart recordings or other permanent record of output. Determine the integrated flow rate for each RM test period. Perform the same calculations specified by section 7.5 in PS–2 of this appendix. If the RA is no greater than 20 percent of the mean value of the RM test data, the RA test is complete. If the RA is greater than 20 percent of the mean value of the RM test data, check all system components and take any corrective action that is necessary to achieve the required RA. Repeat this RA test until the RA requirement of this section is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location.

(7) Material Weight Comparison Method. This method applies to any solid mass flow CPMS that uses a combination of a belt conveyor and scale and is equipped with a totalizer. To conduct this test, pass a quantity of pre-weighed material over the belt conveyor in a manner consistent with actual loading conditions. To weigh the test quantity of material that is to be used during the initial validation, you must use a scale that satisfies the accuracy requirements of section 6.5 of this specification. The test quantity must be sufficient to challenge the conveyor belt-scale system for at least three revolutions of the belt. Record the length of the test. Calculate the mass flow rate using the measured weight and the recorded time. Using this mass flow rate as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record flow rate at multiple locations, repeat this procedure for each location. In addition, you must perform an initial validation check on the integrator used by your material feed CPMS according to the manufacturer's specifications.

8.7 How do I perform an initial validation check of my pH CPMS? You must perform an initial validation check of your pH CPMS using either of the methods described in paragraphs (1) and (2) of this section.

(1) Comparison to Calibrated pH Measurement Device. Place a calibrated pH measurement device adjacent to your pH CPMS so that the calibrated test device is subjected to the same environment as your pH CPMS. The calibrated pH measurement device must satisfy the accuracy requirements specified in section 6.5 of this specification. Allow sufficient time for the response of the calibrated pH measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, concurrently record the pH measured by your pH CPMS and the calibrated pH measurement device. If concurrent readings are not possible, extract a sufficiently large sample from the process stream and perform measurements using a portion of the sample for each meter. Using the pH measured by the calibrated pH measurement device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record pH at multiple locations, repeat this procedure for each location.

(2) Single Point Calibration. This method requires the use of a certified buffer solution. All buffer solutions used must be certified by NIST and accurate to ±0.02 pH units at 25 °C (77 °F). Set the temperature on your pH meter to the temperature of the buffer solution, typically room temperature or 25 °C (77 °F). If your pH meter is equipped with automatic temperature compensation, activate this feature before calibrating. Set your pH meter to measurement mode. Place the clean electrodes into the container of fresh buffer solution. If the expected pH of the process fluid lies in the acidic range (less than 7 pH), use a buffer solution with a pH value of 4.00. If the expected pH of the process fluid lies in the basic range (greater than 7 pH), use a buffer solution with a pH value of 10.00. Allow sufficient time for the response of your pH CPMS to reach equilibrium. Record the pH measured by your CPMS. Using the buffer solution pH as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this procedure, calibrate your pH CPMS using the procedures specified in the manufacturer's owner's manual. If the manufacturer's owner's manual does not specify a two-point calibration procedure, you must perform a two-point calibration procedure based on ASTM D1293–99 (2005) (incorporated by reference—see § 60.17). If you are required to measure and record pH at multiple locations, repeat this procedure for each location.

8.8 How do I perform an initial validation check of my conductivity CPMS? You must perform an initial validation check of your conductivity CPMS using either of the methods described in paragraphs (1) and (2) of this section.

(1) Comparison to Calibrated Conductivity Measurement Device. Place a calibrated conductivity measurement device adjacent to your conductivity CPMS so that the calibrated measurement device is subjected to the same environment as your conductivity CPMS. The calibrated conductivity measurement device must satisfy the accuracy requirements specified in section 6.5 of this specification. Allow sufficient time for the response of the calibrated conductivity measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, concurrently record the conductivity measured by your conductivity CPMS and the calibrated conductivity measurement device. If concurrent readings are not possible, extract a sufficiently large sample from the process stream and perform measurements using a portion of the sample for each meter. Using the conductivity measured by the calibrated conductivity measurement device as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the accuracy requirement of Table 8 of this specification, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this specification, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this validation check procedure until the accuracy requirement of Table 8 of this specification is satisfied. If you are required to measure and record conductivity at multiple locations, repeat this procedure for each location.

(2) Single Point Calibration. This method requires the use of a certified conductivity standard solution. All solutions used must be certified by NIST and accurate to ±2 percent micromhos per centimeter (μmhos/cm) (±2 percent microsiemens per centimeter (μS/cm)) at 25 °C (77 °F). Choose a conductivity standard solution that is close to the measuring range for best results. Since conductivity is dependent on temperature, the conductivity tester should have an integral temperature sensor that adjusts the reading to a standard temperature, usually 25 °C (77 °F). If the conductivity meter allows for manual temperature compensation, set this value to 25 °C (77 °F). Place the clean electrodes into the container of fresh conductivity standard solution. Allow sufficient time for the response of your CPMS to reach equilibrium. Record the conductivity measured by your CPMS. Using the conductivity standard solution as the value for V_c, follow the procedure specified in section 12.2 of this specification to determine if your CPMS satisfies the accuracy requirement of Table 8 of this specification. If you determine that your CPMS satisfies the

accuracy requirement of Table 8, the validation check is complete. If your CPMS does not satisfy the accuracy requirement of Table 8 of this procedure, calibrate your conductivity CPMS using the procedures specified in the manufacturer's owner's manual. If the manufacturer's owner's manual does not specify a calibration procedure, you must perform a calibration procedure based on ASTM D 1125–95 (2005) or ASTM D 5391–99 (2005) (incorporated by reference—see § 60.17). If you are required to measure and record conductivity at multiple locations, repeat this procedure for each location.

8.9 Are there any acceptable alternative procedures for installing and verifying my CPMS? You may use alternative procedures for installing and verifying the operation of your CPMS if the alternative procedures are approved by the Administrator. In addition, for temperature and pressure CPMS, you can use the methods specified in paragraphs (1) and (2) of this section, respectively, to satisfy the initial validation check.

(1) Alternative Temperature CPMS Validation Check. As an alternative to the procedures for the temperature CPMS initial validation check in this specification, you may use the methods listed in Table 6 of this specification to determine the accuracy of thermocouples or resistance temperature detectors. However, you also must check the accuracy of the overall CPMS system using the methods specified in section 8.4 of this specification or an alternative method that has been approved by the Administrator.

(2) Alternative Pressure CPMS Validation Check. As an alternative to the procedure for the pressure CPMS initial validation check in this specification, you may use the methods listed in Table 7 of this specification to check the accuracy of the pressure sensor associated with your pressure CPMS. However, you also must check the accuracy of the overall CPMS using the methods in section 8.5 of this specification or an alternative method that has been approved by the Administrator.

8.10 How do I perform a leak test on pressure connections, as required by this specification? You can satisfy the leak test requirements of sections 8.5 and 8.6 of this specification by following the procedures described in paragraphs (1) through (3) of this section.

(1) For each pressure connection, apply a pressure that is equal to the highest pressure the connection is likely to be subjected to or 0.24 kilopascals (1.0 inch of water column), whichever is greater.

(2) Close off the connection between the applied pressure source and the connection that is being leak-tested.

(3) If the applied pressure remains stable for at least 15 seconds, the connection is considered to be leak tight. If the applied pressure does not remain stable for at least 15 seconds, take any corrective action necessary to make the connection leak tight and repeat this leak test procedure.

9.0 *What ongoing quality control measures are required?*

Ongoing quality control procedures for CPMS are specified in Procedure 4 of appendix F of this part.

10.0 *Calibration and Standardization* [Reserved]

11.0 *Analytical Procedure* [Reserved]

12.0 *What calculations are needed?*

The calculations needed to comply with this performance specification are described in sections 12.1 and 12.2 of this specification.

12.1 How do I determine if a calibrated measurement device satisfies the accuracy hierarchy specified in section 6.5 of this specification. To determine if a calibrated measurement device satisfies the accuracy hierarchy requirement, follow the procedure described in paragraphs (1) and (2) of this section.

(1) Calculate the accuracy hierarchy (A_h) using Equation 17–1.

$$A_h = \frac{A_r}{A_c} \qquad \text{(Eq. 17-1)}$$

Where:

A_h = Accuracy hierarchy, dimensionless.
A_r = Required accuracy (A_p or A_v) specified in Table 8 of this specification, percent or units of parameter value (e.g., degrees Celsius, kilopascals, liters per minute).
A_c= Accuracy of calibrated measurement device, same units as A_r.

(2) If the accuracy hierarchy (A_h) is equal to or greater than 3.0, the calibrated measurement device satisfies the accuracy hierarchy of Section 6.5 of this specification.

12.2 How do I determine if my CPMS satisfies the accuracy requirement of PS–17? To determine if your CPMS satisfies the accuracy requirement of PS–17, follow the procedure described in paragraphs (1) through (4) of this section.

(1) If your CPMS measures temperature, pressure, or flow rate, calculate the accuracy percent value (A_{pv}) using Equation 17–2. If your CPMS measures pH, proceed to paragraph (2) of this section.

$$A_{pv} = V_c \quad \frac{A_p}{100} \qquad \text{(Eq. 17-2)}$$

Where:

A_{pv} = Accuracy percent value, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).
V_c = Parameter value measured by the calibrated measurement device or measured by your CPMS when a calibrated signal simulator is applied to your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).
A_p = Accuracy percentage specified in Table 8 of this specification that corresponds to your CPMS, percent.

(2) If your CPMS measures temperature, pressure, or flow rate other than mass flow rate or steam flow rate, compare the accuracy percent value (A_{pv}) to the accuracy value (A_v) in Table 8 of this specification and select the greater of the two values. Use this greater value as the allowable deviation (d_a) in paragraph (4) of this section. If your CPMS measures pH, use the accuracy value (A_v) specified in Table 8 of this specification as the allowable deviation (d_a). If your CPMS measures steam flow rate, mass flow rate, or conductivity, use the accuracy percent value (A_{pv}) calculated using Equation 17–2 as the allowable deviation (d_a).

(3) Using Equation 17–3, calculate the measured deviation (d_m), which is the absolute value of the difference between the parameter value measured by the calibrated device (V_c) and the value measured by your CPMS (V_m).

$$d_m = \left|V_c - V_m\right| \qquad \text{(Eq. 17-3)}$$

Where:

d_m = Measured deviation, units of the parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).
V_c = Parameter value measured by the calibrated measurement device or measured by your CPMS when a calibrated signal simulator is applied to your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).
V_m = Parameter value measured by your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

(4) Compare the measured deviation (d_m) to the allowable deviation (d_a). If the measured deviation is less than or equal to the allowable deviation, your CPMS satisfies the accuracy requirement of this specification.

13.0 *What initial performance criteria must I demonstrate for my CPMS to comply with PS–17?*

You must demonstrate that your CPMS meets the accuracy requirements specified in Table 8 of this specification.

14.0 *What are the recordkeeping requirements for PS–17?*

You must satisfy the recordkeeping requirements specified in Sections 14.1 and 14.2 of this specification.

14.1 What data does PS–17 require me to record for my CPMS? For each affected CPMS that you operate, you must record the information listed in paragraphs (1) through (6) of this section.

(1) Identification and location of the CPMS;

(2) Manufacturer's name and model number of the CPMS;

(3) Range of parameter values you expect your CPMS to measure and record;

(4) Date of the initial calibration and system validation check;

(5) Results of the initial calibration and system validation check; and

(6) Name of the person(s) who performed the initial calibration and system validation check.

14.2 For how long must I maintain the data that PS–17 requires me to record for my CPMS? You are required to keep the records required by this specification for your CPMS for a period of 5 years. At a minimum, you must maintain the most recent 2 years of data onsite and available for inspection by the enforcement agency.

15.0 *Pollution Prevention* [Reserved]

16.0 *Waste Management* [Reserved]

17.0 *Which references are relevant to PS–17?*

1. Technical Guidance Document: Compliance Assurance Monitoring. U.S. Environmental Protection Agency Office of Air Quality Planning and Standards Emission Measurement Center. August 1998. (*http://www.epa.gov/ttn/emc/cam.html*).

2. NEMA Standard Publication 250. ''Enclosures for Electrical Equipment (1000 Volts Maximum)''. National Electrical Manufacturers Association. 1997.

3. ASTM E–220–86 (1996): Standard Test Methods for Calibration of Thermocouples by Comparison Techniques. American Society for Testing and Materials. May 1986.

4. MC96–1–1982: Temperature Measurement Thermocouples. American National Standards Institute. August 1982.

5. The pH and Conductivity Handbook. Omega Engineering, Inc. 1995.

6. ASTM E–452–89: ''Standard Test Method for Calibration of Refractory Metal Thermocouples Using an Optical Pyrometer''. American Society of Testing and Materials. April 1989.

7. ASTM E 644–06: ''Standard Test Methods for Testing Industrial Resistance Thermometers''. American Society of Testing and Materials. 2006.

8. ASME B 40.100–2005: ''Pressure Gauges and Gauge Attachments''. American Society of Mechanical Engineers. 2005.

9. ASTM E 251–92 (2003): ''Standard Test Methods for Performance Characteristics of Metallic Bonded Resistance Strain Gages''. American Society for Testing and Materials. 2003.

10. ASHRAE 41.8–1989: ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters''. American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. 1989.

11. ISA RP 16.6–1961: ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''. Instrumentation, Systems, and Automation Society. 1961.

12. ANSI/ISA–RP31.1–1977: ''Specification, Installation, and Calibration of Turbine Flow Meters''. Instrumentation, Systems, and Automation Society. 1977.

13. ASTM E 1–95: ''Standard Specifications for ASTM Thermometers''. American Society for Testing and Materials. 1995.

14. ANSI/ASHRAE 41.1–1986: ''Standard Method for Temperature Measurement'' American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc. February 1987.

15. ANSI/ASHRAE 41.3–1989: ''Standard Method for Pressure Measurement''. American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc. 1989.

16. ISA RP 16.5–1961: ''Installation, Operation, and Maintenance Instructions for Glass Tube Variable Area Meters (Rotameters)''. Instrumentation, Systems, and Automation Society. 1961.

17. ASME MFC–3M–2004: ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi''. American Society of Mechanical Engineers. 1989.

18. ASTM E–1137–97: ''Standard Specification for Industrial Platinum Resistance Thermometers''. American Society for Testing and Materials. 1997.

19. The Temperature Handbook. Omega Engineering, Inc. 2000.

20. The Pressure, Strain and Force Handbook. Omega Engineering, Inc. 1999.

21. The Flow and Level Handbook. Omega Engineering, Inc. 2000.

22. ASTM D–5464–93 (1997): ''Standard Test Methods for pH Measurement of Water of Low Conductivity''. American Society for Testing and Materials. 1993.

23. ASTM D–1293–99: ''Standard Test Methods for pH of Water''. American Society for Testing and Materials. 1999.

24. ANSI/ASME MFC–4M–1986 (R2003): ''Measurement of Gas Flow by Turbine Meters''. American Society of Mechanical Engineers. 2003.

25. ASME/ANSI MFC–6M–1987: ''Measurement of Fluid Flow in Pipes Using Vortex Flow Meters''. American Society of Mechanical Engineers. 1987.

26. ASME/ANSI MFC–7M–1987: ''Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles''. American Society of Mechanical Engineers. 1987.

27. ASME/ANSI MFC–9M–1988: ''Measurement of Liquid Flow in Closed Conduits by Weighing Method''. American Society of Mechanical Engineers. 1989.

28. ASME/ANSI MFC–10M–1994: ''Measurement of Liquid Flow in Closed Conduits by Volumetric Method''. American Society of Mechanical Engineers. 1994.

29. ISO 8316:1987: ''Measurement of Liquid Flow in Closed Conduits-Method by Collection of Liquid in a Volumetric Tank''. International Organization for Standardization. 1987.

30. NIST Handbook 44—2002 Edition: ''Specifications, Tolerances, And Other Technical Requirements for Weighing and Measuring Devices, as adopted by the 86th National Conference on Weights and Measures 2001'', Section 2.21: ''Belt-Conveyor Scale Systems''.

31. ISO 10790:1999: ''Measurement of Fluid Flow in Closed Conduits-Guidance to the Selection, Installation, and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements''. International Organization for Standardization. 1999.

32. ASTM D 1125–95 (2005): ''Standard Test Methods for Electrical Conductivity and Resistivity of Water''. American Society for Testing and Materials. 2005.

33. ASTM D 5391–99 (2005): ''Standard Test Method for Electrical Conductivity and Resistivity of a Flowing High Purity Water Sample''. American Society for Testing and Materials. 2005.

18.0 *What tables are relevant to PS–17?*

TABLE 1—SENSOR COMPONENTS OF COMMONLY USED CPMS

For a CPMS that measures . . .	Using a . . .	The sensor component consists of the . . .
1. Temperature	a. Thermocouple	Thermocouple.
	b. Resistance temperature detector (RTD)	RTD.
	c. Optical pyrometer	Optical assembly and detector.
	d. Thermistor	Thermistor.
	e. Temperature transducer	Integrated circuit sensor?
2. Pressure	a. Pressure gauge	Gauge assembly, including bourdon element, bellows element, or diaphragm.
	b. Pressure transducer	Strain gauge assembly, capacitance assembly, linear variable differential transformer, force balance assembly, potentiometer, variable reluctance assembly, piezoelectric assembly, or piezoresistive assembly.
	c. Manometer	U-tube or differential manometer.
3. Flow rate	a. Differential pressure device	Flow constricting element (nozzle, Venturi, or orifice plate) and differential pressure sensor.
	b. Differential pressure tube	Pitot tube, or other array of tubes that measure velocity pressure and static pressure, and differential pressure sensor.
	c. Magnetic flow meter	Magnetic coil assembly.

TABLE 1—SENSOR COMPONENTS OF COMMONLY USED CPMS—Continued

For a CPMS that measures . . .	Using a . . .	The sensor component consists of the . . .
	d. Positive displacement flow meter	Piston, blade, vane, propeller, disk, or gear assembly.
	e. Turbine flow meter	Rotor or turbine assembly.
	f. Vortex formation flow meter	Vortex generating and sensing elements.
	g. Fluidic oscillating flow meter	Feedback passage, side wall, control port, and thermal sensor.
	h. Ultrasonic flow meter	Sonic transducers, receivers, timer, and temperature sensor.
	i. Thermal flow meter	Thermal element and temperature sensors.
	j. Coriolis mass flow meter	U-tube and magnetic sensing elements.
	k. Rotameter	Float assembly.
	l. Solids flow meter	Sensing plate.
	m. Belt conveyor	Scale.
4. pH	pH meter	Electrode.
5. Conductivity	Conductivity meter	Electrode.

TABLE 2—DESIGN STANDARDS FOR TEMPERATURE SENSORS

If the sensor is a . . .	You can use the following design standards as guidance in selecting a sensor for your CPMS . . .
1. Thermocouple	a. ASTM E235–88 (1996), ''Specification for Thermocouples, Sheathed, Type K, for Nuclear or Other High-Reliability Applications.'' b. ASTM E585/E 585M–04, ''Specification for Compacted Mineral-Insulated, Metal-Sheathed, Base Metal Thermocouple Cables.'' c. ASTM E608/E 608M–06, ''Specification for Mineral-Insulated, Metal-Sheathed Base Metal Thermocouples.'' d. ASTM E696–07, ''Specification for Tungsten-Rhenium Alloy Thermocouple Wire.'' e. ASTM E1129/E 1129M–98 (2002), ''Standard Specification for Thermocouple Connectors.'' f. ASTM E1159–98 (2003), ''Specification for Thermocouple Materials, Platinum-Rhodium Alloys, and Platinum.'' g. ISA–MC96.1–1982, ''Temperature Measurement Thermocouples.''
2. Resistance temperature detector	ASTM E1137/E1137M–04, ''Standard Specification for Industrial Platinum Resistance Thermometers.''

TABLE 3—STANDARDS FOR THE INSTALLATION OF FLOW SENSORS

If the sensor of your flow CPMS is a . . .	You should install the flow sensor according to . . .
1. Differential pressure device	ASME MFC–3M–2004, ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi''.
2. Critical flow venturi flow meter used to measure gas flow rate.	ASME/ANSI MFC–7M–1987 (R2001), ''Measurement of Gas Flow by Means of Critical Flow Venturi Nozzles''.
3. Turbine flow meter	ANSI/ISA RP 31.1–1977, ''Recommended Practice: Specification, Installation, and Calibration of Turbine Flowmeters'', or, if used for gas flow measurement, ANSI/ASME MFC–4M–1986 (R2003), ''Measurement of Gas Flow by Turbine Meters''.
4. Rotameter	ISA RP 16.5–1961, ''Installation, Operation, and Maintenance Instructions for Glass Tube Variable Area Meters (Rotameters)''.
5. Coriolis mass flow meter	ISO 10790:1999, ''Measurement of fluid flow in closed conduits—Guidance to the selection, installation and use of Coriolis meters (mass flow, density and volume flow measurements).
6. Vortex formation flow meter	ASME/ANSI MFC–6M–1998 (R2005), ''Measurement of Fluid Flow in Pipes Using Vortex Flow Meters''.

TABLE 4—VOLUMETRIC METHODS FOR INITIAL VALIDATION CHECK OF FLOW METERS

Designation	Title
1. ISA RP 16.6–1961	''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''.
2. ANSI/ISA RP 31.1–1977	''Specification, Installation, and Calibration of Turbine Flow Meters''.
3. ISO 8316:1987	''Measurement of Liquid Flow in Closed Conduits—Method by Collection of Liquid in a Volumetric Tank''.

TABLE 5—WEIGHING METHODS FOR INITIAL VALIDATION CHECK OF FLOW METERS

Designation	Title
1. ASHRAE 41.8–1989	''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters''.
2. ISA RP 16.6–1961	''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''.
3. ANSI/ISA RP 31.1–1977	''Specification, Installation, and Calibration of Turbine Flow Meters''.

TABLE 5—WEIGHING METHODS FOR INITIAL VALIDATION CHECK OF FLOW METERS—Continued

Designation	Title
4. ANSI/ASME MFC–9M–1988	"Measurement of Liquid Flow in Closed Conduits by Weighing Method".

TABLE 6—ALTERNATE METHODS FOR INITIAL VALIDATION CHECK OF TEMPERATURE SENSORS

If the temperature sensor in your CPMS is a . . .	And is used in . . .	You can perform the initial validation check of the sensor using . . .
1. Thermocouple	Any application	ASTM E220–07e1.
2. Thermocouple	A reducing environment	ASTM E452–02 (2007).
3. Resistance temperature detector	Any application	ASTM E644–06.

TABLE 7—ALTERNATE METHODS FOR INITIAL VALIDATION CHECK OF PRESSURE SENSORS

If the pressure sensor in your CPMS is a . . .	You can perform the initial validation check of the sensor using . . .
1. Pressure gauge	ASME B40.100–2005.
2. Metallic bonded resistance strain gauge	ASTM E251–92 (2003).

TABLE 8—CPMS ACCURACY REQUIREMENTS

If your CPMS measures . . .	You must demonstrate that your CPMS operates within . . .
1. Temperature, in a non-cryogenic application.	An accuracy percentage (A_p) of ±1.0 percent of the temperature measured in degrees Celsius or within an accuracy value (A_v) of 2.8 degrees Celsius (5 degrees Fahrenheit), whichever is greater.
2. Temperature, in a cryogenic application.	An accuracy percentage (A_p) of ±2.5 percent of the temperature measured in degrees Celsius or within an accuracy value (A_v) of 2.8 degrees Celsius (5 degrees Fahrenheit), whichever is greater.
3. Pressure	An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 0.12 kilopascals (0.5 inches of water column), whichever is greater.
4. Liquid flow rate	An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 1.9 liters per minute (0.5 gallons per minute), whichever is greater.
5. Gas flow rate	a. A relative accuracy of ±20 percent, if you demonstrate compliance using the relative accuracy test, or b. An accuracy percentage (A_p) of ±10 percent, if your CPMS measures steam flow rate, or c. An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 280 liters per minute (10 cubic feet per minute), whichever is greater, for all other gases and accuracy audit methods.
6. Mass flow rate	An accuracy percentage (A_p) of ±5 percent.
7. pH	An accuracy value (A_v) of ±0.2 pH units.
8. Conductivity	An accuracy percentage (A_p) of ±5 percent.

5. Appendix F to part 60 is amended as follows:

a. In Procedure 1, by:

i. Revising the second (last) sentence in the first paragraph of section 1.1; and

ii. Adding sections 4.1.1, 4.1.2, 4.3.3, 4.4.1, 5.5.5, and 5.1.7.

b. Adding Procedure 4 in numerical order to read as follows:

Appendix F to Part 60—Quality Assurance Procedures

Procedure 1. Quality Assurance Requirements for Gas Continuous Emission Monitoring Systems Used for Compliance Determination

1. Applicability and Principle

1.1 * * * The CEMS may include systems that monitor one pollutant (e.g., SO_2 or NO_X), a combination of pollutants (e.g., benzene and hexane), or diluents (e.g., O_2 or CO_2).

* * * * *

4. CD Assessment

* * * * *

4.1.1 Multiple Organic Pollutant CEMS. Source owners and operators of gas chromatographic CEMS that are subject to PS 9 and are used to monitor multiple organic pollutants must perform the daily CD requirement specified in section 4.1 of this procedure using any one of the target pollutants specified in the applicable regulation.

4.1.2 CEMS Subject to PS 15. To satisfy the daily CD requirement of this procedure, source owners and operators of extractive Fourier Transfer Infrared (FTIR) CEMS that are subject to PS 15 must perform at least once daily the calibration transfer standards check, analyte spike check, and background deviation check specified in PS–15 (40 CFR part 60, appendix B), sections 10.1, 10.4, and 10.6, respectively. The analyte spike check can be performed using any of the target analytes.

* * * * *

4.3.3 Out-of-Control Definition for CEMS Subject to PS 15. If the calibration transfer standards check, analyte spike check, or background deviation check exceeds twice the accuracy criterion of ±5 percent for five, consecutive daily periods, the CEMS is out of control. If the calibration transfer standards check, analyte spike check, or background deviation check exceeds four times the accuracy criterion of ±5 percent during any daily calibration check, the CEMS is out of control. If the CEMS is out of control, take necessary corrective action. Following corrective action, repeat the calibration checks specified in this section.

* * * * *

4.4.1 Data Storage Requirements for CEMS Subject to PS 15. In addition to the requirements of section 4.4 of this procedure, source owners and operators of CEMS subject to PS–15 (40 CFR part 60, appendix B) must satisfy the data storage requirements of section 6.3 of PS–15.

* * * * *

5. Data Accuracy Assessment

* * * * *

5.1.5 Audits for CEMS Subject to PS 9. For CEMS that are subject to PS 9, the requirements of section 5.1 of this procedure apply, with the following exceptions:

(1) The RATA specified in sections 5.1.1 and 5.1.4 of this procedure does not apply.

(2) The CGA must be conducted every calendar quarter.

(3) The CGA must be conducted according to the procedures specified in section 5.3 of PS–9 (40 CFR part 60, appendix B), except that the audit must be performed at two points as specified in section 5.1.2 of this procedure.

(4) The CGA must be conducted for each target pollutant specified in the applicable regulation.

(5) The RAA specified in section 5.1.3 of this procedure does not apply.

(6) Audits conducted under this procedure fulfill the requirement of section 5.3 of PS–9 (40 CFR part 60, appendix B) for quarterly performance audits.

5.1.6 Audits for CEMS Subject to PS–15. For CEMS that are subject to PS–15 (40 CFR part 60, appendix B), the requirements of section 5.1 of this procedure apply, with the following exceptions:

(1) The RATA specified in sections 5.1.1 and 5.1.4, the CGA specified in section 5.1.2, and the RAA specified in section 5.1.3 of this procedure do not apply.

(2) To satisfy the quarterly accuracy audit requirement of this procedure, one of the accuracy checks specified in PS–15 (40 CFR part 60, appendix B), sections 9.1 (Audit Sample), 9.2 (Audit Spectra), and 9.3 (Submit Spectra for Independent Analysis) must be performed at least once each calendar quarter, consistent with the following additional criteria:

(i) The audit sample check, specified in section 9.1 of PS–15 (40 CFR part 60, appendix B), must be conducted at least once every four calendar quarters.

(ii) The audit spectra check, specified in section 9.2 of PS–15 (40 CFR part 60, appendix B), can be used to satisfy the quarterly accuracy audit requirement only once every four calendar quarters.

(3) Audits conducted under this procedure fulfill the requirement of section 9 of PS–15 (40 CFR part 60, appendix B) for quarterly or semiannual QA/QC checks on the operation of extractive FTIR CEMS.

* * * * *

Procedure 4. Quality Assurance Requirements for Continuous Parameter Monitoring Systems at Stationary Sources

1.0 *What is the purpose of this procedure?*

The purpose of this procedure is to establish the minimum requirements for evaluating on an ongoing basis the quality of data produced by your continuous parameter monitoring system (CPMS), and the effectiveness of quality assurance (QA) and quality control (QC) procedures that you have developed for your CPMS. This procedure applies instead of the QA and QC requirements for applicable CPMS specified in any applicable subpart to parts 60, 61, or 63, unless otherwise specified in the applicable subpart. This procedure presents requirements in general terms to allow you to develop a QC program that is most effective for your circumstances. This procedure does not restrict your current QA/QC procedures to ensure compliance with applicable regulations. Instead, you are encouraged to develop and implement a more extensive QA/QC program or to continue such programs where they already exist.

1.1 To what types of devices does Procedure 4 apply? This procedure applies to any CPMS that is subject to Performance Specification 17 (PS–17).

1.2 When must I comply with Procedure 4? You must comply with this procedure when conditions (1) or (2) of this section occur.

(1) At the time you install and place into operation a CPMS that is subject to PS–17.

(2) At the time any of your existing CPMS become subject to PS–17.

1.3 How does Procedure 4 affect me if I am also subject to QA procedures under another applicable subpart? This procedure does not apply if any more stringent QA requirements apply to you under an applicable requirement. You are required to comply with the more stringent of the applicable QA requirements.

2.0 *What are the basic requirements of Procedure 4?*

This procedure requires all owners and operators of a CPMS to perform periodic QA evaluations of CPMS performance and to develop and implement QC programs to ensure that CPMS data quality is maintained.

2.1 What types of procedures are required for me to demonstrate compliance? This procedure requires you to meet the requirements of paragraphs (1) and (2) of this section.

(1) Perform periodic accuracy audits of your CPMS; and

(2) Take corrective action when your CPMS fails to meet the accuracy requirements of this procedure.

2.2 What types of recordkeeping and reporting activities are required by Procedure 4? This procedure does not have any reporting requirements but does require you to record and maintain data that identify your CPMS and show the results of any performance demonstrations of your CPMS. Recordkeeping requirements are specified in section 14 of this procedure.

3.0 *What special definitions apply to Procedure 4?*

3.1 Accuracy. A measure of the closeness of a measurement to the true or actual value.

3.2 Accuracy hierarchy. The ratio of the accuracy of a measurement instrument to the accuracy of a calibrated instrument or standard that is used to measure the accuracy of the measurement instrument. For example, if the accuracy of a calibrated temperature measurement device is 0.2 percent, and the accuracy of a thermocouple is 1.0 percent, the accuracy hierarchy is 5.0 (1.0 ÷ 0.2 = 5.0).

3.3 Calibration drift. The difference between a reference value and the output value of a CPMS after a period of operation during which no unscheduled maintenance, repair, or adjustment took place.

3.4 Conductivity CPMS. The total equipment that is used to measure and record liquid conductivity on a continuous basis.

3.5 Continuous parameter monitoring system (CPMS). The total equipment that is used to measure and record parameters, such as temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH or conductivity, in one or more locations on a continuous basis.

3.6 Differential pressure tube. A device, such as a pitot tube, that consists of one or more pairs of tubes that are oriented to measure the velocity pressure and static pressure at one of more fixed points within a duct for the purpose of determining gas velocity.

3.7 Electronic components. The electronic signal modifier or conditioner, transmitter, and power supply associated with a CPMS.

3.8 Flow CPMS. The total equipment that is used to measure liquid flow rate, gas flow rate, or mass flow rate on a continuous basis.

3.9 Mass flow rate. The measurement of solid, liquid, or gas flow in units of mass per time, such as kilograms per minute or tons per hour.

3.10 Mechanical component. Any component of a CPMS that consists of or includes moving parts or that is used to apply or transfer force to another component or part of a CPMS.

3.11 pH CPMS. The total equipment that is used to measure and record liquid pH on a continuous basis.

3.12 Pressure CPMS. The total equipment that is used to measure and record the pressure of a liquid or gas at any location or the differential pressure of a gas or liquid at any two locations on a continuous basis.

3.13 Resolution. The smallest detectable or legible increment of measurement.

3.14 Sensor. The component of a CPMS that senses the parameter being measured (currently temperature, pressure, liquid flow rate, gas flow rate, mass flow rate, pH, or conductivity) and generates an output signal. Table 1 identifies the sensor components of some commonly used CPMS.

3.15 Solid mass flow rate. The measurement in units of mass per time of the rate at which a solid material is processed or transferred. Examples of solid mass flow rate are the rate at which ore is fed to a material dryer or the rate at which powdered lime is injected into an exhaust duct.

3.16 Temperature CPMS. The total equipment that is used to measure and record the temperature of a liquid or gas at any location or the differential temperature of a gas or liquid at any two locations on a continuous basis.

3.17 Total equipment. The sensor, mechanical components, electronic components, data recording, electrical wiring, and other components of a CPMS.

4.0 *Interferences* [Reserved]

5.0 *What do I need to know to ensure the safety of persons who perform the accuracy audits specified in Procedure 4?*

The accuracy audits required under Procedure 4 may involve hazardous materials, operations, site conditions, and equipment. This QA procedure does not purport to address all of the safety issues associated with these audits. It is the responsibility of the user to establish appropriate safety and health practices and determine the applicable regulatory limitations prior to performing these audits.

6.0 *What are the equipment requirements for Procedure 4?*

6.1 What types of equipment do I need for performing the accuracy audit of my CPMS? The specific types of equipment that you need for your CPMS accuracy audit depend on the type of CPMS, site-specific conditions, and the method that you choose for conducting the accuracy audit, as specified in sections 8.1 through 8.5 of this procedure. In most cases, you will need the equipment described in paragraphs (1) and (2) of this section.

(1) A separate device that either measures the same parameter that your CPMS measures, or that simulates the same electronic signal or response that your CPMS generates, and

(2) Any test ports, pressure taps, valves, fittings, or other equipment required to perform the specific procedures of the accuracy audit method that you choose, as specified in section 8.1 of this procedure.

6.2 What are the accuracy requirements for the equipment that I use to audit the accuracy of my CPMS? Unless you meet one of the exceptions listed in section 6.3 of this procedure, any measurement instrument or device that you use to conduct an accuracy audit of your CPMS must have an accuracy that is traceable to National Institute of Standards and Technology (NIST) standards and must have an accuracy hierarchy of at least three. To determine if a measurement instrument or device satisfies this accuracy hierarchy requirement, follow the procedure described in section 12.1 of this procedure.

6.3 Are there any exceptions to the accuracy requirement of section 6.2 of this procedure? There are three exceptions to the NIST-traceable accuracy requirement specified in section 6.2, as described in paragraphs (1) through (3) of this section.

(1) If you perform an accuracy audit of your CPMS by comparison to a redundant CPMS, you need not meet the NIST-traceability requirement of section 6.2; however, the redundant CPMS must have an accuracy equal to or better than the corresponding minimum required accuracy specified in Table 6 of this procedure for that specific type of CPMS.

(2) As an alternative for the calibrated pressure measurement device with NIST-traceable accuracy that is required in paragraphs (2) and (4) of section 8.2 and in paragraph (4) of section 8.3 of this specification, you can use a mercury-in-glass or water-in-glass U-tube manometer to check the accuracy of your pressure CPMS.

(3) When validating a flow rate CPMS using the methods specified in paragraphs (2), (3), or (7) of section 8.3 of this specification, the container used to collect or weigh the liquid or solid is not required to have NIST-traceable accuracy.

7.0 *What reagents or standards do I need to comply with Procedure 4?*

The specific reagents and standards needed to demonstrate compliance with this procedure depend upon the parameter that your CPMS measures and the method that you choose to check the accuracy of your CPMS. Sections 8.1 through 8.5 of this procedure identify the specific reagents and standards that you will need to conduct accuracy audits of your CPMS.

8.0 *What quality assurance and quality control measures are required by Procedure 4 for my CPMS?*

You must perform accuracy audits, meet the accuracy requirements of this procedure, and perform any additional checks of the CPMS as specified in sections 8.1 through 8.9 of this procedure.

8.1 How do I perform an accuracy audit for my temperature CPMS? To perform the accuracy audit, you can choose one of the methods described in paragraphs (1) through (3) of this section.

(1) Comparison to Redundant Temperature Sensor. This method requires your CPMS to have a primary temperature sensor and a redundant temperature sensor. The redundant temperature sensor must be installed adjacent to the primary temperature sensor and must be subject to the same environment as the primary temperature sensor. To perform the accuracy audit, record three pairs of concurrent temperature measurements within a 24-hour period. Each pair of concurrent measurements must consist of a temperature measurement by each of the two temperature sensors. The minimum time interval between any two such pairs of consecutive temperature measurements is one hour. You must take these readings during periods when the process or control device that is being monitored by the CPMS is operating normally. Calculate the mean of the three values for each temperature sensor. The mean values must agree within the minimum required accuracy specified in Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your temperature CPMS, you must perform the procedures outlined in PS–17. If you are required to measure and record temperatures at multiple locations, repeat this procedure for each location.

(2) Comparison to Calibrated Temperature Measurement Device. Place the sensor of a calibrated temperature measurement device adjacent to the sensor of your temperature CPMS in a location that is subject to the same environment as the sensor of your temperature CPMS. The calibrated temperature measurement device must satisfy the accuracy requirements specified in section 6.2 of this procedure. Allow sufficient time for the response of the calibrated temperature measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, record concurrently the temperatures measured by your temperature CPMS and the calibrated temperature measurement device. Using the temperature measured by the calibrated measurement device as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of the primary CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record temperatures at multiple locations, repeat this procedure for each location.

(3) Separate Sensor Check and System Check by Temperature Simulation. This method applies to temperature CPMS that use either a thermocouple or a resistance temperature detector as the temperature sensor. First, perform the temperature sensor check using the appropriate ASTM standard listed in Table 2 of this procedure. To perform the system check, record the temperature using your temperature CPMS with the process or control device that is monitored by your temperature CPMS operating under normal conditions. Under the same operating conditions, disconnect the sensor from the CPMS system and connect a calibrated simulation device that is designed to simulate the same type of response as the CPMS sensor. The simulation device must satisfy the accuracy requirements specified in section 6.2 of this procedure. Within 15 minutes of measuring and recording the temperature using your temperature CPMS, simulate the same temperature recorded for the temperature CPMS. Allow sufficient time for the response of the simulation device to reach equilibrium. Using the temperature simulated by the calibrated simulation device as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If the calculated accuracy does not meet the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your temperature CPMS, you must perform the procedures outlined in PS–17. If you are required to measure and record temperatures at multiple locations, repeat this procedure for each location.

8.2 How do I perform an accuracy audit for my pressure CPMS? To perform the accuracy audit, you can choose one of the methods described in paragraphs (1) through (4) of this section.

(1) Comparison to redundant pressure sensor. This method requires your CPMS to

have a primary pressure sensor and a redundant pressure sensor. The redundant pressure sensor must be installed adjacent to the primary pressure sensor and must be subject to the same environment as the primary pressure sensor. To perform the accuracy audit, record three pairs of concurrent pressure measurements within a 24-hour period. Each pair of concurrent measurements must consist of a pressure measurement by each of the two pressure sensors. The minimum time interval between any two such pairs of consecutive pressure measurements is one hour. You must take these readings during periods when the process or control device that is being monitored by the CPMS is operating normally. Calculate the mean of the three values for each pressure sensor. The mean values must agree within the minimum required accuracy specified in Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your pressure CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

(2) Comparison to Calibrated Pressure Measurement Device. With the process or control device that is monitored by your pressure CPMS operating under normal conditions, record the pressure at each location that is monitored by your pressure CPMS. For each pressure monitoring location, connect the process lines from the process or emission control device that is monitored by your pressure CPMS to a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or calibrated pressure measurement device. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.2 of this procedure. The calibrated pressure measurement device must also have a range equal to or greater than the range of your pressure CPMS. Perform a leak test on all manometer or calibrated pressure measurement device connections using the method specified in section 8.9 of this procedure. Allow sufficient time for the response of the calibrated pressure measurement device to reach equilibrium. Within 30 minutes of measuring and recording the corresponding pressure using your CPMS, record the pressure measured by the calibrated pressure measurement device at each location. Using the pressure measured by the calibrated pressure measurement device as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If the calculated accuracy does not meet the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the accuracy requirements. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your pressure CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pressures at multiple locations, repeat this procedure for each location.

(3) Separate Sensor Check and System Check by Pressure Simulation Using a Calibrated Pressure Source. Perform the pressure sensor check using the appropriate ASTM standard listed in Table 3 of this procedure. These sensor check methods apply only to pressure CPMS that use either a pressure gauge or a metallic-bonded resistance strain gauge as the pressure sensor. To perform the system check, begin by disconnecting or closing off the process line or lines to your pressure CPMS. For each location that is monitored by your pressure CPMS, connect a pressure source to your CPMS. The pressure source must be calibrated and must satisfy the accuracy requirements of section 6.2 of this procedure. The pressure source also must be adjustable, either continuously or incrementally over the pressure range of your pressure CPMS. Perform a leak test on the calibrated pressure source using the method specified in section 8.9 of this procedure. Using the calibrated pressure source, apply to each location that is monitored by your CPMS a pressure that is within ±10 percent of the normal operating pressure of your pressure CPMS. Allow sufficient time for the response of the calibrated pressure source to reach equilibrium. Using the pressure applied by the calibrated pressure source as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not meet the accuracy requirement of Table 6 of this procedure, check all system components and take any other corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your pressure CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

(4) Separate Sensor and System Check by Pressure Simulation Procedure Using a Pressure Source and a Calibrated Pressure Measurement Device. Perform the pressure sensor check using the appropriate ASTM standard listed in Table 3 of this procedure. These sensor check methods apply only to pressure CPMS that use either a pressure gauge or a metallic-bonded resistance strain gauge as the pressure sensor. To perform the system check, begin by disconnecting or closing off the process line or lines to your pressure CPMS. Attach a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or a calibrated pressure measurement device (the reference pressure measurement device) in parallel to your pressure CPMS. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.2 of this procedure. Connect a pressure source to your pressure CPMS and the parallel reference pressure measurement device. Perform a leak test on all connections for the pressure source and calibrated pressure measurement device using the method as specified in section 8.9 of this procedure. Apply pressure to your CPMS and the parallel reference pressure measurement device. Allow sufficient time for the responses of your CPMS and the parallel reference pressure measurement device to reach equilibrium. Record the pressure measured by your pressure CPMS and the reference pressure measurement device. Using the pressure measured by the parallel reference pressure measurement device as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not meet the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your pressure CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pressure at multiple locations, repeat this procedure for each location.

8.3 How do I perform an accuracy audit for my flow CPMS? To perform the accuracy audit on your flow CPMS, you can choose one of the methods described in paragraphs (1) through (7) of this section that is applicable to the type of material measured by your flow CPMS and the type of sensor used in your flow CPMS.

(1) Comparison to redundant flow sensor. This method requires your CPMS to have a primary flow sensor and a redundant flow sensor. The redundant flow sensor must be installed adjacent to the primary flow sensor and must be subject to the same environment as the primary flow sensor. If using two Coriolis mass flow meters, care should be taken to avoid cross-talk, which is interference between the two meters due to mechanical coupling. Consult the manufacturer for specifics. To perform the accuracy audit, record three pairs of concurrent flow measurements within a 24-hour period. Each pair of concurrent measurements must consist of a flow measurement by each of the two flow sensors. The minimum time interval between any two such pairs of consecutive flow

measurements is one hour. You must take these readings during periods when the process or control device that is being monitored by the CPMS is operating normally. Calculate the mean of the three values for each flow sensor. The mean values must agree within the minimum required accuracy specified in Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flow at multiple locations, repeat this procedure for each location.

(2) Volumetric Method. This method applies to any CPMS that is designed to measure liquid flow rate. With the process or control device that is monitored by your flow CPMS operating under normal conditions, record the flow rate measured by your flow CPMS for the subject process line. Collect concurrently the liquid that is flowing through the same process line for a measured length of time using the Volumetric Method specified in one of the standards listed in Table 4 of this procedure. Using the flow rate measured by the Volumetric Method as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flows at multiple locations, repeat this procedure for each location.

(3) Gravimetric Method. This method applies to any CPMS that is designed to measure liquid flow rate, liquid mass flow rate, or solid mass flow rate. With the process or control device that is monitored by your flow CPMS operating under normal conditions, record the flow rate measured by your flow CPMS for the subject process line. At the same time, collect the material (liquid or solid) that is flowing or being transferred through the same process line for a measured length of time using the Weighing, Weigh Tank, or Gravimetric Methods specified in the standards listed in Table 5 of this procedure. Using the flow rate measured by the Weighing, Weigh Tank, or Gravimetric Methods as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flows at multiple locations, repeat this procedure for each location.

(4) Separate Sensor Check and System Check by Differential Pressure Measurement Method. This method applies only to flow CPMS that use a differential pressure measurement flow device, such as an orifice plate, flow nozzle, or venturi tube. This method may not be used to validate a flow CPMS that measures gas flow by means of one or more differential pressure tubes. To perform the sensor check, remove the flow constricting device and perform a visual inspection for wear or other deformities based on manufacturer's recommendations. Take any corrective action that is necessary to ensure its proper operation. To perform the system check, record the flow rate measured by your flow CPMS while the process or control device that is monitored by your CPMS operating under normal conditions. Under the same operating conditions, disconnect the pressure taps from your flow CPMS and connect the pressure taps to a mercury-in-glass U-tube manometer, a water-in-glass U-tube manometer, or calibrated differential pressure measurement device. If a calibrated pressure measurement device is used, the device must satisfy the accuracy requirements of section 6.2 of this procedure. Perform a leak test on all manometer or calibrated differential pressure measurement device connections using the method specified in section 8.9 of this procedure. Allow sufficient time for the response of the calibrated differential pressure measurement device to reach equilibrium. Within 30 minutes of measuring and recording the flow rate using your CPMS, record the pressure drop measured by the calibrated differential pressure measurement device. Using the manufacturer's literature or the procedures specified in ASME MFC–3M–2004 (incorporated by reference—see § 60.17), calculate the flow rate that corresponds to the differential pressure measured by the calibrated differential pressure measurement device. For CPMS that use an orifice flow meter, the procedures specified in ASHRAE 41.8–1989 (incorporated by reference—see § 60.17) also can be used to calculate the flow rate. Using the calculated flow rate as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flows at multiple locations, repeat this procedure for each location.

(5) Separate Sensor Check and System Check by Pressure Source Flow Simulation Method. This method applies only to flow CPMS that use a differential pressure measurement flow device, such as an orifice plate, flow nozzle, or venturi tube. This method may not be used to validate a flow CPMS that measures gas flow by means of one or more differential pressure tubes. To perform the sensor check, remove the flow constricting device and perform a visual inspection for wear or other deformities based on manufacturer's recommendations. Take any corrective action that is necessary to ensure its proper operation. To perform the system check, connect separate pressure sources to the upstream and downstream sides of your pressure CPMS, where the pressure taps are normally connected. The pressure sources must be calibrated and must satisfy the accuracy requirements of section 6.2 of this procedure. The pressure sources also must be adjustable, either continuously or incrementally over the pressure range that corresponds to the range of your flow CPMS. Perform a leak test on all connections between the calibrated pressure sources and your flow CPMS using the method specified in section 8.9 of this procedure. Using the manufacturer's literature or the procedures specified in ASME MFC–3M–2004 (incorporated by reference-see § 60.17), calculate the required pressure drop that corresponds to the normal operating flow rate expected for your flow CPMS. For CPMS that use an orifice flow meter, the procedures specified in ASHRAE 41.8–1989 (incorporated by reference-see § 60.17) also can be used to calculate the pressure drop. Use the calibrated pressure sources to apply the calculated pressure drop to your flow CPMS. Allow sufficient time for the responses of the calibrated pressure sources to reach equilibrium. Record the flow rate measured by your flow CPMS. Using the flow rate measured by your CPMS when the calculated pressure drop was applied as the value for Vc, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit until the accuracy

requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flows at multiple locations, repeat this procedure for each location.

(6) Relative Accuracy (RA) Test. This method applies to any flow CPMS that measures gas flow rate. If your flow CPMS uses a differential pressure tube as the flow sensor and does not include redundant sensors, you must use this method to validate your flow CPMS. The reference methods (RM's) applicable to this test are Methods 2, 2A, 2B, 2C, 2D, and 2F in 40 CFR part 60, appendix A–1, and Method 2G in 40 CFR part 60, appendix A–2. Conduct three sets of RM tests. Mark the beginning and end of each RM test period on the flow CPMS chart recordings or other permanent record of output. Determine the integrated flow rate for each RM test period. Perform the same calculations specified by PS–2 (40 CFR part 60, appendix B), section 7.5. If the RA is no greater than 20 percent of the mean value of the RM test data, the RA test is complete. If the RA is greater than 20 percent of the mean value of the RM test data, check all system components and take any corrective action that is necessary to achieve the required RA. Repeat this RA test until the RA requirement of this section is satisfied.

(7) Material Weight Comparison Method. This method applies to any solid mass flow CPMS that uses a combination of a belt conveyor and scale and includes a totalizer. To conduct this test, pass a quantity of pre-weighed material over the belt conveyor in a manner consistent with actual loading conditions. To weigh the test quantity of material that is to be used during the accuracy audit, you must use a scale that satisfies the accuracy requirements of section 6.2 of this procedure. The test quantity must be sufficient to challenge the conveyor belt-scale system for at least three revolutions of the belt. Record the length of the test. Calculate the mass flow rate using the measured weight and the recorded time. Using this mass flow rate as the value for Vc, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your flow CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record flow at multiple locations, repeat this procedure for each location.

8.4 How do I perform an accuracy audit for my pH CPMS? To perform the accuracy audit, you can choose one of the methods described in paragraphs (1) through (3) of this section.

(1) Comparison to redundant pH sensor. This method requires your CPMS to have a primary pH sensor and a redundant pH sensor. The redundant pH sensor must be installed adjacent to the primary pH sensor and must be subject to the same environment as the primary pH sensor. To perform the accuracy audit, concurrently record the pH measured by the two pH sensors. You must take these readings during periods when the process or control device that is being monitored by the CPMS is operating normally. The two pH values must agree within the minimum required accuracy specified in Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of your pH CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pH at multiple locations, repeat this procedure for each location.

(2) Comparison to Calibrated pH Meter. Place a calibrated pH measurement device adjacent to your pH CPMS so that the calibrated test device is subjected to the same environment as your pH CPMS. The calibrated pH measurement device must satisfy the accuracy requirements specified in section 6.2 of this procedure. Allow sufficient time for the response of the calibrated pH measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, record concurrently the pH measured by your pH CPMS and the calibrated pH measurement device. If concurrent pH readings are not possible, extract a sufficiently large sample from the process stream and perform measurements using a portion of the sample for each meter. Using the pH measured by the calibrated pH measurement device as the value for Vc, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of the primary CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pH at multiple locations, repeat this procedure for each location.

(3) Single Point Calibration. This method requires the use of a certified buffer solution. All buffer solutions used must be certified by NIST and accurate to ±0.02 pH units at 25 °C (77 °F). Set the temperature on your pH meter to the temperature of the buffer solution, typically room temperature or 25 °C (77 °F). If your pH meter is equipped with automatic temperature compensation, activate this feature before calibrating. Set your pH meter to measurement mode. Place the clean electrodes into the container of fresh buffer solution. If the expected pH of the process fluid lies in the acidic range (less than 7 pH), use a buffer solution with a pH value of 4.00. If the expected pH of the process fluid lies in the basic range (greater than 7 pH), use a buffer solution with a pH value of 10.00. Allow sufficient time for the response of your CPMS to reach equilibrium. Record the pH measured by your CPMS. Using the buffer solution pH as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, calibrate your pH CPMS using the procedures specified in the manufacturer's owner's manual. If the manufacturer's owner's manual does not specify a two-point calibration procedure, you must perform a two-point calibration procedure based on ASTM D 1293–99 (2005) (incorporated by reference—see § 60.17). If you replace any electrical or mechanical components of your pH CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record pH at multiple locations, repeat this procedure for each location. If you are required to measure and record pH at multiple locations, repeat this procedure for each location.

8.5 How do I perform an accuracy audit for my conductivity CPMS? To perform the accuracy audit, you can choose one of the methods described in paragraphs (1) through (3) of this section.

(1) Comparison to Redundant Conductivity Sensor. This method requires your CPMS to have a primary conductivity sensor and a redundant conductivity sensor. The redundant conductivity sensor must be installed adjacent to the primary conductivity sensor and must be subject to the same environment as the primary conductivity sensor. To perform the accuracy audit, concurrently record the conductivity measured by the two conductivity sensors. You must take these readings during periods when the process or control device that is being monitored by the CPMS is operating normally. The two conductivity values must agree within the minimum required accuracy specified in Table 6 of this procedure. If your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this accuracy audit procedure until the accuracy requirement of Table 6 of this

procedure is satisfied. If you replace any electrical or mechanical components of your conductivity CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record conductivity at multiple locations, repeat this procedure for each location.

(2) Comparison to Calibrated Conductivity Meter. Place a calibrated conductivity measurement device adjacent to your conductivity CPMS so that the calibrated test device is subjected to the same environment as your conductivity CPMS. The calibrated conductivity measurement device must satisfy the accuracy requirements specified in section 6.2 of this procedure. Allow sufficient time for the response of the calibrated conductivity measurement device to reach equilibrium. With the process or control device that is monitored by your CPMS operating under normal conditions, record concurrently the conductivity measured by your conductivity CPMS and the calibrated conductivity measurement device. If concurrent conductivity readings are not possible, extract a sufficiently large sample from the process stream and perform measurements using a portion of the sample for each meter. Using the conductivity measured by the calibrated conductivity measurement device as the value for V_c, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, check all system components and take any corrective action that is necessary to achieve the required minimum accuracy. Repeat this procedure until the accuracy requirement of Table 6 of this procedure is satisfied. If you replace any electrical or mechanical components of the primary CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record conductivity at multiple locations, repeat this procedure for each location.

(3) Single Point Calibration. This method requires the use of a certified conductivity standard solution. All conductivity standard solutions used must be certified by NIST and accurate within ±2 percent micromhos per centimeter (μmhos/cm) (±2 percent microsiemens per centimeter μS/cm)) at 25 °C (77 °F). Choose a conductivity standard solution that is close to the measuring range for best results. Since conductivity is dependent on temperature, the conductivity tester should have an integral temperature sensor that adjusts the reading to a standard temperature, usually 25 °C (77 °F). If the conductivity meter allows for manual temperature compensation, set this value to 25 °C (77 °F). Place the clean electrodes into the container of fresh conductivity standard solution. Allow sufficient time for the response of your CPMS to reach equilibrium. Record the conductivity measured by your CPMS. Using the conductivity standard solution as the value for V_C, follow the procedure specified in section 12.2 of this procedure to determine if your CPMS satisfies the accuracy requirement of Table 6 of this procedure. If you determine that your CPMS satisfies the accuracy requirement of Table 6 of this procedure, the accuracy audit is complete. If your CPMS does not satisfy the accuracy requirement of Table 6 of this procedure, calibrate your conductivity CPMS using the procedures specified in the manufacturer's owner's manual. If the manufacturer's owner's manual does not specify a calibration procedure, you must perform a calibration procedure based on ASTM D 1125–95 (2005) or ASTM D 5391–99 (2005) (incorporated by reference—see § 60.17). If you replace any electrical or mechanical components of your conductivity CPMS, you must perform the procedures outlined in PS–17 (40 CFR part 60, appendix B). If you are required to measure and record conductivity at multiple locations, repeat this procedure for each location.

8.6 Are there any acceptable alternative procedures for evaluating my CPMS? You may use alternative procedures for evaluating the operation of your CPMS if the alternative procedures are approved by the Administrator.

8.7 How often must I perform an accuracy audit of my CPMS? Depending on the parameter measured (temperature, pressure, flow, pH, or conductivity), you must perform the accuracy audits according to the frequencies specified in paragraphs (1) and (2) of this section.

(1) Temperature, Pressure, Flow, and Conductivity. If your CPMS measures temperature, pressure, flow rate, or conductivity, you must perform an accuracy audit of your CPMS at least quarterly using the procedures specified in sections 8.1 through 8.3 and 8.5, respectively, of this procedure. You also must perform within 48 hours an accuracy audit of your CPMS following any periods of at least 24 hours in duration throughout which:

(i) The value of the measured parameter exceeded the maximum rated operating limit of the sensor, as specified in the manufacturer's owner's manual, or

(ii) The value of the measured parameter remained off the scale of the CPMS data recording system.

(2) pH. If your CPMS measures pH, you must perform an accuracy audit of your pH CPMS at least weekly using the procedures specified in section 8.4 of this procedure.

8.8 What other checks must I do on my CPMS? According to the parameter being measured (temperature, pressure, flow, pH, or conductivity), you must perform the additional checks specified in paragraphs (1) through (4) of this section.

(1) Temperature. If your temperature CPMS is not equipped with a redundant temperature sensor, at least quarterly, perform a visual inspection of all components of your temperature CPMS for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion. You must take necessary corrective action to replace or repair any damaged components as soon as possible.

(2) Pressure. At least monthly, check all mechanical connections for leakage. If your pressure CPMS is not equipped with a redundant pressure sensor, at least quarterly, perform a visual inspection of all components of the pressure CPMS for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion. You must take necessary corrective action to replace or repair any damaged components as soon as possible.

(3) Flow Rate. At least monthly, check all mechanical connections for leakage. If your flow CPMS is not equipped with a redundant flow sensor, at least quarterly, perform a visual inspection of all components of the flow CPMS for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion. You must take necessary corrective action to replace or repair any damaged components as soon as possible.

(4) pH. If your pH CPMS is not equipped with a redundant sensor, at least monthly, perform a visual inspection of all components of the pH CPMS for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion. You must take necessary corrective action to replace or repair any damaged components as soon as possible.

(5) Conductivity. If your conductivity CPMS is not equipped with a redundant sensor, at least quarterly, perform a visual inspection of all components of the conductivity CPMS for physical and operational integrity and all electrical connections for oxidation and galvanic corrosion. You must take necessary corrective action to replace or repair any damaged components as soon as possible.

8.9 How do I perform a leak test on pressure connections, as required by this procedure? You can satisfy the leak test requirements of sections 8.2 and 8.3 of this procedure by following the procedures specified in paragraphs (1) through (3) of this section.

(1) For each pressure connection, apply a pressure that is equal to the highest pressure the connection is likely to be subjected to or 0.24 kilopascals (1.0 inch of water column), whichever is greater.

(2) Close off the connection between the applied pressure source and the connection that is being leak-tested.

(3) If the applied pressure remains stable for at least 15 seconds, the connection is considered to be leak tight. If the applied pressure does not remain stable for at least 15 seconds, take any corrective action necessary to make the connection leak tight and repeat this leak test procedure.

9.0 *What quality control measures are required by this procedure for my CPMS?*

You must develop and implement a QA/QC program for your CPMS according to section 9.1 of this procedure. You must also maintain written QA/QC procedures for your CPMS.

9.1 What elements must be covered by my QA/QC program? Your QA/QC program must address, at a minimum, the elements listed in paragraphs (1) through (5) of this section.

(1) Accuracy audit procedures for the CPMS sensor;

(2) Calibration procedures, including procedures for assessing and adjusting the calibration drift (CD) of the CPMS;

(3) Preventive maintenance of the CPMS (including a spare parts inventory);

(4) Data recording, calculations, and reporting; and

(5) Corrective action for a malfunctioning CPMS.

9.1 How long must I maintain written QA/QC procedures for my CPMS? You are required to keep written QA/QC procedures on record and available for inspection by the enforcement agency for the life of your CPMS or until you are no longer subject to the requirements of this procedure.

10.0 *Calibration and Standardization* [Reserved]

11.0 *Analytical Procedure* [Reserved]

12.0 *What calculations are needed?*

The calculations needed to comply with this procedure are described in sections 12.1 and 12.2 of this procedure.

12.1 How do I determine if a calibrated measurement device satisfies the accuracy hierarchy specified in section 6.2 of this procedure? To determine if a calibrated measurement device satisfies the accuracy hierarchy requirement, follow the procedure described in paragraphs (1) and (2) of this section.

(1) Calculate the accuracy hierarchy (A_h) using Equation 4–1.

$$A_h = \frac{A_r}{A_c} \qquad \text{(Eq. 4-1)}$$

Where:

A_h = Accuracy hierarchy, dimensionless.

A_r = Required accuracy (A_p or A_v) specified in Table 6 of this procedure, percent or units of parameter value (e.g., degrees Celsius, kilopascals, liters per minute, pH units).

A_c = Accuracy of calibrated measurement device, same units as A_r.

(2) If the accuracy hierarchy (A_h) is equal to or greater than 3.0, the calibrated measurement device satisfies the accuracy hierarchy of section 6.2 of this procedure.

12.2 How do I determine if my CPMS satisfies the accuracy requirement of Procedure 4? To determine if your CPMS satisfies the accuracy requirement of this procedure, follow the procedure described in paragraphs (1) through (4) of this section.

(1) If your CPMS measures temperature, pressure, or flow rate, calculate the accuracy percent value (A_{pv}) using Equation 4–2. If your CPMS measures pH, proceed to paragraph (2) of this section.

$$A_{pv} = V_c \quad \frac{A_p}{100} \qquad \text{(Eq. 4-2)}$$

Where:

A_{pv} = Accuracy percent value, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

V_c = Parameter value measured by the calibrated measurement device or measured by your CPMS when a calibrated signal simulator is applied to your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

A_p = Accuracy percentage specified in Table 6 that corresponds to your CPMS, percent.

(2) If your CPMS measures temperature, pressure, conductivity, or flow rate other than mass flow rate or steam flow rate, compare the accuracy percent value (A_{pv}) to the accuracy value (A_v) specified in Table 6 of this procedure and select the greater of the two values. Use this greater value as the allowable deviation (d_a) in paragraph (4) of this section.

(3) If your CPMS measures pH, use the accuracy value (A_v) specified in Table 6 of this procedure as the allowable deviation (d_a).

(4) If your CPMS measures steam flow rate, mass flow rate, or conductivity, use the accuracy percent value (A_{pv}) calculated using Equation 2 as the allowable deviation (d_a).

(5) Using Equation 4–3, calculate the measured deviation (d_m), which is the absolute value of the difference between the parameter value measured by the calibrated device (V_c) and the value measured by your CPMS (V_m).

$$d_m = \left|V_c - V_m\right| \qquad \text{(Eq. 4-3)}$$

Where:

d_m = Measured deviation, units of the parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

V_c = Parameter value measured by the calibrated measurement device or measured by your CPMS when a calibrated signal simulator is applied to your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

V_m = Parameter value measured by your CPMS during the initial validation check, units of parameter measured (e.g., degrees Celsius, kilopascals, liters per minute).

(6) Compare the measured deviation (d_m) to the allowable deviation (d_a). If the measured deviation is less than or equal to the allowable deviation, your CPMS satisfies the accuracy requirement of this procedure.

13.0 *What performance criteria must I demonstrate for my CPMS to comply with this quality assurance procedure?*

You must demonstrate that your CPMS meets the applicable accuracy requirements specified in Table 6 of this procedure.

14.0 *What are the recordkeeping requirements for Procedure 4?*

You must satisfy the recordkeeping requirements specified in sections 14.1 and 14.2 of this procedure.

14.1 What data does this procedure require me to record for my CPMS? You must record the results of all CPMS accuracy audits and a summary of all corrective actions taken to return your CPMS to normal operation.

14.2 For how long must I maintain the QA data that this procedure requires me to record for my CPMS? You are required to keep the records required by this procedure for your CPMS for a period of 5 years. At a minimum, you must maintain the most recent 2 years of data onsite and available for inspection by the enforcement agency.

15.0 *Pollution Prevention* [Reserved]

16.0 *Waste Management* [Reserved]

17.0 *Which references are relevant to Procedure 4?*

1. Technical Guidance Document: Compliance Assurance Monitoring. U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Emission Measurement Center. August 1998. (http://www.epa.gov/ttn/emc/cam.html).

2. NEMA Standard Publication 250. ''Enclosures for Electrical Equipment, 1000 Volts Maximum''.

3. ASTM E–220–07e1: ''Standard Test Methods for Calibration of Thermocouples by Comparison Techniques''. American Society for Testing and Materials. 2007.

4. ISA–MC96–1–1982: ''Temperature Measurement Thermocouples''. American National Standards Institute. August 1982.

5. The pH and Conductivity Handbook. Omega Engineering, Inc. 1995.

6. ASTM E–452–02 (2007): ''Standard Test Method for Calibration of Refractory Metal Thermocouples Using an Optical Pyrometer''. American Society for Testing and Materials. 2002.

7. ASTM E 644–06: ''Standard Test Methods for Testing Industrial Resistance Thermometers''. American Society for Testing and Materials. 2006.

8. ASME B 40.100–2005: ''Pressure Gauges and Gauge Attachments''. American Society of Mechanical Engineers. February 2005.

9. ASTM E 251–92 (2003): ''Standard Test Methods for Performance Characteristics of Metallic Bonded Resistance Strain Gages''. American Society for Testing and Materials. 2003.

10. ANSI/ASME MFC–3M–2004: ''Measurement of Fluid Flow in Pipes Using Orifice, Nozzle, and Venturi''. American Society of Mechanical Engineers. 1989 (Reaffirmed 1995).

11. ANSI/ASME MFC–9M–1988: ''Measurement of Liquid Flow in Closed Conduits by Weighing Method''. American Society of Mechanical Engineers. 1989.

12. ASHRAE 41.8–1989: ''Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters''. American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. 1989.

13. ISA RP 16.6–1961: ''Methods and Equipment for Calibration of Variable Area Meters (Rotameters)''. Instrumentation, Systems, and Automation Society. 1961.

14. ANSI/ISA–RP31.1–1977: ''Specification, Installation, and Calibration of Turbine Flow Meters''. Instrumentation, Systems, and Automation Society. 1977.

15. ISO 8316:1987: ''Measurement of Liquid Flow in Closed Conduits—Method by Collection of Liquid in a Volumetric Tank''. International Organization for Standardization. 1987.

16. NIST Handbook 44—2002 Edition: ''Specifications, Tolerances, And Other

Technical Requirements for Weighing and Measuring Devices, as adopted by the 86th National Conference on Weights and Measures 2001'', Section 2.21: ''Belt-Conveyor Scale Systems''.

17. ISO 10790:1999: ''Measurement of Fluid Flow in Closed Conduits—Guidance to the Selection, Installation, and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements''. International Organization for Standardization. 1999.

18. ASTM D 1125–95 (2005): ''Standard Test Methods for Electrical Conductivity and Resistivity of Water''. American Society for Testing and Materials. 2005.

19. ASTM D 5391–99 (2005): ''Standard Test Method for Electrical Conductivity and Resistivity of a Flowing High Purity Water Sample''. American Society for Testing and Materials. 2005.

18.0 *What tables are relevant to Procedure 4?*

TABLE 1—SENSOR COMPONENTS OF COMMONLY USED CPMS

For a CPMS that measures . . .	Using a . . .	The sensor component consists of the . . .
1. Temperature	a. Thermocouple	Thermocouple.
	b. Resistance temperature detector	(RTD).
	c. Optical pyrometer	Optical assembly and detector.
	d. Thermistor	Thermistor.
	e. Temperature transducer	Integrated circuit sensor?
2. Pressure	a. Pressure gauge	Gauge assembly, including bourdon element, bellows element, or diaphragm.
	b. Pressure transducer	Strain gauge assembly, capacitance assembly, linear variable differential transformer, force balance assembly, potentiometer, variable reluctance assembly, piezoelectric assembly, or piezoresistive assembly.
	c. Manometer	U-tube or differential manometer.
3. Flow rate	a. Differential pressure device	Flow constricting element (nozzle, Venturi, or orifice plate) and differential pressure sensor.
	b. Differential pressure tube	Pitot tube, or other array of tubes that measure velocity pressure and static pressure, and differential pressure sensor.
	c. Magnetic flow meter	Magnetic coil assembly.
	d. Positive displacement flow meter	Piston, blade, vane, propeller, disk, or gear assembly.
	e. Turbine flow meter	Rotor or turbine assembly.
	f. Vortex formation flow meter	Vortex generating and sensing elements.
	g. Fluidic oscillating flow meter	Feedback passage, side wall, control port, and thermal sensor.
	h. Ultrasonic flow meter	Sonic transducers, receivers, timer, and temperature sensor.
	i. Thermal flow meter	Thermal element and temperature sensors.
	j. Coriolis mass flow meter	U-tube and magnetic sensing elements.
	k. Rotameter	Float assembly.
	l. Solids flow meter	Sensing plate.
	m. Belt conveyor	Scale.
4. pH	pH meter	Electrode.
5. Conductivity	Conductivity meter	Electrode.

TABLE 2—METHODS FOR TEMPERATURE SENSOR CHECK

If the temperature sensor in your CPMS is a . . .	And is used in . . .	You can perform the accuracy audit of the sensor using . . .
1. Thermocouple	Any application	ASTM E220–07e1.
2. Thermocouple	A reducing environment	ASTM E452–02 (2007).
3. Resistance temperature detector	Any application	ASTM E644–06.

TABLE 3—METHODS FOR PRESSURE SENSOR CHECK

If the pressure sensor in your CPMS is a . . .	You can perform the accuracy audit of the sensor using . . .
1. Pressure gauge	ASME B40.100–2005.
2. Metallic bonded resistance strain gauge	ASTM E251–92 (2003).

TABLE 4—VOLUMETRIC METHODS FOR FLOW METER ACCURACY AUDITS

Designation	Title
1. ISA RP 16.6–1961	Methods and Equipment for Calibration of Variable Area Meters (Rotameters).
2. ANSI/ISA RP 31.1–1977	Specification, Installation, and Calibration of Turbine Flow Meters.
3. ISO 10790:1999	Measurement of Fluid Flow in Closed Conduits-Guidance to the Selection, Installation and Use of Coriolis Meters (Mass Flow, Density and Volume Flow Measurements).
4. ISO 8316:1987	Measurement of Liquid Flow in Closed Conduits-Method by Collection of Liquid in a Volumetric Tank.

TABLE 5—WEIGHING METHODS FOR FLOW METER ACCURACY AUDITS

Designation	Title
1. ASHRAE 41.8–1989	Standard Methods of Measurement of Flow of Liquids in Pipes Using Orifice Flow Meters.

TABLE 5—WEIGHING METHODS FOR FLOW METER ACCURACY AUDITS—Continued

Designation	Title
2. ISA RP 16.6–1961	Methods and Equipment for Calibration of Variable Area Meters (Rotameters).
3. ANSI/ISA RP 31.1–1977	Specification, Installation, and Calibration of Turbine Flow Meters.
4. NIST Handbook 44–2002 Edition, Section 2.21.	Specifications, Tolerances, And Other Technical Requirements for Weighing and Measuring Devices, as adopted by the 86th National Conference on Weights and Measures 2001: Belt-Conveyor Scale Systems.
5. ANSI/ASME MFC–9M–1988	Measurement of Liquid Flow in Closed Conduits by Weighing Method.

TABLE 6—CPMS ACCURACY REQUIREMENTS

If your CPMS measures . . .	You must demonstrate that your CPMS operates within . . .
1. Temperature, in a non-cryogenic application.	An accuracy percentage (A_p) of ±1.0 percent of the temperature measured in degrees Celsius or within an accuracy value (A_v) of 2.8 degrees Celsius (5 degrees Fahrenheit), whichever is greater.
2. Temperature, in a cryogenic application.	An accuracy percentage (A_p) of ±2.5 percent of the temperature measured in degrees Celsius or within an accuracy value (A_v) of 2.8 degrees Celsius (5 degrees Fahrenheit), whichever is greater.
3. Pressure	An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 0.12 kilopascals (0.5 inches of water column), whichever is greater.
4. Liquid flow rate	An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 1.9 liters per minute (0.5 gallons per minute), whichever is greater.
5. Gas flow rate	a. A relative accuracy of ±20 percent, if you demonstrate compliance using the relative accuracy test, or b. An accuracy percentage (A_p) of ±10 percent, if your CPMS measures steam flow rate, or c. An accuracy percentage (A_p) of ±5 percent or an accuracy value (A_v) of 280 liters per minute (10 cubic feet per minute), whichever is greater, for all other gases and accuracy audit methods.
6. Mass flow rate	An accuracy percentage (A_p) of ±5 percent.
7. pH	An accuracy value (A_v) of ±0.2 pH units.
8. Conductivity	An accuracy percentage (A_p) of ±5 percent.

PART 61—[AMENDED]

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

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

Subpart A—[Amended]

7. Section 61.14 is amended by redesignating paragraph (a) as paragraph (a)(1) and adding paragraph (a)(2) to read as follows:

§ 61.14 Monitoring requirements.

(a)(1) * * *

(2) Performance specifications for continuous parameter monitoring systems (CPMS) promulgated under 40 CFR part 60, appendix B and quality assurance procedures for CPMS promulgated under 40 CFR part 60, appendix F apply instead of the requirements for CPMS specified in an applicable subpart upon promulgation of the performance specifications and quality assurance procedures for CPMS.

* * * * *

PART 63—[AMENDED]

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

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

Subpart A—[Amended]

9. Section 63.8 is amended by:

a. Revising paragraph (a)(2);

b. Revising paragraph (c)(2)(i);

c. Revising paragraph (c)(4) introductory text and adding paragraph (c)(4)(iii);

d. Revising paragraphs (c)(6) and (c)(7)(i);

e. Revising paragraph (d)(2)(ii); and

f. Revising paragraphs (e)(2), (e)(3)(i), and (e)(4).

The revisions and additions read as follows:

§ 63.8 Monitoring requirements.

(a) * * *

(2)(i) For the purposes of this part, all CMS required under relevant standards shall be subject to the provisions of this section upon promulgation of performance specifications and quality assurance procedures for CMS as specified in the relevant standard or otherwise by the Administrator.

(ii) Performance specifications for CPMS promulgated under 40 CFR part 60, appendix B and quality assurance procedures for CPMS promulgated under 40 CFR part 60, appendix F apply instead of the requirements for CPMS specified in the relevant standard upon promulgation of the performance specifications and quality assurance procedures for CPMS.

* * * * *

(c) * * *

(2)(i) All CMS must be installed such that representative measurements of emissions or process parameters from the affected source are obtained. In addition, CMS shall be located according to procedures contained in the applicable performance specification(s).

* * * * *

(4) Except for system breakdowns, out-of-control periods, repairs, maintenance periods, calibration checks, and zero (low-level) and high-level calibration drift adjustments, all CMS, including COMS, CEMS, and CPMS, shall be in continuous operation and shall meet minimum frequency of operation requirements as follows:

* * * * *

(iii) All CPMS shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive time period specified in the relevant standard.

* * * * *

(6) The owner or operator of a CMS that is not a CPMS, which is installed in accordance with the provisions of this part and the applicable CMS performance specification(s) shall check the zero (low-level) and high-level calibration drifts at least once daily in accordance with the written procedure specified in the performance evaluation plan developed under paragraphs (e)(3)(i) and (e)(3)(ii) of this section. The zero (low-level) and high-level calibration drifts shall be adjusted, at a minimum, whenever the 24-hour zero (low-level) drift exceeds two times the limits of the applicable performance specification(s) specified in the relevant standard. The system must allow the amount of excess zero (low-level) and high-level drift measured at the 24-hour interval checks to be recorded and quantified, whenever specified. For

COMS, all optical and instrumental surfaces exposed to the effluent gases shall be cleaned prior to performing the zero (low-level) and high-level drift adjustments; the optical surfaces and instrumental surfaces shall be cleaned when the cumulative automatic zero compensation, if applicable, exceeds 4 percent opacity.

* * * * *

(7)(i) A CMS is out of control if—

(A) The COMS or CEMS zero (low-level), mid-level (if applicable), or high-level calibration drift (CD) exceeds two times the applicable CD specification in the applicable performance specification or in the relevant standard; or

(B) The COMS or CEMS fails a performance test audit (e.g., cylinder gas audit), relative accuracy audit, relative accuracy test audit, or linearity test audit; or

(C) The COMS CD exceeds two times the limit in the applicable performance specification in the relevant standard; or

(D) The CPMS fails an accuracy audit.

* * * * *

(d) * * *

(2) * * *

(ii) Determination and adjustment of the calibration drift of the CMS, where applicable;

* * * * *

(e) * * *

(2) Notification of performance evaluation. The owner or operator shall notify the Administrator in writing of the date of the performance evaluation of a COMS or CEMS simultaneously with the notification of the performance test date required under § 63.7(b) or at least 60 days prior to the date the performance evaluation is scheduled to begin if no performance test is required.

(3)(i) Submission of site-specific performance evaluation test plan. Before conducting a required COMS or CEMS performance evaluation, the owner or operator of an affected source shall develop and submit a site-specific performance evaluation test plan to the Administrator for approval upon request. The performance evaluation test plan shall include the evaluation program objectives, an evaluation program summary, the performance evaluation schedule, data quality objectives, and both an internal and external QA program. Data quality objectives are the pre-evaluation expectations of precision, accuracy, and completeness of data.

* * * * *

(4) Conduct of performance evaluation and performance evaluation dates. The owner or operator of an affected source shall conduct a performance evaluation of a required CMS during any performance test required under § 63.7 in accordance with the applicable performance specification or QA procedure as specified in the relevant standard. Notwithstanding the requirement in the previous sentence, if the owner or operator of an affected source elects to submit COMS data for compliance with a relevant opacity emission standard as provided under § 63.6(h)(7), he/she shall conduct a performance evaluation of the COMS as specified in the relevant standard, before the performance test required under § 63.7 is conducted in time to submit the results of the performance evaluation as specified in paragraph (e)(5)(ii) of this section. If a performance test is not required, or the requirement for a performance test has been waived under § 63.7(h), the owner or operator of an affected source shall conduct the performance evaluation not later than 180 days after the appropriate compliance date for the affected source, as specified in § 63.7(a), or as otherwise specified in the relevant standard.

* * * * *

Subpart SS—[Amended]

10. Section 63.996 is amended by adding paragraphs (c)(7) through (c)(10) to read as follows:

§ 63.996 General monitoring requirements for control and recovery devices.

* * * * *

(c) * * *

(7) For each CPMS, the owner or operator must meet the requirements in paragraphs (c)(7)(i) through (vi) of this section.

(i) Satisfy all requirements of applicable performance specifications for CPMS established under 40 CFR part 60, appendix B.

(ii) Satisfy all requirements of quality assurance (QA) procedures for CPMS established under 40 CFR part 60, appendix F.

(iii) The CPMS must complete a minimum of one cycle of operation for each successive 15-minute period.

(iv) To calculate a valid hourly average, there must be at least four equally spaced values for that hour, excluding data collected during the periods described in paragraph (c)(5) of this section.

(v) Calculate a daily average using all of the valid hourly averages for each day.

(vi) Except for redundant sensors, any device that is used to conduct an initial validation or accuracy audit of a CPMS must meet the accuracy requirements specified in paragraphs (c)(7)(vi)(A) and (B) of this section.

(A) The device must have an accuracy that is traceable to National Institute of Standards and Technology (NIST) standards.

(B) The device must be at least three times as accurate as the required accuracy for the CPMS.

(8) For each temperature CPMS, the owner or operator must meet the requirements in paragraphs (c)(8)(i) through (ix) of this section.

(i) Install each sensor of the temperature CPMS in a location that provides representative temperature measurements over all operating conditions, taking into account the manufacturer's guidelines.

(ii) For a noncryogenic temperature range, use a temperature CPMS with a minimum tolerance of 2.8 deg. C or 1.0 percent of the temperature value, whichever is larger.

(iii) For a cryogenic temperature range, use a temperature CPMS with a minimum tolerance of 2.8 deg. C or 2.5 percent of the temperature value, whichever is larger.

(iv) The data recording system associated with the CPMS must have a resolution of one-half of the applicable required overall accuracy of the CPMS, as specified in paragraph (c)(8)(ii) or (iii) of this section, or better.

(v) Perform an initial calibration of the CPMS according to the procedures in the manufacturer's owner's manual.

(vi) Perform an initial validation of the CPMS according to the requirements in paragraph (c)(8)(vi)(A) or (B) of this section.

(A) Place the sensor of a calibrated temperature measurement device adjacent to the sensor of the temperature CPMS in a location that is subject to the same environment as the sensor of the temperature CPMS. The calibrated temperature measurement device must satisfy the accuracy requirements of (c)(7)(vi) of this section. Allow sufficient time for the response of the calibrated temperature measurement device to reach equilibrium. With the process and control device that is monitored by the CPMS operating normally, record concurrently and compare the temperatures measured by the temperature CPMS and the calibrated temperature measurement device. Using the calibrated temperature measurement device as the reference, the temperature measured by the temperature CPMS must be within the accuracy specified in paragraph (c)(8)(ii) or (iii) of this section, whichever applies.

(B) Perform any of the initial validation methods for temperature CPMS specified in applicable performance specifications established under 40 CFR part 60, appendix B.

(vii) Perform an accuracy audit of the temperature CPMS at least quarterly, according to the requirements in paragraph (c)(8)(vii)(A), (B), or (C) of this section.

(A) If the temperature CPMS includes a redundant temperature sensor, record three pairs of concurrent temperature measurements within a 24-hour period. Each pair of concurrent measurements must consist of a temperature measurement by each of the two temperature sensors. The minimum time interval between any two such pairs of consecutive temperature measurements is one hour. The readings must be taken during periods when the process and control device that is monitored by the CPMS is operating normally. Calculate the mean of the three values for each temperature sensor. The mean values must agree within the required overall accuracy of the CPMS, as specified in paragraph (c)(8)(ii) or (iii) of this section, whichever applies.

(B) If the temperature CPMS does not include a redundant temperature sensor, place the sensor of a calibrated temperature measurement device adjacent to the sensor of the temperature CPMS in a location that is subject to the same environment as the sensor of the temperature CPMS. The calibrated temperature measurement device must satisfy the accuracy requirements of paragraph (c)(7)(vi) of this section. Allow sufficient time for the response of the calibrated temperature measurement device to reach equilibrium. With the process and control device that is monitored by the CPMS operating normally, record concurrently and compare the temperatures measured by the temperature CPMS and the calibrated temperature measurement device. Using the calibrated temperature measurement device as the reference, the temperature measured by the temperature CPMS must be within the accuracy specified in paragraph (c)(8)(ii) or (iii) of this section, whichever applies.

(C) Perform any of the accuracy audit methods for temperature CPMS specified in applicable QA procedures established under 40 CFR part 60, appendix F.

(viii) Conduct an accuracy audit following any 24-hour period throughout which the temperature measured by the CPMS exceeds the manufacturer's specified maximum operating temperature range, or install a new temperature sensor.

(ix) If the CPMS is not equipped with a redundant temperature sensor, at least quarterly, perform a visual inspection of all components for integrity, oxidation, and galvanic corrosion.

(9) For each pressure CPMS, the owner or operator must meet the requirements in paragraph (c)(9)(i) through (ix) of this section.

(i) Install each sensor of the pressure CPMS in a location that provides representative pressure measurements over all operating conditions, taking into account the manufacturer's guidelines.

(ii) Use a pressure CPMS with a minimum tolerance of ±5 percent or 0.12 kilopascals (0.5 inches of water column), whichever is greater.

(iii) The data recording system associated with the pressure CPMS must have a resolution of one-half of the required overall accuracy of the CPMS, as specified in paragraph (c)(9)(ii) of this section.

(iv) Perform an initial calibration of the CPMS according to the procedures in the manufacturer's owner's manual.

(v) Perform an initial validation of the CPMS according to the requirements in paragraph (c)(9)(v)(A) or (B) of this section.

(A) Place the sensor of a calibrated pressure measurement device adjacent to the sensor of the pressure CPMS in a location that is subject to the same environment as the sensor of the pressure CPMS. The calibrated pressure measurement device must satisfy the accuracy requirements of paragraph (c)(7)(vi) of this section. Allow sufficient time for the response of the calibrated pressure measurement device to reach equilibrium. With the process and control device that is monitored by the CPMS operating normally, record concurrently and compare the pressure measured by the pressure CPMS and the calibrated pressure measurement device. Using the calibrated pressure measurement device as the reference, the pressure measured by the pressure CPMS must be within the accuracy specified in paragraph (c)(9)(ii) of this section.

(B) Perform any of the initial validation methods for pressure CPMS specified in applicable performance specifications established under 40 CFR part 60, appendix B.

(vi) Perform an accuracy audit of the pressure CPMS at least quarterly, according to the requirements in paragraph (c)(9)(vi)(A), (B), or (C) of this section.

(A) If the pressure CPMS includes a redundant pressure sensor, record three pairs of concurrent pressure measurements within a 24-hour period. Each pair of concurrent measurements must consist of a pressure measurement by each of the two pressure sensors. The minimum time interval between any two such pairs of consecutive pressure measurements is 1 hour. The readings must be taken during periods when the process and control device that is monitored by the CPMS is operating normally. Calculate the mean of the three pressure measurement values for each pressure sensor. The mean values must agree within the required overall accuracy of the CPMS, as specified in paragraph (c)(9)(ii) of this section.

(B) If the pressure CPMS does not include a redundant pressure sensor, place the sensor of a calibrated pressure measurement device adjacent to the sensor of the pressure CPMS in a location that is subject to the same environment as the sensor of the pressure CPMS. The calibrated pressure measurement device must satisfy the accuracy requirements of paragraph (c)(7)(vi) of this section. Allow sufficient time for the response of the calibrated pressure measurement device to reach equilibrium. With the process and control device that is monitored by the CPMS operating normally, record concurrently and compare the pressure measured by the pressure CPMS and the calibrated pressure measurement device. Using the calibrated pressure measurement device as the reference, the pressure measured by the pressure CPMS must be within the accuracy specified in paragraph (c)(9)(ii) of this section.

(C) Perform any of the accuracy audit methods for pressure CPMS specified in applicable QA procedures established under 40 CFR part 60, appendix F.

(vii) Conduct an accuracy audit following any 24-hour period throughout which the pressure measured by the CPMS exceeds the manufacturer's specified maximum operating pressure range, or install a new pressure sensor.

(viii) At least monthly, check all mechanical connections for leakage.

(ix) If the CPMS is not equipped with a redundant pressure sensor, at least quarterly, perform a visual inspection of all components for integrity, oxidation, and galvanic corrosion.

(10) For each pH CPMS, the owner or operator must meet the requirements in paragraph (c)(10)(i) through (vii) of this section.

(i) Install the pH sensor in a location that provides representative measurement of pH over all operating conditions, taking into account the manufacturer's guidelines.

(ii) Use a pH CPMS with a minimum tolerance of 0.2 pH units.

(iii) The data recording system associated with the CPMS must have a resolution of 0.1 pH units or better and

must be capable of measuring pH over the entire range of pH values from 0 to 14.

(iv) Perform an initial calibration of the CPMS according to the procedures in the manufacturer's owner's manual.

(v) Perform an initial validation of the CPMS according to the requirements in paragraph (c)(10)(v)(A) or (B) of this section.

(A) Perform a single point calibration using an NIST-certified buffer solution that is accurate to within ±0.02 pH units at 25 °C (77 °F). If the expected pH of the fluid that is monitored lies in the acidic range (less than 7 pH), use a buffer solution with a pH value of 4.00. If the expected pH of the fluid that is monitored lies in the basic range (greater than 7 pH), use a buffer solution with a pH value of 10.00. Place the electrode of the pH CPMS in the container of buffer solution. Record the pH measured by the CPMS. Using the certified buffer solution as the reference, the pH measured by the pH CPMS must be within the accuracy specified in paragraph (c)(10)(ii) of this section.

(B) Perform any of the initial validation methods for pH CPMS specified in applicable performance specifications established under 40 CFR part 60, appendix B.

(vi) Perform an accuracy audit of the pH CPMS at least weekly, according to the requirements in paragraph (c)(10)(vi)(A), (B), or (C) of this section.

(A) If the pH CPMS includes a redundant pH sensor, record the pH measured by each of the two pH sensors. The readings must be taken during periods when the process and control device that is monitored by the CPMS are operating normally. The two pH values must agree within the required overall accuracy of the CPMS, as specified in paragraph (c)(10)(ii) of this section.

(B) If the pH CPMS does not include a redundant pH sensor, perform a single point calibration using an NIST-certified buffer solution that is accurate to within ±0.02 pH units at 25 °C (77 °F). If the expected pH of the fluid that is monitored lies in the acidic range (less than 7 pH), use a buffer solution with a pH value of 4.00. If the expected pH of the fluid that is monitored lies in the basic range (greater than 7 pH), use a buffer solution with a pH value of 10.00. Place the electrode of the pH CPMS in the container of buffer solution. Record the pH measured by the CPMS. Using the certified buffer solution as the reference, the pH measured by the pH CPMS must be within the accuracy specified in paragraph (c)(10)(ii) of this section.

(C) Perform any of the accuracy audit methods for pH CPMS specified in applicable QA procedures established under 40 CFR part 60, appendix F.

(vii) If the CPMS is not equipped with a redundant pH sensor, at least monthly, perform a visual inspection of all components for integrity, oxidation, and galvanic corrosion.

* * * * *

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Federal Register

Thursday,
October 9, 2008

Part IV

Department of Agriculture

Animal and Plant Health Inspection Service

7 CFR Part 340

Importation, Interstate Movement, and Release Into the Environment of Certain Genetically Engineered Organisms; Proposed Rule

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 340

[Docket No. APHIS–2008–0023]

RIN 0579–AC31

Importation, Interstate Movement, and Release Into the Environment of Certain Genetically Engineered Organisms

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule; notice of public forums.

SUMMARY: We propose to revise our regulations regarding the importation, interstate movement, and environmental release of certain genetically engineered organisms in order to bring the regulations into alignment with provisions of the Plant Protection Act. The revisions would also update the regulations in response to advances in genetic science and technology and our accumulated experience in implementing the current regulations. This is the first comprehensive review and revision of the regulations since they were established in 1987. This rule would affect persons involved in the importation, interstate movement, or release into the environment of genetically engineered plants and certain other genetically engineered organisms.

DATES: We will consider all comments that we receive on or before November 24, 2008. We will also consider comments made at public forums to be held in Davis, CA; Kansas City, MO; and Riverdale, MD.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2008-0023* 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–2008–0023, 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–2008–0023.
- *Public Forums.* Written and oral comment will be accepted at three public forums held during the comment period. See *Public Forums* below.

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: Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–5710.

For information about the public forums, contact: Dr. T. Clint Nesbitt, BRS, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1238; (301) 734–5673.

SUPPLEMENTARY INFORMATION:

Public Forums

In order to provide additional opportunities for the public to comment on the proposed rule, APHIS will hold public forums in three locations: Davis, CA; Kansas City, MO; and Riverdale, MD (see *Meeting Locations* below). These informal forums are designed to engage interested individuals from the public and elicit comments related to the proposed rule. The format will consist of informational posters and comment stations. Attendees will be able walk through the forum during the open hours and interact with other attendees and APHIS personnel. Short welcoming remarks will be given by APHIS personnel at 4:30 p.m. and again at 6 p.m. (local time), but there is no set schedule for each poster station, so the public may come and go at any time during the forum period. Participants will have the opportunity, if desired, to record brief oral comments with a court reporter or to submit comments in writing, following directions provided at the comment stations. A transcript of the oral comments and a copy of any written comments submitted at the public forums will be placed in the rulemaking record and will be available for public inspection.

The purpose of these public forums is to allow the public a venue in which to interact with APHIS representatives and to allow APHIS to solicit further information from the public. Comments received at these public forums will be added to this Docket.

Dates: The public forums will be held in Davis, CA, on October 28, 2008; in Kansas City, MO, on October 30, 2008; and Riverdale, MD, on November 13, 2008. Each public forum will be held from 4 p.m. to 7 p.m., local time.

Meeting Locations: The public forums will be held at the following locations:

USDA Riverside, Oklahoma City Memorial Conference Rooms B, C, and D, 4700 River Road, Riverdale, MD, 20737. For directions or facilities information, call (301) 734–8010.

Walter A. Buehler Alumni & Visitors Center, Alpha Gamma Rho Hall, University of California, Davis, CA, 95616. For directions or facilities information, call (530) 754–9195 or visit *http://www.alumnicenter.ucdavis.edu/*.

Hilton Kansas City Airport, Shawnee Room A, 8801 NW 112th Street, Kansas City, MO, 64153. For directions or facilities information, call (816) 891–8900 or visit *http://www.hiltonkci.com/*.

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I. Introduction

The U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection Service (APHIS) regulates the safe introduction (environmental release, interstate movement, and importation) of certain genetically engineered (GE) organisms under its regulations in 7 CFR part 340. The regulations govern the introduction of GE organisms that might be plant pests. APHIS has amended the regulations several times in an effort to respond to the need for streamlined procedures and has established clear procedures to remove GE organisms that do not pose a plant pest risk from obligations under the regulation.

The APHIS regulations have been used most frequently for permits and notifications for importation, interstate movement, or environmental releases of GE plants, although a smaller number of permits have been issued for GE microorganisms and insects. To date, APHIS has authorized more than 13,000 environmental releases of GE plants, most of which have been part of the development of improved crop varieties for agriculture. These controlled environmental releases are sometimes referred to as field tests or field trials, in recognition of their relationship to field tests done in the traditional development of plant varieties, and in this document the terms field test or field trial should be understood to mean environmental release. In addition to permits and notifications, APHIS has completed reviews in response to petitions requesting nonregulated status under these regulations. To date, APHIS has granted 74 determinations of nonregulated status, and all of these have been for GE plants (more information about these is posted at *http://www.aphis.usda.gov/brs/not_reg.html*). Many of these plants have since been used to develop plant varieties that have become part of the options that growers have for agricultural production in the United States and other countries. The APHIS determinations of nonregulated status have been for the GE plant(s) and their progeny. The GE plant with nonregulated status can be used subsequently in plant breeding programs or in agriculture just like other plant lines. A GE plant that has received nonregulated status can be bred with another GE plant with nonregulated status, and the resulting progeny which could contain multiple GE traits still retains nonregulated status.

The bulk of APHIS-authorized introductions have been crop plants bearing genes which confer resistance to certain insects or tolerance to certain herbicides. Although the current program has been effective in ensuring the safe environmental release, interstate movement, and importation of certain genetically engineered organisms, technological advances have led to new uses and questions about how the current regulations and APHIS authorities will be used to maintain appropriate oversight. Advances in technology have created possibilities for new and different traits, such as those that would produce a compound for pharmaceutical or industrial use. In addition, researchers have been producing organisms that may not fall under the scope of our current regulations and are also beginning to focus more on perennial plants, such as grasses or trees, which may be capable of establishing and persisting outside the site of introduction.

APHIS is proposing to revise its regulations in order to respond to emerging trends in biotechnology, to address the current and future needs of the agency, to continue to ensure a high level of environmental protection, to improve regulatory processes so that they are more transparent to stakeholders and the public, to more efficiently use agency resources and to eliminate unnecessary regulatory burdens.

Given the diversity of U.S. agriculture, the USDA Advisory Committee on Biotechnology and 21st Century Agriculture recently in its March 2008 consensus report encouraged the continuing support of coexistence among various agricultural production systems in U.S. agriculture. APHIS concludes that the changes it is proposing will continue to support coexistence in U.S. agriculture.

In addition, APHIS is proposing changes to the regulations to reflect provisions of the 2008 Farm Bill recently enacted. Section 10204 of Title X of the Food, Conservation, and Energy Act of 2008 (Farm Bill) requires the Secretary of Agriculture to take action on each issue identified in the document entitled ''Lessons Learned and Revisions under Consideration for APHIS' Biotechnology Framework,'' and where appropriate, promulgate regulations. APHIS is proposing certain regulatory changes concerning permit application information requirements, permit conditions, records, and reports that address many of the considerations outlined in Section 10204.

APHIS is also aligning this proposed rule with recommendations arising from the 2005 audit of the USDA Office of Inspector General entitled ''Controls Over Issuance of Genetically Engineered Release Permits.''

II. Background

A. APHIS Role in Federal Regulation of Genetically Engineered Organisms

Under the Coordinated Federal Framework for Regulation of Biotechnology,[1] USDA works with the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) to ensure that the development and testing of biotechnology products occur in a manner that is safe for plant and animal health, human health, and the environment. USDA and EPA are the agencies responsible for protecting U.S. agriculture and the environment. EPA is responsible for the human health, animal health, and environmental safety issues raised by any pesticidal substance produced in genetically engineered (GE) organisms. FDA has authority over the safety of the whole food product other than the pesticidal components regulated by EPA.

B. Current Regulations in 7 CFR Part 340

APHIS administers regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which are Plant Pests or Which There is Reason to Believe are Plant Pests'' (referred to below as the regulations). The current regulations govern the introduction (importation, interstate movement, or release into the environment) of certain GE organisms termed ''regulated articles.'' Regulated articles are essentially GE organisms which might pose a risk as a plant pest.

APHIS first promulgated these regulations in 1987 under the authority of the Federal Plant Pest Act of 1957 (FPPA) and the Plant Quarantine Act of 1912 (PQA), two acts that were subsumed into the Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) in 2000, along with other provisions.

Under the current regulations, a GE organism is a regulated article if it is a plant pest or if the Administrator has reason to believe it is a plant pest; more specifically:

[1] The Coordinated Framework is described in a notice published in the **Federal Register** on June 26, 1986 (51 FR 23302). The notice may be viewed at *http://www.aphis.usda.gov/brs/fedregister/coordinated_framework.pdf.*

''if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest, or is an unclassified organism and/or an organism whose classification is unknown, or any product which contains such an organism, or any other organism or product altered or produced through genetic engineering which the Administrator determines is a plant pest or has reason to believe is a plant pest.'' (Definition of *regulated article,* § 340.1)

In other words, APHIS regulates the introduction (importation, interstate movement, and environmental release) of GE organisms if (1) any of the recipient, genetic donor, or vector organisms are plant pests or of unknown classification or (2) the Administrator has determined or has reason to believe the GE organism is a plant pest. As constructed the regulations apply to GE microorganisms, insects, and other traditional types of plant pests and to any GE plants if plant pest organisms (bacterial and viral plant pathogens) are the donor organisms and vector agents used in the creation of these GE plants.

Taxa containing ''known plant pests'' are those listed in current § 340.2. Current regulations also include a petition procedure (§ 340.5) which allows petitioners to ask APHIS to add or subtract taxa from the list in § 340.2. That list has not been amended since it was established in 1987.

As defined under the current regulations and the PPA, most plants are not plant pests, with the exception of a few parasitic plant species, such as striga, witchweed, and dodder.

The primary procedure for regulation under the PPA is the issuance of a permit, which is an authorization by the Secretary to move plants, plant products, biological control organisms, plant pests, noxious weeds, or articles under conditions prescribed by the Secretary. The PPA also authorizes the Secretary to determine which classes of the above articles must have a permit to be moved. Conditions associated with those permits can be tailored to achieve the appropriate level of regulatory control to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed.

APHIS currently uses a permit and notification system to authorize importation, interstate movement and release into the environment (currently referred to as ''introductions'') of certain GE organisms. Under the current regulations, all regulated articles are eligible for the permitting procedure, but only certain plants are eligible for the notification procedure. Currently, most regulated GE plants are introduced under notification, which is a streamlined procedure. Examples of GE plants introduced under the notification procedure are those GE plants altered to be resistant to certain insects or herbicides. GE plants that do not meet the notification eligibility criteria and all other GE organisms, such as microbes and insects, must be introduced under the permit procedure in current § 340.4. In recent years, APHIS has processed most notifications and permits through its electronic, e-permitting system that is accessible by the internet at *http://www.aphis.usda.gov/permits/learn_epermits.shtml*.

In making a regulatory determination for a permit or notification for a GE organism subject to the part 340 regulations, APHIS makes such a determination on whether the actions under notification or permit are unlikely to result in the introduction or dissemination of a plant pest. This determination takes into account various risk factors, including, among other things, a low risk that the GE organism or its progeny can persist, reproduce, and establish without human assistance. Other risk factors that would support an ''unlikely'' determination would be minimal availability of suitable hosts or habitats for the organism and low risk that the organism may cause damage to plants and plant products.

Regarding the risk of introduction or dissemination of the GE organism as a plant pest, an ''unlikely'' determination takes into consideration both the nature of the organism (i.e., low risk that the organism or its progeny can persist, reproduce, establish, and spread without human assistance) *and* any additional mitigations that are placed upon the organism that restrict its movement and make its unauthorized introduction or dissemination unlikely.

The notification procedure was first added to the regulations in 1993, and then amended in 1997 to allow a broader range of plant species to be eligible for the procedure. The notification procedure was designed to be a streamlined procedure with the eligibility criteria and performance standards already built into the regulations. Over the past decade, APHIS has typically authorized 700–1200 notifications per year.

As part of the notification procedure, applicants must adhere to performance standards set forth by APHIS for proper confinement of the GE plants. The goal of proper confinement is to ensure that the GE plants do not persist in the environment. Under the notification procedure applicants provide information about the introduction sufficient for APHIS to evaluate eligibility for the procedure and impacts on the environment. This information includes information on the plant species, introduced gene(s), location(s), and anticipated time frame for the introduction.

For notifications, the eligibility criteria and the performance standards stated in the regulations must be met, but APHIS does not prescribe how the performance standards must be met. For example, one of the performance standards in § 340.3(c)(5) requires that ''The field trial must be conducted such that (i) The regulated article will not persist in the environment, and (ii) No offspring can be produced that could persist in the environment.'' The responsible person might meet this standard in a field trial by isolating the regulated GE plants at a sufficient distance to preclude gene flow from the GE plant to sexually compatible plants in the vicinity. Another design protocol might meet the same performance standard by planting the GE plant at a time in the growing season when surrounding plants of the same species would not be biologically capable of being fertilized by pollen from the GE plant (temporal isolation).

The regulations in current § 340.3(e) specify that the APHIS notification procedure must be completed within 30 days for environmental release and importations and within 10 days for the interstate movement of a regulated article. If APHIS completes the review process and finds that all regulatory requirements have been met, the notification is authorized in a process termed ''acknowledgement,'' and the applicant can proceed with the introduction under the terms of the notification. Notifications are valid for one year from the date of introduction.

Approximately 10% of APHIS authorizations are done under the permitting procedure. The permitting procedure, found in § 340.4 of the current regulation, describes the types of permits, information required for permit application, the standard permit conditions, and administrative information (e.g., time frames, appeal procedure, etc.). Permits include specific conditions that must be followed by the permit holder. Standard permit conditions are listed in the regulation, and APHIS can supplement these with additional conditions as necessary. The current regulations specify the amount of time that APHIS is allotted for review of complete permit applications: 60 days for permits for importation and interstate movement; 120 days for environmental release.

Some regulated articles are conditionally exempt from the requirement for permits when moved interstate under the conditions stipulated in the regulation. Conditional exemptions currently exist in the regulations for the interstate movement of certain GE bacteria (*Escherichia coli, Bacillus subtilis*), fungi (*Saccharomyces cerevisiae*), as well as the plant species *Arabidopsis thaliana.* APHIS established these conditional exemptions from interstate movement permit by amending the regulations in 1988 and 1990.

APHIS forwards the applications for all permits, and notifications, with any confidential business information redacted, to State regulators in the States to which regulated articles will be moved and/or in which environmental release is planned. This is done to notify States of the requested action and to allow States to review and comment on proposed releases or importations or movements.

The current regulations also include various provisions and prescribed standards for containers, marking, and identity that apply to shipments of regulated articles. For example, there are instructions regarding how to label containers of imported regulated articles with the nature of the contents, origin and destination, and other information, and detailed instructions on what materials (plastic, metal, etc.) and dimensions may be used for containers of regulated articles.

Under the current regulations, APHIS may also grant ''nonregulated status'' to a GE organism in accordance with the procedure described in § 340.6. A determination of nonregulated status means that the organism is no longer subject to the part 340 regulations, and therefore there is no longer any requirement for APHIS authorization under part 340 for a permit or notification when the GE organism is imported, moved interstate, or released into the environment.

C. Plant Protection Act Authority to Regulate Plant Pests, Noxious Weeds, and Biological Control Organisms

Under the provisions of the PPA, Congress has granted the Secretary of Agriculture authority to develop regulations in order to detect, control, eradicate, suppress, prevent, or retard the spread of plant pests or noxious weeds. The PPA grants the Secretary authority to regulate the movement into and through the United States of any plant, plant pest, plant product, biological control organism, noxious weed, article, or means of conveyance, in order to prevent the introduction or dissemination of *plant pests* and *noxious weeds.*

The current regulations were promulgated under former statutes, i.e., the FPPA and PQA, which provide USDA authority to regulate articles that present a risk of *plant pest* introduction or dissemination. In addition to the provisions of the FPPA and PQA, the PPA incorporates authority that previously was under the Noxious Weed Act of 1974. In order to best evaluate the risks associated with these GE organisms and regulate them when necessary, APHIS needs to exercise its authorities regarding noxious weeds and biological control organisms, in addition to its authority regarding plant pests.

The definition of plant pest in the PPA is broad and includes living organisms that could directly or indirectly injure, damage, or cause disease in any plant or plant product (7 U.S.C. § 7702(14)). Under the PPA, organisms which could be plant pests include:

- Protozoans
- Non-human animals
- Parasitic plants
- Bacteria
- Fungi
- Viruses or viroids
- Infectious agents or other pathogens
- Any article similar to or allied with any of the above articles.

The definition of noxious weed in the PPA includes:

> * * * any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment. (PPA § 7702(10))

An important distinction between noxious weeds and plant pests is that noxious weeds under the PPA are always plants or plant products. Plant pests are usually not plants (with the exception of certain parasitic plants such as dodder, striga, and witchweed), but are other types of organisms that harm plants.

III. Proposed Rule

A. Proposed Regulatory Scope (§ 340.0 Scope and general restrictions)

We propose to better align the regulations with the PPA authorities in order to ensure that the environmental release, importation, or interstate movement of GE organisms does not pose a risk of introducing or disseminating plant pests or noxious weeds. Although the current program has been effective in ensuring the safe environmental release, interstate movement, and importation of genetically engineered organisms, technological advances have led to the possibility of developing GE organisms that do not fit within the plant pest definition, but may cause environmental or other types of physical harm or damage covered by the definition of noxious weed in the PPA. Therefore, we consider that it is appropriate to align the regulations with both the plant pest and noxious weed authorities of the PPA.

1. Genetically Engineered Organisms Subject to 7 CFR part 340

We are proposing to revise the scope of the regulations in § 340.0 to make it clear that decisions regarding which organisms are regulated remain science-based and take both plant pest and noxious weed risks into account. The proposed scope of the regulations states that genetically engineered organisms whose importation, interstate movement, or release into the environment would be subject to the regulations are:

Genetically engineered plants if:

(i) The unmodified parent plant from which the GE plant was derived is a plant pest or noxious weed, or

(ii) The trait introduced by genetic engineering could increase the potential for the GE plant to be a plant pest or noxious weed, or

(iii) The risk that the GE plant poses as a plant pest or noxious weed is unknown, or

(iv) The Administrator determines that the GE plant poses a plant pest or noxious weed risk.

Genetically engineered non-plant, non-vertebrate organisms if:

(i) The recipient organism can directly or indirectly injure, cause damage to, or cause disease in plants or plant products; or

(ii) The GE organism has been engineered in such a way that it may increase the potential for it to be a plant pest: or

(iii) The risk that the GE organism poses as a plant pest is unknown, or

(iv) The Administrator determines that the GE organism poses a plant pest risk.

Under the current regulations, there is no explicit statement of the relative responsibilities of the Administrator and regulated parties in determining whether an organism met the definition for *regulated article* and therefore would be subject to the regulations. Under the proposed regulations, the responsible person for a GE organism could correctly apply the criteria in § 340.0 to determine whether the GE organism is subject to the regulations. Alternatively,

the Administrator could determine any GE organism to be regulated after determining that the GE plant poses a plant pest or noxious weed risk.

In many cases, it will be very straightforward for a responsible person to apply these criteria and determine that a GE organism is subject to the regulations. For example, the GE organism would clearly be subject to the regulations if the recipient organism were a plant pest or noxious weed. A GE organism would also clearly be subject to the regulations if there was little data or previous experience available concerning the recipient organism's plant pest or noxious weed potential, or the type of modification, with the result that it is difficult to do a reliable evaluation of the risks that the GE organism may be a plant pest or noxious weed.

In other cases, it may not be readily apparent to the responsible person for a GE organism whether or not the organism falls within the scope of § 340.0 and is regulated. For this reason, persons who are not sure about whether a GE organism falls within the regulations or who maintain that a particular GE organism is not subject to the regulations based on their belief that it is not an organism within the scope of § 340.0 may consult with APHIS.

A GE organism may be within the scope of the regulations based on the information available at the time of the determination, which is usually less information than is available when the Administrator evaluates, for example, whether a regulated GE organism should be considered for an exemption from the requirement for a permit, or should be considered for a determination of nonregulated status (see discussion of § 340.6 below regarding nonregulated status). In other words, this scope determination has one purpose (to determine whether regulation is necessary at all) and is based on one level of knowledge about a GE organism, while determinations regarding such things as necessary permit conditions or exemptions or nonregulated status have a different purpose and are based on a different level of knowledge about a GE organism.

It is important to note that while a GE organism may be within the scope of the regulations due to certain identified plant pest or noxious weed risks, it may also be within the scope of the regulations if there is not enough information about the GE organism's potential plant pest or noxious weed risks to make a decision regarding those risks. At the early stages of developing a GE organism, there may not be sufficient information available about the organism to clearly determine the potential associated plant pest or noxious weed risks. Unknown risks might lead to a determination by the Administrator that a GE organism should be subjected to regulatory oversight if APHIS lacks familiarity with the non-transformed recipient organism or the introduced trait.

The proposed scope makes it clear that the mere act of genetic engineering does not trigger regulatory oversight or mean that a GE organism will pose risks as a plant pest or noxious weed. Instead, it clarifies that APHIS would subject a GE organism to regulatory oversight based upon known plant pest and noxious weed risks of the parent organisms, or based upon the traits of the GE organism, or based upon the possibility of unknown risks as a plant pest or noxious weed when insufficient information is available.

Consultation With APHIS Regarding the Scope of These Regulations

The criteria described in the scope should help developers form a reasonable expectation as to whether their GE organism is within the scope of the regulations, based on the nature of the parent organisms, the engineered traits, and the amount of information available regarding the organism and similar organisms.

APHIS anticipates that initially the range of GE organisms that the Administrator may determine to be covered by the proposed regulatory scope will be broad. This will be due to both an initial measured implementation of the revised regulatory oversight as well as to the application of the scope criteria to the transformed organisms and recipient traits. Over time, the range of GE organisms subject to oversight is expected to decrease as APHIS becomes more familiar with these organisms and receives information from which it can reach a conclusion that these GE organisms or groups of organisms do not present increased or unfamiliar plant pest or noxious weed risks. Because the Administrator may make such a determination at any time the Administrator receives information that a GE organism is within the scope, APHIS expects that developers will seek early consultation with APHIS on whether the regulatory scope covers their GE organism. Since it is generally necessary for research or business plans to include, as early as possible, elements addressing regulatory processing, approval, and compliance, it will be in the interest of the developers to determine the regulatory status of their GE organism prior to contemplating its movement or environmental release. Therefore, APHIS will offer to consult with a developer of a GE organism regarding whether the GE organism is within the scope of the proposed regulations.

After consultation and review of available information, the Administrator will respond in writing as to whether the Administrator has determined that the GE organism is within the scope of the regulations. APHIS plans to make information publicly available by posting and maintaining information on its Web site about the determinations it makes pursuant to this consultation process to help the public and regulated entities understand which organisms are subject to the regulations.

We welcome suggestions from the public on the most appropriate ways to provide administrative guidance to the public on the issue of which GE organisms are within the scope of the regulations. The Agency is especially interested in ways which will balance transparency with the efficient use of Agency resources in conducting consultations and communicating information to the public regarding which GE organisms are within the scope of the regulations.

Organisms Specifically Excluded From the Scope of the Regulations

Specifically excluded from the proposed regulatory scope are GE microorganisms that are regulated as biological control organisms by the EPA under provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). APHIS concludes that there is no need for such GE organisms to be evaluated by both agencies. EPA is already evaluating the environmental safety of such organisms with respect to their impact on the entire environment, including plants. We also propose to retain an exclusion from the current regulations for GE microorganisms where the recipient microorganism is not a plant pest and which have resulted from the addition of genetic material from a donor organism where the material is well characterized and contains only non-coding regulatory regions.

Effect of Noxious Weed Authority on the Scope of the Proposed Regulations

The definition of noxious weed encompasses plants that pose risks akin to plant pests, because it includes ''any plant or plant product'' that can ''injure or cause damage to crops * * * other interests of agriculture * * * or the environment'', but also includes plants that can pose harm to non-plant organisms, such as humans. Therefore

evaluation of noxious weed risk expands what we can consider, while still including those risks examined under the plant pest approach. When considering risks associated with a GE plant, we would continue to consider whether it can harm plants, as well as whether it can cause the other types of physical harm or damage described in the definition for noxious weed.

The first consideration in determining if a plant is a noxious weed is identifying what direct injury or damage (physical harm) the plant causes. If direct harm or damage is established, the next consideration is to evaluate any indirect damage the plant may cause to interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment. In general, federally listed noxious weeds are plants that are likely to be aggressively invasive, have significant negative impacts, and are extremely difficult to manage or control once established.

The distinction between a weed and a noxious weed warrants emphasis. ''Weeds,'' in the broadest sense of the word, could include any plant growing where and/or when it is unwanted; even plants that are desirable in some settings may be considered weeds in others. In a narrower sense, weeds are invasive, often non-native, plants which impact natural and managed ecosystems, often with significant negative consequences due to lost yields, changes in management practices, altered herbicide use, etc. Only a fraction of these problematic weeds are considered to be so invasive, so harmful, and so difficult to control that Federal regulatory intervention to prevent their introduction or dissemination is justified, and these are the focus of the regulatory controls placed on them by APHIS. However, any weed, and virtually any plant or plant product, can be evaluated by APHIS to determine whether its characteristics and potential impacts warrant its listing as a noxious weed.

APHIS currently lists 98 aquatic, terrestrial, or parasitic plant taxa as noxious weeds. The species included in the list illustrate the kinds of plants APHIS considers to be sufficiently invasive, damaging, and difficult to control to be deemed noxious weeds. Table 1 describes some specific examples from the Federal noxious weed list and the kinds of impacts noxious weeds can have, to illustrate the types of effects APHIS will be looking for when evaluating whether GE plants reviewed under part 340 have any potential noxious weed traits. The experience and precedents developed by the APHIS–PPQ noxious weed program provide a guide for the regulation of plants that may be noxious weeds, and we intend to apply it to the consideration of GE plants in the same way.

TABLE 1—EXAMPLES OF IMPACTS CAUSED BY FEDERALLY LISTED NOXIOUS WEEDS

Impact	Description of impact	Example species
Lost productivity of crop fields.	Noxious weeds may directly compete with crop plants for limited resources, dramatically reducing yields.	Cogongrass (*Imperata cylindrica*) infests over 20 crop species; it releases chemicals into the soil that suppress crop growth and causes damaging puncture wounds to plant roots, bulbs, and tubers. Other examples include Benghal dayflower (*Commelina benghalensis*), red rice (*Oryza* spp.), and kikuyugrass (*Pennisetum clandestinum*).
Parasitic damage to crops.	Parasitic plants can cause significant reductions in yield by attaching themselves to a host plant, removing nutrients and ultimately killing it.	Federally listed noxious parasitic plants include the dodders (*Cuscuta* spp.)—with common names like strangleweed, devil's-guts, hellbine, and witch's hair—and witchweed (*Striga* spp.), which causes devastating losses in corn, sorghum, and rice.
Reduced productivity of pasture.	Grazing animals may avoid noxious weeds and consume the more favorable pasture species, resulting in increased noxious weed populations at the expense of more favorable species. Noxious weeds may also outcompete desirable pasture species.	Serrated tussock (*Nassella trichotoma*) has heavily infested large areas, leaving them completely incapable of supporting livestock.
Injury to humans or livestock.	Many noxious weeds are toxic, harming humans or livestock either when consumed or by direct contact.	Cape tulip (*Homeria* spp.) contains a cardiac glycoside, which can be fatal to livestock. Contact with giant hogweed (*Heracleum mantegazzianum*) causes painful skin blisters. Three-cornered jack (*Emex australis*) and devil's thorn (*Emex spinosa*) both bear spiny fruits that can cripple or cause injury to livestock or other animals.
Unchecked overgrowth.	Noxious weeds may be capable of completely dominating the landscape and preventing the use of cultivated or pasture lands for agriculture.	Mile-a-minute vines (*Mikania cordata* and *M. micrantha*) can entirely smother fields and forests in a dense, tangled mass of vines. A single plant of the aquatic weed giant salvinia (*Salvinia* spp.) can blanket 40 square miles in 3 months, and produce an underwater mat 3 feet thick.
Physical obstructions.	Growth rate and habit of some noxious weeds may physically hamper the movement of livestock and humans, or interfere with navigation of waterways.	Certain mesquites (*Prosopis* spp.), jointed prickly pear (*Opuntia aurantiaca*), and African boxthorn (*Lycium ferocissimum*) form impenetrable thickets filled with thorns or needles, blocking the movement of grazing animals, injuring them or preventing access to food and water.
Disruption of water flow.	Aquatic noxious weeds may disrupt water flow, adversely affecting irrigation, drainage and flood control canals, city water intakes, and recreational water use.	Notable examples include hydrilla (*Hydrilla verticillata*), giant salvinia (*Salvinia* spp.), and Chinese waterspinach (*Ipomoea aquatica*). Dense mats of oxygen weed (*Lagarosiphon major*) can completely shut down operation of hydroelectric plants.

TABLE 1—EXAMPLES OF IMPACTS CAUSED BY FEDERALLY LISTED NOXIOUS WEEDS—Continued

Impact	Description of impact	Example species
Habitat alteration	Noxious weeds may severely alter water quality by changing oxygen and nutrient content, may dramatically lower local water tables, or could so significantly outcompete or overgrow other vegetation resulting in a complete ecological shift of the habitat.	Infestation of lakes and ponds with hydrilla (*Hydrilla verticillata*) can alter aquatic ecosystems so drastically that native plants are entirely eliminated, rendering the habitat unsuitable for fish and other wildlife.

As discussed above, APHIS' determination that a plant is a noxious weed is based on notable physical harm or injury caused by the plant. The elements of the noxious weed definition include a number of interests that might be damaged by noxious weeds including not only plants but irrigation, navigation, the natural resources of the United States, the public health, the environment and interests of agriculture. Often APHIS quantifies the physical harm or injury in terms of economic losses. Loss in commodity value due to the presence of noxious weeds in seeds, for example, is a consequence of the anticipated physical damage that would be caused if the seed containing a noxious weed were distributed and planted; the economic loss is never simply the result of market preference to have commodities free of certain noxious weed seeds in and of itself, in the absence of any potential physical damage or harm. APHIS does not consider significant economic effects alone that are not linked to physical damage to be sufficient to determine a plant is a noxious weed.

Certainly, some noxious weeds can cause physical harm to the health of humans or livestock and other animals. In general, these impacts occur when individuals come into direct contact with the noxious plants or plant parts, which may cause physical injury or are toxic or otherwise harmful when consumed. Conceivably, noxious weeds growing in crop fields could potentially threaten public health, for example, if toxic parts of the noxious weeds are harvested and inadvertently enter the food supply. If such toxic or otherwise harmful noxious weed parts were found in food and caused the food to be ''adulterated'' within the meaning of the FFDCA, FDA could take regulatory action against the food.

Whereas APHIS has no direct role in evaluating the safety of foods, the agency plays an important supporting role in safeguarding the food supply by protecting the health of plants and animals at the farm level. When evaluating whether a particular GE plant may be a noxious weed because it poses a public health risk when growing in the environment, APHIS considers toxicity and other food safety information, including the type reviewed by EPA and FDA. In the case of GE plants, APHIS would not assess the safety of the GE plant for human or animal consumption, but would consider available information about toxicity and other food safety information in assessing noxious weed risk posed by the plants growing in the environment.

It should be noted, moreover, that most GE plants that APHIS has been regulating in the past, such as varieties of GE corn and soybeans modified with common agronomic traits, do not qualify as ''noxious weeds''. But with the increasing diversity of both agronomic and non-agronomic traits being engineered into plants it is appropriate to place regulatory controls upon GE plants proportionate to the likelihood that they may present a noxious weed risk until the potential risk can be appropriately evaluated.

How Non-Plant, Non-Vertebrate GE Organisms Fall Within the Scope of the Regulations

The proposed revision of the regulations retains control for potential plant pest risks posed by non-plant, non-vertebrate GE organisms. We would continue to explicitly use the plant pest provisions of the PPA for regulating non-plant, non-vertebrate GE organisms which align with the taxa listed in the PPA definition of plant pest. In its reviews of GE non-plant and non-vertebrate species, APHIS will continue to assess GE insects, fungi, bacteria, and other non-plant, non-vertebrate organisms for their potential to pose risks as plant pests.

The scope of the regulations as defined above makes it clear that it is the Administrator, and not the public, who determines whether a non-plant organism is within or outside the proposed scope of the Part 340 regulations. APHIS welcomes public comment on the proposed concise criteria that the Administrator would consider when concluding that a GE organism is not a plant pest. We envision providing additional information on the Administrator's interpretation on such criteria at the time of the final rule or in subsequent administrative guidance.

GE Vertebrate Animals Do Not Fall Within the Scope of the Regulations

Although the PPA definition of plant pest includes the potential for a nonhuman, vertebrate animal to be considered a plant pest, APHIS decided at this time that there are no demonstrated risks or pending GE animal developments indicating that it is necessary for the proposed regulations to evaluate vertebrate GE animals as potential plant pests. Because other statutory authorities exist for addressing GE animals, APHIS could guard against any plant pest risks that might be presented by GE vertebrate animals without directly regulating them under the regulations in part 340. On the other hand, we propose to regulate GE invertebrate animals under part 340 because many classes of invertebrates include known plant pests (e.g., insects, arachnids, nematodes, gastropods, etc.).

How GE Biological Control Organisms (BCOs) Fall Within the Scope of the Regulations

The PPA defines biological control organism (BCO) as ''any enemy, antagonist, or competitor used to control a plant pest or noxious weed'' (7 U.S.C. 7702(2)). The PPA gives the authority to regulate plant pests and noxious weeds, not specifically biocontrol organisms. APHIS recognizes that BCOs may have the potential to affect populations of noxious weeds or plant pests, or become plant pests themselves. To fall within the scope of the proposed regulations, the GE BCO would have to pose a threat as a plant pest or noxious weed. There are relatively few examples today of GE BCOs, but these may become more common in the future. For example, some researchers are developing GE biological control pink bollworms that

are sterile, which achieve their controlling effect by reducing the ability of fertile, non-GE pink bollworms to produce offspring. Such GE pink bollworm BCOs would fall within the scope of the proposed regulation, because they are plant pests. Although there are currently no examples of using GE plants as BCOs, such a GE plant would be evaluated under the proposed regulations to evaluate whether it is a noxious weed or a plant pest.

Currently, the federal regulation of microbial BCOs is regulated by EPA under FIFRA, and this covers GE as well as non-GE microorganisms used to mitigate the effect of pests. Unlike the PPA, which limits the definition of BCO only to organisms used to control plant pests and noxious weeds, FIFRA covers microorganisms used as biological control for any pest. APHIS considers it duplicative to have these regulations include GE microbial BCOs under its scope since FIFRA already adequately covers them, so APHIS is proposing that the regulatory scope language in § 340.0(d) would explicitly exclude GE microorganisms if they are already being regulated as BCOs by EPA under FIFRA. We are proposing to only regulate GE BCO macro-organisms that fall under the proposed regulatory scope (APHIS–PPQ currently regulates the macro-organism non-GE BCOs used to control plant pests and noxious weeds pursuant to other regulations). APHIS welcomes public comment on this aspect of its proposal.

Intrastate Movements of GE Organisms Between Contained Facilities and Activities in Contained Facilities Do Not Fall Within the Scope of the Regulations

Under the current regulations, certain GE organisms are only regulated by APHIS if they are imported, moved interstate, or released into the environment. The regulations do not govern intrastate movements between contained facilities such as laboratories, nor do they govern such activities as creating GE organism in a contained research laboratory. The proposed revision does not change this aspect of the regulations.

2. Deleting the List of Organisms Which Are or Contain Plant Pests

In § 340.2 of the current regulations, there is a list of taxa that are considered to be plant pests. Under the proposed scope, this list is not needed because we would not use taxonomic classification of donor and recipient organisms to determine if a GE organism is regulated. When in the course of evaluating a GE organism APHIS considers whether a donor or recipient species is likely to be a plant pest or noxious weed, we would consider the most up-to-date pest information maintained by PPQ. This information is more specific than the information in the list of plant pest taxa in the current regulations, and should be more useful and reliable than static lists of taxa. APHIS welcomes public comment on deletion of the taxa list and preferred sources of plant pest and noxious weed information for use under the proposed regulations.

With deletion of this list from the regulations, there is also no longer a need for the procedure currently described in § 340.5 for amending this list.

3. Regulating Whole Organisms, Parts, and Nonliving Products

APHIS proposes to clarify the regulated status of nonliving plant products in the regulations. First, the PPA defines a plant pest only as any *living* stage of any of the articles specifically named in the plant pest definition that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product. Moreover, APHIS does not consider most GE organisms or parts of GE organisms which cannot reproduce to present a risk as plant pests or noxious weeds.

Conversely, we would regulate importation, interstate movement and release into the environment of GE seedlings, seeds, tubers, cuttings, bulbs, spores, etc., because there is a reasonable, albeit small, possibility of reproduction, establishment, and spread if these were deliberately or accidentally released into the environment without authorization.

Viable pollen from GE plants imported, moved interstate, or released into the environment would be subject to the regulations because such movements of pollen can reasonably lead to genomes becoming established in the environment. Similarly, in circumstances where an article incidentally contains viable pollen, during movement, APHIS would consider the movement regulated. There are many cases, however, when pollen may be present but is no longer capable of producing offspring, e.g., nonviable or immature pollen. In such cases, APHIS would not require permits under this part. The commercial distribution of cut flowers is one pollen movement situation that APHIS has considered in light of the regulations, especially in cases where the flowers are grown in other countries then imported only as cut flowers. APHIS considers these circumstances to pose little, if any risk, and therefore would not require permits for these activities.

The PPA defines a noxious weed as encompassing both plants and plant products. A plant product is defined as ''any flower, fruit, vegetable, root, bulb, seed, or other plant part that is not included in the definition of plant; or any manufactured or processed plant or plant part.'' APHIS has regulated GE organisms under part 340 for over 20 years, and there is no strong evidence to suggest the need to regulate nonliving (nonviable) plant products in most cases. However, if in a specific case the importation, interstate movement, or environmental release of nonliving products of a GE plant may pose noxious weed risks, APHIS has clear authority to address those risks by imposing permit conditions on the handling of such nonliving products of the GE organism in the permit issued for the associated living GE organism. The proposed regulations state clearly in § 340.3(b) that the Administrator may also assign permit conditions addressing nonliving plant materials associated with or derived from GE organisms when such conditions are needed to make it unlikely that the nonliving materials would pose a noxious weed risk. APHIS invites consultation from any person considering a movement or release of nonliving materials derived from a GE organism who is uncertain as to whether it would be regulated.

B. Permits for Authorizing Importation, Interstate Movement and Release Into the Environment of Certain GE Organisms

1. Elimination of the Notification Procedure

APHIS first added the notification procedure to the regulations in 1993 as an administratively streamlined procedure for certain GE plants that met the eligibility criteria described in the regulation. Rather than using customized requirements, like the permit conditions used for the permitting procedure, the notification procedure uses generalized performance standards that are described in the regulation itself. The use of the performance standards that do not vary from one notification to the next is one of the ways that the more rapid administrative turnaround was achieved. In some ways, the term ''notification'' has been misleading to the public, since they do not realize that sending a notification does not mean automatic authorization by APHIS.

APHIS reviews notifications to verify that the GE plant meets the eligibility criteria, and also evaluates whether the

proposed importation, interstate movement or environmental release can be done in a manner that meets the performance standards described in the regulation. In many ways, these APHIS evaluations for notifications are very similar to those done for permit applications, but the notification procedure relies on applicants agreeing to meet the performance standards described in the regulation rather than submitting an application for APHIS review describing the specific measures they will employ for the activity (as is the case for permits). With permits, but not with notifications, APHIS can accept the proposed measures or add to them and the result is a set of binding customized permit conditions.

Because the notification procedure uses only the performance standards in the regulations, it is more administratively streamlined, but the general nature of the standards has made it difficult for APHIS inspectors to determine if a notification holder is in compliance and can also make enforcement more difficult. For example, under the current regulations, one of the performance standards for notifications relevant to environmental releases states that: ''The field trial must be conducted such that (1) the regulated article will not persist in the environment, and (2) no offspring can be produced that could persist in the environment.'' Conversely, specific conditions which APHIS places on permits are unambiguous, easy to verify at inspection, and easier to enforce. A specific permit condition that could be used to address just part of the performance standard described above might read: ''After final harvest of the GE corn plants covered under this environmental release permit, the site will be monitored every 4 weeks for the emergence of volunteer corn seedlings for one year, and any emerging volunteer plants will be devitalized before they produce pollen. Records of the monitoring and management of volunteers must be maintained by the permit holder and made available to APHIS upon request.''

APHIS employs performance standards in many of its regulations, where appropriate. For example, we propose to employ a performance standard in another part of this proposal, container requirements for shipments of GE organisms. In that case, it is possible to employ a straightforward standard that the container must not break or leak when subjected to ordinary handling in transportation. The use of performance standards under the notification procedure has some benefits, such as providing the responsible person with flexibility in how the standard is met, e.g., allowing for appropriate change in protocols used during the growing season. However, there are some disadvantages in not specifically enumerating the specific measures that constitute compliance with the regulations. The permitting procedure does not have this disadvantage, because the permit conditions specify which actions need to be taken by the responsible person to be in compliance.

APHIS considered revising the performance standards and retaining the notification procedure, but this would not have remedied its shortcomings, especially the lack of specificity that is a necessity of using broadly applicable, performance standards in the regulations.

Under the proposed regulations where all authorizations will be done under a permitting procedure, the permit conditions will provide more specific information about what procedures the permit holder must follow in order to be in compliance. In the proposed rule, we are describing in detail the types of core permit conditions that will be imposed, plus the additional permit conditions that the Administrator can place upon the permit holder in order to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed.

In view of the above discussion, APHIS has determined that it would have more flexible, risk-appropriate oversight, better regulatory enforcement and improved transparency if all regulated importations, interstate movements, and releases into the environment are authorized under the permitting procedure. The use of the permitting procedure in lieu of notifications is also necessary for APHIS to address some of the recommendations arising from the OIG Report and the provisions of the 2008 Farm Bill. For example, the OIG recommendations have led to proposed provisions in the regulations that will enable APHIS to add permit conditions to require additional reports during the course of an environmental release, the submission of notices to APHIS if the permit holder decides not to conduct the environmental release, and 7-day, pre-plant notices in the case of GE plants engineered to produce pharmaceutical or industrial substances. The last recommendation is already being implemented as a permit condition, because all of these authorizations are done under the permitting procedure. The OIG recommendations cannot be implemented under the notification procedure, because under the current regulations APHIS does not have the ability to attach conditions to notifications. This provides additional justification for APHIS to propose the elimination of the notification procedure. The APHIS proposal to eliminate the notification procedure is an effective way to address several of the provisions of the Farm Bill, such as the changes to the requirements for recordkeeping and reporting.

2. Revisions to Permit Procedures

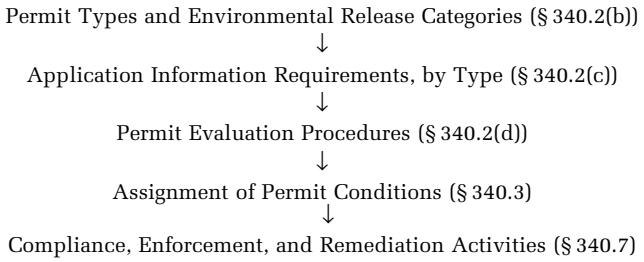
APHIS proposes to reorganize the regulations to improve the clarity of the permit application and evaluation procedures. The proposed change is more a reorganization than substantive change, and should enhance the transparency of the regulations to the public. The permitting procedure will continue to identify and obtain information relevant to evaluating the risks associated with a proposed importation, interstate movement, or release into the environment, and determine and document whether, and under what conditions, the activity should be allowed. The proposed regulations related to the issuance of permits are divided into two sections. The first is proposed § 340.2, *Procedure for permits*, which describes permit types, the procedure for permit application (including information requirements), and the Agency's administrative actions for permits. The second is proposed § 340.3, *Permit conditions*, which describes the general types of conditions that APHIS may add to a permit, and the obligations of the responsible person after permit issuance.

APHIS is proposing explicit procedures for amendment, transfer of responsibility, and revocation of permits in order to establish clear regulatory procedures that can increase efficiency yet maintain adequate safety. Currently the APHIS administrative practices to amend, transfer, and revoke permits have not been explicit in the regulation, and this addition will provide increased transparency and efficiency.

The proposed changes organize the regulations to more clearly reflect the procedural steps in the application, evaluation, and issuance of a permit (see Figure 1). First, the different types of permits (importation, interstate movement, and environmental release) are described in § 340.2(b), as are new subcategories of environmental release permits. Second, the types of information that must be submitted with a permit application are described in § 340.2(c). The permit type, as well as

the nature of the environmental release (if the permit is for a release), affect the application information requirements. Third, § 340.2(d) outlines the procedural and administrative steps of issuing a permit. Finally, the attachment of conditions to permits, which is also dependent upon permit type and release category, is described in § 340.3. Each of these permit-related sections of the proposed regulations is discussed below.

Figure 1. Schematic of activities associated with issuance and enforcement of permits, showing associated sections of the proposed regulation.



3. Permit Types and Environmental Release Categories (§ 340.2(b))

As discussed above in the background section, APHIS currently uses two procedures—notification and permits—to authorize the importation, interstate movement and release into the environment of GE organisms considered to be regulated articles under this part. The permitting procedure can be used for all regulated articles, but the notification procedure can be used only for certain GE plants that meet the eligibility criteria described in the regulations. Whereas permits are issued with explicit permit conditions which must be met by the permit holder, notifications have generalized ''performance standards'' described in the regulation and therefore do not vary from one notification to the next. Currently, approximately 90% of APHIS authorizations are done under the notification procedure.

Under the proposed system, which would eliminate notifications, APHIS would continue to issue three types of permits—interstate movement, importation, and environmental release. The procedures for the first two types of permits are relatively straightforward, and the conditions usually required for these permits address risks that are very similar from one shipment to another. We propose only minor adjustments to the procedures for interstate movement and import permits. In general, deliberate release of GE organisms into the environment presents a greater risk of introducing or disseminating plant pests and noxious weeds, and thus requires more careful oversight, than shipments of GE organisms into and across the country in secure containers. Of the three permit types, only environmental release permits would be differentiated into broad risk-related categories by the Administrator. This categorization would occur prior to the detailed and specific APHIS evaluation of an individual permit application. Table 2 summarizes the relationship of the three permit types and categories that pertain to environmental release permits.

TABLE 2—PROPOSED PERMIT TYPES AND CATEGORIES FOR ENVIRONMENTAL RELEASE PERMITS

Type		Use
Importation permit		For securely moving a GE organism into the United States.
Interstate Movement		For securely moving a GE organism from any State into or through any other State.
Environmental Release:*	Release Category A	For releases into the environment, outside the constraints of physical containment that are found in a laboratory, contained greenhouse, fermenter, other contained structure, or secure shipment.
	Release Category B	
	Release Category C	
	Release Category D	
	Release Category E (non-plants)	

* In some cases, an environmental release permit may also incorporate permits for importation or interstate movement when such movements are incidental to the environmental release.

The proposed sorting system for environmental release permits includes five categories: Four for releases of GE plants (Categories A–D) and one for releases of all other GE organisms (Category E). Releases of GE non-plant organisms (Category E) would be placed into a single category and reviewed on a case-by-case basis. APHIS considered the creation of smaller risk-related subcategories for non-plants, but APHIS has received too few permit applications to warrant the creation of these smaller groupings. Releases of plants would be grouped into four categories, as described below.

APHIS considered a tiered permitting system which would sort proposed environmental releases of plants into a number of risk-based categories. Lowest risk releases would be assigned to Tier 1, slightly higher risk releases in Tier 2, and so on. In such a system, tier assignment is analogous to a risk rating. In developing the specifics of implementing such a system in the regulations, however, APHIS found that it was challenging to pre-assign all conceivable releases into tiers representing discrete levels of risk. There are a large number of risk factors that contribute to the overall risk associated with any given release. These factors include reproductive biology and growth habit of the species, potential for gene flow to other species, phenotype engineered into the organism, familiarity with the genetic material used, safety of any expressed products, scale of the release, location, duration, experience, and compliance history of the applicant, proximity to threatened

and endangered species, and other factors.

Sorting proposed releases considering all relevant factors would lead to an unwieldy system with many risk-based categories, and would essentially require a full risk assessment prior to assigning a proposed release to the appropriate risk category. Consequently, it would be nearly impossible for applicants and the public to predict the risk tier to which a proposed release would be assigned.

APHIS proposes that the permitting system for environmental release permits would assign releases into administrative categories based upon two primary risk-related factors described below, so that the categories would identify the general types of releases of plants which share broadly similar risks and management issues. This initial administrative sorting would be followed by an evaluation that fully characterized the risk of the proposed release, which would then be the primary basis for adding necessary permit conditions. APHIS concludes that such a system could appropriately sort most releases into groupings that are alike enough that they could usually be treated similarly initially, in terms of application information requirements and evaluation of potential risks. In most cases the initial groupings would also result in a similar level of oversight of the release and conditions attached to the permit-but any final determination of the permit category, oversight and permit conditions would depend on the results of the APHIS evaluation.

Using this approach, there is no prior conclusion that every release within the same category poses the same level of risk. Likewise, releases in different categories do not necessarily pose greatly different risks. For this reason, APHIS would not refer to these groupings as ''tiers,'' as this implies an incremental increase in risk from tier to tier, but would instead label them as ''categories'' which are lettered and not numbered.

APHIS developed the proposed sorting scheme by first examining the types of releases that typically are authorized under its current regulations. APHIS then modified the categories to make them more explicitly connected to plant pest and noxious weed risks.

The two primary factors APHIS identified as most relevant to define its sorting system for environmental release permits were the (1) ability of the unmodified recipient plant species to persist in the wild and (2) potential of the engineered trait to cause harm, injury, or damage, as described in the definitions of plant pest and noxious weed. Secondary factors, which in some instances may change the initial categorization, include: how the recipient plant is commonly used (e.g., as a food or feed crop); the impact of the engineered trait on the fitness of the GE plant; and, the degree of uncertainty associated with the trait and its possible impacts.

Regarding the persistence factor, APHIS proposes to group plant species according to the risk of persistence of the plant or its progeny in the environment without human intervention. Based upon the growth habit of the plant species and presence of wild relatives in the United States, APHIS proposes to sort all plants into four groups, listed in order of increasing persistence risk:

- *Low:* Populations of the recipient plant are unlikely to persist in the environment without human intervention, and the recipient plant has no interfertile wild relatives in the United States. Examples include corn, soybeans, and cotton (except in certain areas).
- *Moderate:* Populations of the recipient plant are known to be weakly persistent in the environment without human intervention, or the recipient plant has interfertile wild relatives in the United States. Examples include alfalfa, beets, canola, rice, and tomato.
- *High:* Populations of the recipient plant are known to be strongly persistent in the environment without human intervention, or the recipient plant has interfertile wild relatives in the United States which are aggressive colonizers. Examples include creeping bentgrass, poplar, sorghum, and sunflower.
- *Severe:* The recipient plant is a Federally-listed noxious weed or is known to be similarly aggressive in its ability to colonize and persist in the environment without human intervention. Examples include hydrilla and kudzu.

These aspects of plant biology and growth habit are broad indicators of the increasing likelihood that the plant or its progeny can reproduce and spread without human intervention. ''Interfertile wild relatives'' includes both wild relatives in the traditional sense, as well as feral populations of the same species persisting outside agroecosystems. The distinction between ''weakly persistent'' and ''strongly persistent,'' is intended to mean survival without human intervention for one or very few generations (weakly persistent) versus several to many generations (strongly persistent). APHIS will clarify which species fall into each group by publishing lists in guidance.

Similarly, with regard to the factor for potential harm caused by introduced traits, APHIS proposes to group traits engineered into plants into four simple groupings based upon the definitions of plant pest and noxious weed. The groups are listed in order of increasing potential hazard of the engineered trait:

- *Low:*
  - Any new proteins or substances produced are unlikely to be toxic or otherwise cause serious harm to humans, vertebrate animals, or invertebrate organisms upon consumption of or contact with the plant or plant parts; and
  - No morphological changes which could cause mechanical injury or damage; and
  - Introduced sequences are known not to result in plant disease, and confers no or very low increased disease susceptibility.

An example would include expression of well characterized proteins known not to be toxic or harmful, such as a marker gene that does not pose a food or feed safety concern, or expression of viral genes where it is demonstrated that no protein is produced

- *Moderate:*
  - Any new proteins or substances produced are unlikely to be toxic or otherwise cause serious harm to humans or vertebrate animals upon consumption of or contact with the plant or plant parts ; or
  - Novel resistance to the application of an herbicide; or
  - Has novel ability to cause mechanical injury or damage; or
  - Produces proteins or substances that are associated with plant disease that are not prevalent or endemic in the area of release, or that confer an increased susceptibility to disease.

Examples include expression of new CRY proteins, ,mechanisms of herbicide tolerance (e.g., CP4–EPSPS, which confers glyphosate tolerance), and production of viral movement proteins.

- *High:*
  - Any new proteins or substances produced may be toxic or to otherwise cause serious harm to humans or vertebrate animals, upon consumption of or contact with the plant or plant parts; or
  - Produces an infectious entity which can cause disease in plants.

Examples include mercury hyper-accumulators or production of some pharmaceutical compounds.

- *Severe:*

Any new proteins or substances produced are known or likely to be

highly toxic or fatal to humans or vertebrate animals, upon consumption of or contact with the plant or plant parts.

These aspects of the engineered trait are related to harms or damages associated with plant pests or noxious weeds. This takes into consideration (1) the harmfulness of any substances produced, (2) the possibility of creating morphological changes that would cause physical injury, and (3) the likelihood of increasing plant disease, either due to risk of creating novel pests or increased inoculum source. Novel resistance to an herbicide is included in the ''moderate'' category due to the impacts the trait could have on the ability to manage the plant or its progeny.

The proposed use of plant growth habit and trait harm or injury as the two main factors for the initial sorting of environmental releases into categories uses the two factors to roughly approximate ''exposure'' and ''hazard,'' respectively. Thus, using a combination of these two factors alone, we propose the following initial sorting of plant-trait combinations into release permit categories (see Table 3). Once environmental releases of GE plants have been sorted into the permit categories shown in Table 3, we will review and evaluate the information submitted by the applicant to determine oversight and permit conditions. The information requested from applicants will not be limited to these factors and is, in fact, designed to allow us to evaluate any of the risks associated with noxious weeds and plant pests. In some instances, our review may result in a change to the release category assignment of a GE plant.

TABLE 3—INITIAL SORTING INTO ADMINISTRATIVE PERMIT CATEGORIES (A, B, C, AND D) FOR ENVIRONMENTAL RELEASES OF GE PLANTS, BASED UPON PERSISTENCE RISK OF THE RECIPIENT PLANT SPECIES AND POTENTIAL HARM OR DAMAGE OF THE ENGINEERED TRAIT

Persistence *	Potential harm or damage of engineered trait			
	Low	Moderate	High	Severe
Low	A	A	C	D
Moderate	A	B	C	D
High	B	B	C	D
Severe	D	D	D	D

* Persistence risk of the recipient plant species.

The sorting system above presumes that there is sufficient scientific information available about the GE plant to support the categorization. For example, the phenotype conferred by inserted sequences and the growth habit of the plant species in the U.S. must be well-characterized and based upon direct empirical observation of the genetic construct in the recipient plant species. In cases where less (or nothing) is known about phenotype of the engineered trait in the recipient plant species-such as inference based upon sequence similarity, protein structure modeling, or observation of the genetic construct in other species-the release category may be changed (from A to B or B to C) as a result of this uncertainty. Similarly, lack of familiarity with the plant species' behavior in the U.S. or the techniques needed to mitigate the likelihood of its persistence could also change the release category.

APHIS considered whether to adjust the categories table to acknowledge that an engineered trait could affect (enhance or detract from) the other factor axis, namely the persistence risk of the nonmodified recipient plant. Engineered traits such as resistance to biotic or abiotic stresses could theoretically increase the fitness of the plant, and thereby increase the likelihood that it will persist in the environment without human assistance. Considering the range of persistence risks posed by all of the different plant species sorted into any one of the proposed groupings, however, APHIS has concluded that in most instances the engineered trait would not alter the likelihood of persistence enough to warrant a change in initial release category. However, in cases where the engineered trait significantly alters plant growth habit, metabolism, or reproduction to increase the likelihood of persistence in the environment, APHIS could change the release category accordingly. Examples of such changes might include converting an annual species to a perennial or converting a plant with C3 metabolism to crassulacean acid metabolism (CAM).

The proposed category system should provide a simple, transparent way for APHIS review information in applications to initially sort releases into broad, risk-related categories, which can then be more efficiently assessed for the actual risks posed by the release. However, it should be emphasized that the categories are intended only for initial sorting, and other factors are taken into account in the APHIS evaluation when determining the specific permit conditions.

APHIS intends that release Category A will be associated with a level of regulatory oversight similar to environmental release notifications under the current system, and Categories B and C with a level of regulatory oversight similar to various permits that have been issued under the current system. However, it will be much clearer to the public what types of oversight will be applied broadly within each category. As we discussed above, oversight and permit conditions with each category will be similar, though not necessarily identical, for any plant within the category. Category D was created to acknowledge the possibility that some proposed releases may pose a very high risk of introducing a highly persistent or harmful plant into the environment. To date, APHIS has never been requested to allow releases that would fall into this category. If an applicant were to propose a Category D release, APHIS would only authorize such releases after imposing extremely strict levels of oversight akin to high security quarantine far exceeding that of Category C that would ensure that the GE plants could not persist in the environment. The information requirements, permit conditions, and general levels of oversight associated with each release Category are discussed below.

This simple sorting system places GE plants into categories and provides a relatively clear, simple rationale for placement in a given category. What follows is a series of illustrations of common plant-trait combinations and the release categories to which they would be assigned:

- *Category A:*
  - Bt corn producing CRY1ab toxin. The plant is unlikely to persist in the

environment and the safety of the protein has been assessed by the EPA.

○ Soybeans engineered with glyphosate tolerance conferred by CP4–EPSPS. While herbicide tolerance poses a ''moderate'' hazard, soybean has no interfertile wild relatives in the U.S..

• *Category B:*

○ Corn producing a new CRY protein. The plant is unlikely to persist and the novel CRY protein is likely to be toxic to some species that live or feed on the plant (normally Category A), but its food/feed safety is only inferred from similarity to other CRY proteins.

○ Random ''knock-out'' or antisense libraries of soybean lines. While the lines may not likely produce novel proteins or substances (Category A), because of the uncertainty associated with the impacts of genetic engineering on these lines, they would be treated as Category B. Well-characterized lines taken from such libraries that do not produce new proteins would likely be treated as Category A.

○ Kentucky bluegrass engineered with glyphosate resistance conferred by CP4–EPSPS. Herbicide resistance is a ''moderate'' hazard and bluegrass has interfertile wild relatives in the U.S.

○ Pines producing an enzyme to enhance paper production. Pines are persistent and have interfertile wild relatives in the United States.

• *Category C:*

○ Poplar engineered to produce enzymes for heavy metal bioremediation.

• *Category D:*

○ Any Federally listed noxious weed that has been genetically engineered; any GE plant producing a vertebrate toxin.

Permits for Environmental Releases of Plants Making Pharmaceutical and Industrial (PMPI) Compounds

APHIS considered whether to continue to issue environmental release permits for GE plants engineered to produce pharmaceutical and industrial compounds if the GE plant species is the same as, or sexually compatible with, a species commonly used for food or feed. APHIS concludes that the proposed permitting procedure and the use of stringent permit conditions can continue to effectively minimize the risks that may be associated with the environmental release of such GE plants. APHIS will continue to impose permit conditions that take into account the issues related to the safety of proteins or other substances that these plants have been engineered to produce. Based upon APHIS experience to date, many releases of GE plants producing pharmaceutical or industrial substances would fall in Category C, and would carry the same level of oversight as current permits for PMPI.

4. Permit Application Information Requirements (§ 340.2(c))

In the proposed regulations, we provide greater detail about the basic application information requirements that need to be addressed in all permit applications, as well as additional basic information required for each permit type and the categories in the case of environmental release permits. Under the current regulation, certain areas where APHIS routinely needs information from the applicant do not become apparent until the applicant submits the permit application (and APHIS subsequently follows up for additional information). Some of the information requirements related to recordkeeping, reporting, and contractual arrangements among the permit holder and agents are new to the regulation and reflect, in part, certain provisions of the 2008 Farm Bill and also align with recommendations of USDA's OIG 2005 Report. For example, the OIG recommendations have led to provisions that will enable APHIS to require geographic coordinates for the locations of environmental releases.

The differences between the information required for an application under the current regulations versus the proposed regulations may be seen by comparing current § 340.4 to proposed § 340.2(c). Both the current and proposed application procedures require information characterizing the nature of the GE organism, including detailed molecular biology information about the expression of the introduced genetic material. They also both require information about the type of movement and/or release planned. The proposed rule requires more detail in some of these areas, and more description of the applicant's plans and methods to prevent unauthorized releases, and to respond to unauthorized releases if they occur. This information is used in part by APHIS to formulate the specific permit conditions. In cases where the permit is for environmental release, and would be in permit categories C or D according to the table in § 340.2(b)(3), a greater level of detail would be required for almost all aspects of the activity, including the recipient organism, the inserted gene(s), site location and management practices, and training and communication among the permit holder and agents involved in the activity covered under the permit. This information would also address the capability of the organism to persist or spread in the environment, or include details about how the engineered traits might be harmful.

5. Permit Conditions (§ 340.3)

Conditions are specific practices or requirements that an applicant must follow upon issuance of a permit. Under the current regulation, the permit conditions are described in the same section as the permit procedure itself. In the proposed revision, the permit conditions are enumerated in a separate section (§ 340.3) to accommodate the additional details to describe conditions for the three permit types as well as the categories of environmental release permits.

The use of permits and permit conditions gives APHIS and the responsible person a clearer understanding as to what actions must be taken for the permit holder to comply with the regulation. In the proposed regulation, APHIS has strived to provide as much transparency and predictability as possible about permit conditions while retaining sufficient flexibility so that the regulations will be adaptable in a broad range of cases.

Permits will be issued with the core permit conditions described in § 340.3(a), which are a minimum set of basic conditions for importation, interstate movement, and release. The Administrator may add to these conditions additional or expanded conditions when necessary to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed.

The Administrator will assign the permit conditions in a manner that is commensurate with the risk of the individual proposed movement or release. Additional or expanded permit conditions may include, but are not limited to, specific requirements for: reproductive, cultural, spatial, temporal controls; monitoring; post-termination land use; site security or access restrictions; and management practices such as training of personnel involved in the release.

The proposed description of permit conditions elaborates on the ''standard'' permit conditions found in the current regulations, and the additional detail is designed to better communicate with potential applicants what the requirements are likely to be for their particular permit, and will better support administration of the program, including compliance and enforcement.

In the current regulation, only ''standard'' permit conditions are described, and APHIS has the authority to place other conditions upon the permit as deemed necessary by the

Administrator. The proposal for permit conditions will be more transparent to the public and this transparency will better facilitate planning by researchers, especially those who have not previously received permits from APHIS.

The proposed required core permit conditions consolidate six primary areas addressed in different parts of the current regulations to ensure compliance with the regulation and to make it unlikely that the permitted activity will result in the introduction and dissemination of a plant pest or noxious weed: Identity, shipment, unauthorized dissemination, communication and training, records, reports and notices. APHIS intends the list of specific condition areas we propose in § 340.3 to be used for all permits we issue as they apply to importation, interstate movement, and release into the environment. The required permit conditions listed in § 340.3 represent the permit conditions that we propose to apply for any type of permit. Listing them in the regulations should provide applicants with the ability to plan their activities with knowledge of the primary requirements for all activities that would have to be met to comply with the regulations.

For environmental release permits, proposed § 340.3(a)(4)(iii)(F) would also require the permit holder to notify APHIS seven days prior to initiation of the release if the release is Category C or D. For all Categories, permit holders are required to notify APHIS if they do not conduct the release.

The current regulations require environmental release permit holders to submit field test reports to APHIS within 6 months after termination of a field test. Under proposed § 340.3(a), the requirement simply states that the responsible person shall submit reports to APHIS at the times specified in the permit conditions and containing the information specified in the permit conditions.

APHIS is also proposing revision of the regulations to clarify the procedure it would use for amendment of permit conditions, transfer of a permit to a different responsible person, and revocation of an existing permit. Each of these additions to the regulations reflect current administrative practices and the incorporation of these into the regulations will make the overall system more transparent.

Currently, APHIS attaches conditions to permits at the moment the permit is issued to the applicant. Under the current regulations, the permitting procedure does not include a formal acknowledgement from the applicant prior to permit issuance that they are aware of and consent to the permit conditions. To verify that applicants are aware of and willing to abide by the conditions, APHIS proposes to add an additional administrative step in the permit procedure in § 340.2(d)(6) to support administration of the program. We are proposing to require that applicants agree prior to permit issuance that they will comply with all the permit conditions. Eventually, APHIS would build this feature into the existing ePermits system, and in the interim it would provide alternative mechanisms, such as e-mail communications, to implement this step of the permitting procedure.

APHIS is also proposing to clarify in § 340.2(h) of the regulations the procedure to be used when amendment of existing permit conditions is sought by the responsible person or required by APHIS, as well as the procedure for transfer of an existing permit to a different responsible person.

As with the current regulations, APHIS is retaining the flexibility to modify permit conditions as needed under individual circumstances. Proposed § 340.3 will increase transparency, yet still allow sufficient adaptability of the regulations for the full range of permit applications APHIS expects to receive today and in the future. APHIS recognizes that transparency and predictability for applicants must be balanced with maintaining Agency flexibility and adaptability for years to come under these regulations. APHIS encourages the public to comment on the choices we are proposing here, and we welcome suggestions for alternative approaches.

APHIS is proposing to revise the current sections of the regulations for container requirements for shipments of GE organisms (§ 340.8) and marking and identity requirements for imports of GE organisms (§ 340.7). Rather than the highly prescriptive approach in the current regulation, we will use an approach that is performance based and can be adapted to the activity that is being performed. This should provide greater efficiency for the public as well as APHIS, yet still achieve the necessary level of containment during shipments. We have reorganized this information in the regulations so that the requirements are associated with the related activity under the proposed regulation. For example, the shipping requirements for interstate movements under the conditional exemption have the requisite shipping conditions stipulated in the section for conditional exemptions. Likewise, the shipping conditions for import and interstate movement permits have been placed in the section for permit conditions, rather than retaining them in a separate section as in the current regulations. The performance-based standards we are proposing incorporates a simple performance standard in our proposed definition of secure shipment, discussed below: ''Shipment of a package of sufficient strength and integrity to withstand leakage of contents, shocks, pressure changes, and other conditions incident to ordinary handling in transportation.'' APHIS is also proposing to require applicants to provide their proposed methods of secure shipment, and APHIS will specify the methods of secure shipment as a permit condition.

APHIS proposes to eliminate the marking and identity requirements for imports of GE organisms as a separate section of the regulations (current § 340.7). As with the container standard issue discussed above, appropriate labeling and related requirements would be highly individual depending on the organism, type of permit, and other conditions.

APHIS is proposing to include relevant tribal officials when it provides copies of permit applications to state regulatory officials. The current regulations state that APHIS provides this information to state regulatory officials.

6. Elimination of Courtesy Permits

APHIS is also proposing to eliminate the issuance of courtesy permits. Courtesy permits have been part of the regulations since their inception in 1987, but in an effort to better allocate APHIS resources, APHIS is proposing to remove this regulatory feature. The current regulations provide the ability for APHIS to issue ''courtesy permits,'' in order to facilitate the movement of organisms which are outside the scope of these regulations, but whose movement might otherwise be hindered because of their similarity to organisms regulated under these regulations. The issuance of courtesy permits has generated confusion in the public and especially in the research community. The application form for courtesy permits is identical to the application for other types of permits, and the courtesy permit itself looks like other permits. This has led to the widespread misunderstanding by some researchers that courtesy permits are actually required for the movement of certain organisms, or that issuance of a courtesy permit removes the requirement for applicants to have other authorizations which may be required, under plant

pest regulations such as those found at 7 CFR part 330. APHIS commits significant resources to the issuance of these courtesy permits for the movement of organisms which are not subject to the provisions of part 340. APHIS will work with researchers and relevant government regulatory officials to facilitate the transition.

APHIS will also be available for consultation by persons who formerly used courtesy permits and other persons moving similar non-regulated articles, to discuss how to facilitate their movement. We also encourage the public to comment on the proposed elimination of courtesy permits and how APHIS should work with persons moving organisms for which we might formerly have issued courtesy permits.

C. Conditional Exemptions From Permit Requirement (§ 340.4)

The PPA allows the Secretary to create ''exceptions'' to the permit requirement when the Secretary deems that a permit is not necessary. That is, these regulated activities are allowed, under certain conditions, without seeking prior authorization via permit. The current APHIS regulations contain such PPA exceptions, but they are referred to as ''exemptions'' in the regulations. The current regulations include conditional exemptions from the requirement for interstate movement permits. These conditional exemptions were established in the regulations during the first few years after the regulations were first promulgated. The last conditional exemption was established in the regulations in 1990 for the interstate movement of GE plants of the species *Arabidopsis thaliana* as long as the conditions described in the regulations are met.

In its proposed revision to the regulations, APHIS is retaining the existing conditional exemptions from interstate movement. We are also proposing a new regulatory procedure that would enable APHIS to approve new conditional exemptions more efficiently than using the procedure of notice and comment rulemaking for each individual exemption. This can be a transparent and efficient way to provide regulatory relief. This new procedure for approving conditional exemptions is described in § 340.5, and it incorporates transparent steps including scientific review, public input, and adaptability when APHIS establishes the conditions relevant to the specific conditional exemption. Conditional exemptions, by their nature, will always include conditions and continued APHIS oversight to ensure that the conditions are met.

The current regulations provide for conditional exemptions from the requirement for permits for the interstate movement of certain GE strains of the microorganisms *Escherichia coli, Saccharomyces cerevisiae,* and *Bacillus subtilis,* and the plant *Arabidopsis thaliana* in § 340.2(b), and these conditional exemptions are being retained under the proposed regulations. Conditional exemptions from permit have been part of the regulations since the first exemption was established in 1988 (for the interstate movement of certain GE microorganisms), with the addition of another conditional exemption, through rulemaking, in 1990 for certain types of GE *Arabidopsis thaliana,* one of the most commonly used plants for scientific studies and which is frequently distributed among researchers. The essential conditions for each of these conditional exemptions address the following: (1) Species of the GE organism, (2) the types of genetic modifications that are allowed or prohibited for the GE organism, and (3) the manner in which the GE organism is shipped interstate. The existing conditional exemptions for the interstate movement of microorganisms were based on APHIS' conclusion that the exemption from the requirement for permits for interstate movement of these microorganisms would ''not present a risk of the introduction or dissemination of a plant pest'' (53 FR 12910, p.12910).

The existing conditional exemptions for *E. coli, Bacillus subtilis, Saccharomyces cerevisiae* and *Arabidopsis thaliana* are being retained in the proposed regulations. APHIS has no information that would indicate that such conditional exemption would be result in the introduction and dissemination of a plant pest or noxious weed. The text of the conditional exemption is being updated to place the shipping requirements with the other conditions associated with the exemption, instead of the current regulatory organization that has the shipping requirements in a separate section of the regulation.

In addition to the existing conditional exemptions, APHIS is proposing a transparent and efficient petition procedure in § 340.5 whereby the Administrator may approve additional conditional exemptions from permit without having to amend the regulations. This procedure would provide for a scientific review by APHIS as well as the opportunity for public review and comment on the scientific basis for the proposed exemption and the conditions associated with the exemption. The proposed procedure would provide an adaptable means of ensuring that the regulatory oversight is proportional to the risks posed by specific activities with GE organisms.

Proposed § 340.5 describes the procedure whereby a petitioner would seek a determination by the Administrator that the importation, interstate movement, and/or release into the environment of a GE organism is not subject to the requirement to have a permit under this part. We propose that the Administrator's decision to approve an exemption would be based upon a determination that the exemption from the requirement for a permit, when conducted with the associated conditions, is unlikely to result in the introduction or dissemination of a plant pest or noxious weed. APHIS anticipates that creating this new petition procedure to allow approval of additional conditional exemptions would enhance its ability to customize regulatory oversight to be proportional to any risks associated with importation, interstate movement, or release into the environment of a GE organism.

Under the proposed procedure, petitioners have the flexibility to propose various types of conditional exemptions from the requirement for a permit: The proposal can be for one or more permit types (importation, interstate movement, or release into the environment). In addition, the petitioner can propose the relevant conditions. The Administrator may approve the proposed conditional exemption as submitted in the petition, or the Administrator may impose alternatives to the requested exemption and conditions. The Administrator would review the scientific information and evaluate potential risks relevant to the proposal, then make the relevant documents (proposal and any supporting information) available to the public for review and comment prior to the Administrator's decision.

The information needed for a petition for conditional exemption would depend on the nature of the exemption requested and the proposed conditions for exemption. For example, conditional exemptions for the interstate movement of narrowly-defined groups of organisms with restrictive associated conditions might require considerably less information to justify than exemptions for broadly defined groups of organisms or less restrictive associated conditions. In making its determination, APHIS would consider all relevant information, including information in the scientific literature, copies of unpublished studies, and reviews by other regulatory agencies.

APHIS foresees many advantages to the proposed procedure, including scientific rigor, public involvement, and regulatory efficiency. APHIS would continue to provide to the public the relevant scientific information under consideration, its environmental analysis, and the rationale for its determination. The public would also retain its ability to provide comments to the agency prior to a decision approving a new exemption. APHIS decisions regarding these newly approved conditional exemptions would be published in the **Federal Register** and maintained on a list accessible to the public.

In evaluating whether to approve a new conditional exemption, APHIS would carefully consider issues related to enforceability of the conditional exemption when proposing to approve a conditional exemption. Unlike permit conditions, which are binding on the specific responsible person, the conditions associated with the exemption would apply to anyone who conducts the activity under the conditional exemption. Before granting such a conditional exemption, APHIS would take into consideration the likelihood that such conditions would be followed and the consequences if they are not.

Conditional exemptions could be used, for example, for the importation of certain GE commodities. A person could petition for an exemption from all permits for shipments of a particular GE commodity grain under the condition that the grain is not grown, but will only be moved for direct use as food, feed, or for processing. The proposed procedure to approve new exemptions would be sufficiently adaptable that it can consider approving exemptions for the shipment of certain GE commodities that would take into account any conditions necessary to make it unlikely to result in the introduction and dissemination of plant pests or noxious weeds.

APHIS considered proposing specific criteria in the regulations that the Agency would use when evaluating potential risks of imported GE commodities which are viable propagules such as grains like corn, wheat, etc. APHIS considered that such a criterion-based system in the regulations might allow APHIS to conduct expedited reviews of imports that met the specified criteria. APHIS considered criteria such as whether the GE plant had undergone a safety review in a foreign country, whether APHIS had granted nonregulated status to something similar, and the likelihood that the commodity could be propagated (seeds, fruit with seeds, nonviable products like flour, etc.).

However, at this time APHIS is not proposing such criteria in the regulation. APHIS does not rule out the possibility of developing such a criterion-based system in the future. We welcome comments from the public on this issue.

We are also proposing regulatory procedures whereby the Administrator may revoke any exemption under this part after it is approved. As proposed, the Administrator may revoke any exemption if the Administrator receives information subsequent to approving the exemption and makes a determination based upon this information that the circumstances have changed such that the exemption is likely to result in the introduction or dissemination of a plant pest or noxious weed. A revocation may not be appealed. However, any person may file a new petition in accordance with § 340.5 regarding the same or similar organisms covered by the exemption if new information relevant to the revocation becomes available.

In addition to this procedure for completely revoking an exemption so it would be unavailable for use by any person, we propose to add a provision in paragraph (e) of the conditional exemptions section, § 340.4, under which the Administrator may revoke the right of an individual person to use an exemption without revoking the exemption for other persons. The Administrator could revoke an individual's right to use an exemption after determining that the person or any agent of the person has failed to comply at any time with any provision of this part.

D. Petitions for Nonregulated Status (§ 340.5)

The current regulations include a procedure by which anyone may petition APHIS to grant ''nonregulated status'' to a GE organism, which means it would no longer be subject to the regulations in part 340. This nonregulated status is different from that of regulated articles that might be conditionally exempt from the requirement for a permit when moved interstate (following the conditions specified in the regulations).

Published APHIS decisions made under the current regulations have used different ways to express the basic standard ''unlikely to pose a plant pest risk'' in determining whether to grant nonregulated status to a specific GE organism. In its determinations, APHIS has conveyed the basic standard of ''unlikely to pose a plant pest risk'' by concluding that the GE organism ''poses no more of a plant pest risk than its non-genetically engineered counterpart,'' ''will not pose a plant pest risk''; or that there is ''no plant pest risk,'' or ''no direct or indirect plant pest effects.'' Regardless of the phrases used in its determination of nonregulated status to date, APHIS has applied the same basic evaluation criteria to each determination to conclude that the GE organism is unlikely to pose a plant pest risk and therefore is not subject to the part 340 regulations.

APHIS is proposing revisions to § 340.6 that will clarify the petition procedure, information requirements for petitions, and the standard upon which the Administrator will make a determination that a GE organism is approved for nonregulated status. Under the current regulations, the basic standard for a determination of nonregulated status of a GE organism has been related to plant pest risk. In § 340.6(b)(4) of this proposed rule, we are proposing to apply a similar basic standard derived from the proposed regulatory scope in § 340.0(a), namely, whether the GE organism is unlikely to be a plant pest or noxious weed.

The current regulations also have a provision at § 340.6 to extend a determination of nonregulated status and grant nonregulated status to a GE organism based on the similarity of the GE organism to an antecedent GE organism that has already granted nonregulated status (§ 340.6(e) ''Extensions to determinations of nonregulated status''). This provision has been in the APHIS regulations since 1997 and has been used fifteen times to grant nonregulated status to additional GE plants based on similarity to their antecedents. This existing ''extension procedure'' was designed for APHIS to take into account the previous evaluation conducted by APHIS and thereby afford the potential for expedited evaluations of a petition for extension. The extension procedure has some administrative aspects which are streamlined but in practice the APHIS scientific reviews for extensions are similar to those of the antecedent organism.

Some members of the public have misunderstood the nature of the extension procedure, believing that APHIS has not conducted a thorough scientific review. Some members of the public have misconstrued the term ''extension'' to conclude that an extension would extend the duration of nonregulated status (nonregulated status is not granted with an expiration date).

For these reasons, APHIS is proposing to eliminate the extension procedure in

the regulation. APHIS sees no advantage to retaining the distinction in the regulations between reviews for antecedents and reviews for subsequent petitions for extensions. Because the proposed revisions for petition for nonregulated status provide a high degree of flexibility, a separate extension procedure is not needed in the regulation. Review of petitions under the proposed regulations will rely on previous evaluations of similar GE organisms when they exist. APHIS foresees that some evaluations for nonregulated status may require less time if previous evaluations have addressed the issues relevant to a new petition for nonregulated status.

In § 340.6 we propose some revisions to the information that the Administrator may require a petitioner to submit in consideration of the particular petition. In the current regulation, the information needs are described largely with respect to evaluating GE plants, but APHIS foresees that other GE organisms may also be suitable candidates. This provision may become more important as new commercial applications of biotechnology emerge and new types of information are needed to properly assess the risks associated with new types of GE organisms. In all of the nonregulated status requests processed to date, the subject organisms and the alterations involved did not present unanticipated or completely novel approaches and APHIS was able to make a determination based on information in the petitions. When needed, APHIS obtained additional information from petitioners, in a consultation process similar to the one proposed.

We are also proposing a regulatory procedure whereby the Administrator may revoke a previous approval of nonregulated status. This is consistent with the existing regulations and policies that the Administrator may place a deregulated GE organism back under the regulations if the Administrator concludes that the GE organism poses a plant pest risk. As proposed, the Administrator may revoke any approval of nonregulated status if the Administrator receives information subsequent to approval that the GE organism is likely to be a plant pest or noxious weed. If the Administrator revokes an approval for nonregulated status, the Administrator may approve for the same GE organism an exemption from the requirement for permit in accordance with § 340.5. The revocation, its effective date, and the reasons for it will be published in the **Federal Register**. A revocation may not be appealed. However, any person may file a new petition in accordance with § 340.5 or § 340.6 regarding the same or similar organisms covered by the revocation if new information relevant to the revocation becomes available.

Treatment of GE Organisms That Have Been Granted Nonregulated Status

Although the APHIS evaluations of GE plants that would be conducted under the proposed regulatory changes will evaluate some additional factors because of consideration of noxious weed risks, APHIS nonetheless considers this proposed revision to be sufficiently consistent with the criteria evaluated in making determinations of nonregulated status to date under the current regulations. For this reason, APHIS is proposing that all previous determinations of nonregulated status made since the early 1990s under the part 340 regulations will be automatically approved for nonregulated status under the revisions proposed here. The history of safe use of these nonregulated GE plants in agriculture in the United States and other countries gives APHIS confidence that it is appropriate to retain nonregulated status under the revised regulations for all those GE plants which have been granted nonregulated status under the existing regulations. Many of these GE plants have been incorporated into plant breeding programs and been used to develop hundreds of crop varieties that have been widely and safely used in agriculture around the world.

We also note that although the addition of the term ''noxious weed'' is new to the proposed regulation, previous evaluations for determinations of nonregulated status considered the concept of plant pest risk in a broad context that included consideration of potential weediness. The evaluations considered, *inter alia,* whether the unmodified plant was a weed, whether the GE plant was a weed, and whether the interbreeding of the GE plant with sexually compatible plant species would result in offspring that would be weeds. In each case in which APHIS granted nonregulated status to date, APHIS reached the conclusion that in each instance that the potential for weediness was unlikely to occur. In the case of some petitions for nonregulated status in which the GE plants were engineered with sequences derived from plant viruses, APHIS also considered in its reviews whether the genetic modification was unlikely to result in a new plant pest, in this case a plant virus (through mechanisms such as recombination or transencapsidation).

E. Compliance, Enforcement, and Remedial Action (§ 340.7)

1. Ensuring Compliance With Permits and Exemption Activities

In recent years, APHIS has strengthened its program in order to improve permit holders' compliance with the regulations, to augment the approaches used to prevent or remediate potential risks to plant health, and to utilize appropriate enforcement strategies. This proposal provides an opportunity to set forth the compliance and enforcement requirements and the tools and administrative practices APHIS may employ as part of an integrated approach to prevent the introduction or dissemination of plant pests and noxious weeds, and to support overall administration of the program. These matters are addressed in proposed § 340.7, ''Compliance, enforcement, and remedial actions.'' These proposed regulatory changes also reflect certain provisions of the 2008 Farm Bill and align with recommendations of USDA's OIG.

APHIS seeks to clarify that it will use the full range of enforcement authorities and penalties granted under the PPA. As described above, APHIS issues permits with specific conditions or requirements placed upon the responsible person. Proposed § 340.7 clarifies the requirement for compliance with these conditions, as well as the approaches available to APHIS to verify compliance. Such conditions may include requirements for the responsible person to establish and maintain records related to the permit, as well as allowing APHIS to review those records. This section underscores APHIS' ability to conduct inspections and audit records related to the regulated activities.

In this proposed rule, the requirements for record retention are being increased. Records indicating that a GE organism that was imported or moved interstate reached its intended destination must be retained for at least 2 years after completion of importation or interstate movement, and all other records must be retained for at least 5 years after completion of all obligations required under a relevant permit or exemption. APHIS is also proposing changes to the nature of the records that are required, a topic discussed in greater detail in section E of this document, ''E. Paperwork Reduction Act.'' Changes include a requirement to maintain records for activities done under a conditional exemption, as well as contracts and other information related to agreements between the responsible person and all agents that conduct activities subject to this part.

In a previous section of this proposal we discussed the types of records proposed as core permit conditions in § 340.3. We also propose to add certain recordkeeping requirements to § 340.7 that would apply not just to responsible persons exercising permits, but to all responsible persons and their agents engaged in the importation, interstate movement, or release into the environment of any GE organism that is subject to this part, including persons utilizing the conditional exemptions from permits.

In recent years, APHIS has accrued a great deal of experience in enforcing the regulations and investigating possible violations of them. This experience has helped us identify specific types of records that may not be required by the current regulations, but that are necessary for effective enforcement of the proposed regulations.[2] For example, in investigations of field trials we have found that we could not always obtain detailed maps for each planting area used during each season of the trial. This information is important for the efficient enforcement of the regulations. We also found that sometimes records of actual field trial operations over time were not sufficient to confirm that the procedures, equipment, and safeguards APHIS approved for a field trial were actually employed. That is, while existing records could generally confirm plans to use, for example, certain cleaning equipment or procedures at certain intervals, or to conduct plantings on certain dates, the records did not confirm that plans were actually carried out on the approved dates. We also found that records for some field trials did not identify which staff members or contractors were responsible for performing which duties, either during a field test or in the event of an unauthorized release that triggered the field test contingency plan. When responsibilities cannot be linked to specific individuals, it makes it very difficult to investigate possible violations. Another gap in necessary records we discovered through experience was the absence of clear written records of the responsibilities of different organizations, when several different entities were involved in a field trial. During investigations we may need to review not only any written contracts, but also any written agreements among researchers, developers, or other parties that are sharing performance of tasks required by the permit for a field trial.

The proposed regulations would allow APHIS to require these types of records. As APHIS considered the types of records needed to support the regulations it became apparent that regulations could not specify in a ''one size fits all'' fashion all record requirements that might be needed. Therefore, we propose to add those detailed record requirements of truly general applicability in § 340.3 and § 340.7. However, we also propose in § 340.3 that we would continue to impose any necessary additional record requirements appropriate to each permit situation as individual permit conditions.

Proposed § 340.7 also outlines the possible consequences of failure to comply with the regulations, including denial of future permits; revocation of current permits; destruction, treatment, and removal of GE organisms; issuance of penalties; and a means to settle alleged civil violations prior to the issuance of an administrative complaint.

Under this proposal, every person whose activities are within the scope of the regulations must comply with all the requirements of this part. Moreover, a responsible person can be held liable for the violation of any requirement of this part by any agent working for the responsible person (including persons contracted to conduct or carry out the environmental release on their own or on leased properties).

We propose to address remediation authority and procedures to a greater degree of detail than the current regulations. In proposed §§ 340.7(e) and (g) we explicitly state that the APHIS Administrator has the authority to take remedial actions in the event that an incident requires such actions. We also specify that the APHIS Administrator has the authority to order remedial action by others. These orders could take the form of an Administrative Order, Emergency Action Notification, or similar regulatory instrument. Additional information about these types of orders and related procedures are provided in administrative guidance on the APHIS Web site. The consequence for failure to abide by the orders of the Administrator is also described in proposed § 340.7, linking remediation to enforcement.

Finally, APHIS has clarified in the proposed regulations that in the event of a permit revocation, it may act or order action of the responsible person in the handling of the organisms, articles, or means of conveyances.

2. Low Level Presence of Regulated GE Plants in Seed or Grain

On March 29, 2007, APHIS published a **Federal Register** notice titled ''Policy on Responding to the Low-Level Presence of Regulated Genetically Engineered Plant Materials'' (72 FR 14649–14651; Docket No. APHIS–2006–0167. This notice described how APHIS responds when low levels of regulated GE plant materials occur in commercial seeds or grain that may be used for food or feed. This issue was also addressed in the DEIS in Issue 7. Both of these documents described how APHIS has addressed these occurrences in the past, and how the Agency intends to address them in the future. We are proposing to amend the current regulations to explicitly incorporate APHIS' low level presence policy.

As described in the DEIS, APHIS proposes to establish criteria under which the occurrence of a low level presence (LLP) of GE plant materials in seeds or grain may not be cause for agency remedial action. APHIS would still retain discretion to order corrective or remedial actions in situations that meet the non-actionable criteria, when the Administrator determines remedial action is needed to make the LLP unlikely to result in the introduction or dissemination of a plant pest or noxious weed. We propose to list criteria and describe possible enforcement actions in the regulations to improve transparency regarding how APHIS would respond to LLP in most instances. APHIS will not predetermine a specific level that is considered non-actionable as far as taking some remedial and/or enforcement action because this determination should always be made case-by-case. These criteria are intended to apply only to APHIS' decision to take or order remedial action in the event that LLP occurs. The proposed criteria are listed within the section describing the Administrator's ability to take or order remedial actions. Regardless of whether APHIS considers the LLP actionable with regard to remediation, any violations of the regulations or permit conditions could still result in any of the compliance and enforcement actions listed in the regulations, including imposing civil penalties.

APHIS is proposing a new provision in the regulations that would reflect the current policy cited above. The provision describes the criteria APHIS will use when determining that a LLP event would be non-actionable with regard to remediation, namely when the criteria support a conclusion that the

[2] Details of investigations that have led APHIS to propose expanded records requirements may be found in the ''Lessons Learned'' document cited above, and in investigation report documents on the APHIS Web site, e.g., ''2007 Report of LibertyLink Rice Incidents'' (*http://www.aphis.usda.gov/newsroom/content/2007/10/content/printable/RiceReport10-2007.pdf*) and ''Transcript of Technical Briefing on Rice Investigation'' (*http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2007/10/0285.xml*).

LLP is unlikely to result in the introduction or dissemination of a plant pest or noxious weed. Because the criteria are safety-based, they will be used for incidents of low level presence originating domestically (e.g., from field testing) as well as any low level presence that might be detected in import shipments that may contain organisms subject to regulation.

APHIS also considered two additional criteria, which we have not adopted in the proposed rule. First, we considered a criterion that would require that the genetic material be introduced into the plant using a method that has been demonstrated to result in integration of the new sequences into the plant genome, as defined in § 340.1. We did not include this criterion in our proposal because its relevance in the LLP context is unclear. A second criterion considered was that the genetic material engineered into the GE plant does not encode substances with whose function APHIS is unfamiliar. APHIS did not adopt this criterion since it is redundant with the proposed criteria that will be used, i.e., that the function of the introduced genetic sequences is known and that key food safety issues have been addressed.

The DEIS, in Issue 7, Alternative 3, proposed that APHIS would also consider the LLP safety criteria when deciding whether to issue a permit for environmental release, and what type and severity of permit conditions to assign to the release permit. In its evaluation of permit applications, APHIS does plan to refer to the LLP criteria, as described above.

F. Administrative Changes

1. Confidential Business Information

APHIS is proposing a new § 340.8 to provide further guidance on the manner in which confidential business information (CBI) will be addressed in the implementation of these regulations. This change will support the overall administration of the program. The proposed § 340.8 cites the relevance of the Freedom of Information Act (FOIA) and exemptions from releasing information pursuant to FOIA, namely, 5 U.S.C. 552(b)(4), and states that APHIS may exempt from disclosure to the public trade secrets and commercial or financial information obtained from a person that are privileged or confidential. Proposed § 340.8 also states how persons wishing to protect confidential business information should communicate with APHIS in permit applications, petitions, or other submissions to APHIS.

2. Time Frames for APHIS Action on Permit Applications and Petitions

Current regulations specify time frames within which APHIS must take certain actions, such as issuing permits, acknowledging notifications or issuing decisions on petitions to grant nonregulated status. APHIS experience in the last several years has shown that the time required to complete these actions has increased beyond the time frames originally stipulated in the regulations in 1987 (permits) and 1993 (petitions for nonregulated status). As stated in the current regulation, APHIS is obligated to give its reply in the stipulated time, even if required procedures are not yet complete. Therefore, APHIS proposes to include in § 340.2(d) of the regulations a statement that APHIS will generally respond in the time frames indicated. APHIS believes it is important to continue to meet the indicated time frames whenever possible, but the most important thing is to communicate the actual status of reviews and procedures with applicants rather than be obligated to reach a decision in a certain number of days despite the complexities involved with a review. APHIS is particularly seeking comment on this proposed change from persons with experience under the current time frames.

3. Duration Period for Permits

Under the current regulations, notifications for environmental release and interstate movement are valid for one year, and the duration period for a permit issued for an environmental release is not specified. Currently interstate movement permits are only valid for one year from the date of issuance, and a new import permit must be obtained for each imported shipment.

APHIS will continue to retain the flexibility of the permitting procedure to authorize environmental release permits that can be effective for any appropriate time period. In some cases, it may be most efficient to authorize environmental release permits that are valid for more than a single year. In such cases, APHIS can retain adequate oversight by performing periodic inspections and requiring periodic reports. Experience has revealed situations where field tests lasting more than one year are essential. For example, some environmental releases of GE fruit trees may take several years to evaluate the fruit production that often does not begin for several years after planting.

In order to provide greater flexibility and efficiency, APHIS is also proposing to eliminate the current restrictions in the regulation on the duration of permits for interstate movement and importation. The proposed regulations will remove the requirements that interstate movement permits are only valid for one year from the date of issuance, and that importation permits must be obtained for each individual importation. These changes should give APHIS the flexibility to issue these permits with suitable durations to meet the individual circumstances.

G. Definitions and Miscellaneous Changes

APHIS proposes to change certain definitions in § 340.1 of the regulations, to add certain new definitions, and to remove definitions for terms that are defined in the PPA or that no longer appear in the regulations.

Revised Definitions

APHIS proposes to change the definitions of the following terms in § 340.1:

Release into the environment would read ''Dispersal beyond the constraints of a contained facility or secure shipment. Synonymous with the term environmental release.''

Secure shipment is a new term defined below. By adding reference to secure shipment in this definition, we clarify the distinction between environmental release and shipments for importation and interstate movement; any such movements which are not done by secure shipment constitute an environmental release.

Responsible person would read ''The person who has control and will maintain control over a GE organism during its importation, interstate movement, or release into the environment and assures compliance with all conditions contained in any applicable permit or exemption as well as other requirements in this part. A responsible person shall be at least 18 years of age and be a legal resident of the United States or designate an agent who is at least 18 years of age and a legal resident of the United States.'' The change from the former definition is the addition of ''at least 18 years of age,'' added to prevent possible enforcement difficulties.

New Definitions

APHIS proposes to add definitions of the following new terms:

Confidential business information, CBI would read ''Information such as trade secrets or commercial or financial information that may be exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA),

because disclosure could reasonably be expected to cause substantial competitive harm. USDA regulations on how the agency will handle CBI and how to determine what information may be exempt from disclosure under FOIA (5 U.S.C. 552) are found at 7 CFR § 1.12.'' We propose to add this definition because APHIS has often been asked to clarify what is and is not CBI, and how it is handled. The definition describes typical types of CBI, and the language in proposed § 340.8 describes how persons submitting documents to APHIS can request that identified information be treated as CBI. There is also additional guidance on CBI contained in administrative guidance on the APHIS Web site regarding document preparation for part 340 requests. However, it is important to realize that in actual situations where someone submits a FOIA request for particular information, the APHIS FOIA Officer makes the ultimate determination as to whether particular information shall be released, in accordance with the standards of FOIA, Executive Order 12600, and 7 CFR 1.12.

Contingency plan would read ''A written plan stating how the responsible person will respond in the event of the unauthorized environmental release of GE organisms.'' We propose to define this new term to describe a document mentioned in both the permit application information requirements section (§ 340.2(c)) and the permit conditions section (§ 340.3).

Exempt, exempted, exemption would read ''A determination by the Administrator that the importation, interstate movement, and/or release into the environment of an organism or class of organisms described in § 340.0(a) is not subject to the requirement to have a permit under this part. An exemption from one type of permit (e.g., interstate movement) does not remove remaining obligations to obtain other permits under this part.'' We propose to add this definition for the term *exemption* to refer to situations where a regulated movement is exempt from the requirement for a permit. The proposed definition is based on language in Sec. 411(b)(1) of the PPA (7 U.S.C. 7711(c)), titled ''Exception to permit requirement,'' which authorizes the Secretary to issue regulations to allow the movement of specified plant pests without further restriction if the Secretary finds that a permit is not necessary.

Noxious weed would read ''Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.'' This is the definition for noxious weed found in the PPA.

Recipient organism would read ''The organism that will receive the genetic material from a donor organism in the process of genetic engineering (once the organism is engineered it is referred to as the genetically engineered (GE) organism).'' This definition is needed to properly distinguish organisms and their traits in comparisons of GE organisms to the same organisms prior to transformation.

State or tribal regulatory official would read ''State or tribal official with responsibilities for plant health, or any other duly designated State or tribal official, in the State or on the tribal lands where the importation, interstate movement, or release into the environment is to take place.'' This term is used in reference to consultations with States and tribes under the regulations.

Secure shipment would read ''Shipment in a container or a means of conveyance of sufficient strength and integrity to withstand leakage of contents, shocks, pressure changes, and other conditions incident to ordinary handling in transportation.''

We propose to add the following two definitions to make it clear that, when the Administrator authorizes it, a signature required under the regulations may be an electronic signature and a written document required under the regulations (e.g., a permit application) may be an electronic document.

Signature, signed would read ''The discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic signatures when authorized by the Administrator.''

Write, writing, written would read ''Any document or communication required by this part to be in writing may also be provided by electronic communication when authorized by the Administrator.''

Deletion of Definitions

We propose to remove the following definitions from the regulations: *courtesy permit, expression vector, introduce or introduction, regulated article, stably integrated, vector or vector agent,* and *well-characterized and contains only non-coding regulatory regions.*

These definitions would be removed because the terms would no longer be used in the regulations. We propose to eliminate the term *regulated article* partly because the use of the term ''article'' in current part 340 is not consistent with usage in the PPA, which uses the term article to mean ''any material or tangible object that could harbor plant pests or noxious weeds''—that is, things like packing materials, shipping containers, commodities, etc.—and not a plant pest or noxious weed itself. Under the current regulation, however, *regulated article* refers exclusively to certain GE organisms. Furthermore, under both the PPA and part 340, ''articles'' are not regulated, but rather their importation, interstate movement or environmental release is regulated. For these reasons, the term ''regulated article'' in the current regulations is both inconsistent with the terminology of the PPA and difficult for the public to comprehend.

We also propose to remove the definition for introduction. APHIS currently uses the term in part 340 to denote certain kinds of activities that fall within the scope of the regulation, namely importation, interstate movement, and release into the environment. The PPA, however, does not specifically define the term introduction. Therefore, to avoid confusion, instead of using the term introduction to define the different types of regulated activities, APHIS will instead refer to these specific activities themselves in the regulations, namely, the importation, interstate movement and release into the environment.

Miscellaneous Changes

We also propose to make minor miscellaneous changes to the regulations to improve their clarity and remove redundancies. For example, in addition to adding the definition for CBI discussed above, we are consolidating requirements concerning CBI, formerly contained in several sections of the regulations, into proposed § 340.8.

IV. Required Analyses

A. National Environmental Policy Act

On January 23, 2004 (69 FR 3271), APHIS published a notice of intent to prepare a draft environmental impact statement (DEIS) in accordance with the National Environmental Policy Act in connection with the regulations at 7 CFR part 340 and potential changes to those regulations. This notice identified potential issues and alternatives to be studied and requested public comment to shape the scope of the DEIS.

On July 17, 2007, APHIS published the DEIS evaluating regulatory alternatives under consideration and solicited public comment on the DEIS

(72 FR 39021–39025). The Environmental Protection Agency published a separate notice on July 13, 2007, soliciting public comment on the DEIS (72 FR 38576–38577). The notices sought comments on the quality of our analysis of potential environmental effects of the alternatives under consideration, and also sought views on how each alternative would affect areas such as the overall effectiveness of our biotechnology program, its operational efficiency, industry compliance issues, or other issues that would be associated with the implementation of an alternative.

The major elements of this proposed rule were accurately described in the alternatives contained in the DEIS and their potential environmental effects were analyzed in the DEIS. Table 4 below provides a comparison between the proposed changes to part 340 and the DEIS. We received numerous comments on the DEIS, which will be discussed fully when we publish a final environmental impact statement (FEIS). The DEIS and the comments on it were used by APHIS to inform decision makers and aid the design of this proposal. Information from the DEIS comments, along with information from many other sources, including certain provisions of the 2008 Farm Bill and recommendations from USDA's OIG, was used to inform the drafters of this proposed rule about the issues perceived to be involved in and addressed by the rulemaking. We will respond to all DEIS comments in detail in the FEIS since the agency action (revising the regulations in part 340) is still subject to change based on comments and information received on this proposed rule, and thus we cannot provide definitive and final comment responses until we issue the FEIS and the final rule.

Consideration of the DEIS comments led APHIS to refine and reorganize some of the regulatory alternatives it considered. Therefore, the presentation and discussion of the alternatives proposed in this proposal do not exactly match those described in the DEIS. The differences are primarily a matter of reorganizing and realigning some material and their corresponding regulatory alternatives, using more descriptive terms in some criteria listed in the alternatives, and choosing between regulatory alternatives that fall within the analysis of the DEIS. Accordingly, the DEIS is still consistent and applicable as an analysis of the potential environmental effects of the proposed action. However, we are interested in receiving comments on whether any of the proposed regulatory alternatives in this document do not appear to have been adequately addressed within the DEIS.

TABLE 4—SUMMARY OF PROPOSED CHANGES TO THE REGULATIONS AND RELATIONSHIP TO DEIS

Summary of proposed substantive changes to the regulation	DEIS issue	DEIS alternative
Redescription of which GE organisms are subject to the regulations.	1	2 (DEIS preferred alternative) or 3.
Deletion of the list of plant pest taxa in the regulations and the petition procedure to amend the list.		
Clarification that APHIS has the authority to regulate nonliving materials through permit conditions in cases where such materials may pose a risk as a noxious weed.	5	2 (DEIS preferred alternative).
Revision of the application information requirements and permit conditions for all permit types.		
Elimination of the current notification procedure for importation, interstate movement, and release into the environment of certain types of GE plants (permitting procedure will be used instead).	2	4 (DEIS preferred alternative).
Revision of the permitting system for environmental releases:	2	4 (DEIS preferred alternative).
• Subdivision into 5 categories of permits for environmental releases (4 for GE plants, 1 for other GE organisms).	4	2 (DEIS preferred alternative).
• Continue strict permit conditions for environmental releases of GE plants engineered to produce compounds intended for pharmaceutical or industrial uses.	6	1 (No action alternative).
Continued use of permits with appropriate conditions for single or multiple year releases.		
Creation of new administrative procedures in permitting: (1) The explicit agreement of the responsible person to comply with regulatory requirements of the permit, (2) amendment of existing permit conditions, (3) transfer of permits to a different responsible person, and (4) revocation of a permit.		
Elimination of the prescribed shipping container provisions in favor of a performance based approach specified as permit conditions for importation and interstate movement.	10	2 (DEIS preferred alternative).
Revision of the existing conditional exemptions for interstate movement such that the shipping standard is part of the exemption. Addition of a recordkeeping requirement for persons using the existing conditional exemptions.		
Elimination of the option for APHIS to issue courtesy permits for importation, interstate movement, and environmental release of GE organisms which are not subject to the regulation.		
Creation of a petition procedure for the Administrator to approve additional conditional exemptions from the requirement for a permit. This also includes a description of administrative steps if Administrator revokes an exemption, amends the conditions of an exemption, or prohibits a person from using a conditional exemption.	3 8	2 (DEIS preferred alternative). 1 (DEIS No Action alternative).
Clarification and revision of the existing petition procedure for determining nonregulated status, including elimination of the procedure to extend a previous determination of nonregulated status, and a description of the administrative steps if Administrator revokes nonregulated status.		
Clarification of the actions the Administrator may take related to compliance, enforcement, and remediation.		
Clarification of APHIS approach to the low level presence of regulated GE plants in seed or grain.	7	3 (DEIS preferred alternative).
Definition of Confidential Business Information (CBI) and description of administrative practices for CBI.		

We received approximately 23,000 comments on the DEIS, of which more than 22,000 were variations of several form letters. There were also several lengthy and detailed evaluations of environmental, scientific, legal, cultural, and economic issues raised by the DEIS. APHIS took all comments related to regulatory changes under consideration as we developed the content of this proposed rule, and altered a number of preliminary ideas for the proposal based on comments. We will fully summarize and address the comments received on the DEIS in a Final Environmental Impact Statement to be prepared in conjunction with the publication of a final rule. In addition to specific DEIS issues that were discussed above in the Preamble, the following section summarizes and discusses those comments on the DEIS that were most directly related to the regulatory alternatives discussed in this proposed rule and the ways in which these comments affected development of the proposal.

Many DEIS commenters addressed how the regulations should use the PPA authorities regarding noxious weeds, plant pests, and biological control organisms. Most comments on the DEIS that addressed this issue stated that APHIS should expand the scope of its regulatory program beyond plant pests to include both noxious weeds and certain biological control organisms, consistent with all of the regulatory authorities of the PPA. The following opinions were expressed regarding PPA authority regarding noxious weeds and the meaning of the PPA definition of noxious weed.

Very few commenters suggested that APHIS biotechnology regulations should implement the PPA's noxious weed definition in its broadest possible sense. One commenter suggested that APHIS broadly interpret the phrase ''other interests of agriculture,'' in the PPA definition of noxious weed such that APHIS would consider a plant to be a noxious weed if it poses solely economic harm, i.e., in the absence of physical harm. As explained previously in this proposal, such an interpretation is not consistent with the PPA, nor with the manner in which APHIS–PPQ has implemented the noxious weed program pursuant to the PPA. Many commenters suggested that APHIS needed clear regulations or policies to describe how it will be evaluating whether GE plants pose threats as noxious weeds. APHIS agrees and has framed this proposal to clarify the issue for the public.

Some commenters stated that APHIS should acknowledge limits to its consideration of potential damage to public health in APHIS regulations, and the noxious weed definition should not be interpreted so broadly as to provide APHIS with the legal responsibility or authority to determine the food safety of GE crops or to prevent GE crops from entering the food supply. The commenters stated that Congress clearly intended the FDA to be responsible in this area.

We agree, and this proposal acknowledges FDA authority in the food safety area. However, it is important that the regulatory procedures in each agency dovetail and support each other where agency mission areas come in contact. This proposal recognizes this need for mutual agency support. When a permit for environmental release, importation, or interstate movement of a new GE organism is submitted to APHIS, we would evaluate whether there are any signs that the environmental release, importation, or interstate movement of the organism could present risks to the public health. If APHIS is concerned that there may be food safety risks associated with the GE organism, we would contact FDA. The decision on whether or how to regulate food and feed from the GE organism to address food and feed safety risks would then be FDA's. On the other hand, it is also likely that existing food safety evaluations will prove to be useful and relevant to APHIS evaluations of a GE organism. Food safety concerns are one of several factors APHIS would take into account when considering, for example, what types of permit conditions are needed for the environmental release of a GE organism, or whether activities associated with the organism should qualify for an exemption from the permit requirement.

Several commenters stated that under the current regulations APHIS has always considered noxious weed risk, or at least ''weediness.'' We agree that in practice, when APHIS assesses a GE plant it has always evaluated the potential weediness of the GE plant in relation to its plant pest potential. In the context of the PPA, ''weediness'' is more properly a noxious weed risk characteristic than a plant pest one, and the proposed revision of the regulations will more clearly align the regulations with the plant pest and noxious weed risk pursuant to the PPA. Current APHIS regulations and guidance directly address the importance of including weediness when evaluating risks associated with GE organisms. For example, when the petition procedure to grant nonregulated status was added to part 340 in 1993, the traits APHIS listed for evaluation explicitly included ''weediness of the regulated article'' (see current § 340.6(c)(4)).

Several DEIS commenters addressed what characteristics should trigger regulation of a GE organism, or put another way, how to set the scope of organisms subject to regulation. In the DEIS, APHIS explored many options including continuing to make its decisions primarily based upon the transformation event (also sometimes referred to as the individual transformed line, transgenic line or GE line). Some members of the public refer to this as an event-by-event approach. It is sometimes contrasted with a ''trait-based'' approach that focuses more on the resulting trait or phenotype of the GE organism. In a trait-based approach, a regulatory decision for an organism engineered for one phenotype would apply equally to other GE organisms if they had the same phenotype or trait, regardless of whether they were engineered with the same genes. APHIS invited comment on the relative merits of the event-by-event approach and the trait-based approach. The current regulations do not limit APHIS to one approach or the other. Many readers equated ''event-by-event'' with a ''process-based'' system and likewise equated ''trait-based'' regulation with a ''product-based'' system. Thus many comments focused on the relative merits of a product-based system versus a process-based system.

Some suggested that the trigger be ''process-based'', i.e., the process of modifying the organism by recombinant DNA techniques would be the determinant. Others suggested the trigger be ''product-based'', i.e., the nature of the resulting product (organism) would be the determinant for whether the organism would be subject to the regulation. Many of the comments were not actually related to the basis for the trigger, but rather to the focus of the risk assessment, with most stating that the risk assessments should be based on the biology of the organism (product-based), not the technique by which it was made (process-based). One commenter believes that the process of genetic engineering is a useful trigger, but once regulated, the characteristics of the GE organism should dominate APHIS considerations of safety.

Those supporting a process-based approach for identifying which organisms should be subject to regulation stated that each GE organism can have unintended as well as intended changes, and that these unintended changes to the organism would require that each individual resulting from genetic engineering must be assessed on a case-by-case basis.

Some commenters also suggested that this approach of APHIS assessment of each individual GE organism better protects the environment and human health than an approach that focuses primarily on the trait(s) of the GE organism.

Some commenters against process-based approach stated that this approach is illogical, on the one hand, to regulate a plant species with no known risks only because GE techniques were used to modify it, whereas on the other hand the same plant species modified by other techniques faces no additional regulatory requirements from APHIS.

Those supporting a product-based regulatory approach stated that it would be aligned with the preponderance of scientific opinion on the issue, that the characteristics of the organism should take precedence over the technique of genetic modification in the APHIS assessment of the organism. APHIS agrees that any evaluation of risk should be based on the biology of the product.

Several commenters suggested that the definition of *regulated article* would have to be reexamined and possibly redefined to reflect changes in the PPA. Commenters also stated that the term *regulated article* was problematic whether linked to specific taxa in § 340.2, under the current regulations, or linked to plants produced by particular technologies. These commenters emphasized that actions under the regulations usually amount to an investigation of whether an article (GE organism) needs to be regulated, and that predefining the subject of the investigation as a regulated article strongly implies that a decision has been made to require some regulatory oversight.

The proposed elimination of the term ''regulated article'' would facilitate a clearer understanding that it is not the GE organism that is regulated, but rather the importation, interstate movement, or release into the environment of the GE organism.

APHIS determined that eliminating ''introduction'' as a defined term would facilitate clearer understanding that the activities subject to the regulations are in fact importation, interstate movement, and release into the environment.

In the DEIS, APHIS discussed the need to regulate nonliving products of GE organisms. The preferred alternative was to have a procedure to regulate non-viable material only in certain rare circumstances when it might pose a risk. Most of the DEIS comments addressing this issue agreed that APHIS should regulate nonviable GE plant material only in certain circumstances, based on the risks posed. The few comments that provided greater detail identified toxicity risks and possible persistence in the environment of toxic nonviable plant parts or debris as the most significant risk associated with nonliving GE products. A few commenters also stated that adding a clear definition of ''nonliving'' or ''nonviable'' would aid the regulations.

APHIS has responded to these comments in this proposal by not usually regulating nonliving GE products, and by providing that when any control is needed over such a product that is associated with a living GE organism which is covered by a permit, due to toxicity or other risks, such controls would be included as permit conditions in permits issued for the associated living GE organism. We propose to provide for this by adding the following sentence to paragraph (b) of § 340.3, *Permit conditions:* ''The Administrator may also assign permit conditions addressing nonliving materials associated with or derived from GE plants when such conditions are needed to make it unlikely that the nonliving materials would pose a noxious weed risk.''

We received one DEIS comment directly addressing the issuance of courtesy permits. This comment supported retaining use of courtesy permits, and stated that courtesy permits facilitate the importation of GE *Drosophila melanogaster* strains by the research community and also ease the workload for APHIS. The continued issuance of courtesy permits diverts Agency resources unnecessarily from organisms that are within the scope of the regulations. We intend to help develop informational materials for the research community and other agencies that are aware of courtesy permits to clarify that such permits are not required, and to explain this to any persons who contact us requesting courtesy permits in the future.

Several DEIS comments addressed the notification procedure and supported eliminating it. Some comments suggested that the types of organisms formerly eligible for the notification process should instead be handled through a two-tiered permitting process, with experimental permits for field trials and commercial permits for GE crops that are to be sold in commerce. Other comments suggested that while some organisms might require permits with minimal conditions rather than notifications, others with even lower risks could be exempted from permit requirements. These latter comments also generally suggested that some of the criteria in the current regulations used to determine eligibility for the notification process could be preserved in the new regulations as criteria to identify organisms that should be exempted from the requirement for a permit. One commenter stated that since the current ''notification'' process involves acknowledgment by APHIS and conditions as well as notification, changing to a system of low risk permits would be a *de facto* acknowledgment of the current process. To address these issues, APHIS is proposing to eliminate notifications and to handle regulated GE organisms that previously would have been eligible for notifications through a permitting procedure.

We received a few comments on the DEIS generally related to procedures for reviewing permit applications. Comments stated that the role of States in reviewing or approving permit applications for GE crops has been very important and useful under the current regulations, and should continue in future regulations. Comments also stated the importance of scientific integrity in the review process, and emphasized the importance of coordinating with other agencies (particularly FDA and EPA review) when issues within their mission area arise during APHIS review of applications.

The proposed changes to the permit application procedure address these concerns. States would have a continuing role in application review that is very similar to their existing role, and we have been increasing interactions with the relevant tribal authorities in recent years.

Several comments were peripherally related to the DEIS issue of whether APHIS should establish standard or general permit conditions or what they should require. These comments emphasized that the purpose of permit conditions is to control risks not otherwise controlled, and that permit conditions must be developed in response to careful consideration of the risks presented by the particular permitted activity. One comment stated that APHIS should not require permit conditions that have the primary purpose of preventing crops from entering the food supply, because APHIS does not have the legal authority or scientific expertise to set them.

We have taken these views into account in designing this proposed rule. Proposed § 340.3 describes the core list of general conditions that APHIS would impose on all permits as well as additional conditions for specific types of permits. APHIS is also making it clear that APHIS may also add other specific

conditions to a permit upon its issuance. Conditions are specific practices or requirements that an applicant must follow upon issuance of a permit. Conditions are added as a consequence of the APHIS evaluation in order to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed.

Several DEIS comments stressed that APHIS needs to do more to ensure that the permit conditions it sets are actually followed and enforced. The changes to permit procedures proposed for § 340.2 contribute to that goal by obtaining written agreement from the responsible person that he or she, and all of their agents, must comply with all of the permit conditions before issuance of the permit.

Almost all DEIS comments on containers or marking and identity for regulated articles supported performance standards for containers. Most of these commenters made the point that performance criteria are generally more adaptable and efficient than prescriptive criteria. Some stated that shipping research organisms interstate in enclosed containers is a low-risk activity that is very unlikely to result in release, establishment or harm.

Some commenters stated that the type of container indicated by performance standards must be appropriate to the level of risk in the tiered permit system for the shipped GE organism. One commenter requested that APHIS make its container standards consistent with the International Air Transporters Association (IATA) requirements for shipping.

The way this proposed rule deals with container standards is consistent with the above DEIS comments.

Most of the commenters addressing tiered or categorized permit systems supported APHIS establishing a tiered permitting system for plants based on criteria that included risk and other GE organism characteristics. However, commenters also stressed that risk categories should be based on a trait by species approach, not on the basis of individual transformed plant line (referred to as ''event-by-event'' in some of the comments). Some commenters advised against using limited broad based categories that include many different species with different biologies and different risk factors. Several stated the importance of evaluating permit applications on a case-by-case basis, to avoid the risk that categorizing permit types could result in approval of risky releases that were inadvertently seen as ''routine categories.''

Several commenters stated that a tiered permitting system should be flexible and allow consideration of any factors that seem relevant, or allow reclassification of a GE plant from one tier to another based on additional characterization information and agency familiarity with the GE plant. Some commenters opposed the development of a tiered risk-based permitting system because each transformation event can have unintended effects that must be assessed on a case-by-case basis, rather than through predefined categories. We have addressed these views in this proposed rule by changing the permit tier system described in the DEIS to a proposed permit application categorization system that is more flexible than the system described in the DEIS.

In the DEIS, APHIS considered whether to continue to issue environmental release permits for GE plants engineered to produce pharmaceutical and industrial compounds if the GE plant species is the same as, or sexually compatible with, a species commonly used for food or feed. APHIS concludes that the permitting procedure with its stringent permit conditions can continue to effectively minimize the risks that may be associated with the environmental release of such GE plants. APHIS will continue to impose appropriate permit conditions that take into account the issues related to the public safety of proteins or other substances that these plants have been engineered to produce.

Numerous commenters supported banning the outdoor production of pharmaceuticals and industrial substances in food and feed crops. Some stated that food crops should not be used for the production of pharmaceuticals and industrial substances.

Some commenters stated that GE plants used for the production of pharmaceuticals and industrial substances should be evaluated by criteria that are different from those used to evaluate crops intended for food. Other commenters stated that if such GE industrial plants were made from food crop species, or could spread genes to food crop species, they should be evaluated based on food safety risk, not the industrial product's function, and approved only if they pose no food safety risks. However, with regard to evaluating food safety, several commenters also stated that FDA should be the agency evaluating these risks.

We have not seen evidence suggesting that these types of organisms present unique or uncontrollable risks, or risks higher than those that may be associated with many other uses for GE plants. Our approach in this proposed rule addresses the other concerns cited by DEIS commenters.

Many commenters were concerned that the outdoor cultivation of GE plants producing pharmaceutical and industrial compounds could be a source of gene flow to nearby non-GE plants or result in the co-mingling of grain with related crop species intended for food or feed. Risks associated with this scenario may be abated by either of two means: (1) Preventing such gene flow or co-mingling from occurring, or (2) establishing that if such gene flow or co-mingling to other plants does occur, it does not present an unacceptable risk of introducing or disseminating a noxious weed.

Such gene flow can be minimized or substantially prevented through permit conditions developed for environmental releases of GE pharmaceutical or industrial plants. In many cases the genetic and phenotypic characteristics of the organism also serves to discourage survivability of the plant away from the intended site as well as gene flow to other plants. During the review prior to permit issuance, APHIS would also always consider the effects if the GE plant were likely to spread widely, or if large-scale gene flow to other plants occurred. A permit for an environmental release would not be approved if APHIS concluded there was a likelihood of such events causing any of the types of harm as described in the noxious weed definition.

One DEIS comment on the issue of multiple-year permits stated that compliance agreements should be used instead of actual multiple-year permits. Another suggested that multiple-year permits should be limited to trait/crop combinations not intended for feed or food use. In contrast, another comment stated that APHIS should consider allowing multi-year permits for any product, not just GE pharmaceutical or industrial plants.

Several commenters stated a risk-based opposition to multi-year permits and stated that crops engineered to produce pharmaceuticals or industrial compounds should always be regulated under an annually-reviewed permit system.

This proposed rule addresses the risk-based concerns cited by commenters in the proposed processes for issuing permits and granting exemptions, discussed elsewhere in this document. We propose to allow multi-year permits for any type of regulated activity, when we determine that appropriate risk-related conditions can be prescribed for those activities. We have not seen any

convincing evidence, in DEIS comments or elsewhere, that limiting use of multi-year permits to certain types of organisms would reduce risk or otherwise serve the purpose of the regulations.

Of the approximately 67 comments received by APHIS on the interstate movement exemptions discussion in the DEIS, 30 comments appear to support APHIS' preferred Alternative 2, under which APHIS would exempt from permit requirements for interstate movement a class of GE plants or organisms that are well-studied and present little or no environmental risk, as is currently done for *Arabidopsis.* However, many of these commenters suggested that APHIS choose an approach that combined this with one or more of the other Alternatives. Several commenters stated that the regulations should provide a procedure for APHIS to consider additional exemptions from interstate movement restrictions on a case-by-case basis.

APHIS has concluded that the most appropriate proposal for the regulations at this time is to provide a clear and adaptable procedure whereby it would use a case-by-case approach to consider the merits of new exemptions from the requirement for a permit. The procedure, described in proposed § 340.5, would allow for a transparent procedure in which APHIS would evaluate the proposed exemption, and the public would have an opportunity to review APHIS' evaluation and provide comments prior to APHIS decisions on individual cases. The proposed procedure should provide the benefit of transparency and scientific rigor while affording a more streamlined and cost-efficient procedure that would not require formal amendment of the regulations when each new exemption is approved.

Several DEIS comments addressed what criteria in the regulations the Agency could use to determine the level of risk assessment applied to imported GE commodities which are viable propagules. They fell into two general groups. Both groups stated that any expedited review or exemption for GE commodity imports needed to be granted based on a review of risk and a determination that the importation presented no significant risks. Beyond that, one group emphasized that commodity imports were in general inherently safe, and such an expedited system would be appropriate and would also greatly facilitate international trade. The other group was skeptical about inherent safety of GE commodities and suggested that exemptions should only be offered when there are procedures ensuring that the commodities are made non-viable or safeguards are in place to ensure that propagation will not occur. Some comments in this group also stated that such exemptions should not be granted for a GE commodity from any country until APHIS has confidence that the country has robust regulatory guidelines and assessment standards with strong, reliable science and trustworthy regulatory oversight, equivalent in effectiveness to the U.S. system.

One comment included a general statement that it was important that a petitioner for deregulation or exemption should work closely with APHIS to develop and evaluate the management plan under which the subject GE organism would be grown if deregulated or exempted. APHIS agrees that its regulatory approach should include working closely with petitioners on their proposals for exemption, especially if management plans are part of the requisite conditions. APHIS would retain some degree of oversight and could restrict movements of a GE organism such that the exemption and its conditions are unlikely to result in the introduction or dissemination of a plant pest or noxious weed. The proposed procedure to approve additional conditional exemptions is sufficiently adaptable even when the exemption is for all forms of movement (i.e., importation, interstate movement, and environmental release).

Very few DEIS comments directly addressed enforcement and compliance. A few comments stated that APHIS regulatory oversight and enforcement of its regulations in the past have been insufficient and have provided inadequate containment of GE crops. This proposed rule would strengthen enforcement and compliance and enhance the effectiveness of the regulations.

Comments on the discussion in the DEIS of low level presence ranged from suggestions that APHIS should completely prevent such incidents by banning all outdoor growth of GE plants to suggestions that LLP is a minor problem needing only minimal controls, and does not warrant an increased regulatory burden to control a minor risk. Some commenters stated that the preferred alternative in the DEIS accepted too high a level of risk. These commenters generally preferred DEIS alternative 4, which would impose very strict permit conditions on all environmental releases to reduce the likelihood of LLP events. Most commenters agreed that APHIS should adopt an LLP policy that recognizes the wide variety of risk levels associated with such incidents, and that beyond applying general criteria APHIS should investigate each unauthorized release individually and determine actions based on the facts surrounding each incident. Some commenters stated that any LLP policy should clearly state that even if an incident was found to be non-actionable (i.e., not requiring remedial action), persons involved would still be subject to enforcement actions such as civil penalties if violations of the regulations occurred.

APHIS has considered all these views in the development of this proposed rule and has attempted to find a reasonable balance. It is not warranted, or practical, to implement a ''zero tolerance'' LLP policy. Instead, we propose a policy that each LLP incident would be individually investigated, and APHIS would then make a decision on whether, or what kind of, remedial action is needed. In making this determination APHIS would use established criteria to rate the risks involved in the LLP incident. However, these criteria would not fully determine the APHIS response. In addition to considering the criteria, APHIS would evaluate any other relevant information regarding the LLP incident and order remedial action if it appears necessary.

Also, we propose to clearly state that regardless of whether APHIS considers the LLP actionable with regard to remediation, any violations of the regulations or permit conditions can still result in compliance and enforcement actions for failure to comply with the regulations.

One DEIS comment directly addressed timelines for APHIS to perform permit- and petition-related activities and urged APHIS to continue to define specific timelines for regulatory reviews to allow for a predictable regulatory review system. The comment stated that time frames are especially critical for field trial permitting activities since planting occurs during a narrow window each year and a delay of a month or two in a regulatory decision can result in a year delay due to the inability to timely plant a field trial.

We understand the concerns, and have decided to keep the time frames in the text of the regulations. However, as discussed above, APHIS will view them as performance goals and will generally respond in the time frames indicated, rather than be obligated to respond at those times. In recent years, there has been an increase in the time required for APHIS review due to the increasing complexity of issues related to environmental effects, new traits, and unfamiliar species. In addition to

retaining general time frames in the regulations, APHIS intends to discuss time frames with each applicant early in the application process, and to the extent possible give the applicant reliable time estimates based on the nature and complexity of the particular application and current APHIS activities and resources that are expected to affect the application review.

B. Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been reviewed under Executive Order 12866. The rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this proposed rule, which is summarized below. Copies of the full economic analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov). The analysis provides a cost-benefit analysis, as required by Executive Order 12866, and an analysis of the potential economic effects of this final rule on small entities, as required by the Regulatory Flexibility Act.

Background

The adoption of genetically engineered (GE) crops by farmers worldwide has become increasingly widespread. The United States, Argentina, Brazil, Canada, and China are the major GE crop adopters. In 2008, 92 percent of soybean, 80 percent of corn, and 86 percent of cotton acreages planted in the United States were genetically engineered (USDA NASS, 2008). In addition to the major field crops, GE varieties of papaya, yellow squash, and zucchini were available for commercial production in 2008.

Worldwide plantings of transgenic crops grew by 12 percent in 2007, reaching 282.4 million acres in 23 countries growing biotech crops in 2007, including 12 developing countries. Over the next decade, use of these ''first-generation'' GE crops, which carry traits such as insect resistance and herbicide tolerance, should continue to grow while a second generation of crops promises new applications and traits such as improved drought tolerance, biofuel-related enhancements, and quality and nutritional traits.[3]

[3] Global Status of Commercialized Biotech/GM Crops, ISAAA Briefs 37–2007, 35–2006, The International Service for the Acquisition of Agri-Biotech Applications, Cornell University.

The benefits associated with the use of some GE crops already in production include higher yields, lower pesticide costs, and overall savings in management time. There are also environmental benefits from reduced pesticide use. Attempts have been made to quantify the benefits that have occurred as a result of the adoption of GE crops and, according to a recent survey, farm-level net economic benefits worldwide from the adoption of GE crops were estimated to be $7 billion in 2006 (Brookes and Barfoot 2008). Total net benefits, 1996–2006, were estimated to be $34 billion. Of this total estimated net welfare gains, the United States experienced the largest benefit, with $15.8 billion; followed by Argentina, $6.6 billion; China, $5.8 billion; and Brazil, $1.9 billion (Brookes and Barfoot 2008). U.S. farmers' welfare gains from the adoption of biotechnology ranged from 29 to 42 percent of total net welfare gains (Price *et al.* 2005; Falck-Zepeda, Traxler, and Nelson 2000).

The high rate of GE crop adoption by farmers has been driven by an increase in consumption of product developed with the use of GE techniques. However, studies that quantify consumers' benefits from the use of biotechnology are limited, as most studies tend to focus on the direct adopters of biotechnology, i.e., the producers. Price *et al.* (2006) found consumers do benefit from the adoption of Bt cotton.

Overall, consumers' gains from the adoption of various GE crops have been estimated to range from 4 to 17 percent of total net welfare gains (Price *et al.* 2005; Falck-Zepeda, Traxler, and Nelson 2000).

Crop producers and consumers are not the only beneficiaries of recent advances in biotechnology. The providers of biotechnology have also benefited from the increased adoption of GE products. Intellectual property right laws have offered incentives for the private sector to invest in research and development of GE products, and as a result, plant breeding expenditures have largely shifted from the public to the private sector (Fuglie 2006). As private research spending has increased, so has the number of firms engaged in this type of research. However, consolidation and mergers during the 1990's resulted in an industry dominated by large companies. Currently, 80 percent of biotech traits that have been approved are owned or co-owned by four firms (Bayer Crop Science, DuPont, Monsanto, and Syngenta) or their subsidiaries (Kalaitzandonakes, Alston, and Bradford 2007).

With regard to the beneficial effects for the environment of GE plants in commercial production, their production has resulted since 1996 in decreases in the use of pesticides by 286 million kg and in the use of herbicides by 51 million kg (Brookes and Barfoot 2008). These declines represent 7.9 percent reductions. In terms of greenhouse gases, one study estimated cultivation using no-tillage systems associated with GE crops modified for herbicide tolerance to reduce fuel use by 32.52 liters/ha (89 percent) compared to conventional methods, and 14.7 liters/ha (76 percent) compared to reduced tillage methods (Jasa 2002). An American Soybean Association survey[4] showed significant reductions in tillage, and therefore in fuel use, by growers of glyphosate-tolerant soybeans. The fuel reductions were estimated as 1.26 gallons per acre, or, for the 56 million acres of glyphosate-tolerant soybeans planted in 2001, 70 million gallons of fuel saved and associated greenhouse gas emissions avoided. These fuel-use reductions translate into reductions of carbon dioxide emissions of 89.44 kg/ha and 40.43 kg/ha, respectively. Overall in 2006, the total carbon dioxide savings associated with the use of GE crops were 1.2 billion kg. This is equivalent to removing 540,000 cars from the streets for a year.

Benefits of the Proposed Rule

The proposed rule would provide benefits by establishing more efficient regulation of GE organisms and activities subject to part 340 and by continuing to provide a high level of protection against risks associated with these organisms and activities. Benefits would also include improved public understanding of and confidence in APHIS' biotechnology regulatory responsibilities, and improved clarity and transparency of the regulatory process. Several amendments of the proposed rule would improve the efficiency of APHIS' biotech regulatory process. Particular proposed changes that should improve the efficiency of the regulations include the elimination of courtesy permits and the establishment of a procedure to evaluate and grant requests for new exemptions from the requirement that GE organisms have a permit to be imported, moved interstate, or released into the environment.

Approving new exemptions could be done without amending the regulations, resulting in considerable time savings

[4] Cited in Fawcett, Richard and Towery, Dan. Conservation Tillage and Plant Biotechnology: How New Technologies Can Improve the Environment By Reducing the Need to Plow. Conservation Technology Information Center, West Lafayette, Indiana.

for regulated parties and reducing APHIS' rulemaking costs. Persons using an exemption would also avoid the costs and delays associated with obtaining a permit for each new planned movement or release of a GE organism covered by the exemption.

APHIS commits considerable resources to issuing courtesy permits not actually required by or needed to implement the part 340 regulations. These courtesy permits have been issued to facilitate the movement of GE organisms that are but whose movement may be hindered due to their similarity to organisms that are subject to part 340. By improving public awareness that such organisms do not need a permit and eliminating the courtesy permit process APHIS would improve efficiency and reduce its regulatory workload, and save time for regulated entities who would no longer make unnecessary courtesy permit requests.

The Agency currently issues environmental release permits, including permits that are used for production of pharmaceutical and industrial compounds sold in commerce. In general, permits for releases of plants producing pharmaceutical or industrial compounds have been limited to a one-year duration. However, the proposed regulations provide a more useful and efficient approach to setting appropriate risk-related conditions in multi-year environmental release permits. Under the proposed system, APHIS would likely increase issuance of multi-year environmental release permits, thereby reducing the time the regulated entities need to spend submitting applications as well as the time APHIS spends reviewing the permit applications.

APHIS' biotechnology operations would be aided by more clarity in terms of required data submissions and administrative procedures. More detail is provided regarding what applicant information is required for each permit application type, and how application information relates to the proposed new permit categories for environmental release permits. These changes, along with more clearly defined categories for the environmental release permits, would potentially reduce the time some entities, large or small, spend on an application or petition process. Increased efficiency benefits may be most helpful to smaller companies and public sector entities, where GE research is generally conducted on a much smaller scale than that of large agri-business enterprises.

The proposal includes provisions to require necessary recordkeeping and reporting but to fine-tune this burden through particularized permit conditions to require only what is needed to ensure regulatory compliance based on individual cases. This should contribute to greater efficiency.

The proposed rule's greater clarity and transparency is expected to enhance the general public's perception of APHIS regulation in this area, with associated benefits from increased support of and compliance with the regulations.

In addition to the information provided in the regulations, APHIS proposes to develop new guidance documents to assist in the preparation and submission of applications.

Costs of the Proposed Rule

There are several cost areas associated with the proposed rule. Costs associated with the proposed rule that regulated entities would incur include costs of learning and adapting procedures to changed requirements, providing more or different information in permit applications, and additional recordkeeping for some entities. The additional recordkeeping burden is discussed below in the Paperwork Reduction Act section. Annual costs resulting from the additional recordkeeping may be estimated as the salary and associated costs for 640 additional hours of recordkeeping divided among 160 respondents.

Many provisions of the proposed regulations are revisions of the current regulations, and it is not expected that familiarization costs would be substantial. However, estimates of these costs are not available and therefore APHIS invites public comment on the costs the regulated community may incur with respect to rule familiarization and changes to their application systems.

Costs to APHIS are currently incurred in the regulatory assessment and review of submitted materials. Because the new permit process is largely similar to the current process, it is expected that ongoing permit processing costs to APHIS would remain essentially unchanged. As a start-up cost to change the permit system to accommodate requirements of the proposed rule, APHIS may potentially incur a one-time additional cost of $500,000. However the current system is adaptable to the new regulations and it is not anticipated that there would be any efficiency loss during the transitional period. APHIS would also potentially incur incremental costs conducting outreach activities for the proposed rule, developing guidance documents to ensure that the regulated community is familiar with the requirements of the rule, and providing staff training that may be necessary. Because of the new definition of the scope of the regulations, APHIS may devote more resources to consultations with regulated parties if they request consultation to determine whether particular GE organisms are or are not subject to the regulations. Such consultation should decrease after the first year or two of implementation, as such determinations of regulated status accumulate and become the basis for guidance of general applicability.

Initial Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), this analysis considers the economic impact of the proposed rule on small businesses, small organizations, and small governmental jurisdictions. Section 603 of the Act requires that the initial regulatory flexibility analysis (IRFA) be made available for public comments. This section addresses the IRFA requirements, as stated in Sections 603(b) and 603(c) of the Act.

Reasons Action Is Being Considered

APHIS is taking action to amend 7 CFR part 340, which was promulgated in 1987 under the authority of the Federal Plant Pest Act of 1957 and the Plant Quarantine Act of 1912. These acts were subsequently subsumed within the Plant Protection Act (PPA) of 2000, and the proposed revisions would bring part 340 in alignment with this Act. Advances in biotechnology and accumulation of oversight experience by APHIS have also made it necessary to revise and update the regulations, and in addition, the 2008 Farm Bill (The Food, Conservation, and Energy Act of 2008) enacted most recently contains provisions that need to be incorporated into the proposed rule. The proposed changes would improve the regulatory process by providing greater transparency, flexibility, and efficiency.

Objective and Legal Basis for the Rule

The objectives of this rule are to amend part 340 to provide consistency with the PPA authorities and to incorporate updates and improvements to provide a more efficient regulatory process while controlling potential risk to plant health and the environment. The PPA authorizes the Secretary of Agriculture to implement programs and policies designed to prevent the introduction and spread of plant pests and diseases. Specifically, the Secretary of Agriculture is given the authority under the PPA to prevent the importation or dissemination of plant pests and noxious weeds. To do so, the

Secretary may regulate the importation, interstate movement, and release into the environment of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance that could potentially spread plant pests or noxious weeds.

Description and Estimate of the Number of Small Entities Regulated

The proposed rule may affect a wide range of public and private biotechnology research facilities, GE crop and seed production, food processors, grain processors, and paper producers that fall into various categories of the North American Industry Classification System (NAICS). For the purpose of this analysis and following the Small Business Administration (SBA) guidelines, the potentially affected entities are classified within the following sectors: Agriculture, Forestry, Fishing and Hunting (Sector 11), Manufacturing (Sectors 31–33), Wholesale Trade (Sector 42), Retail Trade (Sector 44 and 45), Transportation (Sectors 48 and 49), and Professional, Scientific and Technical Services (Sector 54).

For the Agriculture, Forestry, Fishing and Hunting sector, the subsectors of Crop Production, Animal Production, Forestry and Logging, and Support Activities for Agriculture and Forestry are potentially affected by this rule. The proposed rule may affect a wide range of establishments in the Crop Production category. Establishments in this category are considered small by SBA standards if annual sales are not more than $0.75 million. According to the 2002 Census of Agriculture, 97 percent of the farming businesses are considered small. Potentially affected crop-producing industries, with their NAICS codes in parentheses, are as follows: Soybean Farming (111110); Oilseed Farming (except soybean) (111120); Dry Pea and Bean Farming (111130); Wheat Farming (111140); Corn Farming (111150); Rice Farming (111160); Oilseed and Grain Combination Farming (111191); All Other Grain Farming (111199); Potato Farming (111211); Other Vegetable (except potato) and Melon Farming (111219); Orange Groves (111310); Citrus (except orange) Groves (111320); Apple Orchards (111331); Grape Vineyards (111332); Strawberry Farming (111333); Berry (except Strawberry) Farming (111334); Tree Nut Farming (111335); Fruit and Tree Nut Combination Farming (111336); Other Noncitrus Fruit Farming (111337); Mushroom Production (111411); Other Food Crops Grown Under Cover (111419); Nursery and Tree Production (111421); Floriculture Production (111422); Tobacco Farming (111910); Cotton Farming (111920); Sugarcane Farming (111930); Hay Farming (111940); Sugar Beet Farming (111950); Peanut Farming (111960); and All other Miscellaneous Crop Farming (111970).

Some aspects of animal production may be affected because some GE plants are used for animal feeds and may have enhanced nutritional value or other benefits. In terms of animal production, potentially affected entities include ones within the following industries: Beef Cattle Ranching and Farming (NAICS 112111); Cattle Feedlots (NAICS 112112); Hog and Pig Farming (NAICS 112210); Sheep Farming (NAICS 112410); Goat Farming (NAICS 112420); and Apiculture (NAICS 112910). Except for Cattle Feedlots, entities in all of these industries are considered small by SBA standards if annual sales are not more than $0.75 million. Cattle Feedlot establishments are considered small by SBA standards if annual sales are not more than $2 million. According to the 2002 Census of Agriculture, 93 percent of Cattle Feedlot businesses, 99 percent of Beef Cattle Ranching and Farming businesses, 81 percent of Hog and Pig Farming businesses, 99 percent of Sheep and Goat farming businesses, and 99 percent of Apiculture businesses are considered small.

For the Forestry and Logging subsector the potentially affected establishments are classified within Timber Tract Operations (NAICS 113110); Forest Nursery and Gathering of Forest Products (NAICS 113210); and Logging (NAICS 113310). Establishments in the category of Timber Tract Operations and Forest Nursery and Gathering of Forest Products are considered small by SBA standards if annual sales are not more than $6.5 million and establishments in the category of Logging are considered small if employment is not more than 500. According to the 2002 Survey of Business Owners, 99 percent of establishments in the Logging category are considered small. Neither the Census of Agriculture nor the Economic Census tracks revenue for establishments classified within Timber Tract Operations and Forest Nursery and Gathering of Forest Products.

In terms of Support Activities for Agriculture and Forestry, the potentially affected establishments are classified within Cotton Ginning (NAICS 11511); Soil Preparation, Planting, and Cultivating (NAICS 115112); Crop Harvesting (NAICS 115113); Postharvest Crop Activities (NAICS 115114); Farm Management Services (115116) Support Activities for Animal Production (NAICS 115210); and Support Activities for Forestry (NAICS 115310). Establishments in these categories are considered small by SBA standards if annual sales are not more than $6.5 million. However, neither the Census of Agriculture nor the Economic Census reports revenue for these establishments.

Entities that may be directly affected by the proposed rule in the Manufacturing Sector are classified within Ethyl Alcohol Manufacturing (NAICS 325193); Pesticide and Other Agricultural Chemical Manufacturing (NAICS 325320); Pharmaceutical Preparation Manufacturing (NAICS 325412); and Medicinal and Botanical Manufacturing (NAICS 325411). Establishments in the Ethyl Alcohol Manufacturing category are considered small if they employ not more than 1,000 persons and those in the category of Pesticide and Other Agricultural Chemical Manufacturing (NAICS 325320) are considered small if they employ not more than 500 persons. For both the Pharmaceutical Preparation Manufacturing (NAICS 325412); and Medicinal and Botanical Manufacturing (NAICS 325411) categories, establishments are considered small if they employ not more than 750 persons. According to the 2002 Economic Census, 98 percent of the establishments in the Chemical Manufacturing Sector had fewer than 500 employees and 99 percent had fewer than 1000. Therefore, businesses in the chemical manufacturing are predominantly small by SBA standards.

In terms of Wholesale Trade, entities that would be potentially affected may be found in the following categories: Fresh Fruit and Vegetable Merchant Wholesalers (NAICS 424480); Other Grocery and Related Products Merchant Wholesalers (NAICS 424490); Grain and Field Bean Merchant Wholesalers (NAICS 424510); Other Farm Product Raw Material Merchant Wholesalers (NAICS 424590); Farm Supplies and Merchant Wholesalers (NAICS 424910); and Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers (NAICS 424930). Establishments in the above categories are considered small by SBA standards if they employ not more than 100 persons. According to the 2002 Survey of Business Owners, 97 percent of the establishments in this category employed fewer than 100 people and are considered small by SBA standards.

Retail Trade, establishments that would be affected by the rules are in the following categories: Nursery and Garden Centers (NAICS 444220); Supermarkets and Other Grocery Stores (NAICS 445110); Fruit and Vegetable

Markets (NAICS 445230); All Other Specialty Food Stores (NAICS 445299); Food (Health) Supplement Stores (NAICS 446191); Warehouse Clubs and Superstores (NAICS 452910); and Florist (NAICS 453110). Establishments in the Nursery and Garden Center, Fruit and Vegetable Markets, All other Specialty Food Stores, Food (Health) Supplement Stores; and Florist categories are considered small by SBA standards if annual sales are not more than $6.5 million. Supermarkets and Other Grocery Stores are considered small by SBA standards if annual sales are not more than $25 million. While the Economic Census reports total annual sales, the Census does not provide a breakdown of these establishments by revenue categories.

In terms of the Transportation sector, the potentially affected entities are in the category Farm Product Warehousing and Storage (NAICS 493130). Establishments in this category are considered small by SBA standards if annual sales are not more than $23.5 million. However, the Economic Census reports only total revenue for all establishments in this category.

In terms of Professional, Scientific and Technical Services, establishments in the category of Research and Development in the Physical, Engineering, and Life Sciences (NAICS 54170) may be affected. Establishments in this category are considered small by SBA standards if they employ not more than 500 persons. According to 2002 Economic Census, 82 percent of the establishments in this category are considered small.

Although information was not available on the business sizes for all potentially affected establishments, based on the foregoing information we can assume that the majority of the entities that may be affected by the proposed rule are small by SBA standards.

Given the aforementioned, a review of entities that have made application requests to APHIS shows that of the 420 applicants for the last 6 years, 263 were universities and colleges and public and private research institutions. The remainder of the applicants fall under various NAICS classification codes specified above but given time constraints their business size could not be readily determined. We were able to ascertain that the 263 institutions (63 percent) are large by SBA standards as they fall under NAICS code 54170 Research and Development in Physical Science. Establishments in this category are considered small by SBA standards if they employ not more than 500 persons. Even though the 2002 Economic Census suggests that 82 percent of the establishments in this category are considered small, the majority of applicants to APHIS are large by SBA standards.[5]

Description and Estimate of Compliance Requirement

The proposed rule would require additional and modified information collections through recordkeeping, reporting, and notifications to APHIS when certain events occur. The proposed application process requires certain new information. The current and proposed rules both require submission of reports following an environmental release or field test, but the proposed requirement is more specific about the contents of such reports. Both the current and proposed rules require APHIS to be notified if an unauthorized release occurs or if during release the GE organism is found to have characteristics substantially different from those anticipated by the permit. The proposed rule is more specific about the types of records that must be kept for importations, interstate movements, and environmental releases, where the current regulations left more of these details to be specified only in permit conditions. In terms of record retention requirements, the proposed rule spells out a 2-year retention for records indicating that a GE organism imported or moved interstate reached its intended destination, and a 5-year retention for all other required records. By providing more specific information on what records are required, the proposed rule should alleviate some current burden that may result from persons keeping unnecessary records. In addition, APHIS has established the Biotechnology Quality Management System (BQMS), which is a voluntary compliance assistance unit within USDA APHIS. BQMS would facilitate the regulatory efforts of USDA APHIS by conducting outreach activities and providing compliance assistance to the regulated community. This would lessen any burden of the proposed rule to the regulated community.

Duplication, Overlap, and Conflict With Existing Rules and Regulations

APHIS has identified areas where the proposed rule will need to be closely coordinated with other Federal rules and statutory authorities. Coordination has been an important aspect of the daily implementation of the current regulation, and APHIS foresees additional areas for coordination under the proposed rule. In particular, APHIS will coordinate with the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA). FDA regulates GE organisms under the authority of the Federal Food, Drug and Cosmetic Act and the Public Health Service Act (42 U.S.C. 262 *et seq.*), as appropriate. The EPA regulates plant-incorporated protectants under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and certain biological control organisms under the Toxic Substances Control Act (TSCA). As examples of areas that need coordination, some of the plant-incorporated protectants regulated by EPA are also subject to APHIS requirements under the PPA. Also, FDA is the primary U.S. agency responsible for ensuring the safety of commercial food and food additives, and FDA authority extends to any nonpesticidal substance that may be introduced into a new GE plant and that is expected to become a component of food. The proposed regulations would clarify the regulatory scope and procedures used by APHIS relative to these other agencies and improve the coordination process.

Significant Alternatives to the Rule

APHIS considered several significant alternatives during development of this proposed rule. We have compared the selected alternatives to others that were not selected to evaluate their feasibility and to consider whether any alternatives provide ways to minimize significant economic impacts on small entities. We have not identified any selected alternative that imposes disproportionate costs on small businesses, or any non-selected alternative that would both achieve the regulatory purposes and reduce costs for small businesses.

The selected alternative regarding the scope of the regulatory oversight was to add considerations of noxious weed risk in addition to evaluating plant pest risks, and to use genetic transformation, coupled with a determination by the Administrator as to whether a GE organism met certain risk-based criteria, as the trigger for regulation. Other alternatives considered included continuing to base the scope of regulation only on plant pest risks, or trying to develop a set of solely trait-based criteria that could be used to predict what articles would be regulated without the need for determinations by the Administrator. The first of these alternatives could have resulted in costs from damages caused by a GE plant with

[5] The size determination was made using public information about these entities. This information was primarily obtained from the entities' Web sites.

noxious weed aspects that was not regulated under the plant pest risks standard. The second alternative was not considered technically feasible, and could also have resulted in costs for persons who erroneously decide their GE plant is not within the scope of the regulations, but are overruled by a later determination by the Administrator that the GE plant is regulated.

The selected alternative for providing transparency and predictability to the permitting system was to establish permit categories for environmental releases of plants based on newly devised criteria. We also considered evaluating all requests for environmental release permits on a case-by-case basis, without categories. This alternative would have resulted in less predictability for applicants, and likely would have increased their costs for information collection because applications known to be in a particular category can contain less information about non-relevant areas.

The selected alternative regarding the duration period for permits was to make multi-year permits for interstate movement and importation more feasible by removing the one-year limit for interstate movement permits and the requirement to obtain a new importation permit for each imported shipment. We also considered alternatives to maintain either the current or alternative specific time limits for such permits. These alternatives would have resulted in additional costs for applicants who would have to reapply for permits, rather than having the original permit issued with an appropriate duration.

C. 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.)

D. Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) No State or local laws or regulations would be preempted by this rule; (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.

E. 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). The information collection or recordkeeping requirements in current 7 CFR part 340 have been approved under OMB Control No. 0579–0085. 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–2008–0023. Please send a copy of your comments to: (1) Docket No. APHIS–2008–0023, 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.

This proposed rule contains certain information collection and recordkeeping requirements that would apply to persons and their agents engaged in the importation, interstate movement, or release into the environment of any GE organism that is subject to the regulations. The majority of the requirements would apply to persons moving GE organisms under a permit issued by APHIS, but some requirements also apply to persons engaged in regulatory activities with GE organisms even when no permit is required, e.g., when they are exempted from the interstate movement permit requirement.

The proposed information and recordkeeping requirements are found in § 340.3, *Permit conditions,* and in § 340.7, *Compliance, enforcement, and remedial action.* Permit conditions for individual permits issued under the regulations may also require that certain records relevant to the particular movement must be kept.

The proposed permit conditions for shipments imported or moved interstate include maintaining records of the same types of information that the current regulations require to be on the package labeling of such shipments (nature and quantity, sender, destination, permit number, etc.) We believe that most persons shipping or importing GE organisms already maintain such records as part of normal business practices.

The proposed permit conditions for environmental releases include keeping records of all protocols or guidelines used to direct any environmental release. The current regulations already require persons conducting an environmental release under permit or notification to create and submit to APHIS a field test report, and in many cases the protocol or guidelines would normally be included in these field reports. This proposed change would require that the protocols or guidelines be kept in all cases as distinctly identifiable records, which may cause some increase in recordkeeping burden.

In some particular environmental release cases where higher risk levels make it necessary, the proposed rule would allow APHIS to add a special permit condition requiring the permit holder to maintain and make available to APHIS written manuals or protocols describing how specified permit conditions will be met, such as management practices used for the environmental release, training, communications, and identity preservation systems. This would be used in cases where it is deemed necessary to provide specific guidance in addition to the proposed general condition for all permits (i.e., that the holder must keep records related to permitted activities of sufficient quality and completeness to demonstrate compliance with all permit conditions and requirements under this part). Another proposed permit condition would require permit holders to develop and keep a written contingency plan to respond to any unauthorized environmental release. Both of these recordkeeping requirements would be added because some researchers or developers were found to be unclear about what management and communications practices were needed to prevent unauthorized releases, and also about their responsibilities and the measures they must take in the event of an unauthorized release.

The proposed procedure to apply for an environmental release permit requires applicants to submit a great deal of information characterizing the nature of the GE organism, the type of movement and release planned, plans and methods used to prevent unauthorized releases, and other matters. Most of the same information is obtained through the current application process, which allows the Administrator to require an applicant to submit any additional information that is needed for adequate evaluation of the application. The proposed application procedure is more specific in describing what information is required, and may result in a slight increase in the amount of information submitted with the average application.

The reporting burden for permit holders under the proposed rule would be similar to the burden under the

current regulations. In both cases they must submit reports of all field tests to APHIS, report any unauthorized releases, and submit any additional reports required as individual permit conditions in their permits.

The current regulations do not specify record retention periods, although some permits APHIS issued included specific retention requirements as permit conditions. This proposal would require that records associated with an importation or interstate shipment must be retained for at least 2 years after completion of the movement, and all other records (e.g., regarding environmental releases) must be retained for at least 5 years after completion of all obligations required under a relevant permit or exemption.

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 2 hours per response.

Respondents: Public and private biotechnology research facilities, GE crop and seed producers, food processors, grain processors, and paper producers that fall into various categories of the North American Industry Classification System.

Estimated annual number of respondents: 160.

Estimated annual number of responses per respondent: 2.

Estimated annual number of responses: 320.

Estimated total annual burden on respondents: 640 hours.

Copies of this information collection can be obtained from Celeste Sickles, the Agency Information Management Specialist, at (301) 851–2908.

F. 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, the Agency Information Management Specialist, at (301) 851–2908.

List of Subjects in 7 CFR Part 340

Administrative practice and procedure, Biotechnology, Genetic engineering, Imports, Packaging and containers, Permits, Plant diseases and pests, Noxious weeds, Transportation.

Accordingly, we propose to revise 7 CFR part 340 to read as follows:

PART 340—IMPORTATION, INTERSTATE MOVEMENT, AND RELEASE INTO THE ENVIRONMENT OF CERTAIN GENETICALLY ENGINEERED ORGANISMS

Sec.

340.0 Scope and general restrictions.
340.1 Definitions.
340.2 Procedure for permits.
340.3 Permit conditions.
340.4 Conditional exemptions from the requirement for a permit for interstate movement.
340.5 Petition for new conditional exemptions from the requirement for a permit.
340.6 Petition for nonregulated status.
340.7 Compliance, enforcement, and remedial action.
340.8 Confidential business information.
340.9 Costs and charges.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

§ 340.0 Scope and general restrictions.

(a) In order to prevent the unauthorized introduction or dissemination of a plant pest or noxious weed, no person shall import, move interstate, or release into the environment genetically engineered organisms described in paragraph (b) of this section, unless the importation, interstate movement, or release into the environment:

(1) Is authorized under a permit issued by the Administrator in accordance with § 340.2, or

(2) Is exempt from the requirements for a permit in accordance with § 340.4 or § 340.5, or

(3) Is approved for nonregulated status in accordance with § 340.6 or has previously been approved for nonregulated status pursuant to former regulations under this part, or

(4) Is excluded in accordance with paragraph (d) of this section.

(b) Genetically engineered organisms whose importation, interstate movement, or release into the environment is subject to the regulations in this part are:

(1) Genetically engineered plants if:

(i) The unmodified parent plant from which the GE plant was derived is a plant pest or noxious weed, or

(ii) The trait introduced by genetic engineering could increase the potential for the GE plant to be a plant pest or noxious weed, or

(iii) The risk that the GE plant poses as a plant pest or noxious weed is unknown, or

(iv) The Administrator determines that the GE plant poses a plant pest or noxious weed risk.

(2) Genetically engineered non-plant, non-vertebrate organisms if:

(i) The recipient organism can directly or indirectly injure, cause damage to, or cause disease in plants or plant products; or

(ii) The GE organism has been engineered in such a way that it may increase the potential for it to be a plant pest: or

(iii) The risk that the GE organism poses as a plant pest is unknown, or

(iv) The Administrator determines that the GE organism poses a plant pest risk.

(3) *Opportunity to consult APHIS.* Any person may contact APHIS to discuss how the criteria of this paragraph apply in the case of a particular GE organism or group of organisms.

(c) The Administrator may issue permits for the importation, interstate movement, or release into the environment of certain genetically engineered organisms described in paragraph (a) of this section. These permits may include such requirements or conditions as the Administrator deems necessary to prevent the unauthorized introduction or dissemination of a plant pest or noxious weed. The Administrator may also designate certain exemptions from the requirement to obtain permits. The Administrator may also approve for nonregulated status a genetically engineered organism described in paragraph (a) of this section for which a determination has been made by the Administrator that the organism is unlikely to be a plant pest or noxious weed.

(d) Genetically engineered microorganisms that are regulated as biological control organisms under the Federal Insecticide, Fungicide, and Rodenticide Act are not subject to the regulations in this part. Genetically engineered microorganisms where the recipient microorganism is not a plant pest and which has resulted from the addition of genetic material from a donor organism where the material is well characterized and contains only non-coding regulatory regions are not subject to the regulations in this part.

§ 340.1 Definitions.

Terms used in the singular form in this part shall be construed as the plural, and vice versa, as the case may demand. The following terms, when used in this part, shall be construed, respectively, to mean:

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

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

Confidential business information, CBI. Information such as trade secrets or commercial or financial information that may be exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA), because disclosure could reasonably be expected to cause substantial competitive harm. USDA regulations on how the agency will handle CBI and how to determine what information may be exempt from disclosure under FOIA (5 U.S.C. 552) are found at 7 CFR 1.12.

Contained facility, contained structure. A physical structure designed to minimize release into the outdoor environment. Examples of contained structures include, but are not limited to, laboratories, containment greenhouses, bioreactors, and fermenters.

Contingency plan. A written plan stating how the responsible person will respond in the event of the unauthorized environmental release of GE organisms.

Donor organism. The organism from which genetic material is obtained for transfer to the recipient organism in the process of genetic engineering.

Environmental release. See definition of *Release into the environment.*

Exempt, exempted, exemption from permit. A determination by the Administrator that the importation, interstate movement, and/or release into the environment of an organism or class of organisms described in § 340.0(a) is not subject to the requirement to have a permit under this part. An exemption from one type of permit (e.g., interstate movement) does not remove remaining obligations to obtain other permits under this part.

Genetic engineering. The genetic modification of organisms by recombinant DNA techniques.

Genetically engineered, GE. A term applied to organisms that have been produced by genetic engineering, e.g., GE organisms, GE plants.

Import and importation. To move into, or the act of movement into, the territorial limits of the United States.

Inspector. Any employee of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or other person, authorized by the Administrator, in accordance with law to enforce the provisions of this part.

Interstate movement. Movement from any State into or through any other State.

Means of conveyance. Any personal property used for, or intended for use for, the movement of any other personal property. This specifically includes, but is not limited to, automobiles, trucks, railway cars, aircraft, boats, freight containers, and other means of transportation.

Nonregulated status. A determination by the Administrator that an organism described in § 340.0(a) is not subject to any of the regulatory requirements of this part.

Noxious weed. Any plant or plant product that can directly or indirectly injure or cause damage to crops (including nursery stock or plant products), livestock, poultry, or other interests of agriculture, irrigation, navigation, the natural resources of the United States, the public health, or the environment.

Organism. Any active, infective, or dormant stage or life form of an entity characterized as living, including vertebrate and invertebrate animals, plants, bacteria, fungi, mycoplasmas, mycoplasma-like organisms, as well as entities such as viroids, viruses, or any entity characterized as living, related to the foregoing.

Permit. A written authorization by the Administrator for the importation, interstate movement, and/or release into the environment of a GE organism under this part.

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

Plant. Any plant (including any plant part) for or capable of propagation, including trees, tissue cultures, plantlet cultures, pollen, shrubs, vines, cuttings, grafts, scions, buds, bulbs, roots, and seeds.

Plant pest. 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, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any other living stage similar to or allied with any of these organisms.

Plant product. Any flower, fruit, vegetable, root, bulb, seed, or other plant part that is not included in the definition of plant; or any manufactured or processed plant or plant part.

Recipient organism. The organism that will receive the genetic material from a donor organism in the process of genetic engineering (once the organism is engineered it is referred to as the genetically engineered (GE) organism).

Release into the environment. Dispersal beyond the constraints of a contained facility or secure shipment. Synonymous with the term environmental release.

Responsible person. The person who has control and will maintain control over a GE organism during its importation, interstate movement, or release into the environment and assures compliance with all conditions contained in any applicable permit or exemption as well as other requirements in this part. A responsible person shall be at least 18 years of age and be a legal resident of the United States or designate an agent who is at least 18 years of age and a legal resident of the United States.

Secure shipment. Shipment in a container or a means of conveyance of sufficient strength and integrity to withstand leakage of contents, shocks, pressure changes, and other conditions incident to ordinary handling in transportation.

Signature, signed. The discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic signatures when authorized by the Administrator.

State. Any State of the United States, the District of Columbia, American Samoa, Guam, Northern Mariana Islands, Puerto Rico, the Virgin Islands of the United States, and any other Territories, Possessions, or Districts of the United States.

State or tribal regulatory official. State or tribal official with responsibilities for plant health, or any other duly designated State or tribal official, in the

State or on the tribal lands where the importation, interstate movement, or release into the environment is to take place.

United States. All of the States.

Write, writing, written. Any document or communication required by this part to be in writing may also be provided by electronic communication when authorized by the Administrator.

§ 340.2 Procedure for permits.

(a) *General.* A permit is required for the importation, interstate movement, or release into the environment of any GE organism that is subject to this part, as described in § 340.0, The responsible person seeking a permit for the importation, interstate movement, or release into the environment of such organisms shall submit a written application for a permit to APHIS in accordance with paragraph (c) of this section and obtain the permit prior to the importation, interstate movement, or release into the environment.

(b) *Types of permits.* The Administrator may issue the following three types of permits under this part.

(1) *Import permit.* Import permits are for secure shipment via any means of conveyance from outside the United States into contained facilities within the United States.

(2) *Interstate movement permit.* Interstate movement permits are for secure shipment via any means of conveyance from a contained facility in any State into or through any other State to another contained facility.

(3) *Environmental release permit.* Environmental release permits are for the environmental release of GE organisms. In cases in which importation and interstate movements will occur incidental to an environmental release, the importation and interstate movements will also be authorized under the environmental release permit.

(c) *Permit application information requirements.* Applicants must submit to APHIS sufficient information about the specific nature of the GE organism and the particular proposed permit conditions, so that the Administrator is able to consider whether the proposed importation, interstate movement, or release into the environment is likely to result in the introduction or dissemination of a plant pest or noxious weed. The basic information required in permit applications is described in this paragraph. The type and level of detail needed for the Administrator to issue a permit may vary by type of permit. For environmental releases, application information will be used to sort proposed releases of GE organisms into administrative categories described in paragraph (d) of this section. Applicants should consult with APHIS prior to applying for permits in order to obtain further guidance as to what additional information the Administrator may require to be submitted with the application.

(1) *Information required in all permit applications.* Each application must include all of the following information, and any other information specified for individual types of permits as described in this paragraph:

(i) The name, title, and contact information (e.g., mailing address, e-mail, telephone and fax numbers) of the responsible person;

(ii) The type of permit sought (importation, interstate movement, or environmental release, and if the permit is for environmental release, which category);

(iii) Information necessary to identify and characterize the GE organism(s) for which a permit is sought, including:

(A) The scientific names of all donor and recipient species plus any designations used for the GE organism(s) (e.g., strain, line, variety);

(B) The form of the GE organism (e.g., seeds, rootstocks, tubers, spores, larvae, eggs) and the amount (e.g., numbers, total weight or volume); and a description of any biological material accompanying the GE organism under permit (e.g., culture medium, or host organisms, etc.);

(C) The anticipated phenotype of the GE organism and the nature of the inserted sequences or other genetic modification intended to confer the phenotype;

(D) Intended uses of the GE organism after the termination of the importation, interstate movement, or environmental release (e.g., contained research in laboratories or containment greenhouses, culturing, propagation, breeding, processing for analysis or manufacture, sale and distribution for consumption); and

(E) Description of how the GE organism will be marked, labeled, or otherwise identified during the importation, interstate movement, or environmental release;

(iv) The proposed time frame (estimated start and duration) within which the importation(s), interstate movement(s) or environmental release(s) will occur;

(v) Description of how permit requirements will be communicated to persons having contact with the GE organism under permit;

(vi) Description of any training given to persons having contact with the GE organism under permit, including but not limited to detailed information on how this training will facilitate compliance with conditions imposed under the permit and any other regulatory requirements under this part; and

(vii) A certification statement signed by the responsible person that certifies that the application information is correct.

(2) *Additional information required in all applications for importation permits, interstate movement permits, and all environmental release permits that include importation or interstate movement.*

(i) The location(s) of the origin(s) and destination(s), including information on the addresses, and contact details of the sender(s) and recipient(s), if different from the responsible person.

(ii) A description of the method of secure shipment.

(iii) A description of the manner in which packaging material, shipping containers, and any other material accompanying the GE organism will be disposed.

(3) *Additional information required in all environmental release permit applications.* Information should address the persistence risk and potential harm of the GE organism in the environment, including but not limited to:

(i) A description of how the phenotype of the GE organism differs from the phenotype of the recipient organism, particularly with respect to potential interactions with and its likelihood of persistence in the environment.

(ii) The location and size of all proposed release sites, including area, geographic coordinates, addresses, and contact information of a person at each release site, if different from the responsible person. Include information about the ecology and agronomy of each site, including but not limited to:

(A) Presence of any wild or cultivated species that are sexually compatible with the GE organism;

(B) Presence of any Federally-listed threatened or endangered species that could interact with the GE organism during the release;

(C) Presence of any designated critical habitat, or habitat proposed for designation, in the area of the release site; and

(D) Land use history of the site and adjacent areas.

(iii) A description of the site management practices and control procedures designed to make it unlikely that there will be unauthorized introduction or dissemination of the GE organism beyond the proposed area and

the permit time frame of release. Each of the descriptions shall include:

(A) Description of the methods and stages of transport of the GE organism from a contained facility to the environmental release site, and any storage methods used at the site;

(B) Description of methods of planting, inoculation, or release; any reproductive or cultural controls; methods of treatment and harvest used for the GE organism; and a proposed plan for monitoring the site for pests, diseases, and effects on other organisms during the time the GE organism is released;

(C) Description of the methods and stages of transport of the GE organism from release site back into contained facilities, or methods of devitalization at the site(s) of the environmental release;

(D) Description of the cleaning, disinfection, or other methods used to make it unlikely that unauthorized dissemination of the GE organism into the environment could occur via means of conveyance and other articles (e.g., planters, harvesters, containers);

(E) Description of any post-release land use practices, including any monitoring plans to ensure that the GE organism or its progeny are unlikely to reproduce and disseminate in the environment after the termination of the release (e.g., managing volunteer plants); and

(F) Description of the contingency plans associated with the release.

(d) *Administrator action on permit applications.* An initial review should generally be completed by APHIS within 15 days of the receipt of the application for importation or interstate movement permits, and within 30 days for environmental release permits. An application will be considered complete when the Administrator determines that it includes all information required by this section and any additional information that the Administrator determines is needed for review. If necessary after its initial evaluation of an application, APHIS will notify the applicant in writing if the submitted application information is incomplete, and the applicant will be provided the opportunity, without prejudice, to revise the application information to meet the needs for administrative processing and scientific review. Once the Administrator has determined that an application is complete, the Administrator will commence review. The APHIS review should generally be completed within 60 days after it is determined to be complete for importation and interstate movement permits, and within 120 days after it is determined to be complete for environmental release permits.

(1) *Administrative categories for environmental releases.* The Administrator will use the following categories to efficiently administer the program and tailor regulatory oversight in a manner that is commensurate with risk. Environmental releases of GE plants are assigned to one of four categories (A–D), using the factors described in (i–iv). A fifth category (E) is for environmental releases of all non-plant organisms; applications in this category will be reviewed on a case-by-case basis.

(i) *Initial sorting into categories.* The Administrator will use the following factors to initially sort environmental releases into administrative categories.

(A) Persistence of the nonmodified plant, ranked as follows:

(*1*) *Low:* Populations of the recipient plant are unlikely to persist in the environment without human intervention, and the recipient plant has no interfertile wild relatives in the United States.

(*2*) *Moderate:* Populations of the recipient plant are known to be weakly persistent in the environment without human intervention, or the recipient plant has interfertile wild relatives in the United States.

(*3*) *High:* Populations of the recipient plant are known to be strongly persistent in the environment without human intervention, or the recipient plant has interfertile wild relatives in the United States which are aggressive colonizers.

(*4*) *Severe:* The recipient plant is a Federally-listed noxious weed or is known to be similarly aggressive in its ability to colonize and persist in the environment without human intervention.

(B) Potential harm or damage of the engineered traits, ranked as follows:

(*1*) *Low:* Any new proteins or substances produced are unlikely to be toxic or otherwise cause serious harm to humans, vertebrate animals, or invertebrate organisms upon consumption of or contact with the plant or plant parts; and

(*i*) No morphological changes which could cause mechanical injury or damage; and

(*ii*) Introduced sequences are known not to result in plant disease, and confers no or very low increased disease susceptibility.

(*2*) *Moderate:* Any new proteins or substances produced are unlikely to be toxic or otherwise cause serious harm to humans or vertebrate animals upon consumption of or contact with the plant or plant; or

(*i*) Novel resistance to the application of an herbicide; or

(*ii*) Novel ability to cause mechanical injury or damage; or

(*iii*) Produces proteins or substances that are associated with plant disease that are not prevalent or endemic in the area of release, or that confer an increased susceptibility to disease.

(*3*) *High:* Any new proteins or substances produced may be toxic or to otherwise cause serious harm to humans or vertebrate animals, upon consumption of or contact with the plant or plant parts; or

(*i*) Produces an infectious entity which can cause disease in plants.

(*4*) *Severe:* Any new proteins or substances produced are known or likely to be highly toxic or fatal to humans or vertebrate animals, upon consumption of or contact with the plant or plant parts.

(C) Environmental releases will be initially sorted into administrative categories A–D as shown in Table 1, based upon the persistence risk and potential harm described in paragraphs (d)(1)(i)(A) and (B) of this section.

TABLE 1 TO § 340.2(d)(1)—INITIAL SORTING INTO PERMIT ADMINISTRATIVE CATEGORIES (A, B, C, AND D) FOR ENVIRONMENTAL RELEASES OF GE PLANTS, BASED UPON PERSISTENCE RISK OF THE RECIPIENT PLANT SPECIES AND POTENTIAL HARM OR DAMAGE OF THE ENGINEERED TRAIT

Persistence *	Potential harm or damage of engineered trait			
	Low	Moderate	High	Severe
Low	A	A	C	D
Moderate	A	B	C	D
High	B	B	C	D

TABLE 1 TO § 340.2(d)(1)—INITIAL SORTING INTO PERMIT ADMINISTRATIVE CATEGORIES (A, B, C, AND D) FOR ENVIRONMENTAL RELEASES OF GE PLANTS, BASED UPON PERSISTENCE RISK OF THE RECIPIENT PLANT SPECIES AND POTENTIAL HARM OR DAMAGE OF THE ENGINEERED TRAIT—Continued

Persistence *	Potential harm or damage of engineered trait			
	Low	Moderate	High	Severe
Severe	D	D	D	D

* Persistence risk of the recipient plant species.

(2) *Modification of initial sorting based upon additional considerations.* Following initial sorting using the factors described in paragraph (1)(i) of this section, the Administrator may reassign the environmental release to a different category based upon one or more of the following factors:

(i) How the recipient plant is used;

(ii) Whether the added trait significantly alters the persistence risk of the GE plant;

(iii) Whether the gene function is known and based upon empirical observation of the added trait in the same species; and

(iv) Any other information the Administrator deems relevant to the risk of introduction or dissemination of a plant pest or noxious weed.

(3) *APHIS review and assignment of permit conditions.* The Administrator will conduct a review and assign appropriate permit conditions so that the proposed activity will be conducted in a manner that makes it unlikely to result in the introduction and dissemination of a plant pest or noxious weed.

(4) *State or tribal review and comment.* The Administrator will submit for notice and review a copy of the permit application and any permit conditions to the appropriate state or tribal regulatory official. Comments received from the state or tribal regulatory official may be considered by the Administrator prior to permit issuance.

(5) *Site inspection.* Prior to and after permit issuance, an inspector may inspect the sites or the means of conveyance associated with the proposed importation, interstate movement, or release into the environment. The responsible person must allow any such inspections.

(6) *Issuance of a permit.* The Administrator may issue a permit if the Administrator concludes that the actions allowed under the permit are unlikely to result in the introduction or dissemination of a plant pest or noxious weed.

(i) Prior to the issuance of a permit, the responsible person must agree in writing, in a manner prescribed by the Administrator, that the responsible person and all agents of the responsible person will comply with the permit conditions. The Administrator will deny the permit application if the responsible person does not agree that both the responsible person and all of his or her agents will comply with all of the permit conditions.

(ii) If a permit is issued, the permit will include specific permit conditions required by the Administrator in accordance with § 340.3. If a permit is denied, within a reasonable time thereafter the applicant will be informed in writing of the reasons why the permit was denied and will be given the opportunity to appeal the denial in accordance with the provisions of paragraph (g) of this section.

(e) *Denial or revocation of a permit.* Permits may be denied or revoked in accordance with this paragraph.

(1) *Denial.* The Administrator may deny an application for a permit if:

(i) The Administrator cannot conclude based on the application that the actions proposed under the permit are unlikely to result in introduction or dissemination of a plant pest or noxious weed; or

(ii) The Administrator receives information apart from the application that precludes a conclusion by the Administrator that the actions proposed under the permit would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed; or

(iii) The Administrator determines that the responsible person or any agent of the responsible person has failed to comply at any time with any provision of this part. This would include failure to comply with the conditions of any permit issued.

(2) *Revocation.* The Administrator may revoke a permit if:

(i) The Administrator receives information subsequent to issuing a permit and makes a determination based upon this information that the circumstances have changed such that actions under the permit would be likely to result in the introduction or dissemination of a plant pest or noxious weed; or

(ii) The Administrator determines that the responsible person or any agent of the responsible person has failed to comply at any time with any provision of this part. This would include failure to comply with the conditions of any permit issued.

(f) *Notice of revocation.* The Administrator may revoke, either orally or in writing, any permit which has been issued. If the revocation is oral, the Administrator will communicate the revocation and the reasons for it in writing as promptly as circumstances allow.

(g) *Appeal of denial or revocation of permit.* Any person who has been denied a permit or had a permit revoked may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the revocation or denial. The appeal shall state all of the facts and reasons upon which the person relies to assert that the permit was wrongfully revoked or denied. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. Upon request of the applicant, a hearing may be held to resolve any conflict as to any material fact. Rules of practice concerning such a hearing will be adopted by the Administrator. This administrative remedy must be exhausted before a person can file suit in court challenging the denial or revocation of a permit.

(h) *Amendment or transfer of permits.* Permits issued under this part may only be amended or transferred in accordance with this section.

(1) *Amendment at responsible person's request.* Where circumstances have changed so that a responsible person desires to have the permit amended, such responsible person must submit a written justification and provide supporting information to APHIS. The Administrator will review the amendment request, and may amend the permit. Prior to issuance of an amended permit, the responsible person must agree in writing that he or she and all of his or her agents will comply with the amended permit and conditions.

(2) *Amendment initiated by APHIS.* The Administrator may amend any

permit and its conditions at any time, upon determining that the amendment is needed to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed, or to ensure that the permit is in compliance with all of the requirements of this part. As soon as circumstances allow, the Administrator will notify the responsible person in writing of the amendment to the permit and the reason(s) for it. The responsible person must agree in writing to comply with the permit and conditions as amended before the Administrator will issue the amended permit. If the responsible person does not agree in writing to comply with the amended permit and conditions, the existing permit will be revoked.

(3) *Transfer of permits.* Permits issued through this part may only be transferred by the Administrator in response to a request by both the responsible person and the proposed transferee, or in the case of a deceased responsible person, the deceased responsible person's legal representative and the proposed transferee. Such transfer may occur if the Administrator determines that:

(i) The proposed transferee meets all of the qualifications of a responsible person under this part;

(ii) The proposed transferee has provided adequate written assurances to the Administrator that the proposed transferee and all of his or her agents will meet the terms and conditions of the permit, including any outstanding mitigation requirements or commitments under this part, and that the proposed transferee agrees to assume all responsibility and liability associated with permit activities and responsibilities; and

(iii) The proposed transferee has provided such other information as the Administrator determines is necessary to the processing of the request for transfer of permit.

§ 340.3 Permit conditions.

(a) *Core permit conditions.* Permits will be issued with the permit conditions below, which are a minimum set of basic conditions. The Administrator may add additional or expanded conditions when necessary to make it unlikely that actions under the permit would result in the introduction or dissemination of a plant pest or noxious weed.

(1) *Permit conditions for all permit types.*

(i) *Identity.* The identity of the GE organism shall be maintained at all times, in order to maintain control of the GE organism, keep it distinct from other organisms, and minimize unintended mixing of the GE organism with other organisms. Conditions for maintaining the identity of the GE organism include, but are not limited to:

(A) Marking, labeling, or otherwise identifying all GE organisms during the course of the permit; and

(B) Having the ability to account for all GE materials associated with the permit.

(ii) *Communication and training.* The responsible person shall effectively communicate any and all conditions, activities, actions, and contingency plans associated with the permit to all his or her agents and any other persons participating in permit-related activities, in order to ensure all persons comply with all requirements under this part. Conditions for communicating and training include, but are not limited to:

(A) Establishing, implementing, and maintaining the means to effectively communicate to all his or her agents and any other persons participating in permit-related activities;

(B) Providing a copy of the permit and conditions to all agents involved in a permit; and

(C) Training all agents and any other persons participating in permit-related activities to effectively conduct tasks required under the permit.

(iii) *Records.* In addition to any other records required by this section or § 340.7(b), records, related to permitted activities of sufficient quality and completeness to demonstrate compliance with all permit conditions and requirements under this part, must be maintained.

(iv) *Notice.* The responsible person shall notify APHIS orally within 24 hours of discovery, and subsequently in writing within 5 business days of discovery, in the event of an unauthorized importation, interstate movement, or release into the environment of a GE organism regulated under this part.

(2) Additional permit conditions for interstate movement permits, importation permits, and environmental release permits which include either an interstate movement or importation.

(i) *Shipment.* The GE organism must be transported in such a way as to minimize the likelihood of the unauthorized release of the GE organism. Conditions include, but are not limited to:

(A) Ensuring that the GE organism is transported in such a way that it is a secure shipment, as defined in § 340.1; and

(B) Treating or disposing of all packaging material, shipping containers, and any other material accompanying the GE organism in such a manner as to make it unlikely to result in the organism's unauthorized importation, interstate movement, or release into the environment.

(ii) *Records.* In addition to any other records required by this section or § 340.7(b), the following records shall be maintained:

(A) Information identifying the general nature and quantity of the organism being shipped;

(B) Name and address of sender, owner, or person shipping the organism;

(C) Name, address, and telephone number of recipient;

(D) Any invoices, packing lists, or bills of lading used for the shipment;

(E) The shipper's name and identifying shipper's mark and number; and

(F) A description of any containers that were used to transport the GE organisms, and a copy of any label used on these containers during transport.

(3) *Additional permit conditions for import permits, and environmental release permits which include importation.*

(i) *Port(s) of Entry.* The GE organism shall be presented for entry only at a port(s) specified in the permit.

(ii) *Records.* In addition to any other records required by this section or § 340.7(b), the responsible person shall maintain records that identify the country and locality where the GE organism was collected, developed, manufactured, reared, cultivated or cultured.

(4) *Additional permit conditions for environmental release permits.*

(i) *Environmental release controls.* Sufficient controls shall be applied during the environmental release of the GE organism to make it unlikely to result in the unauthorized release of the GE organism into the environment. Conditions include, but are not limited to:

(A) Taking adequate precautions as described in the permit to ensure that the GE organism is not inadvertently released in transit between contained facilities and the location of environmental release;

(B) Developing and being prepared to implement a written contingency plan to respond to any unauthorized environmental release;

(C) Following any and all required reproductive, cultural, spatial, and temporal controls, such as isolation distances, buffer zones, and flower removal, as described in the permit, and monitor to ensure that the controls are maintained throughout the duration of the release;

(D) Cleaning equipment used in the environmental release in order to remove or devitalize any viable GE organism the equipment may carry, as described in the permit;

(E) Devitalizing or moving into a contained facility any viable GE material remaining at the termination of the environmental release, when applicable, as described in the permit; and

(F) Managing and monitoring the area of release after the termination of the environmental release and removing or devitalizing any GE organisms which persist after the release, as required in the permit.

(ii) *Records*. In addition to any other records required by this section or § 340.7(b), the following records shall be maintained for each release:

(A) All protocols or guidelines used to direct any environmental release of the GE organism; and

(B) All environmental release reports for the organism. At a minimum such reports must include the APHIS reference number for the environmental release, methods of observation used during the environmental release, resulting information, and analysis regarding all deleterious effects on plants, nontarget organisms, or the environment, and any notices sent to APHIS of any unusual occurrence during the environmental release.

(iii) *Reports and Notices*. In order for the Administrator to monitor the progress of the environmental release, and to evaluate compliance with required permit conditions, permit conditions will include, but are not limited to:

(A) The responsible person shall submit periodic reports and notices to APHIS at the times specified in the permit and containing the information specified within the permit; and

(B) The responsible person shall notify APHIS orally within 24 hours of discovery, and subsequently in writing within 5 business days of discovery, in the event that the GE organism is found to have characteristics substantially different from those listed in the permit or if any circumstances occur which may increase the risk of disseminating a plant pest or noxious weed.

(C) The responsible person shall notify APHIS in writing if the authorized release will not be conducted.

(D) Within 28 days after the initiation of the release, the responsible person shall report to APHIS in writing the final release site coordinates; number of GE organisms actually released; any information related to the expected date(s) and quantities of GE organisms for subsequent planned releases to be done under this permit.

(E) The responsible person shall provide APHIS with a final report that includes information related to any occurrences during the release that might result in the dissemination of a plant pest or noxious weed.

(F) For categories C and D, permit holders shall provide APHIS with written notice no less than seven days prior to the planned initiation of the release.

(G) For categories C and D, permit holders shall provide APHIS with a report no less than 21 days prior to release termination (e.g., harvest of GE plants) that describes the anticipated date(s) of termination.

(b) *Standard for additional permit conditions assigned by Administrator*. The Administrator will assign the permit conditions described above in a manner that is commensurate with the risk of the individual proposed release. Additional or expanded permit conditions may include, but are not limited to specific requirements for: Reproductive, cultural, spatial, temporal controls; monitoring; post-termination land use; site security or access restrictions; and management practices such as training of personnel involved in the release. The Administrator may also assign permit conditions addressing nonliving materials associated with or derived from GE plants when such conditions are needed to make it unlikely that the nonliving materials would pose a noxious weed risk.

§ 340.4 Conditional exemptions from the requirement for a permit for interstate movement.

(a) *General*. Certain GE organisms described in paragraph (b) of this section may be moved interstate without a permit under this part, if they meet the shipping conditions enumerated in paragraph (c).

(b) *Conditional exemptions from the requirement for a permit for interstate movement of certain organisms*. A permit for interstate movement will not be required for the following genetically engineered organisms provided that they meet the requirements of this paragraph and paragraph (c).

(1) *Escherichia coli* genotype K–12 (strain K–12 and its derivatives), sterile strains of *Saccharomyces cerevisiae*, or asporogenic strains of *Bacillus subtilis,* provided that the introduced genetic sequences:

(i) Are maintained on a nonconjugation proficient plasmid, and the organism does not contain other conjugation proficient plasmids or generalized transducing phages;

(ii) Do not cause the production of an infectious entity;

(iii) Are not carried on an expression vector if the cloned genes code for:

(*A*) A toxin to plants or plant products, or a toxin to organisms beneficial to plants; or

(*B*) Other factors directly involved in eliciting plant disease (e.g., cell wall degrading enzymes; or

(*C*) Substances acting as, or inhibitory to, plant growth regulators.

(2) *Arabidopsis thaliana* provided that the introduced genetic sequences:

(i) Do not cause the production of an infectious entity;

(*ii*) Are not derived from an animal or human pathogen;

(*iii*) Do not encode products that are toxic to vertebrates;

(*iv*) Do not encode products known to or likely to be causal agents of disease in vertebrates; and

(*v*) Do not encode products intended for pharmaceutical or industrial use.

(c) *Shipping conditions*. Organisms that meet the criteria described in paragraph (b) of this section must be shipped as follows:

(i) The container and means of conveyance must provide secure shipment to make it unlikely that the introduction or dissemination of the organisms will occur while in transit.

(ii) The container must contain a document which includes the following written information:

(A) Names and contact details for the sender and recipient, and

(B) A statement that the contents are genetically engineered and are eligible for interstate movement without permit under this part, but are not exempt from permit requirements under this part if the organism is imported or released into the environment;

(iii) The responsible person shall notify APHIS orally within 24 hours of discovery, and subsequently in writing within 5 business days of discovery, in the event of an unauthorized release into the environment of a GE organism regulated under this part.

(d) *Revocation of an exemption from requirement for permit*. The Administrator may revoke any existing conditional exemption. The Administrator may revoke a conditional exemption if the Administrator receives information subsequent to approving the conditional exemption and makes a determination based upon this information that the circumstances have changed such that the conditional exemption is likely to result in the introduction or dissemination of a plant pest or noxious weed. The revocation, its effective date, and the reasons for it will be published in the **Federal**

Register. A revocation may not be appealed. However, any person may file a new petition in accordance with § 340.5 regarding the same or similar organisms covered by the revocation if new information relevant to the revocation becomes available.

(e) *Revocation of a person's use of a conditional exemption from requirement for permit.* The Administrator may revoke the right of any person to use a conditional exemption from the requirement for a permit under this part after determining that the person or any agent of the person has failed to comply at any time with any provision of this part. This would include failure to comply with the conditions of any permit or exemption.

(1) *Appeal of revocation of a person's use of a conditional exemption.* Any person who has had the right to use a conditional exemption revoked may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the revocation. The appeal shall state all of the facts and reasons upon which the person relies to assert that the use of the conditional exemption was wrongfully revoked. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. Upon request of the applicant, a hearing may be held to resolve any conflict as to any material fact. Rules of practice concerning such a hearing will be adopted by the Administrator. This administrative remedy must be exhausted before a person can file suit in court challenging the revocation.

§ 340.5 Petition for new conditional exemptions from the requirement for a permit.

(a) *General.* Any person may petition to initiate the procedure for establishing a new conditional exemption from the requirement for a permit under § 340.0(b)(1) of this part. The Administrator may initiate the procedure without filing a petition. All petitions and all actions by the Administrator to establish a new conditional exemption will be evaluated according to the standards for petition approval or denial contained in paragraph (b)(4) of this section.

(b) *Petition submission and evaluation procedure.* To petition for a new conditional exemption from the requirement for a permit under this part, a petitioner must submit a written petition to the Administrator.

(1) The petition must contain information that supports a conclusion that use of the conditional exemption is unlikely to result in the introduction or dissemination of a plant pest or noxious weed. The information shall include the following:

(i) Description of the biology of the organism prior to genetic engineering.

(ii) Detailed description of the genetic changes made to the organism.

(iii) Detailed description of the phenotype of the GE organism, including known and potential differences from the recipient organism that could change the likelihood that the GE organism will pose a risk as a plant pest or noxious weed. Examples of relevant information include, but are not limited to:

(A) Growth habit and reproduction of the GE organism;

(B) Potential host range or geographic area of distribution;

(C) Potential for other organisms to pose risks as plant pests or noxious weeds if they acquire the trait from the GE organism (e.g. via sexual reproduction, horizontal gene transfer);

(D) Susceptibility of the GE organism to disease or damage by pests;

(E) Pathogenicity of the GE organism and/or ability of the GE organism to cause damage or injury to plants or plant parts;

(F) Toxicity, allergenicity, and/or ability of the GE organism to damage or injure other organisms;

(iv) A detailed description of proposed condition(s) to be associated with the exemption and how the conditions would make the exemption unlikely to result in the introduction or dissemination of a plant pest or noxious weed.

(v) Any relevant experimental information, published references, or scientific information which support the conclusions of the petition;

(vi) All reports required under § 340.3;

(vi) Any information known to the petitioner that the GE organism may pose a risk as a plant pest or noxious weed;

(vii) Any other information that the Administrator believes to be relevant to a determination that the proposed conditional exemption from the requirement for a permit for the importation, interstate movement, or release into the environment of the GE organism is unlikely to result in the introduction or dissemination of a plant pest or noxious weed.

(viii) A signed certification by the petitioner that, to the best knowledge and belief of the petitioner, the petition includes all information on which to base a determination, and that it includes all information known to the petitioner which is unfavorable to the petition.

(2) *Insufficient information.* If, upon initial review of the petition, the Administrator concludes that there is insufficient information upon which to make a determination on the petition, the petitioner will be sent a written notice indicating what additional information may be required.

(3) *Public notice.* The Administrator should generally complete the review of the complete petition within 180 days, then publish a notice in the **Federal Register** of the availability of documents related to APHIS' assessment of the proposed conditional exemption. This notice will specify that comments will be accepted from the public on the proposal.

(4) *Petition approval or denial standard.* The Administrator will assess the GE organism and the conditions of the requested exemption to determine whether the requested exemption from a permit for importation, interstate movement, or release into the environment would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed. The Administrator will also consider whether any conditions not contained in the petition would be needed to ensure that the requested exemption would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed. After completing review of the available information and any public comments received on it, the Administrator will furnish to the petitioner and publish in the **Federal Register** one of the following responses:

(i) *Approve a conditional exemption from requirement for a permit.* The approval of a conditional exemption from the requirement for a permit will state which GE organism(s) may be imported, moved interstate, and/or environmentally released without a permit under this part, as well as the conditions relevant to the exemption. The Administrator may also add additional conditions not proposed in the petition, if the Administrator concludes that additional conditions are needed to ensure that the conditional exemption would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed.

(ii) *Deny a conditional exemption from requirement for a permit.* The Administrator will deny a petition if the Administrator cannot conclude that the proposed exemption would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed. The Administrator's written decision will set forth the reason for the denial.

(c) *Appeal of decision.* Any person whose petition under § 340.5 has been denied may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the decision. The appeal shall state all of the facts and reasons upon which the person relies to show that the decision should be changed. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. Upon request of the applicant, a hearing may be held to resolve any conflict as to any material fact. Rules of practice concerning such a hearing will be adopted by the Administrator. This administrative remedy must be exhausted before a person can file suit in court challenging the decision.

(d) *Amending an exemption after approval.* The Administrator may amend conditions to any conditional exemption approved under this section. The Administrator may amend a conditional exemption if the Administrator determines based on information received subsequent to the approval of the exemption that the exemption needs to be amended to ensure that the exemption would be unlikely to result in the introduction or dissemination of a plant pest or noxious weed, and that additional conditions can successfully mitigate that risk. The Administrator may also amend a conditional exemption if needed to ensure that the exemption is in compliance with all of the requirements of this part. The amended conditional exemption and the reasons for it will be published in the **Federal Register**. The addition of conditions may not be appealed. However, any person may file a new petition in accordance with paragraph (a) of this section regarding the same or similar organisms covered by the amended exemption if new information relevant to the amended exemption becomes available.

(e) *Revocation of an exemption from requirement for permit.* The Administrator may revoke any conditional exemption under this section. The Administrator may revoke a conditional exemption if the Administrator receives information subsequent to approving the exemption and makes a determination based upon this information that the circumstances have changed such that the conditional exemption is likely to result in the introduction or dissemination of a plant pest or noxious weed. The revocation, its effective date, and the reasons for it will be published in the **Federal Register**. A revocation may not be appealed. However, any person may file a new petition in accordance with this section regarding the same or similar organisms covered by the revocation if new information relevant to the revocation becomes available.

(f) *Revocation of a person's use of a conditional exemption from requirement for permit.* The Administrator may revoke the right of any person to use a conditional exemption from the requirement for a permit under this part after determining that the person or any agent of the person has failed to comply at any time with any provision of this part. This would include failure to comply with the conditions of any permit or exemption.

(1) *Appeal of revocation of a person's use of a conditional exemption.* Any person who has had the right to use a conditional exemption revoked may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the revocation. The appeal shall state all of the facts and reasons upon which the person relies to assert that the use of the exemption was wrongfully revoked. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. Upon request of the applicant, a hearing may be held to resolve any conflict as to any material fact. Rules of practice concerning such a hearing will be adopted by the Administrator. This administrative remedy must be exhausted before a person can file suit in court challenging the revocation.

(2) [Reserved]

§ 340.6 Petition for nonregulated status.

(a) *General.* Any person may petition to initiate the procedure for approving nonregulated status under this part for a GE organism. The Administrator may initiate the procedure without filing a petition. All petitions and all actions by the Administrator to initiate the procedure for approving nonregulated status will be evaluated according to the standards for petition approval or denial contained in paragraph (b)(4) of this section.

(b) *Petition submission and evaluation procedure.* To petition for approval of nonregulated status, a petitioner must submit a written petition to the Administrator.

(1) The petition must contain information that supports a conclusion that the GE organism is unlikely to be a plant pest or noxious weed. The information shall include the following:

(i) Description of the biology of the organism prior to genetic engineering.

(ii) Detailed description of the genetic changes made to the organism.

(iii) Detailed description of the phenotype of the GE organism, including known and potential differences from the recipient organism that could change the likelihood that the GE organism is unlikely to be a plant pest or noxious weed. Examples of relevant information include, but are not limited to:

(A) Growth habit and reproduction of the GE organism;

(B) Potential host range or geographic area of distribution;

(C) Potential for other organisms to pose risks as plant pests or noxious weeds if they acquire the trait from the GE organism (e.g. via sexual reproduction, horizontal gene transfer);

(D) Susceptibility of the GE organism to disease or damage by pests;

(E) Pathogenicity of the GE organism and/or ability of the GE organism to cause damage or injury to plants or plant parts;

(F) Toxicity, allergenicity, and/or ability of the GE organism to damage or injure other organisms;

(iv) Any relevant experimental information, published references, or scientific information which support the conclusions of the petition;

(v) All reports required under § 340.3;

(vi) Any information known to the petitioner that the GE organism may pose risk as a plant pest or noxious weed;

(vii) Any other information that the Administrator believes to be relevant to a determination that the GE organism is unlikely to be a plant pest or noxious weed.

(viii) A signed certification by the petitioner that, to the best knowledge and belief of the petitioner, the petition includes all information on which to base a determination, and that it includes all information known to the petitioner which is unfavorable to the petition.

(2) *Insufficient information.* If, upon initial review of the petition, the Administrator concludes that there is insufficient information upon which to make a determination on the petition, the petitioner will be sent a written notice indicating what additional information may be required.

(3) *Public notice.* The Administrator should generally complete the review of the complete petition within 180 days, then publish a notice in the **Federal Register** of the availability of documents related to APHIS' assessment of the proposal for nonregulated status. This notice will specify that comments will be accepted from the public on the proposal.

(4) *Petition approval or denial standard.* The Administrator will assess the GE organism to determine whether the GE organism is unlikely to be a plant pest or noxious weed. After completing review of the available information and any public comments received on it, the Administrator will furnish to the petitioner and publish in the **Federal Register** one of the following responses:

(i) *Approve nonregulated status.* The approval of nonregulated status will state which GE organism(s) have been determined to have nonregulated status.

(ii) *Deny nonregulated status.* The Administrator will deny a petition if the Administrator cannot conclude that the GE organism is unlikely to be a plant pest or noxious weed. The Administrator's written decision will set forth the reason for the denial.

(c) *Appeal of decision.* Any person whose petition under § 340.6 has been denied may appeal the decision in writing to the Administrator within ten days after receiving the written notification of the decision. The appeal shall state all of the facts and reasons upon which the person relies to show that the decision should be changed. The Administrator will grant or deny the appeal, in writing, stating the reasons for the decision as promptly as circumstances allow. Upon request of the applicant, a hearing may be held to resolve any conflict as to any material fact. Rules of practice concerning such a hearing will be adopted by the Administrator. This administrative remedy must be exhausted before a person can file suit in court challenging the decision.

(d) *Revocation of nonregulated status.* The Administrator may revoke any approval of nonregulated status of a GE organism. The Administrator may revoke an approval of nonregulated status if the Administrator receives information subsequent to approving the nonregulated status and makes a determination based upon this information that the circumstances have changed such that the GE organism is likely to be a plant pest or noxious weed. If the Administrator revokes an approval for nonregulated status, the Administrator may approve for the same GE organism an exemption from the requirement for permit in accordance with § 340.5. The revocation, its effective date, and the reasons for it will be published in the **Federal Register**. A revocation may not be appealed. However, any person may file a new petition in accordance with this section regarding the same or similar organisms covered by the revocation if new information relevant to the revocation becomes available.

§ 340.7 Compliance, enforcement, and remedial action.

(a) *Access for inspection.* Inspectors shall have access to inspect any relevant premises, facility, location, storage area, waypoint, materials, equipment, means of conveyance, and other articles related to importation, interstate movement, and environmental releases of GE organisms regulated under this part.

(b) *Access to audit and review records.* Inspectors shall have access to audit and review all records required to be maintained under this part.

(c) *Required records.* Responsible persons and their agents engaged in the importation, interstate movement, or release into the environment of a GE organism subject to the regulations of this part are required to establish and keep the following records.

(1) All records required as a condition of a permit or a conditional exemption approved under the procedure described in § 340.5.

(2) Address and any other information needed to identify all contained facilities where the GE organism was stored or utilized, and all locations where the GE organism was released into the environment;

(3) A record identifying which APHIS permit, if any, authorized the importation, interstate movement, or release into the environment;

(4) A record identifying which exemption under this part, if any, authorized the importation, interstate movement, or release into the environment; and

(5) Copies of contracts between the responsible person and all agents that conduct activities subject to this part for the responsible person, and copies of other records (e.g., e-mails, telephone records) for such agreements made without a written contract.

(d) *Record retention.* Records indicating that such a GE organism that was imported or moved interstate reached its intended destination must be retained for at least 2 years after completion of importation or interstate movement, and all other records must be retained for at least 5 years after completion of all obligations required under a relevant permit or exemption.

(e) *Enforcement.* (1) Failure of any person to comply with any of the requirements of this part may result in any or all of the following:

(i) Denial of a permit request by that person;

(ii) After the issuance of a permit, revocation of a permit and destruction, treatment, or removal of the GE organism, or other measures as deemed appropriate or necessary by the Administrator;

(iii) Criminal and/or civil penalties, and

(iv) Remedial or other measures as determined appropriate and necessary by the Administrator.

(2) The Administrator may seek a civil penalty as well as impose and require corrective action plans, remedial measures or other measures as determined appropriate and necessary by the Administrator.

(3) Prior to the issuance of a complaint seeking a civil penalty, the Administrator may enter into a stipulation in which the responsible person agrees to take certain remedial actions or other measures in addition to or in lieu of a stipulated civil penalty, in accordance with 7 CFR § 380.10.

(f) *Liability for acts of an agent.* For purposes of enforcing this part, the act, omission, or failure of any agent for a responsible person as defined in § 340.1 of this part may be deemed also to be the act, omission, or failure of the responsible person.

(g) *Remedial action.* The Administrator may hold, seize, quarantine, treat, apply other remedial measures to, destroy, or otherwise dispose of any GE organisms subject to this part, in order to ensure the GE organisms are unlikely to result in the dissemination of a plant pest or noxious weed. Accordingly, the Administrator may order the responsible person for an active or revoked permit or any other person, through an Emergency Action Notification or other administrative order, to apply remedial measures to a GE organism or means of conveyance carrying a GE organism subject to regulation by this part. The Administrator's determination of whether or not to require or order corrective and/or remedial action in a given situation does not affect, influence, restrict, or in any other way limit the Administrator's determination on whether or not to seek criminal or civil penalties or order other compliance or enforcement requirements as deemed necessary or appropriate by the Administrator to the given situation.

(1) Failure of a person to comply with the Administrator's order for corrective and/or remedial action authorizes the Administrator to take corrective and/or remedial action and recover from the person the costs of any care, handling, application of remedial measures, devitalization, or disposal incurred by APHIS in connection with the corrective and/or remedial actions taken.

(2) *Low level presence (LLP) remedial action.* The Administrator may order remedial action for any unauthorized release into the environment of GE

organisms, including situations involving a low-level mixing of GE plants and materials subject to regulation [1] under this part with commercial seed and grain. In some LLP situations the Administrator may determine not to order remedial action, if the Administrator determines that the low-level mixing is unlikely to result in the introduction or dissemination of a plant pest or noxious weed. These determinations will be made in the same way, based on the same factors, regardless of whether the LLP originates domestically or is found in import shipments that may contain organisms subject to regulation. The factors the Administrator will consider that would support a decision not to order LLP remedial action include, but are not limited to, determinations that:

(i) A GE plant of the same species expressing nearly identical proteins or substances has already been approved for nonregulated status under this part; or

(ii) All of the following statements are true with regard to the GE plant or plants subject to the regulations under this part.

(A) The function of the introduced genetic sequences is known and its expression in the GE plant is unlikely to pose plant pest or noxious weed risk;

(B) Introduced genetic sequences do not cause the production of an infectious entity;

(C) Any genetic sequences derived from plant viruses are non-coding regulatory sequences of known function; or, if sense or antisense genetic sequences, they are derived from viruses prevalent and endemic in the United States that infect plants of the same host species and do not encode a functional noncapsid gene product responsible for cell-to-cell movement of the virus.

(D) The GE plant is not expected to establish outside of a managed ecosystem, and has no sexually-compatible, wild relatives in the United States;

(E) The GE plant does not produce new substances that are known or likely to be toxic to non-target organisms, does not contain genetic sequences from animal or human pathogens, and does not encode products known or likely to be causal agents of disease in animals or humans.

(F) If the GE plant is a food or feed crop, then at least one of the following must be true:

(*1*) The U.S. Environmental Protection Agency has established a tolerance or an exemption from tolerance for any plant-incorporated protectant expressed by the GE plant, or

(*2*) Key food safety issues of the new protein or other substance have been addressed, or,

(*3*) No new protein or substance is produced.

§ 340.8 Confidential business information.

In accordance with the Freedom of Information Act (FOIA) and exemptions from releasing information pursuant to FOIA, namely, 5 U.S.C. 552(b)(4), APHIS may exempt from disclosure to the public trade secrets and commercial or financial information obtained from a person that are privileged or confidential. Persons wishing to protect confidential business information in permit applications, petitions, or other submissions to APHIS under this part should do so in the following manner. If there are portions of a document deemed to contain trade secret or confidential business information, each page containing such information must be marked ''CBI Copy.'' A second copy of each such document must be submitted with all such CBI deleted and marked on each page where the CBI was deleted: ''CBI Deleted.'' In addition, those portions of the document which are deemed ''CBI'' must be identified in an attachment to the document, which also must justify how each piece of information requested to be treated as CBI is a trade secret or is commercial or financial information and are privileged or confidential.

§ 340.9 Costs and charges.

The services of the inspector related to carrying out this part and provided during regularly assigned hours of duty and at the usual places of duty will be furnished without cost.[2] The U.S. Department of Agriculture will not be responsible for any costs or charges incident to inspections or compliance with the provisions of this part, other than for the services of the inspector.

Done in Washington, DC, this 1st day of October 2008.

Charles D. Lambert,

Acting Under Secretary for Marketing and Regulatory Programs.

[FR Doc. E8–23584 Filed 10–6–08; 9:30 am]

BILLING CODE 3410–34–P

[1] ''Subject to regulation'' may include situations where a GE organism granted nonregulated status subsequently had that status revoked in accordance with § 340.6(d).

[2] The Department's provisions relating to overtime charges for an inspector's services are set forth in 7 CFR part 354.0.

Federal Register

Thursday,
October 9, 2008

Part V

Securities and Exchange Commission

17 CFR Parts 230, 231, 232, et al.
Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 231, 232, 239, 240, 241, and 249

[Release Nos. 33–8957; 34–58597; File No. S7–10–08]

RIN 3235–AK10

Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions

AGENCY: Securities and Exchange Commission.

ACTION: Final rule and interpretation.

SUMMARY: Almost nine years after the adoption of the original cross-border exemptions in 1999, the Commission is adopting changes to expand and enhance the utility of these exemptions for business combination transactions and rights offerings and to encourage offerors and issuers to permit U.S. security holders to participate in these transactions on the same terms as other target security holders. Many of the rule changes we are adopting today codify existing interpretive positions and exemptive orders in the cross-border area. We also are setting forth interpretive guidance on several topics. In two instances, we have extended the rule changes adopted here to apply to acquisitions of U.S. companies as well, because we believe the rationale for the changes in those instances applies equally to acquisitions of domestic and foreign companies. We also are adopting changes to allow certain foreign institutions to file on Schedule 13G to the same extent as would be permitted for their U.S. counterparts, where specified conditions are satisfied. We also are adopting a conforming change to Rule 16a–1(a)(1) to include the foreign institutions eligible to file on Schedule 13G.

DATES: The final rule is effective December 8, 2008, except that the amendments to part 231 and 241 are effective October 9, 2008.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, or Tamara Brightwell, Senior Special Counsel, at (202) 551–3440, in the Division of Corporation Finance, and Elizabeth Sandoe, Branch Chief, and David Bloom, Special Counsel, at (202) 551–5720, in the Division of Trading and Markets (regarding Rule 14e–5), U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: We are amending Rules 162,[1] 800[2] and 802[3] under the Securities Act of 1933[4] and Rule 101[5] of Regulation S–T.[6] We also are amending Rules 13d–1,[7] 13e–3,[8] 13e–4,[9] 14d–1,[10] 14d–11,[11] 14e–5,[12] and 16a–1[13] under the Securities Exchange Act of 1934.[14] We also are making changes to Form S–4,[15] Form F–4,[16] Form F–X,[17] Form CB,[18] Schedule 13G[19] and Schedule TO.[20]

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I. Background and Summary

A. General Overview of the Cross-Border Exemptions

The existing cross-border exemptions,[21] as adopted in 1999, are structured as a two-tier system based broadly on the level of U.S. interest in a transaction, measured by the percentage of target securities of a foreign private issuer[22] beneficially owned by U.S. holders.[23] The purpose of the exemptions is to address conflicts

[1] 17 CFR 230.162.
[2] 17 CFR 230.800.
[3] 17 CFR 230.802.
[4] 15 U.S.C. 77a *et seq.*
[5] 17 CFR 232.101.
[6] 17 CFR 232.10 *et seq.*
[7] 17 CFR 240.13d–1.
[8] 17 CFR 240.13e–3.
[9] 17 CFR 240.13e–4.
[10] 17 CFR 240.14d–1.
[11] 17 CFR 240.14d–11.
[12] 17 CFR 240.14e–5.
[13] 17 CFR 240.16a–1.
[14] 15 U.S.C. 78a *et seq.*
[15] 17 CFR 239.25.
[16] 17 CFR 239.34.
[17] 17 CFR 239.42.
[18] 17 CFR 239.800 and 17 CFR 249.480.
[19] 17 CFR 240.13d–102.
[20] 17 CFR 240.14d–100.

[21] Generally, the rule citations to the cross-border exemptions throughout this release refer to the exemptions that were adopted in 1999. When applicable, we specify that a citation is to a ''new'' or ''amended'' rule.

[22] ''Foreign private issuer'' is defined in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)].

[23] ''U.S. holder'' is defined in the cross-border exemptions as any security holder resident in the United States. See Securities Act Rule 800(h) [17 CFR 230.800(h)]; Instruction 2 to Exchange Act Rules 13e–4(h)(8) and (i) [17 CFR 240.13e–4(h)(8) and 240.13e–4(i)] and 14d–1(c) and (d) [17 CFR 240.14d–1(c) and 240.14d–1(d)].

between U.S. and foreign regulation, thereby facilitating the inclusion of U.S. investors in cross-border transactions. While today's amendments will expand the scope of some of the exemptions, we retain this basic two-tier structure and the threshold U.S. ownership percentages. However, we are revising the manner in which eligibility to rely on the revised exemptions is determined.

Where U.S. holders own no more than 10 percent of the subject securities, a qualifying cross-border transaction will be exempt from most U.S. tender offer rules [24] pursuant to Tier I and from the registration requirements of Section 5 of the Securities Act of 1933 [25] pursuant to Securities Act Rules 801 [26] and 802. Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Rule 13e–3.[27] An issuer that is the subject of a tender offer also is exempt from the obligation to express a position, and provide reasons for its position, about the tender offer to its own security holders under Tier I.[28] At the same level of U.S. ownership, Rules 801 and 802 also provide relief from the registration requirements of Securities Act Section 5 for securities issued in rights offerings and business combination transactions.

Where an issuer or acquiror relies on Rules 801 or 802 or the Tier I exemptions, it must furnish a Form CB to the Commission.[29] Form CB is a cover sheet to which the issuer or acquiror attaches an English translation of the disclosure document used in the foreign home jurisdiction and disseminated to U.S. target security holders.[30] The due date for furnishing Form CB to the Commission is the next business day after the disclosure document used in the foreign home jurisdiction is published or otherwise disseminated in accordance with home country rules.[31] The materials submitted under cover of Form CB are not deemed filed with the Commission, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.[32]

In adopting the cross-border exemptions, we did not intend to create new filing obligations for issuers and acquirors where none existed previously. For that reason, a bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Rules 13e–3 or 13e–4 or Regulation 14D,[33] but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Exchange Act Section 14(e) [34] and Regulation 14E; [35] accordingly, furnishing a Form CB is not necessary.[36]

Tier II provides targeted relief from some U.S. tender offer rules for issuers and third-party bidders where U.S. security holders own more than 10 percent, but no more than 40 percent, of the target class. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. While they do address certain areas of common regulatory conflict, the Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from the Securities Act registration requirements provided in Rules 801 and 802 are based broadly on the level of U.S. interest in a given transaction, as measured by the percentage of shares beneficially owned by U.S. holders. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.[37] We retain these basic equal treatment principles in our rule revisions.

B. Background of Rule Revisions Adopted

On May 6, 2008, we proposed revisions to the rules governing certain cross-border business combination transactions, as well as revisions to the beneficial ownership reporting rules for certain foreign institutions.[38] These revisions were intended to expand and enhance the utility of the exemptions available for cross-border business combination transactions.[39] Many of the changes we proposed would codify existing interpretive positions and exemptive orders, and were intended to encourage offerors and issuers in cross-border business combinations to permit U.S. security holders to participate in these transactions in the same manner as other holders. Additionally, we provided guidance regarding several interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We also addressed the applicability of the U.S. all-holders provisions to foreign target security holders in tender offers for domestic issuers. In several instances, we requested comment about whether

[24] The U.S. anti-fraud and anti-manipulation rules and civil liability provisions continue to apply to these transactions. See *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33–7759, 34–42054 (October 22, 1999) [64 FR 61382] (the ''1999 Cross-Border Adopting Release''), Section I.A.

[25] 15 U.S.C. 77e.

[26] 17 CFR 230.801.

[27] Exchange Act Rules 13e–3(g)(6) [17 CFR 240.13e–3(g)(6)], 13e–4(h)(8), and 14d–1(c).

[28] Exchange Act Rule 14e–2(d) [17 CFR 240.14e–2(d)].

[29] Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) [17 CFR 230.801(a)(4)(i) and 230.802(a)(3)(i)], and Exchange Act Rules 13e–4(h)(8)(iii) and 14d–1(c)(3)(iii) [17 CFR 240.13e–4(h)(8)(iii) and 240.14d–1(c)(3)(iii)].

[30] Item 1 of Form CB.

[31] Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 13e–4(h)(8)(iii) and 14d–1(c)(3)(iii). If the bidder is a foreign company, it must also file a Form F–X with the Commission appointing an agent for service of process in the United States. See Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 13e–4(h)(8)(iii) and 14d–1(c)(3)(iii).

[32] 15 U.S.C. 78r. See also, 1999 Cross-Border Adopting Release, Section II.A.2. An acquiror or other person submitting Form CB is subject to U.S. anti-fraud provisions. See footnote 24 above.

[33] Exchange Act Rules 14d–1 through 14d–11 [17 CFR 240.14d–1 through 17 CFR 240.14d–11].

[34] 15 U.S.C. 78n(e).

[35] 17 CFR 240.14e–1 through 17 CFR 240.14e–8.

[36] See 1999 Cross-Border Adopting Release, Section II.A.2. Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act [15 U.S.C. 78*l*], as well as partial offers for less than all of the subject class, where the bidder will not own more than five percent of the subject class of equity securities after the tender offer (based on purchases in the tender offer and ownership in the target before the offer commences).

[37] Securities Act Rules 801(a)(3) and 802(a)(2) [17 CFR 230.801(a)(3) and 230.802(a)(2)]; Exchange Act Rules 13e–4(h)(8)(ii) and (i)(2)(ii) [17 CFR 240.13e–4(h)(8)(ii) and 240.13e–4(i)(2)(ii)]; and 14d–1(c)(2) and (d)(2)(ii) [17 CFR 240.14d–1(c)(2) and 240.14d–1(d)(2)(ii)].

[38] See *Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Release No. 33–8917, 34–57781 (May 6, 2008) (the ''Proposing Release'').

[39] ''Business combination'' is defined in Securities Act Rule 800(a) as any ''statutory amalgamation, merger, arrangement or reorganization requiring the vote of security holders of one or more participating companies. It also includes a statutory short form merger that does not require a vote of security holders.'' In this release, we use the term more broadly to include those kinds of transactions, as well as tender and exchange offers. See Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)] (defining the term more broadly, to include the types of transactions listed in Rule 145(a) [17 CFR 230.145(a)], as well as exchange offers). A ''cross-border'' business combination, as that term is used throughout this release, refers to a business combination in which the target company (or the issuer in a rights offering) is a foreign private issuer, as defined in Exchange Act Rule 3b–4(c).

various rule changes we proposed should apply to tender offers for U.S. companies.[40]

In response to our request for comment on the Proposing Release, we received comments from a variety of groups and constituencies, most of whom expressed their support for our proposed modifications to the current rules. While commenters generally supported our proposed changes, some advocated further modifications to our rules.[41] After considering the comments, we are adopting amendments to the cross-border exemptions and beneficial ownership rules substantially as proposed, but with modifications discussed more fully in this release. We also are adopting two changes to rules applicable to all tender offers, including those for U.S. target companies, where we believe the rule modifications initially proposed in the cross-border context will be useful and in the public interest if applied to all tender offers.[42]

1. Reasons for the Amendments

As discussed in the Proposing Release, before the cross-border exemptions were adopted in 1999,[43] cross-border business combination transactions or rights offerings often excluded U.S. holders of a foreign issuer or foreign target company because of actual or perceived conflicts between U.S. and foreign law. Exclusion of U.S. investors deprived them of some or all of the benefits of such cross-border transactions. The cross-border exemptions adopted in 1999 represented an effort to facilitate the inclusion of U.S. security holders in foreign transactions in a manner consistent with our investor protection mandate.

While we believe the exemptions were successful in addressing many areas of conflict between U.S. and foreign law, we recognize that in some instances the exemptions are not operating as optimally as intended, or do not address recurring conflicts of law and practice not anticipated when we adopted them. The revisions we adopt today address frequently arising issues and unintended consequences that have detracted from the usefulness of the existing cross-border exemptions. The revisions represent an expansion and refinement of the current exemptions. We believe they will encourage more offers to be extended into the United States.

The amendments we are adopting represent another step in the Commission's efforts to revise its rules relating to transactions involving foreign private issuers.[44] These changes are intended to address the realities of the modern securities markets and, in particular, the increasing globalization of those markets. Increasingly, U.S. persons seek to diversify their investments by purchasing securities of foreign companies. Their ability to do so, including through direct purchases on foreign exchanges, has been facilitated greatly by the Internet. While the increasing globalization of the securities markets has proved beneficial to U.S. investors and companies, as well as non-U.S. investors and foreign private issuers, it also has increased the potential for regulatory conflicts in the context of cross-border business combination transactions. Whether foreign private issuers list their securities on a U.S. exchange or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions frequently present conflicts between U.S. and foreign regulatory systems.

The revisions we are adopting today are intended to address the most frequent areas of conflict or inconsistency with foreign regulations and practice that acquirors encounter in cross-border business combination transactions. We believe the revisions appropriately balance the need to protect U.S. investors through the application of protections afforded by U.S. law, while facilitating transactions that may benefit all security holders, including those in the United States. The expanded availability of the cross-border exemptions will serve the public interest by encouraging bidders to include U.S. holders in cross-border business combination transactions from which they otherwise might be excluded, thereby extending the benefits of those transactions to U.S. investors.[45] We recognize that these revisions will not eliminate all conflicts in law or practice presented by cross-border business combination transactions. The staff will continue to address those issues not covered by these revisions on a case-by-case basis, as is currently the practice.[46]

2. Summary of the Amendments

The rule amendments we are adopting address practical problems that have limited the ability of bidders to rely on the exemptions. We believe they also will alleviate some of the burdens on

[40] Additionally, in several instances in the Proposing Release, we solicited comment regarding whether various proposed changes should be extended to the Multijurisdictional Disclosure System (''MJDS'') with Canada. We are not adopting any changes to MJDS at this time.

[41] The public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington, DC 20549 in File No. S7–10–08, or may be viewed at *http://www.sec.gov/rules/proposed/s71008.shtml*.

[42] The rule changes that will apply to all tender offers, including those for domestic target companies: (1) Eliminate the maximum time limit on the length of the subsequent offering period and (2) provide the ability to commence an exchange offer upon the filing of a registration statement and before its effectiveness in exchange offers not subject to Rule 13e–4 or Regulation 14D. See amended Exchange Act Rule 14d–11 and amended Securities Act Rule 162.

[43] See 1999 Cross-Border Adopting Release.

[44] The Commission has undertaken several recent rulemaking initiatives that impact foreign private issuer reporting and registration requirements. For example, we recently revised our rules to make the U.S. capital markets more attractive to foreign private issuers by allowing the use of financial statements prepared in accordance with International Financial Reporting Standards (''IFRS'') as issued by the International Accounting Standards Board (''IASB''), without a reconciliation to U.S. GAAP. See *Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP*, Release No. 33–8879 (December 21, 2007) [73 FR 986]. In addition, we amended the deregistration rules for exiting the U.S. regulatory system when the level of U.S. interest in a foreign private issuer's securities has decreased, such that continued registration is no longer justified. See *Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, Release No. 34–55540 (March 27, 2007) [72 FR 16934]. On August 27, 2008, we adopted changes to the manner of determining the availability of the Rule 12g3–2(b) exemption from Exchange Act registration. See *Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers*, Release No. 34–58465 (September 5, 2008) [73 FR 52752]. Further, on August 27, 2008, we also adopted rule revisions applicable to foreign issuers, intended to improve the accessibility of the U.S. public capital markets and enhance the information available to investors. These revisions were proposed in *Foreign Issuer Reporting Enhancements*, Release No. 33–8900 (February 29, 2008) [73 FR 13404]. See also, *SEC Votes to Modernize Disclosure Requirements to Help U.S. Investors in Foreign Companies* (August 27, 2008) (announcing the adoption of three sets of rule amendments).

[45] In discussing the changes we are adopting, the focus of the discussion is on acquirors in business combination transactions because the rules changes primarily impact that constituency. However, some of those changes, such as those to the eligibility test for the cross-border exemptions, also affect comparable provisions in the rights offering exemption in Securities Act Rule 801. We discuss the specific changes relating to the rights offering exemption in greater detail in Section II.A.3. below.

[46] As discussed in the Proposing Release, the staff often provides exemptive or no-action relief by letter in the context of individual cross-border transactions. Pursuant to Rules 30–1 and 30–3 of the SEC's Rules of General Organization [17 CFR 200.30–1 and 200.30–3], we have delegated to the staff the authority to exempt individual bidders and issuers from the application of our rules. No-action and exemptive letters issued by the staff in connection with cross-border transactions may be found on our Web site at *http://www.sec.gov/divisions/corpfin/cf-noaction.shtml* and *http://www.sec.gov/divisions/marketreg/mr-noaction.shtml#rule14e5*.

bidders who must comply with two or more regulatory systems in the context of cross-border transactions. Highlights of the amendments, which are adopted as proposed except where otherwise specified, include:

- Modifications to the manner in which the look-through analysis must be conducted under our current rules, to alleviate timing concerns associated with that calculation, including:
- Changes to the reference date for the calculation of U.S. beneficial ownership to allow calculation as of any date no more than 60 days before and no more than 30 days after the public announcement of the transaction; [47] and
- No longer requiring that individual holders of more than 10 percent of the subject securities be excluded from the calculation of U.S. ownership; [48]
- An alternate test for determining eligibility to rely on the cross-border exemptions, based in part on a comparison of average daily trading volume of the subject securities in the United States and worldwide. This alternate test will be available for all non-negotiated transactions and those for which the look-through analysis mandated by our rules may not be conducted; [49]
- Expanded relief under Tier I for affiliated transactions subject to Rule 13e–3 for transaction structures not covered under our current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
- Extension of relief afforded by the Tier II provisions to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
- Expansion of relief afforded under Tier II to eliminate recurrent conflicts between U.S. and foreign law and practice in several areas, including:
- Allowing multiple foreign offers in conjunction with a concurrent U.S. offer;
- Permitting bidders to include foreign holders of ADRs in the U.S. offer and, under specified conditions, U.S. holders in the foreign offer(s);
- Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
- Allowing subsequent offering periods in both cross-border and domestic offers to extend beyond 20 U.S. business days; [50]
- Allowing securities tendered during the subsequent offering period to be purchased within 20 business days from the date of tender, rather than 14 business days as originally proposed;
- Allowing bidders to pay interest on securities tendered during a subsequent offering period, where required under foreign law;
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods for certain kinds of tender offers; [51]
- Permitting bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date; [52]
- Codification of three class exemptive letters with respect to the application of Rule 14e–5 for Tier II tender offers;
- Expansion of the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act, including offers for domestic target companies; [53]
- Modification of the cover pages of specified tender offer schedules and registration statements to identify any cross-border exemptions relied upon in conducting the relevant transactions;
- Requiring electronic filing of all Forms CB and Forms F–X, filed in connection with Form CB; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, subject to certain conditions, and expanding the definition of beneficial ownership in Exchange Act Rule 16a–1(a)(1) to include those foreign institutions.[54]

In addition to these rule amendments, we also are reiterating the interpretive guidance we provided in the Proposing Release, with some modifications. We are providing guidance on the following issues:

- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;
- The application of the all-holders provisions of our tender offer rules to foreign target security holders in transactions subject to U.S. equal treatment provisions;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The availability of the vendor placement procedure for exchange offers.

As discussed in further detail below, the revised rules we adopt today differ in some respects from what we proposed. For example, the alternate eligibility test is a combination of the existing look-through analysis and components of the existing test for non-negotiated transactions. For the revised look-through analysis, we are providing a longer date range than proposed, during which acquirors and issuers can calculate U.S. ownership. Where the acquiror or issuer is not able to accomplish the look-through analysis as of the date in 60 days before and 30 days after public announcement, we provide an extended period to accommodate those situations.

The changes we proposed to the eligibility test would have applied only to business combination transactions; however, those we adopt are applicable to rights offerings also. Another difference between the rule changes we proposed and those we adopt is that two changes are applicable to all business combinations, including those in which the target is a U.S. company. Under our revised rules, bidders conducting tender offers for either U.S. or foreign target companies may extend the subsequent offering period beyond the current 20-business day limit. In addition, offerors in exchange offers for both domestic and foreign targets may commence those offers before the effective date of the registration statement, even where the exchange offer is not subject to specified U.S. tender offer rules.

The revisions adopted today will be effective for transactions that commence

[47] Acquirors in business combinations that are unable to accomplish the look-through analysis as of a date during that range may calculate U.S. ownership as of a date no more than 120 days before public announcement. For rights offerings, the amended rule would permit calculation as of a date within 60 days before or 30 days after the record date. See amended Securities Act Rule 800(h)(1). The proposal included the date range of 60 days before announcement of a business combination only, and did not permit calculation as of a date after announcement.

[48] This change was not proposed, but the Proposing Release solicited comment on it. After further consideration and review of commenters' responses, we believe this change is appropriate.

[49] Although we did not propose this specific change, we did solicit comment generally on possible changes to the eligibility criteria. See Proposing Release, Section II. For bidders relying on the alternate test because they are unable to conduct the look-through analysis, the ADTV calculation will include a primary trading market component.

[50] We proposed to allow this change only for cross-border tender offers.

[51] Separate pro ration pools would be permitted only for Tier II tender offers that use the ''mix and match'' offer structure. See Section II.C.4.d. below.

[52] In the Proposing Release, we set forth interpretive guidance regarding the ability to terminate an initial offering period or voluntary extension of that period before a scheduled expiration date. We solicited comment on whether we should codify the existing interpretive guidance. See Proposing Release, Section II.C.6. We are codifying this guidance in new Exchange Act Rules 13e–4(i)(1)(vii) and 14d–1(d)(2)(ix).

[53] We proposed to allow this change only for cross-border tender offers.

[54] The change to Rule 16a–1 [17 CFR 240.16a–1] was not proposed, but was requested by commenters. We believe this change is consistent with the regulatory history of aligning the scope of Rule 16a–1(a)(1) with Rule 13d–1(b)(1)(ii).

after the effective date of the revised rules. To the extent that the parties to transactions other than those that commence after the effective date wish to rely on these rule changes, requests for relief will be considered on a case-by-case basis. Transition issues and the effective date of the revised rules relating to beneficial ownership reporting are discussed in Section II.F.

II. Discussion

A. Revised Eligibility Test for the Revised Cross-Border Exemptions

We are adopting changes to the eligibility test for the cross-border exemptions that we believe will facilitate the use of the exemptions and reduce the burden of determining eligibility. For negotiated transactions, acquirors must continue to conduct the look-through analysis, as amended today to provide greater flexibility.[55] Where acquirors are unable to conduct this analysis, we are adopting an alternate test that incorporates elements from the current hostile presumption [56] for non-negotiated deals, including an element based on average daily trading volume of the subject securities (''ADTV'').[57]

The cross-border exemptions require acquirors to query record holders and other nominees to determine U.S. beneficial ownership. For example, acquirors need only ''look through'' nominees located in the United States, the subject company's jurisdiction of incorporation and that of each participant in the business combination transaction, and the jurisdiction that is the primary trading market for the subject securities, if different from the jurisdiction of incorporation.[58] In addition, acquirors may assume that beneficial holders are residents of the jurisdiction in which the nominee queried has its principal place of business, if after reasonable inquiry the acquiror is unable to obtain information from that nominee.[59] These limitations on the scope of the required look-through analysis assist the acquiror in accomplishing the required analysis. We are not changing these provisions in our revised rules.

Where acquirors cannot conduct the look-through analysis, however, we are providing an alternate test similar to the hostile presumption for non-negotiated transactions.[60] Because we recognize that acquirors who do not have the cooperation of the target company may have limited access to information from nominees, this alternate test will be available for all non-negotiated transactions.[61] In the discussion that follows, we provide guidance on the limited circumstances under which the alternate test will be available for negotiated transactions.

The existing cross-border exemptions and the revised exemptions we adopt today continue to be available only when the target company is a foreign private issuer as defined in our rules.[62] As is the case with the existing cross-border exemptions, the revised exemptions are available equally to both U.S. and foreign acquirors, where the company being acquired qualifies as a foreign private issuer.

Under the current rules and the revisions we adopt today, the percentage of the subject securities held beneficially by U.S. persons is an important element in determining eligibility to rely on the exemptions.[63] We continue to believe that U.S. beneficial ownership, as determined by the revised look-through calculation, should be a central element in determining eligibility to rely on the cross-border exemptions. Beneficial ownership is the characteristic of the target subject security holder base that is, in our view, most closely tied to U.S. interest in the subject securities in the context of a business combination transaction or a rights offering.[64] In the case of business combination transactions, which affect all target security holders whether or not they choose to participate, we believe the percentage of the subject securities that is held by U.S. holders is the best measure of when U.S. rules should apply.[65] In addition, because the cross-border exemptions include exemptions from the registration requirements of Section 5 of the Securities Act that are available to both foreign and U.S. acquirors, the focus on the percentage of target securities held by U.S. holders corresponds with the percentage of securities that may be issued without registration by a U.S. acquiror to U.S. target holders. Because securities of U.S. acquirors are likely to have their primary trading market in the United States, it is appropriate to consider the magnitude of these issuances and the resulting flow back into the United States.

The revised rules do not change the threshold percentages of U.S. ownership for reliance on the cross-border exemptions; however, we are changing the manner in which these percentages are determined. To address concerns raised by commenters about the look-through tests for negotiated transactions, we have significantly revised the manner in which that analysis must be performed, including when and under what circumstances it is mandated.[66] Based on feedback from commenters, we also are eliminating the requirement to exclude large security holders of the target class in calculating the percentage of U.S. ownership.[67] Commenters

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[55] See new Securities Act Rules 800(h)(6) and (7); Instructions 2 and 3 to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instructions 2 and 3 to amended Exchange Act Rules 14d–1(c) and (d).

[56] When we refer to the ''hostile presumption'' in this release, we mean the existing test used to determine eligibility for the cross-border exemptions for non-negotiated transactions, *i.e.*, those not made pursuant to an agreement between the acquiror and the target company. See Securities Act Rule 802(c) [17 CFR 230.802(c)] and Instruction 3 to Exchange Act Rules 14d–1(c) and (d).

[57] As used in this release, ''subject securities'' means securities of a target company that are the subject of a tender offer or are sought to be acquired in another kind of business combination transaction.

[58] See amended Securities Act Rule 800(h)(3); Instruction 2.iii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.iii. to amended Exchange Act Rules 14d–1(c) and (d).

[59] See amended Securities Act Rule 800(h)(4); Instruction 2.iv. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.iv. to amended Exchange Act Rules 14d–1(c) and (d).

[60] See new Securities Act Rule 800(h)(6); Instruction 3 to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3 to amended Exchange Act Rules 14d–1(c) and (d).

[61] See new Securities Act Rule 800(h)(6) and Instruction 3 to amended Exchange Act Rules 14d–1(c) and (d).

[62] See Exchange Act Rule 3b–4(c). For the Securities Act Rule 801 exemptions for rights offerings, the issuer must be a foreign private issuer as defined in that rule. For business combinations such as mergers of equals, where both parties to the transaction will be replaced by a successor entity which issues securities in the amalgamation, U.S. holders may hold no more than 10 percent of the subject class, as if measured immediately after the business combination. See Securities Act Rule 802(a) [17 CFR 230.802(a)].

[63] The threshold U.S. beneficial ownership percentages are 10 percent (for Tier I and Securities Act Rules 801 and 802) and 40 percent (for Tier II).

[64] As noted in the Proposing Release, our focus on U.S. beneficial ownership for business combinations and rights offerings differs from the approach we have taken recently for foreign private issuer deregistration and for purposes of the ability of a foreign private issuer to qualify for the exemption from registration under Exchange Act Rule 12g3–2(b) [17 CFR 240.12g3–2(b)]. See the discussion in the Proposing Release, Section I.A.2.

[65] As we stated in the Proposing Release, using an ADTV test may result in target companies with significant U.S. ownership qualifying for the Tier I and Securities Act Rules 801 and 802 exemptions. Where a bidder, including a U.S. company, is eligible to rely on the Tier I cross-border exemptions, it may issue securities without registration under Securities Act Rule 802. We are concerned that use of an ADTV test for eligibility to rely on the cross-border exemptions would allow bidders, including U.S. bidders, to issue significant amounts of bidder securities to U.S. holders, without the protections of Securities Act registration.

[66] See amended Securities Act Rule 800(h); Instructions 2 and 3 to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instructions 2 and 3 to amended Exchange Act Rules 14d–1(c) and (d).

[67] The existing cross-border exemptions require target securities held by holders who individually

advised that this change would expand the availability of the exemptions because of the concentrated ownership structures of many foreign private issuers.[68] We believe the cumulative effect of the revisions will facilitate the look-through process by providing greater flexibility to acquirors, and also will allow them to know at an earlier stage in the planning process how U.S. target holders will be treated.

No aspect of the Proposing Release generated more commentary, and more criticism, than this focus on beneficial ownership and the manner in which it must be calculated under our rules.[69] Despite the revisions to the look-through analysis adopted today, we remain cognizant of the concerns expressed by commenters with respect to the feasibility of the test under certain circumstances.[70] While we believe the look-through analysis and its focus on beneficial ownership should remain the starting point for determining eligibility to rely on the revised exemptions for negotiated transactions, we also recognize that circumstances exist in which acquirors are unable to conduct the look-through analysis.[71] Therefore, we are adopting an alternate test for such circumstances based, in part, on a comparison of the average daily trading volume of the subject securities in the United States as compared to worldwide trading over a twelve-month period.[72] The trading volume percentages we established for the ADTV element of the alternate test are the same as those for the existing hostile presumption.[73] The ADTV element of the alternate test is supplemented by other factors, such as the acquiror's actual knowledge of the U.S. ownership percentage of the subject securities, based on reports filed by the target company and others, as well as information from third parties known to the acquiror.[74]

We believe the changes to the look-through test in the cross-border exemptions and the alternate test we adopt today appropriately balance commenters' concerns with our investor protection goals. In our view, these revisions will increase the availability of the cross-border exemptions, including the exemptions from the registration requirements of Section 5 of the Securities Act,[75] which we anticipate will promote the inclusion of U.S. target holders in more cross-border transactions. We will continue to monitor the application of the revised rules to assess whether additional changes are necessary and in the public interest to facilitate this goal.

1. Changes to the Look-through Analysis

a. Timing of the Calculation

We are adopting, with some modifications, the proposed changes to the timing of and reference date for the calculation of U.S. ownership for determining eligibility to rely on the cross-border exemptions for business combinations.[76] Under existing rules, acquirors are required to calculate U.S. ownership as of a set date—the 30th day before the commencement of a tender offer or before the solicitation for a business combination other than a tender offer.[77] The revisions adopted change the reference date to the public announcement of the business combination transaction.[78] For these purposes, we consider ''public announcement'' to be any oral or written communication by the acquiror or any party acting on its behalf, which is reasonably designed to inform or has the effect of informing the public or security holders in general about the transaction.[79] Under our revised rules, an acquiror seeking to rely on the cross-border exemptions may calculate U.S. ownership as of any date no more than 60 days before and no more than 30 days after the public announcement of the cross-border transaction.

The revised rules will allow the calculation to be accomplished based on a range of dates before public announcement of a business combination transaction because we believe that this will allow the parties to a business combination to determine and inform the markets of the treatment of U.S. target security holders at an earlier stage in the planning process. In addition, this change allows the calculation of U.S. ownership to be made before the target security holder base is affected by the public announcement. Most commenters supported the use of announcement as the reference point for the calculation.[80] Commenters generally also favored the use of a 60-day date range before public announcement, although one party advocated a shorter 30-day range.[81]

We expanded the rule to permit the calculation as of a date no more than 30 days after announcement to address commenters' concerns about the confidentiality of the look-through analysis.[82] Where that analysis must be conducted before announcement, it may compromise the confidentiality of the transaction. By allowing a range of dates both before and after public announcement, the rule is designed to provide acquirors whose home country law permits them to wait to conduct the analysis until after public announcement with flexibility to maintain confidentiality to the greatest extent possible.[83] This change was advocated by several commenters.[84]

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own more than 10 percent of the subject class to be excluded from both the numerator and the denominator in calculating total U.S. ownership. The exclusion requirement applies to both U.S. and non-U.S. large holders. See Section II.A.1.b. below.

[68] See, *e.g.*, letter from Sullivan & Cromwell LLP (''S&C'').

[69] 20 of the 22 comment letters we received addressed this issue, either directly or indirectly.

[70] These include concerns about cost, burden and confidentiality. See, *e.g.*, letter from Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association (''ABA'').

[71] As discussed above, we are not requiring acquirors in hostile transactions to conduct the look-through analysis under our amended rules. This is the same approach as under the existing exemptions. See Instruction 3 to Exchange Act Rules 14d–1(c) and (d).

[72] See new Securities Act Rules 800(h)(6) and (7); Instruction 3 to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3 to amended Exchange Act Rules 14d–1(c) and (d).

[73] See Securities Act Rule 802(c) and Instruction 3.ii. to Exchange Act Rules 14d–1(c) and (d). The thresholds also mirror the maximum percentage limits for U.S. beneficial ownership.

[74] See new Securities Act Rules 800(h)(6) and (7); Instruction 3.ii. and 3.iii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.ii. and 3.iii. to amended Exchange Act Rules 14d–1(c) and (d).

[75] See Securities Act Rules 801 and 802.

[76] See amended Securities Act Rule 800(h); Instruction 1.i. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.i. to amended Exchange Act Rules 14d–1(c) and (d). As noted below, we did not propose but solicited comment on similar changes to the timing of the calculation for eligibility for Securities Act Rule 801 (exemption for rights offerings). Today we also are adopting changes to Rule 800(h) that will provide issuers with greater flexibility to use a date within a 60-day range before and a 30-day period after the record date for a rights offering. See amended Securities Act Rule 800(h) and the discussion below.

[77] See Securities Act Rule 800(h); Instruction 2.i. to Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.i. to Exchange Act Rules 14d–1(c) and (d).

[78] See amended Securities Act Rule 800(h)(1); Instruction 2 to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2 to amended Exchange Act Rules 14d–1(c) and (d).

[79] See generally, Instruction 5 to Exchange Act Rules 13e–4(c) and 14d–2 [17 CFR 240.13e–4(c) and 240.14d–2] (defining public announcement for purposes of precommencement communications about issuer or third-party tender offers).

[80] See, *e.g.*, The Forum for U.S. Securities Lawyers in London.

[81] See, *e.g.*, letter from Linklaters LLP (''Linklaters''). Another commenter suggested that for rights offering, the reference date should be 30 days before the record date, or alternatively, before announcement. See letter from S&C.

[82] See letter from Shearman and Sterling LLP (''Shearman'').

[83] In some foreign jurisdictions, the acquiror may need to conduct the look-through analysis before announcement because home country law may require detailed information about the transaction, including the treatment of U.S. holders, to be included in the announcement.

[84] Two commenters, Shearman and Davis Polk & Wardwell (''DPW''), advocated a range extending

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This 90-day range should be used in most cases. We recognize, however, that the 90-day range may not be enough time in some foreign jurisdictions, depending on the procedures available for obtaining beneficial ownership information. Therefore, our revised rules specify that where the issuer or acquiror is unable to complete the look-through analysis as of this 90-day period, it may use a date within 120 days before public announcement.[85] We considered providing every acquiror and issuer with the flexibility to look through as of a date within the extended 120-day period before announcement. We believe, however, that there should be some limits on dates available to conduct the analysis, and this extended period is warranted only where necessary.[86] We believe that in most cases, this date range will be sufficient time to conduct the required look-through analysis. Where the acquiror or issuer cannot accomplish the look-through analysis within this time period, it may use the alternate test outlined below.

b. Exclusion of Large Target Security Holders

Our revised rules do not affect the percentages of target securities that may be beneficially owned by U.S. holders in order for a transaction to qualify for the exemption. The maximum U.S. ownership percentages remain at no more than 10 percent for reliance on Tier I and Rules 801 and 802 and no more than 40 percent for Tier II.[87] The look-through analysis by which these percentages are calculated has changed, however. Our revised rules will no longer require that individual holders of more than 10 percent of the subject securities be excluded from the calculation of U.S. ownership.[88] We believe this change will significantly expand the number of cross-border business combinations eligible for the exemptions, while still providing appropriate investor protections.

Although we did not propose this change in the Proposing Release, we solicited comment on it, and many commenters advocated it.[89] Commenters noted that requiring the exclusion of large target holders generally has the effect of skewing upward the percentage of U.S. ownership of foreign private issuers, which in turn decreases the availability of the cross-border exemptions.[90] Although existing rules require the exclusion of both U.S. and foreign holders of greater than 10 percent of the subject securities, commenters suggested that the effect of this requirement disproportionately inflates U.S. holdings because holders of large blocks of foreign stock are more likely to be non-U.S. persons.[91] We note that although this may be the case generally, there could be specific fact patterns where this rule change would decrease the availability of the cross-border exemptions because of the particular characteristics of the subject security holder base.[92] We are persuaded by commenters, however, that we should not treat greater-than-10 percent holders as non-market participants for purposes of the U.S. ownership calculation required by our rules.[93] We also believe, based on the staff's own experiences with cross-border transactions since 1999 as well as feedback from the commenters, that eliminating this exclusion requirement will increase the availability of the cross-border exemptions without compromising our investor protection goals.

We are retaining the requirement in our existing rules that securities held by the acquiror be excluded from both the numerator and denominator in calculating U.S. beneficial ownership.[94] We did not propose a change to this requirement of our existing rules. In assessing what securities should be considered for the calculation, it is appropriate to exclude those held by the acquiror because it will not be participating in the acquisition as a target holder. In addition, acquirors often purchase a minority stake in a target company as part of a series of transactions which, while they may occur in stages over time, are part of the same overall acquisition plan; eliminating the requirement to exclude securities held by the acquiror would not reflect the reality that these series of transactions are typically part of an integrated business combination transaction. One commenter noted that excluding securities held by the acquiror could have the effect of inflating the U.S. ownership figures for the remaining securities in the subject class.[95] As noted above, however, this will not always be the case; the requirement to exclude securities held by a U.S. acquiror might have the effect of reducing the total U.S. ownership percentages. In addition, the commenter acknowledged that excluding subject securities held by the acquiror does not present the same logistical issues as requiring an acquiror to exclude securities held by third parties, for which it might not have accurate and complete ownership information.[96]

Several commenters suggested that securities held by greater than 10 percent holders should continue to be excluded from the U.S. ownership calculation, where those large holders are otherwise affiliated with the target.[97] At this time, we are not adopting this recommendation because we believe it may be too cumbersome to require acquirors to determine affiliation. Even if we set objective standards by which affiliation could be determined for these purposes, we believe the approach toward large holders, whether exclusion as under our existing rules, or inclusion under our revised rules, should be consistent for all similarly-situated holders. For this reason, we are not adopting the suggestion of one commenter to exclude from the calculation of U.S. ownership subject securities held by certain U.S.

from the 60th day before through the 30th day after announcement. Another commenter, Simpson Thacher & Bartlett LLP (''STB''), suggested a range from the 60th day before through the 60th day after announcement.

[85] See amended Securities Act Rule 800(h)(1); Instruction 2.i. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.i. to amended Exchange Act Rules 14d–1(c) and (d). This expanded date range is not available for rights offerings. See Section II.A.3. below.

[86] In the Proposing Release, we expressed concern about a bidder or issuer intentionally choosing a date that presents less than a representative picture of the target security holder base. We noted that the cross-border exemptions are not available for any transaction or series of transactions that technically comply with our rules but are in fact part of a scheme to evade them. See Proposing Release, Section II.A.2.b.

[87] See Securities Act Rules 801(a)(2) and 802(a)(1) [17 CFR 230.801(a)(2) and 17 CFR 230.802(a)(1)] and Exchange Act Rules 13e–4(h)(8)(i) and (i)(1)(ii) and 14d–1(c)(1) and (d)(2)(ii) [17 CFR 240.13e–4(h)(8)(i), 240.13e–4(i)(1)(ii), and 240.14d–1(c)(1)].

[88] Under the current rules, all securities held by persons or entities that individually hold more than 10 percent of the subject class, whether U.S. or foreign, must be excluded from both the numerator (U.S. ownership) and denominator (worldwide ownership) when calculating U.S. ownership percentages. See Securities Act Rule 800(h)(2) [17 CFR 230.800(h)(2)]; Instruction 2.ii. to Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.ii. to Exchange Act Rules 14d–1(c) and (d). Under the amended rules, these securities will be included in both the numerator and denominator.

[89] See Proposing Release, Section II.A.2.a. See, *e.g.*, letters from Committee on Mergers, Acquisitions and Corporate Control Contests, Association of the Bar of the City of New York (''ABCNY''), DPW, and Linklaters.

[90] See, *e.g.*, letters from STB and S&C.

[91] See letter from STB.

[92] This could be the case where a foreign private issuer had a disproportionate number of large U.S. security holders of the subject class.

[93] See letter from DPW.

[94] See amended Securities Act Rule 800(h)(2) and Instruction 2.ii. to amended Exchange Act Rules 14d–1(c) and (d).

[95] See letter from ABA.

[96] *Id.*

[97] See, *e.g.*, letters from Cleary Gottlieb Steen & Hamilton LLP (''Cleary'') and DPW.

institutional holders.[98] While the commenter argued that such institutional holders should be excluded from the calculation because our focus should be on retail holders, if we exclude U.S. institutions in determining eligibility to rely on the cross-border exemptions, our rules will apply less frequently to the retail holders who may need them the most. In addition, sophisticated institutional holders benefit from the procedural and other protections of our rules under the Williams Act.[99]

c. Under what circumstances is the issuer or acquiror unable to conduct the look-through analysis to determine eligibility to rely on a cross-border exemption?

As discussed above, the look-through test—as revised today—will remain the primary means of determining eligibility to rely on the cross-border exemptions for negotiated transactions. We continue to believe that extraordinary events in the life of a corporation, such as tender or exchange offers or other kinds of business combination transactions, may pose unique opportunities and risks to security holders. In a tender or exchange offer, where the bidder may present its offer directly to target security holders even where the target company itself does not support the offer, the disclosure and procedural protections of our rules provide critical safeguards for U.S. investors. Unlike capital-raising transactions, the interests of all target security holders, including U.S. holders, are affected by business combinations, whether or not they are permitted to participate in them. Because U.S. beneficial ownership of target securities represents aggregate U.S. economic interest in the target company, we continue to believe that it is the proper standard for determining exemption status. Nevertheless, commenters have pointed out—and the staff's experience has informed us of—some problems that arise in requiring the look-through test. To address these concerns, today we adopt an alternate test, based in part on a comparison of average daily trading volume, which may be used to determine eligibility to rely on the cross-border exemptions. In limited situations, where an issuer or acquiror is unable to conduct the look-through analysis mandated in our rules, it may use the alternate test described below.[100]

Whether an issuer or an acquiror is unable to conduct the look-through analysis required by our rules will depend on the facts and circumstances of the particular analysis. We emphasize, however, that the need to dedicate time and resources to the look-through analysis alone will not support a finding that a bidder is unable to conduct the analysis. Similarly, concerns about the completeness and accuracy of the information obtained from the analysis will not necessarily justify the use of the alternate test. In each instance, the bidder must make a good faith effort to conduct a reasonable inquiry into ascertaining the level of U.S. beneficial ownership. Where issuers and acquirors have questions about the availability of the alternate test, whether in the context of individual cross-border transactions or otherwise, consideration will be given to whether additional guidance is appropriate.

Although we are not providing an exhaustive list of the situations that would justify the use of the alternate test, we do recognize specific factual scenarios when the alternate test could be used. For example, in some foreign jurisdictions, security holder lists are generated only at fixed intervals during the year and are not otherwise available. In those circumstances, where the published information is as of a date outside the range specified in our revised rules,[101] the alternate test may be used unless the acquiror or issuer otherwise has access to more current information. We believe that U.S. ownership information as of a date outside of the expanded range we provide in our revised rules will be outdated and therefore will justify the use of the alternate eligibility test.

We also believe that an acquiror generally will be unable to conduct the required look-through analysis in the manner prescribed by our revised rules when the subject securities are in bearer form.[102] In addition, in certain foreign jurisdictions, nominees may be prohibited by law from disclosing information about the beneficial owners on whose behalf they hold. Where this prohibition extends to the country of residence of the beneficial owners of the subject securities, we believe the alternate test for determining eligibility should be available. Even the issuer itself may be unable to conduct the required look-through analysis and thus may turn to the alternate test under our revised rules.[103] In addition, where a business combination transaction is non-negotiated (not conducted pursuant to an agreement between the target and the acquiror), the acquiror need not conduct the look-through analysis under our revised rules. This is consistent with the existing rules, premised on the concept that a third party will generally have decreased access to ownership information without the cooperation of the target.[104]

2. Elements of the Alternate Test

Under the revised eligibility test, most acquirors will be required to conduct the look-through analysis, as modified by the rule changes we adopt today and discussed above. Only where an acquiror is unable to conduct the required analysis because of specific circumstances may it turn to the other means of determining eligibility specified in the alternate test.[105] As noted above, acquirors in non-negotiated transactions may continue to rely on the alternate test, which is similar to and replaces the current ''hostile presumption.''

Under the alternate test, an acquiror may rely on the cross-border exemptions unless average daily trading volume in the United States exceeds the limits set forth in our rules, reports filed by the target company indicate levels of U.S. ownership inconsistent with the limits for the applicable exemption, or the acquiror knows or has reason to

[98] See letter from Allen & Overy, Ashurst LLP, Clifford Chance LLP, Freshfields Bruckhaus Deringer, Herbert Smith LLP, Linklaters LLP, and Norton Rose LLP. This letter advocates disregarding holdings by U.S. institutional investors, such as those qualifying as ''QIBs'' as defined in Rule 144A, even where such entities individually hold no more than 10 percent of the subject securities.

[99] Pub. L. No. 90–439, 82 Stat. 454 (1968).

[100] *Cf.* Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b–21 [17 CFR 240.12b–21] (providing flexibility, under limited circumstances, for registrants when they are unable to provide information required by the Commission's rules).

[101] Under the amended Instructions to the exemptions, as discussed above, the acquiror must obtain information about U.S. beneficial holders as of a date no more than 60 days before and no more than 30 days after the public announcement of the business combination (as of the record date for a rights offering). Where the acquiror cannot obtain information within these time frames, it may use a date no more than 120 days before public announcement. If it cannot conduct the look-through as of date within this extended time frame, the acquiror or issuer is unable to conduct the look-through for purposes of our rules and may rely on the alternate test.

[102] These are securities for which the issuer or other party does not keep a registry of ownership. The possession of the stock certificate is the only proof of ownership for bearer securities.

[103] See Instruction 3 to amended Exchange Act Rules 13e–4(h)(8) and (i). This is different from the approach in our current rules, where the hostile presumption based on factors other than the look-through analysis is not available to issuers or affiliated bidders.

[104] See the Proposing Release, Section II.A.3.a. and the 1999 Cross-Border Adopting Release, Section II.F.3.

[105] See new Securities Act Rule 800(h)(7); Instruction 3 to amended Exchange Act Rules 13e–4(h) and (i); and Instruction 3 to amended Exchange Act Rules 14d–1(c) and (d).

know that U.S. ownership exceeds the limits for the applicable exemption. We discuss each element of this alternate test below.

a. Average Daily Trading Volume Test

The first prong of our alternate test is based on a comparison of ADTV of the subject securities in the United States, as compared to worldwide ADTV.[106] As revised, this element of the alternate test is satisfied where ADTV for the subject securities in the United States over a twelve-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent (40 percent for Tier II) of ADTV on a worldwide basis.[107] As noted above, the percentage trading volume figures remain unchanged from the comparable component of the existing test for non-negotiated transactions.[108] We considered decreasing these percentages for purposes of this ADTV element, because our analysis indicates that these trading volume levels do not correspond with the U.S. beneficial ownership levels that remain the focus of our revised eligibility test.[109] However, these ADTV figures are a feature of the comparable ADTV element of the existing hostile presumption, and we have retained the comparable limiting elements focused on U.S. beneficial ownership discussed below. For these reasons, and because the alternate test will be available only in limited circumstances outside the context of a non-negotiated transaction, we have not changed the percentages for the ADTV test.

The revised rules specify that where a transaction is not made pursuant to an agreement between the acquiror and the target company, the acquiror need not conduct the look-through analysis.[110] This is similar to the existing ''hostile presumption'' for non-negotiated transactions. We made that presumption available in 1999 when the current exemptions were adopted because we recognized that where no such agreement exists, without the cooperation of the target company, the acquiror's ability to obtain information about brokers and other nominees may be limited.[111] We believe this continues to be the case today.

The revised rules provide acquirors with a range of dates by which they may do the comparison of U.S. and worldwide average daily trading volume. The comparison must be made over a twelve-month period ending no more than 60 days before the public announcement of the transaction.[112] The requirement to perform the comparison as of a twelve-month period minimizes the potential for manipulation of the trading volumes both inside and outside the United States. For the reasons discussed above, we believe that providing a range of dates as of which the comparison may be accomplished provides appropriate flexibility for acquirors. In the context of an objective measure such as ADTV, there should be no concerns about compromising confidentiality by doing this calculation before announcement. Therefore, for purposes of this prong of the alternate test, we are not permitting the acquiror to use a range of dates that extends beyond announcement, as we do for the look-through test discussed above.[113] Using public announcement instead of commencement as the reference point for the calculation will allow acquirors to determine and inform the market and target holders about the treatment of U.S. holders at an earlier stage in the process.

The revised rules also require that there be a ''primary trading market'' for the subject securities, as that term is defined in our rules,[114] in order for the acquiror in a negotiated transaction to rely on the alternate test as a result of being unable to conduct the look-through analysis.[115] ''Primary trading market'' means that at least 55 percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a recent twelve-month period.[116] In addition, if the trading of the subject securities occurs in two foreign markets, the trading in at least one of the two must be larger than the trading in the United States for that class.[117] In our view, the existence of a primary trading market is important because it is designed to ensure that there is a primary foreign regulator with oversight over the transaction. Thus, where there is no primary trading market for the subject securities outside of the United States, an acquiror in a negotiated transaction may not rely on the alternate test. In response to our request for comments, several commenters supported the adoption of a ''primary trading market'' component if we adopted a test based in whole or in part on ADTV.[118]

One commenter stated that requiring average daily trading volume in the United States to be compared to trading in the primary trading market, as opposed to the worldwide trading market, would be too restrictive.[119] The revised rules require a comparison of U.S. ADTV to worldwide ADTV, thus maximizing the size of the denominator and potentially limiting the U.S. average daily trading volume numbers.[120]

b. Information Filed by the Issuer With the Commission or Home Country Regulators

The second prong of the alternate test is that the acquiror must consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the Commission or with the regulator in its home jurisdiction. It may be disqualified from relying on the cross-border exemption sought if those

[106] The comparable prong of the existing hostile presumption test compares ''aggregate trading volume of the subject securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market as reported to the NASD'' to the worldwide aggregate trading volume. See, *e.g.*, the existing Instruction 3 to Exchange Act Rules 14d–1(c) and (d). Although the revised instruction we adopt today refers to ''average daily'' instead of ''aggregate'' trading volume, and eliminates the references to the NASD (or its successor FINRA), we do not view these changes as substantive.

[107] See new Securities Act Rule 800(h)(7)(i); Instruction 3.i. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.i. to amended Exchange Act Rules 14d–1(c) and (d).

[108] See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d–1(c) and (d).

[109] See Memorandum from the Office of Economic Analysis (June 5, 2008) (available in the comment file for the Proposing Release at *http://www.sec.gov/rules/proposed/s71008.shtml*).

[110] See new Securities Act Rule 800(h)(6) and Instruction 3 to amended Exchange Act Rules 14d–1(c) and (d).

[111] See 1999 Cross-Border Adopting Release, Section II.F.3.

[112] See new Securities Act Rule 800(h)(7)(i); Instruction 3.i. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.i. to amended Exchange Act Rules 14d–1(c) and (d). We proposed to modify the instruction in our rules to mandate a calculation over a twelve-calendar-month period ending no later than 60 days before announcement. We did not receive comments specifically addressing this point.

[113] See Instruction 2 to amended Exchange Act Rules 14d–1(c) and (d).

[114] See Exchange Act Rule 12h–6(f)(5).

[115] We did not propose, but we solicited comment on, whether we should adopt a primary trading market requirement when using an ADTV measure. See Proposing Release, Section II.A.4. The primary trading market requirement does not apply to the use of the alternate test for non-negotiated transactions.

[116] Exchange Act Rule 12h–6(f)(5)(i) [17 CFR 240.12h–6(f)(5)(i)]. Elsewhere in the revised exemptions, we continue to use the term ''primary trading market'' more narrowly, to refer to the single, principal foreign trading market for the subject securities outside the United States. See footnote 58 in the Proposing Release.

[117] Exchange Act Rule 12h–6(f)(5)(ii) [17 CFR 240.12h–6(f)(5)(ii)].

[118] See letters from Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller, Slaughter and May, and Uria Menéndez, STB, and Sompo Japan Insurance Inc.

[119] See letter from ABA.

[120] This is consistent with the manner in which the calculation is done for purposes of the deregistration rule. See Exchange Act Rule 12h–6(a)(4)(i) [17 CFR 240.12h–6(a)(4)(i)]. Worldwide average daily trading volume for these purposes would include U.S. average daily trading volume.

reports or other filings indicate levels of U.S. ownership that exceed applicable limits for that exemption.[121]

This element of the alternate test is virtually identical to the comparable element of the existing test for non-negotiated transactions.[122] The only change from the prior test for non-negotiated transactions is that the revised Instruction specifies that only annual reports or other annual information filed before the public announcement of the transaction must be taken into account by the acquiror. We believe it is appropriate to set a time limit on the information that the acquiror must consider, since the planning process of the transaction and the certainty of the exemption itself may be disrupted by a filing that is made late in the process.

The acquiror's eligibility to rely on a cross-border exemption should not be affected by filings after that time, because the public announcement may contain (and in some foreign jurisdictions, must contain) detailed information about the treatment of U.S. target holders. We do not believe that the acquiror should lose eligibility based on reports filed after announcement; conversely, the acquiror will not gain eligibility to rely on the exemptions based on reports filed after announcement indicating a reduction in the percentage of U.S. holders.

The annual report filed with the Commission by foreign private issuers subject to Exchange Act reporting requires disclosure of the percentage of the class held by U.S. persons.[123] Not all foreign private issuers file annual reports with the Commission, however.[124] For those who do not file with the Commission, reports filed in the home jurisdiction may or may not require disclosure of comparable information about U.S. ownership. However, the acquiror may have reason to know U.S. beneficial ownership figures for non-reporting issuers, which also must be taken into account pursuant to the final element of the eligibility test.

c. Reason To Know

We refer to the final element in the new alternate test as the ''reason to know'' element. The existing hostile presumption test for non-negotiated transactions contains a similar element.[125] This prong of the alternate test provides that an applicable cross-border exemption is not available, even where all other elements of the alternate test are met, if the acquiror ''knows or has reason to know'' that U.S. beneficial ownership levels exceed the limits for the applicable exemption.[126]

We believe the reason to know element serves a critical function in protecting the interests of U.S. investors under the current hostile presumption. Each other element of the eligibility test has limitations which may translate into an inaccurate and incomplete picture of the subject security holder base. The reason to know element captures information that the acquiror may gain as a result of its own assessment of the target company and the feasibility of the transaction. The acquiror should not be permitted to ignore such information simply because it comes from sources other than those captured in the other elements of our alternate test. The staff has received numerous questions about what constitutes ''reason to know'' information about U.S. ownership levels that would preclude reliance on the exemptions under the current hostile presumption. To provide guidance on that issue, we proposed changes to this element of the current hostile presumption test to assist acquirors in determining what constitutes ''reason to know.'' [127] The proposed changes, which we are adopting today, clarified that an offeror is deemed to have reason to know information about U.S. ownership of the subject class that appears in any filing with the Commission or any regulatory authority in the issuer's home country or (if different) the jurisdiction in which its primary trading market is located.[128] This change will capture not only filings by the issuer, but also filings by other parties reporting beneficial ownership of the subject securities.[129]

While commenters supported our efforts to provide further specificity on ''reason to know,'' many requested further guidance on this issue, consistent with staff experience that it is an area of concern for practitioners under the current hostile presumption.[130] Therefore, as adopted, the revised provision contains additional references to specific sources of information that will be attributed to the acquiror.[131] This includes information about U.S. ownership ''available from the issuer or obtained or readily available from any other source that is reasonably reliable.'' [132] ''Readily available'' for these purposes means publicly available from sources reasonably accessible to the issuer or acquiror at no or limited cost. We do not intend this language to mean that an issuer or acquiror must take into account information publicly available from any source, no matter how obscure or costly to obtain. If the acquiror and the target enter into an agreement pursuant to which the acquiror has the right to obtain information from the target, including information about U.S. ownership, it will be deemed to know any such information known to the target. We believe such an agreement will almost always exist in the context of a negotiated transaction.

Other sources of information of which the acquiror will be deemed to have knowledge under the rule revisions adopted today include, but are not limited to, third-party information providers and other advisors engaged by the parties to the transaction that may have provided information about U.S. ownership. This change to the rule does not require that the parties engage such third parties in order to qualify for eligibility under this element.[133] The rule simply requires the acquiror to take into account information that is obtained from a third-party information provider, including information that is readily available from such providers.

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[121] See amended Securities Act Rule 800(h)(7)(ii); Instruction 3.ii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.ii. to amended Exchange Act Rules 14d–1(c) and (d).

[122] See Securities Act Rule 802(c)(3) [17 CFR 230.802(c)(3)] and Instruction 3.iii. to Exchange Act Rules 14d–1(c) and (d).

[123] Item 7.A.2. of Form 20–F mandates that ''[i]nformation shall be provided as to the portion of each class of securities held in [the United States] and the number of record holders in the [United States].'' Many foreign private issuers filing Form 20–F provide information about U.S. record ownership only, which is not in and of itself the measure of U.S. ownership used to determine eligibility to rely on the cross-border exemptions.

[124] A foreign private issuer must file an annual report with the Commission only where the foreign private issuer has a class of securities registered under Section 12 of the Exchange Act.

[125] See Securities Act Rule 802(c)(4) [17 CFR 230.802(c)(4)] and Instruction 3.iv. to Exchange Act Rules 14d–1(c) and (d).

[126] See new Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d–1(c) and (d).

[127] See proposed Securities Act Rule 802(c)(4) and proposed Instruction 3.iv. to Exchange Act Rules 14d–1(c) and (d).

[128] *Id.*

[129] Only ''annual reports'' or filings of ''annual information'' by the issuer are covered in the preceding element of the test. Reports that may be covered by the ''reason to know'' element of the revised test include beneficial ownership reports filed by third parties reporting ownership in the subject class.

[130] See, *e.g.*, letter from DPW.

[131] See amended Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d–1(c) and (d).

[132] *Id.*

[133] One commenter requested that we clarify that we are not establishing such a requirement. See letter from Cravath, Swaine, & Moore LLP (''Cravath'').

These examples cited in our revised rules are not intended to be exclusive; an acquiror may have reason to know information from other sources, depending on the particular facts and circumstances of the transaction.[134]

We are adopting as proposed the limiting language in this revised instruction that makes it clear that knowledge or reason to know acquired after public announcement will not disqualify the acquiror from relying on the cross-border exemptions.[135] For the reasons discussed in the preceding section, we believe it is appropriate to include a timing element here, so that the ability to rely on a cross-border exemption is not called into question by knowledge acquired after announcement. Commenters generally supported this change.[136]

3. Changes to Eligibility Test for Rights Offerings

The changes to the eligibility test we adopt today also will apply to the calculation of U.S. ownership for rights offerings. Issuers may now calculate U.S. ownership as of a date no more than 60 days before and 30 days after the record date for the rights offering.[137] Thus, issuers will have greater flexibility on the timing of the calculation of U.S. ownership within a range of dates; however, the reference point for the calculation will continue to be the record date for rights offerings, rather than the date of public announcement for business combinations. This is appropriate because the record date for a rights offering is more closely tied to the specific security holder base that may participate in the transaction.[138]

We solicited comment on, but did not propose changes to, the eligibility test for rights offerings because we did not believe that issuers faced the same problems with the look-through analysis as third-party acquirors did for business combination transactions.[139] However, several commenters argued that we should also adopt similar changes to the rights offering exemption.[140] It is our understanding that many foreign private issuers continue to exclude U.S. holders from rights offerings available to all other security holders. To the extent that the revisions we adopt today make the exemption for rights offerings more readily available and facilitate the inclusion of U.S. holders, these changes may be useful in promoting our investor protection goals.

Therefore, we are adopting similar changes to the method of calculating U.S. ownership for purposes of the exemption for rights offerings as we adopt today for business combination transactions. This will allow issuers more time to conduct the U.S. ownership calculation at an earlier stage in the transaction planning process. In addition to the changes to the look-through analysis mandated under our revised rules, the alternate test for calculating U.S. ownership also will be available for issuers unable to conduct the look-through analysis.[141]

B. Changes to the Tier I Exemptions

1. Expanded Exemption From Exchange Act Rule 13e–3

We are adopting as proposed revised Exchange Act Rule 13e–3(g)(6) expands the scope of the exemption from Rule 13e–3 to cover a broader range of cross-border transactions than otherwise would be subject to that Rule. Existing Rule 13e–3(g)(6) exempts the parties engaged in an affiliated cross-border business combination transaction from the application of Rule 13e–3 where that transaction is structured as an issuer or third-party tender offer under the Tier I cross-border exemptions, or as a securities offering made pursuant to Securities Act Rule 802. Transactions such as cash mergers, compulsory acquisitions for cash, and schemes of arrangement not consummated under these rules could be subject to Rule 13e–3 even where they otherwise would have been eligible for the cross-border exemption from that rule, if structured under Tier I or Securities Act Rule 802.

We believe that the form of the transaction should not govern whether Rule 13e–3 applies to a cross-border transaction which otherwise would be eligible for the Tier I exemption from that rule; therefore, we proposed eliminating the limits on the kinds of cross-border transactions that could be covered under the exemption in Rule 13e–3(g)(6). We are adopting this change as proposed. In order to qualify for the expanded exemption from Rule 13e–3, a party must meet all of the conditions for reliance on Rule 802 or Tier I. These conditions such as the requirement that U.S. security holders be treated at least as favorably as foreign security holders, will continue to safeguard the interests of U.S. holders. In addition, a party relying on revised Rule 13–3(g)(6) for affiliated transactions not conducted pursuant to Securities Act Rule 802 or Tier I must submit a Form CB to the same extent as would be required in a transaction conducted pursuant to those provisions. Because the party relying on the expanded cross-border exemption from Rule 13e–3 would have had an obligation to file a Schedule 13E–3, absent the expanded exemption, a Form CB (and Form F–X where the filer is foreign) will be required.[142]

In the Proposing Release, we solicited comment on how we should accomplish the proposed expansion of the exemption from Rule 13e–3. We asked whether we should revise the rule to list additional transaction structures that would be covered under the expanded exemption, or whether we should simply eliminate any limits on the types of transactions covered, as proposed. The four commenters who addressed this issue supported the change, including our approach of leaving open the kinds of cross-border transactions that may be covered under the expanded exemption, to provide maximum flexibility for the parties covered by Rule 13e–3.[143]

One commenter called for us to extend the exemption from Rule 13e–3 to tender offers conducted pursuant to Tier II, on the grounds that corporate law matters that underpin the enhanced investor protection provisions in Rule 13e–3 are best addressed by home country regulation.[144] We recognize that other jurisdictions may impose equally effective but different safeguards to address the conflict of interests that may exist in a transaction to which Rule 13e–3 applies. We note, however, that Rule 13e–3 is a disclosure provision and we do not believe its application is unduly burdensome, particularly where

[134] The proposed rules note that the sources listed are not intended to be an exclusive list.

[135] We do this by inserting the language the words ''before the public announcement'' into the first sentence of this amended provision. See new Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d–1(c) and (d).

[136] See, *e.g.*, letter from ABCNY.

[137] See amended Securities Act Rule 800(h).

[138] See amended Securities Act Rule 800(h)(1). The expanded date range of up to 120 days if the information is not available within the range otherwise specified is not available for rights offerings. This should not be needed, as it is within the issuer's power to set an appropriate record date.

[139] See Proposing Release, Section II.A. This may be because issuers generally have access to greater information about their own security holders, and rights offerings may not be subject to the same time pressures as business combination transactions.

[140] See letters from Cravath and S&C.

[141] See new Securities Act Rule 800(h)(6) and (7). This is a change from our existing rules, where the hostile presumption based in part on the average daily trading volume comparison is available only for third-party, unaffiliated acquirors. See, *e.g.*, existing Securities Act Rule 802(c), which applies only to persons other than the issuer of the subject securities and is being replaced by the alternate test.

[142] See Instruction to amended Exchange Act Rule 13e–3(g)(6).

[143] See letters from ABA, ABCNY, Cravath, and DPW.

[144] See letter from ABCNY.

U.S. investors make up more than 10 percent of a foreign target's security holder base.

Another commenter called for us to exempt from the application of Rule 13e–3 any transaction subject to a third-party fairness hearing and determination.[145] We decline to expand the exemption in this manner. As noted above, Rule 13e–3 is a disclosure provision and does not regulate the substantive fairness of the underlying transaction. Thus, the fact that an affiliated transaction in a foreign jurisdiction has been found to be fair by an independent tribunal or other third party will be a matter for disclosure under the rule, but in our view, should not affect its general application.

2. Technical Changes to Securities Act Rule 802

We are adopting as proposed the changes to Rule 802(a)(2) and (3) to substitute the word ''offeror'' for ''issuer.'' This is a correction to the existing rule rather than a substantive change. We did not receive any comments on this technical correction.

C. Changes to the Tier II Exemptions

We proposed a number of changes to Tier II in order to alleviate practical difficulties that often result in the need for companies to request specific exemptive or no-action relief.[146] Most commenters did not address the specific changes we proposed, but generally supported our proposed expansion of these exemptions.

1. Tier II Relief for Tender Offers Not Subject to Rule 13e–4 or Regulation 14D

The Tier II exemptions represent targeted modifications to U.S. tender offer rules intended to accommodate differences between U.S. and foreign practice in the context of a cross-border tender offer. Because the Tier II exemptions are contained in Rule 13e–4 and Regulation 14D, the staff receives questions about whether a bidder may rely on these exemptions for a tender offer subject to the provisions of Regulation 14E only. The staff has taken the position that the Tier II exemptions are available for tender offers that would otherwise qualify for those exemptions, but for the fact that the tender offer is not subject to Rule 13e–4 or Regulation 14D. The staff's position was based on the premise that it would be inconsistent for bidders in tender offers subject only to the more basic tender offer provisions in Regulation 14E not to be able to take advantage of the Tier II exemptions, which technically apply to tender offers that are subject to the more extensive regulatory protections in Rule 13e–4 and Regulation 14D. We proposed to change the language of the Tier II exemptions to specifically make it available to offers subject only to Regulation 14E. As we stated in the Proposing Release, we believe the Tier II exemptions should be available for such offers if the conditions in our rules are satisfied; therefore, we are adopting amendments to the rules as proposed to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e–4 or Regulation 14D.[147]

Commenters supported the proposed amendments to codify this position.[148] Under the revised rules, the Tier II exemptions will be available to Regulation 14E-only offers only where the exemptions would have been available if those offers were subject to Rule 13e–4 or Regulation 14D. Thus, all of the existing conditions applicable to the Tier II exemptions will apply. Some of the Tier II exemptions may not be necessary for tender offers not subject to the requirements of Rule 13e–4 or Regulation 14D, because Regulation 14E may not have a corresponding regulatory requirement.[149]

2. Tier II Relief for Concurrent U.S. and Non-U.S. Offers

a. Multiple Foreign Offers in Connection With a U.S. Offer

The existing Tier II cross-border exemptions permit a bidder to conduct two separate but concurrent tender offers: one made *only* to U.S. target security holders and another open *only* to foreign target holders. In some instances, a tender offer may be subject to more than one regulatory regime outside the United States, particularly where the target's country of incorporation is not the location of the primary trading market for the target securities. In the past, bidders have requested and have been granted relief to conduct more than one foreign offer outside of the United States pursuant to the Tier II exemptions.[150]

Because we believe the use of a multiple offer structure may be helpful in addressing procedural and technical conflicts between tender offer rules and practice, as well as procedural requirements between different jurisdictions, we see no reason to prohibit the use of more than one offer outside the United States in connection with the Tier II exemptions. Three commenters addressed this proposed change; all supported it.[151] For the reasons noted above, we are adopting the amendments as proposed to permit the use of more than one offer outside of the United States for tender offers conducted under Tier II.[152] We believe the resulting increased flexibility to resolve regulatory conflicts will promote our goal of facilitating the inclusion of U.S. investors in cross-border tender offers subject to multiple regulatory regimes outside of the United States.

As discussed in the Proposing Release, the amendments we adopt today with respect to the use of a multiple offer structure under Tier II are not intended to permit the use of separate proration pools where such a structure is used in the context of a partial cross-border tender offer.[153] Under the current as well as the revised rules, bidders who conduct separate foreign and U.S. offers to minimize the difficulties of complying with two different regulatory regimes applicable to the offer must pro rate tendered securities on an aggregate basis, where required under U.S. rules.[154]

[145] See letter from the ABA.

[146] Where we refer in this release to ''relief,'' we mean exemptive or no-action relief provided by letter in the context of an individual transaction, unless otherwise indicated. See footnote 46 above referring to the staff's delegated authority to provide exemptive relief from U.S. rules for specific cross-border transactions. Where we refer to ''interpretive guidance,'' we mean oral positions taken by the staff or written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone Interpretations available on our Web site. We refer to ''Commission guidance'' or ''Commission interpretive guidance'' to mean positions expressed by the Commission in releases.

[147] See amended Exchange Act Rules 13e–4(i) and 14d–1(d).

[148] 148 See, *e.g.*, letter from Cravath.

[149] For example, there is no requirement in Regulation 14E to make a tender offer available to all target security holders. Therefore, the accommodation from the all-holders provisions in Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii) will not be necessary for an offer subject only to Regulation 14E.

[150] See, *e.g., Alcan, Inc.* (October 7, 2003) (''*Alcan*''); *Asia Satellite Telecommunications Holdings Limited* (May 25, 2007); *BCP Crystal Acquisition GmbH & Co* (February 3, 2004) and *Mittal Steel Company N.V.* (June 22, 2006) (''*Mittal*'') (providing relief for purchases outside of a U.S. offer for a tender offer that included more than one offer conducted outside of the United States).

[151] Letters from ABA, Cravath, and S&C.

[152] Amended Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii).

[153] Two commenters addressed our request for comment on whether we should permit the use of two separate proration pools in cross-border tender offers under Tier II. Both supported the continued use of a single proration pool. See letters from Cleary and Cravath.

[154] See Exchange Act Section 14(d)(6) [15 U.S.C. 78n(d)(6)] and Exchange Act Rules 13e–4(f)(3) [17 CFR 240.13e–4(f)(3)] and 14d–8 [17 CFR 240.14d–8]. See also the discussion in Section II.C.2.c. of the Proposing Release.

b. U.S. Offer May Include Non-U.S. Holders of ADRs [155]

The existing Tier II exemptions specify that a U.S. offer conducted in connection with a concurrent foreign offer under Tier II may be open to U.S. persons only.[156] This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders, in the U.S. portion of a dual offer. Additionally, in many instances, the target's home country regulations do not apply, by their terms, to ADRs.[157] So, as a practical matter, most bidders in cross-border tender offers wish to include all holders of ADRs in the U.S. portion of a dual offer. Companies frequently seek individual relief from the staff to address these issues.[158] The staff often has granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including foreign holders.[159] Commenters generally supported the proposal.[160] Today we are adopting as proposed rule revisions that will allow a bidder in a cross-border tender offer conducted under Tier II to make the U.S. offer available to all holders of ADRs, including non-U.S. holders, to accommodate this preferred offer structure.[161] These revisions will eliminate the need for companies to seek individual relief in such circumstances.

As we noted in the Proposing Release, bidders have not requested exemptive or no-action relief to permit the inclusion of foreign persons who hold shares directly in share form in the U.S. offer. Two commenters advocated that we allow the U.S. offer to be made to foreign holders of target shares as well as ADRs. We do not believe such a rule change is warranted at this time, given that this type of relief has not been requested frequently. If circumstances arise that weigh in favor of permitting foreign target holders to be included in the U.S. offer in a particular instance, requests for relief will be considered on a case-by-case basis. Therefore, we are not changing our rules to permit foreign holders who hold in direct share form to participate in the U.S. offer under Tier II.

We emphasize that, as discussed in the Proposing Release, this and other rule changes to the Tier II exemptions are not intended to enable a bidder to make an offer open only to ADR holders. This would be prohibited where the target securities are registered under Section 12 of the Exchange Act and the all-holders provisions of U.S. tender offer rules apply.[162]

c. U.S. Holders May Be Included in Foreign Offer

We are adopting as proposed revisions allowing a bidder to include U.S. target security holders in a foreign offer conducted under Tier II, under specified conditions. Under the revised rules, when a bidder conducts concurrent U.S. and foreign offers under Tier II, the foreign offer may be open to U.S. target security holders only where: (i) The laws of the foreign target company's home jurisdiction expressly prohibit the exclusion of any target security holders, including U.S. persons; and (ii) the offer materials distributed to U.S. persons fully and completely describe the risks to U.S. holders of participating in the non-U.S. offer.[163]

This rule change reflects the fact that takeover rules in some non-U.S. jurisdictions do not permit the exclusion of any target security holders from the foreign offer, even where the bidder makes a concurrent U.S. offer that is open to U.S. holders. Where such rules are present, relief has been granted on a case-by-case basis, in order to accommodate the requirements of the applicable foreign regulatory regime.[164] Such relief has been conditioned on the same conditions we now codify in the revised rule, which we believe strikes the appropriate balance between the need to respect a foreign regulatory requirement in a primarily foreign transaction and the need to provide adequate protections for U.S. investors by fully disclosing the risks of participating in a non-U.S. offer not subject to U.S. rules.[165]

Commenters generally supported the proposed changes to the Tier II exemptions, including this change. One commenter stated that permitting U.S. persons to be included in a foreign offer where mandated by foreign law and where U.S. investors have received appropriate disclosure concerning the risks of participating in the foreign offer strikes the appropriate investor protection balance.[166]

We note that the rule change permitting U.S. investors to participate in a non-U.S. offer conducted under the Tier II exemptions does not require them to do so. Under our revised rules, as was the case before today's amendments, any U.S. holder who prefers to tender into the U.S. offer in a multiple offer under Tier II is free to do so.

3. Termination of Withdrawal Rights While Counting Tendered Securities

We are adopting as proposed the rule revisions permitting a bidder in a cross-border tender offer conducted under Tier II to suspend withdrawal rights during the counting of tendered securities and until those securities are accepted for payment.[167] Rule 13e–4(f)(2)(ii) and Section 14(d)(5) of the Exchange Act require bidders to provide ''back-end'' withdrawal rights if tendered securities have not been accepted for payment within a certain date after the commencement of a tender offer.[168] Acceptance of securities tendered terminates the back-end withdrawal rights mandated by Rule 13e–4 and the Exchange Act.[169]

The requirement to provide back-end withdrawal rights creates problems in cross-border tender offers not generally present in U.S. offers. Differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. The manner

[155] ''ADRs'' refer to American Depositary Receipts. As in the Proposing Release, we use this term synonymously with American Depositary Shares, or ADSs.

[156] Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii).

[157] See, *e.g., Portugal Telecom, SGPS, S.A.* (December 19, 2006) (''*Portugal Telecom*'') (noting that the provisions of the Portuguese Securities Code and the rules and regulations of the Portuguese Comissão de Mercado de Valores Mobiliários did not apply to the offer for ADSs of the target company listed on the New York Stock Exchange).

[158] See *Harmony Gold Mining Company Limited* (November 19, 2004) (''*Harmony Gold 2004*''); *Discount Investment Corporation Ltd.* (June 14, 2004); *Alcan; Serono S.A.* (September 12, 2002) (''*Serono S.A.*''); and *Southern Cross* (March 5, 2002).

[159] See, *e.g., Royal Bank of Scotland plc* (July 23, 2007) (''*Royal Bank*''); *E.ON Aktiengesellschaft* (December 6, 2006) (''*E.ON*''); *Koninklijke Ahold N.V.* (September 10, 2002) (''*Koninklijke*'').

[160] See, *e.g.*, ABA.

[161] Amended Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii).

[162] See Exchange Act Rules 13e–4(f) [17 CFR 240.13e–4(f)] and 14d–10 [17 CFR 240.14d–10].

[163] See amended Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii).

[164] See, *e.g., Gas Natural SDG, S.A.* (March 2, 2006) (''*Gas Natural*'').

[165] See amended Exchange Act Rules 13e–4(i)(2)(ii) and 14d–1(d)(2)(ii).

[166] Letter from ABA.

[167] See new Exchange Act Rules 13e–4(f)(2)(v) and 14d–1(d)(2)(viii).

[168] For issuer tender offers subject to Rule 13e–4, tendering security holders must be able to withdraw tendered securities after the expiration of 40 business days from the commencement of the tender offer. Exchange Act Rule 13e–4(f)(2)(ii) [17 CFR 240.13e–4(f)(2)(ii)]. For third-party tender offers, Section 14(d)(5) of the Exchange Act states that withdrawal rights exist ''at any time after sixty days from the date of [commencement] of the original tender offer * * *.''

[169] Exchange Act Rule 13e–4(f)(2)(ii) states that back-end withdrawal rights arise upon the 41st day after commencement of an offer ''if [tendered securities are] not yet accepted for payment.'' We interpret the back-end withdrawal rights provisions in Section 14(d)(5) of the Exchange Act to terminate upon acceptance of tendered securities.

in which securities are tendered and centralized for counting in U.S. tender offers typically enable bidders to accept tendered securities almost immediately after the expiration of the initial offering period, thereby terminating back-end withdrawal rights. However, because of differences in the manner in which securities are tendered in many non-U.S. jurisdictions, the centralization and counting of tendered securities can take longer than in the United States.[170] This makes it more likely that back-end withdrawal rights will exist during the counting process in a cross-border tender offer, thereby complicating the counting and payment procedure.

As a result of these difficulties, bidders have sought relief from the application of the back-end withdrawal rights provided under our rules in connection with cross-border tender offers.[171] We have recognized that the mechanics of the tendering and counting regimes in other countries justifies different treatment under our rules,[172] and for the same reasons, we believe it is appropriate to provide an exemption in this area. Under the rule revisions we are adopting, back-end withdrawal rights may be suspended after the expiration of an offer while tendered securities are being counted in a cross-border tender offer conducted under Tier II, so long as:

- The bidder has provided an offer period (including withdrawal rights) of at least 20 U.S. business days; [173]
- At the time withdrawal rights are suspended, all offer conditions other than the minimum acceptance condition have been satisfied or waived; [174] and
- Back-end withdrawal rights are suspended only until tendered securities are counted and are reinstated immediately after that process, to the extent they are not terminated by the acceptance of tendered securities.[175]

Under the rules before today's amendments, back-end withdrawal rights were suspended between the end of an initial offering period and the commencement of a subsequent offering period.[176] We believe the rule change we adopt today is necessary because not every tender offer includes a subsequent offering period. For example, subsequent offering periods are not permitted in issuer tender offers or in third-party offers for less than all of the securities of the target class.[177] A subsequent offering period in a third-party tender offer for all outstanding target securities is at the option of the bidder and is not required under U.S. rules. The rule change we adopt today also operates to suspend back-end withdrawal rights that may exist after the expiration of a subsequent offering period, to the extent the bidder meets the conditions outlined in our rules.

The rule changes we adopt today are not intended to eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the offer period. Where a lengthy regulatory review process survives the expiration of a tender offer, the back-end withdrawal rights provided under our rules provide an important safeguard for tendering security holders.

Commenters generally supported the proposed changes to Tier II, including this one. One commenter noted that this relief is helpful even where no subsequent offering period is provided, and agreed that the requirement that all offer conditions must be satisfied at the time withdrawal rights are suspended is in the best interests of security holders.[178] Otherwise, security holders could face a prolonged period during which they could not withdraw and would not have received payment for tendered securities.[179] One commenter suggested that we also permit suspension of back-end withdrawal rights while a financing condition remains outstanding at the time withdrawal rights are suspended.[180] The commenter noted that the financing for an offer may be contingent on the satisfaction or waiver of the minimum acceptance condition. At this time, we are not extending the rule to permit the suspension of back-end withdrawal rights while an offer condition, other than a minimum acceptance condition, remains outstanding. As noted above, in our view, only conditions for regulatory approvals necessary to the consummation of the offer may survive its expiration.[181]

4. Subsequent Offering Period Changes

a. Maximum Time Limit on Subsequent Offering Period Eliminated

Based on our experience with foreign rules permitting the use of a subsequent offering period, we revised our rules in 1999 to permit the use of this offer structure in domestic tender offers.[182] Current rules permit a third-party bidder in a tender offer for all of the subject class of securities to include a subsequent offering period during which securities may be tendered and purchased on a rolling or ''as tendered'' basis if certain conditions are met.[183] We adopted the subsequent offering period because we believe it benefits target security holders who may want to tender into an offer once the offer is unconditional and will be consummated; once an offer for all outstanding securities is certain to be consummated successfully because all offer conditions have been satisfied or waived, the opportunity to tender into

[170] For a description of the counting and centralization process in several European jurisdictions, see *Business Objects S.A.* (December 5, 2007) and *Vodafone AirTouch PLC* (December 22, 1999).

[171] See, *e.g., Barclays PLC tender offer for ABN AMRO Holding N.V.* (August 7, 2007) (''*Barclays*''); *Endesa, S.A.* (July 3, 2007); and *Portugal Telecom.*

[172] See Exchange Act Rules 13e–4(i)(2)(iv) and 14d–1(d)(iv) [17 CFR 240.13e–4(i)(2)(iv) and 240.14d–1(d)(iv)]. As a result of the differences in process between the U.S. and various foreign jurisdictions, Tier II currently includes prompt payment relief to allow a bidder meeting the conditions of that exemption to pay for tendered securities in accordance with home country law or practice.

[173] New Exchange Act Rules 13e–4(f)(2)(v)(A) and 14d–1(d)(2)(viii)(A).

[174] For reasons discussed above, the bidder in a cross-border tender offer may not know at the expiration of the offer whether the minimum tender condition has been satisfied, and the amended rules recognize this issue. See new Exchange Act Rules 13e–4(f)(2)(v)(B) and 14d–1(d)(2)(viii)(B). However, because the tenders of securities must occur before the expiration, even where the counting process occurs after the end of the offer, we view a minimum tender condition as being satisfied at or before expiration, consistent with our view that all non-regulatory conditions must be satisfied or waived as of that date. See footnote 151 in the Proposing Release. Note that the only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer.

[175] New Exchange Act Rules 13e–4(f)(2)(v)(C) and 14d–1(d)(2)(viii)(C).

[176] Exchange Act Rule 14d–1(d)(2)(v) [17 CFR 240.14d–1(d)(2)(v)].

[177] Exchange Act Rule 14d–11(b) [17 CFR 240.14d–11(b)].

[178] Letter from ABA.

[179] These provisions allow tendering security holders to withdraw their tendered securities after a certain period of time. Certain regulatory approval processes, such as anti-trust approvals, may be lengthy and back-end withdrawal rights may provide an important safeguard in such cases. See generally, *ProSiebenSat.1 Media AG* (January 30, 2007)(in granting no-action relief from the prompt payment requirements of Exchange Act Rule 14e–1(c) where a regulatory condition was expected to survive the expiration of a tender offer, the staff explicitly noted that tendering target holders would have withdrawal rights through the date of receipt of such regulatory approvals). Consideration will be given to requests for relief under those circumstances only where a compelling reason exists.

[180] Letter from STB.

[181] See footnote 174 above and footnote 151 in the Proposing Release.

[182] *Regulation of Takeovers and Security Holder Communications*, Release No. 33–7760 (October 22, 1999) [64 FR 61408] (''Regulation M–A Adopting Release'').

[183] Exchange Act Rule 14d–11 permits the use of a subsequent offering period in an offer for all securities of the class that is the subject of the tender offer. If the bidder is offering security holders a choice of different forms of consideration, there may be no ceiling on any form of consideration offered. Subsequent offering periods are not permitted for issuer tender offers.

a subsequent offering period and to be paid quickly allows remaining target security holders to be paid before a back-end merger or other second-step transaction.[184] The subsequent offering period also may facilitate a bidder's efforts to reach the thresholds necessary to effect a short-form or ''squeeze-out'' merger at the levels set by the laws of the relevant jurisdiction.[185]

In practice, however, U.S. rules on subsequent offering periods have been a source of conflict with foreign regulations in the context of cross-border tender offers. A conflict often arises because Rule 14d–11 imposes a maximum time limit of 20 U.S. business days on the length of subsequent offering period.[186] Subsequent offering periods of significantly longer duration are common under law or practice in many foreign jurisdictions.[187] To address the conflict, today we are eliminating the maximum time limit on the length of a subsequent offering period in both foreign and domestic tender offers.

As proposed, this rule change would have applied only to Tier II cross-border tender offers. We also solicited comment on whether we should eliminate the 20-business day time limit as to domestic offers. Because we believe the flexibility to conduct a longer subsequent offering period will be beneficial to bidders and target security holders in U.S. offers as well, we are making this change to our tender offer rules generally.[188] We believe that as a practical matter, eliminating the limit on the time period for a subsequent offering period will benefit target security holders who choose not to tender into an initial offering period. The elimination of the 20-business day time limit will allow security holders more time to tender during the subsequent offering period. Tendering holders will be paid more quickly, thereby avoiding the lengthy process that may be associated with a squeeze-out process. We do not believe that the elimination of this limit will have any negative effects on security holders. Security holders tendering during a subsequent offering period will continue to be protected by the prompt payment provisions, as modified today in the case of Tier II offers, in the event that a subsequent offering is conducted over an extended period of time.[189]

Five commenters specifically supported our proposal to eliminate the time limit on the length of the subsequent offering period.[190] Three supported making corresponding changes to the rules applicable to domestic tender offers, as we are doing today.[191] One commenter advocated the elimination of the 20-business day limit on the length of the subsequent offering period but expressed support for retaining the minimum three-business day period in our current rules.[192] We did not propose to eliminate the requirement that the subsequent offering period be at least three business days long, and we are not doing so today.[193] We believe the minimum time period is necessary to give remaining target security holders a meaningful opportunity to exercise the right to tender during this period.

b. Prompt Payment of Securities Tendered During the Subsequent Offering Period

We are adopting a modification of the proposed changes to the payment process for securities tendered during the subsequent offering period in a Tier II cross-border tender offer.[194] U.S. rules mandate that securities tendered during a subsequent offering period must be paid for as soon as they are tendered, on a ''rolling'' basis.[195] Our revised rules will allow a bidder in a cross-border tender offer conducted pursuant to the Tier II exemptions to ''bundle'' and pay for securities tendered in the subsequent offering period within 20 business days of the date of tender. For purposes of this rule provision only, a business day will be determined by reference to the relevant foreign jurisdiction; this will provide greater flexibility for bidders, because foreign and U.S. holidays may vary.[196]

The requirement to pay for securities tendered during the subsequent offering period on a rolling basis exists because security holders cannot withdraw securities tendered in that period. Therefore, because the tender offer is no longer subject to any conditions,[197] it is appropriate for tendering security holders to be paid immediately upon tender.

In a cross-border tender offer, foreign rules or practice often dictate payment practices during the subsequent offering period that conflict with U.S. rules. For example, foreign law may require securities tendered during the subsequent offering period to be paid for within a certain number of days after the expiration of the subsequent offering period [198] or may require ''bundling'' of securities and payment on specified periodic take-up dates.[199] In the past, bidders have been granted relief to accommodate conflicts between U.S. rules and non-U.S. law or practice with respect to payment practices during the subsequent offering period.[200]

This revised rule we adopt today is slightly modified from the proposal in

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[184] See Regulation M–A Adopting Release, Section II.G.1.

[185] *Id.*

[186] Another source of conflict is the minimum extension periods set forth in Exchange Act Rules 13e–4(e)(3) and 14d–4(d)(2) [17 CFR 240.13e–4(e)(3) and 240.14d–4(d)(2)]. These rules require an offer to remain open from the date that material changes to the offer materials are disseminated to security holders, as follows: (i) five business days for a prospectus supplement containing a material change other than price or share levels; (ii) 10 business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change; (iii) 10 business days for a prospectus supplement included as part of a post-effective amendment; and (iv) 20 business days for a revised prospectus when the initial prospectus was materially deficient.

[187] See *RWE Aktiengesellschaft* (March 22, 2002) (''*RWE*'') (noting that subsequent offering periods lasting significantly longer than 20 business days are the custom in Great Britain and are permitted under The City Code on Takeovers); *Serono S.A.* (noting that French law does not set a maximum for the number of days in a subsequent offering and requesting relief for a 30 trading day subsequent offering period, with immediate acceptance of tendered shares on an ''as tendered'' basis); *Rio Tinto plc* (July 24, 2007) (''*Rio Tinto*'') (noting that Canadian law sets no maximum period for subsequent offering periods); *STATs ChipPAC Ltd.* (March 15, 2007) (''*STATs ChipPAC*'') (relief for a subsequent offering period of up to four months from the commencement date); and *Harmony Gold 2004* (requesting relief for a subsequent offering of longer than 20 U.S. business days, as permitted under South African law and as is customary market practice in that jurisdiction).

[188] See amended Exchange Act Rule 14d–11.

[189] See Exchange Act Rule 14d–11(e) [17 CFR 240.14d–11(e)] and amended Exchange Act Rule 14d–1(d)(2)(iv).

[190] See letters from ABA, Cleary, Cravath, Linklaters, and S&C.

[191] See letters from ABA, Cleary, and Cravath.

[192] Letter from ABA and Exchange Act Rule 14d–11.

[193] Exchange Act Rule 14d–11.

[194] See amended Exchange Act Rule 14d–1(d)(2)(iv).

[195] See Exchange Act Rule 14d–11(e) [17 CFR 240.14d–11(e)].

[196] See amended Exchange Act Rule 14d–1(d)(2)(iv). By not defining business day in accordance with the U.S. calendar, we believe this rule modification will be more useful because U.S. and non-U.S. holidays will vary.

[197] A subsequent offering period may commence only when all offer conditions have been satisfied or waived. See Exchange Act Rule 14d–11(c) [17 CFR 240.14d–11(c)].

[198] This is the practice in the Netherlands and France, for example. See *Barclays* and *Aventis* (June 10, 2004).

[199] For example, under Canadian law, tendered securities must be taken up and paid for within ten calendar days of tender.

[200] See *Barclays* (relief granted to permit payment for securities tendered in the subsequent offering period within five Dutch trading days after the end of that period); *Rio Tinto* (shares tendered during a subsequent offering period may be taken up and paid for within ten calendar days of the date of tender, in accordance with Canadian law); and *Aventis* (relief granted to permit payment for securities tendered into a French offer to be made within 12–18 French trading days after the expiration of that period).

order to provide expanded flexibility to avoid conflicts between U.S. and non-U.S. law and practice and to address concerns raised by commenters that the proposal did not go far enough in this regard. We initially proposed to require payment for securities tendered during the subsequent offering period to be made within 14 business days, but solicited comment on whether a shorter or longer period would be appropriate.[201] As adopted, we are allowing bidders 20 business days to effect payment. The change to 20 business days was requested by one commenter.[202] We believe that allowing 20 business days to effect payment should be sufficient in most jurisdictions, and increasing the payment period to 20 business days, rather than 14 business days as proposed, will not be detrimental to investors.

Several other commenters expressed support for allowing bidders to pay for securities tendered during the subsequent offering period in accordance with the target's home country law or practice, rather than fixing a set payment date, as proposed.[203] We are not adopting this change. Because we are eliminating the maximum time period for the subsequent offering period, we believe that maintaining a time limit for payment is appropriate and in the best interests of U.S. investors. Without a time limit for payment, investors tendering securities in the subsequent offering period may face an indefinite waiting period for payment of their tendered securities. Maintaining a time limit is particularly important because target security holders who tender during the subsequent offering period do not have withdrawal rights.[204]

The rule change we adopt is intended to set a minimum standard for payment for securities tendered during a subsequent offering period. Where local law mandates and local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender to satisfy U.S. prompt payment requirements.[205]

Although, as noted in the previous section, we are eliminating the limits on the length of the subsequent offering period for domestic as well as cross-border tender offers, we are not adopting corresponding changes to permitted payment practice during the subsequent offering period for domestic offers.[206] The changes in permitted payment practice for Tier II cross-border tender offers are necessitated by direct conflicts between U.S. and foreign law and practice; no such conflicts exist for U.S. offers. Moreover, because withdrawal rights are not provided during a subsequent offering period, we believe that in domestic offers where there is no impediment to doing so, it is appropriate to continue to require payment to be made on an as tendered basis.

c. Payment of Interest on Securities Tendered During the Subsequent Offering Period

We are adopting as proposed a rule change permitting bidders in Tier II cross-border tender offers to pay interest on securities tendered during a subsequent offering period, where required under foreign law.[207] In some foreign jurisdictions, bidders are legally obligated to pay interest on securities tendered during a subsequent offering period at a rate set by law.[208] Sometimes interest accrues from the actual date of tender; in other jurisdictions, interest accrues from a date certain unrelated to the date of tender.[209]

Without the rule change we adopt today, paying interest on securities tendered during a subsequent offering period would violate U.S. rules, which mandate that security holders who tender into a subsequent offering period must receive the same consideration as those that tender during the initial offering period.[210] Because of this prohibition, bidders have requested and received exemptive relief to address the direct conflict of law presented, where foreign law in the relevant jurisdiction requires the payment of interest on securities tendered but U.S. law prohibits it.[211] The rule changes we adopt today codify this relief for Tier II tender offers.

We note that the rule change we adopt today applies only where the payment of interest is mandated by the law of the relevant foreign jurisdiction applicable to the offer. It is not intended to allow bidders to pay more in the subsequent offering period simply as an inducement to tendering.[212] We believe the general requirement that bidders make the same amount and form of consideration in the initial and subsequent offering periods serves an important function to eliminate any coercion of target security holders, and should be maintained unless it is inconsistent with an express requirement of applicable foreign law.

We have not limited the amount of interest that may be paid on securities tendered during the subsequent offering period. In our experience, the rate of interest set by foreign law generally results in a *de minimis* payment, but we have not conditioned the application of the revised exemption on the amount of the interest payment. Only one commenter responded to our question regarding whether we should limit the amount of interest that may be paid on securities tendered during the subsequent offering period. That commenter supported our approach of not setting a limit, on the grounds that interest payments would not have a coercive effect under the circumstances where they are permitted by our revised rules.[213]

Our rule change does not permit the payment of interest on securities tendered during the initial offering period. The only commenter who addressed this question indicated that we should permit interest payments on securities tendered during an initial offering period, where such interest payments are required under home country law.[214] However, this is not an area where relief is frequently requested, so we do not believe a rule change is appropriate at this time.[215]

[201] See Proposing Release, Section II.C.4.a.

[202] See letter from Linklaters.

[203] See letters from ABA, Shearman, and S&C.

[204] See note to Exchange Act Rule 14d–11.

[205] The language of amended Exchange Act Rule 14d–1(d)(2)(iv) states ''[w]here payment may not be made on a more expedited basis under home jurisdiction law or practice * * *.''

[206] See Exchange Act Rule 14d–1(d)(2) [17 CFR 240.14d–1(d)(2)] and Section II.C.4.a. of this release.

[207] New Exchange Act Rule 14d–1(d)(2)(vi).

[208] Germany and Brazil are two such foreign jurisdictions. For example, in Brazil, bidders must pay interest at a statutory rate on securities ''put'' to the bidder after the termination of a successful voluntary offer. We consider such a put right to be a tender offer or to constitute the subsequent offering period in a voluntary offer. See the description of this feature of Brazilian law in *Embratel Participacoes S.A.* (December 6, 2006) (''*Embratel*'') and *Telemar Participacoes S.A.* (October 9, 2007) (''*Telemar*''). See also, *Bayer AG* (September 26, 2006) (''*Bayer*'') (describing a similar requirement under German law).

[209] *Id.*

[210] Exchange Act Rules 14d–10 and 14d–11(f) [17 CFR 240.14d–11(f)].

[211] See, *e.g.*, *Telemar*; *Embratel*; and *Blackstone Entities* (December 16, 2004).

[212] One commenter argued that voluntary interest payments should be permitted. See letter from ABA. However, we believe that the general purposes for which we permit the use of a subsequent offering period are not consistent with the payment of offer consideration different than that provided during the initial offering period, unless specifically required by home country law.

[213] See letter from ABA.

[214] See letter from Cravath.

[215] To our knowledge, the staff has never been asked to provide no-action or exemptive relief to permit the payment of interest on securities tendered during an initial offering period. This may be, as one commenter posited, because tendering security holders often have withdrawal rights during an initial offering period, so they may not be deemed to have sold their shares until those rights terminate at the end of the initial offering period. See letter from ABA.

Consideration will be given to requests for relief in connection with individual cross-border transactions, if local law requires the payment of interest on securities tendered during an initial offering period.

d. Mix and Match Offers and the Initial and Subsequent Offering Periods

We proposed changes to our rules, which we adopt as proposed, to facilitate so-called ''mix and match'' cross-border tender offers. We view these changes as necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match offer structure generally. In a mix and match offer, bidders offer a set mix of cash and securities in exchange for each target security, but permit tendering holders to request a different proportion of cash or securities. These elections by tendering holders are satisfied to the extent that other tendering security holders make offsetting elections for the opposite proportion of cash and securities, subject to a maximum amount of cash or securities that the bidder is willing to issue.[216]

U.S. rules prohibit several features characteristic of mix and match offers. Under U.S. subsequent offering period rules, a bidder must offer the same form and amount of consideration to security holders who tender into both the initial and subsequent offering periods.[217] Further, a bidder may not impose a ceiling on any form of alternate consideration offered during the subsequent offering period.[218]

Because of the prompt payment and other requirements of U.S. rules and the requirements of foreign law or practice in cross-border offers, bidders in mix and match offers often request relief to use two different proration and offset pools in their offers: one for securities tendered during the initial offering period and another for those tendered in the subsequent offering period.[219] The rule revisions we adopt today expressly permit the use of separate offset ''pools'' for securities tendered during the initial and subsequent offering periods for cross-border tender offers conducted under Tier II.[220] This rule change is necessary because of the U.S. prohibition on the payment of different consideration in the initial and subsequent offering periods.[221] New Rule 14d–1(d)(2)(viii) also eliminates the prohibition on a ceiling for the form of consideration in a mix and match cross-border offer under Tier II, where target security holders are able to elect to receive alternate forms of consideration in the offer. Applicable foreign rules generally require the bidder to promptly take up and pay for securities tendered during the initial offering period at the end of that period.[222] In a mix and match offer where the bidder allows tendering security holders to make offsetting elections of cash and bidder securities, the bidder must set the offset or proration ''pool'' at the end of the initial offering period for the securities tendered during that period, in order to begin the payment process for those securities. Similarly, the bidder must count and offset against each other all securities tendered during the subsequent offering period.

We solicited comment about whether these changes should be extended to tender offers for U.S. target companies. Two commenters argued that these changes should apply to all tender offers, including offers for domestic targets, on the grounds that an acquiror for a U.S. target can accomplish the same result by entering into a merger agreement that provides target security holders with the same elections.[223] We are not extending these rule changes to tender offers for domestic issuers at this time. U.S. law already permits acquirors to structure business combination transactions in a manner that achieves the same result as the mix and match tender offer structure through the use of the merger structure. We have not received requests for relief in this area in connection with tender offers for U.S. targets; therefore, at this time, we do not believe there is a compelling reason to change our rules to provide this accommodation for U.S. offers.

5. Terminating Withdrawal Rights Immediately After Reducing or Waiving a Minimum Acceptance Condition

We are reaffirming the interpretive position we expressed in the Proposing Release, with some further modifications, with respect to a bidder's ability in a cross-border tender offer conducted under Tier II to waive or reduce a minimum acceptance condition without providing withdrawal rights. Under U.S. tender offer rules, bidders must ensure that a tender offer remains open and includes withdrawal rights for a prescribed period after a material change in the terms of the offer.[224] Generally, waiving or reducing the minimum acceptance condition is considered a material change in the terms of the offer that triggers this requirement. A statement in the initial offer materials advising target security holders that the minimum acceptance condition *may* be reduced or waived is not sufficient to avoid the obligation to inform target security holders of this development if it actually occurs. Such a statement also is not sufficient to avoid the obligation to extend the offering period where required to satisfy the minimum time periods set forth in our rules.[225]

The requirement to provide withdrawal rights after a reduction in, or waiver of, a minimum acceptance condition under U.S. rules conflicts with law or practice in certain foreign jurisdictions. The conflicts with U.K. law and practice were the primary basis for the adoption of our original interpretive position when the cross-border exemptions were adopted in 1999.[226] Since that time, we have encountered other foreign jurisdictions with conflicting law or practice regarding the need or the ability of a bidder to provide withdrawal rights after reducing or waiving a minimum acceptance condition in a tender offer.[227] Because of these conflicts, we believe the basic premise for our interpretive position of permitting flexibility for bidders in Tier II cross-border tender offers to waive or reduce a minimum tender condition without providing withdrawal rights remains valid. As noted in the Proposing Release, however, additional conditions

[216] For a discussion of the mechanics of a mix and match cross-border tender offer, see, *e.g., Barclays* and *Alcan.*

[217] Exchange Act Rule 14d–11(f).

[218] Exchange Act Rule 14d–11(b).

[219] See *Barclays* and *SERENA Software Inc.* (April 13, 2004)(setting a cap on the number of bidder shares and cash that would be issued in a mix and match election, with elections for more cash or shares being offset against one another).

[220] New Exchange Act Rule 14d–1(d)(2)(viii).

[221] See Exchange Act Rule 14d–11(f).

[222] See, *e.g.,* Germany and the United Kingdom.

[223] See letters from ABA and Cleary.

[224] Exchange Act Rules 13e–4(e)(3) and 14d–4(d). The Commission has expressed the position that the minimum extension periods set forth in those rules apply as general guidelines applicable to all tender offers, including those that are not subject to Rule 13e–4 or Regulation 14D. See footnote 186 above and the discussion in Regulation M–A Adopting Release, Section II.E.2. See also Exchange Act Rule 14e–1(b) [17 CFR 240.14e–1(b)], which states that a tender offer must remain open for a minimum of 10 business days after a change in the consideration offered, the amount of securities sought, or the dealer's soliciting fee.

[225] A bidder must announce that it may reduce or waive the minimum condition at least five business days before it reduces or waives it. See footnote 186 and the 1999 Cross-Border Adopting Release, Section II.B.

[226] See 1998 Cross-Border Proposing Release, Section II.C.2.f.

[227] For example, Netherlands law and practice allows a bidder to reduce or waive a minimum acceptance condition at or after the end of the initial offering period without providing tendering holders with the ability to withdraw their securities after the reduction or waiver. See, *e.g., Barclays.*

are necessary to assure that the guidance is used for the purposes for which it was originally granted.[228]

We will not object if a bidder in a cross-border tender offer satisfying the requirements of Tier II waives or reduces the minimum acceptance condition in the offer without providing withdrawal rights after the reduction or waiver (except where an extension is required under Exchange Act Rule 14e–1),[229] under the following conditions:

- The bidder must announce that it may waive or reduce the minimum acceptance condition at least five business days before the actual waiver or reduction; [230]
- The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of a waiver or reduction, which may include placing an advertisement in a newspaper of national circulation in the United States; [231]
- The press release must state the exact percentage to which the minimum acceptance condition may be reduced (or if it will be waived, rather than reduced). The bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules;
- During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided;
- The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;
- The procedure for waiving or reducing the minimum acceptance conditions must be described in the offering materials;
- The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition;
- All offer conditions are satisfied or waived when withdrawal rights are terminated; [232]
- The potential impact of the waiver or reduction of the minimum acceptance condition is fully discussed in the initial offering materials or any supplemental materials; [233] and
- The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and in any case, may not reduce or waive the minimum acceptance condition below a majority [234] of the outstanding securities of the subject class.

With respect to the last bullet point above, we initially limited the guidance to apply only where the bidder would not waive or reduce the minimum acceptance condition below a simple majority.[235] We solicited comment on what should be considered a ''majority'' for these purposes. Consistent with the feedback from one commenter,[236] we have further modified the guidance to address foreign jurisdictions in which some percentage greater than a simple majority may be required to control the target company after the offer. As we modify the guidance today, it may not be relied upon unless the bidder undertakes not to waive below a simple majority, or the percentage threshold required to control the target company under applicable foreign law, if it is greater. We are aware of at least one foreign jurisdiction where a percentage greater than a simple majority is required to control the management and corporate governance of a target company.[237] As discussed in the Proposing Release, in addition to the potential need to provide alternate sets of pro forma financial statements under our existing disclosure rules,[238] we believe reducing the minimum acceptance condition significantly below the level at which it is initially set may fundamentally change the nature of the transaction and the relationship between the offeror and the target company going forward. In particular, where the minimum acceptance condition changes below a majority of the subject class or that greater percentage needed to control the target company, security holders should be afforded withdrawal rights after the change, as the nature of their investment decision may have changed fundamentally.[239]

Several commenters argued that placing a newspaper advertisement in a newspaper of national circulation in the United States is unnecessary in the Internet age and unduly burdensome.[240] While the use of a newspaper advertisement is not required under all circumstances, we believe in the tender offer context, newsprint media remain an important means of communicating with security holders, and in particular, ''back office'' personnel at many financial institutions. Although we continue to believe that in most instances today, a newspaper advertisement is an appropriate method of dissemination reasonably calculated to inform U.S. holders, we recognize that as practice changes, and Internet and other means of communication evolve, a newspaper advertisement may in the future become unnecessary.[241]

One of the commenters advocated eliminating the requirement to provide five days notice of a possible waiver or reduction.[242] We believe that advance notice of a possible waiver or reduction serves an important function in warning target security holders who may wish to withdraw their tendered securities immediately if their tender decision would be impacted by a change in the minimum acceptance condition. Therefore, we are retaining this condition. Another commenter advocated expanding the ability to waive or reduce a minimum acceptance condition without providing withdrawal rights to the waiver of a financing condition, arguing that this renders the successful completion of the offer more

[228] See Proposing Release, Section II.C.5.

[229] Our position on reduction or waiver was never intended to allow a bidder to terminate withdrawal rights required under a mandatory extension of the offer period, *i.e.*, an extension required under Rule 14e–1. See 1999 Cross-Border Adopting Release, Section II.B. We maintain this limitation today in modifying the position.

[230] As noted above, a statement in the initial offering materials will not satisfy this condition.

[231] This announcement should be filed on EDGAR, as is generally the practice today.

[232] See Section II.A. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001) at *http://www.sec.gov/interps/telephone/phonesupplement3.htm*.

[233] The staff has conditioned a bidder's ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on adequately describing the potential impact of that action in the initial offer materials or in a supplement. See, *e.g., Royal Bank*.

[234] We consider a ''majority'' for these purposes to be any number greater than 50 percent of the outstanding securities of the subject class.

[235] See Proposing Release, Section II.C.5.

[236] See letter from ABA.

[237] We have been advised that Germany is one such foreign jurisdiction. Under German law, 75 percent of a target's security holders must approve a ''domination agreement'' between the target and the bidder in order for the bidder to effectively exercise control of the target company after a tender offer. Therefore, unless the bidder can obtain at least 75 percent of the target's securities in the tender offer, it cannot be assured of the ability to fully integrate the target company. See, *e.g., Bayer* and *Blackstone*.

[238] See Item 5 of Forms S–4 and F–4 and Rule 11–02(b)(8) of Regulation S–X [17 CFR 210.11–02(b)(8)]. Rule 11–02(b)(8) mandates that where a transaction is structured in such a way that significantly different results may occur, additional pro forma presentation must be provided which give effect to the range of possible results.

[239] See Proposing Release, Section II.C.5.

[240] See letters from ABA and Cravath.

[241] *Cf. Commission Guidance on the Use of Company Web Sites*, Release No. 34–58288 (August 1, 2008).

[242] See letter from ABA.

likely and therefore benefits holders.[243] While we do not disagree that some changes in the terms of an offer may be viewed beneficially by target holders, we continue to believe that the provisions of U.S. rules that require extension of an offer period when its terms materially change are appropriate in most instances and should be relaxed only where conflicts between U.S. and foreign law or practice so necessitate. In our experience, bidders have not sought relief to waive a financing condition without providing withdrawal rights in cross-border tender offers. In addition, we believe that in some circumstances, the waiver of a financing condition may present risks to target holders, including those who have already tendered into the offer, because a bidder may waive the financing condition, thinking that financing is secure, when this may not turn out to be the case.

We reiterate that the ability to rely on our position, as modified above, to terminate withdrawal rights immediately after waiving or reducing a minimum acceptance condition is limited to offers that otherwise satisfy the requirements of the Tier II cross-border exemptions.[244] In addition, it may be relied upon only where law or practice in the applicable foreign jurisdiction does not permit the bidder to provide withdrawal rights after the reduction or waiver, as required under U.S. law. We do not believe a bidder in a cross-border offer should be permitted to rely on this position where it is not needed under the requirements of foreign law or practice.

6. Early Termination of an Initial Offering Period or a Voluntary Extension of an Initial Offering Period

Where the expiration date of a tender offer has been set by the bidder, whether in the original offer materials or in supplemental materials announcing an extension of the offer, changing that expiration date requires notice to target security holders before the initial offering period closes and withdrawal rights terminate.[245] This extension requirement in U.S. rules conflicts with the law or practice in some foreign jurisdictions, which mandate that once all offer conditions have been satisfied or waived, the initial offering period and withdrawal rights must terminate so that the bidder may begin the payment process.[246] Generally in these foreign jurisdictions, a subsequent offering period provides a means by which remaining target holders may participate in the offer, so they are not disadvantaged by its early termination.[247]

Both before and after the adoption of the cross-border exemptions, bidders in cross-border tender offers frequently have sought additional relief from the staff to terminate the initial offering period before its scheduled expiration, thereby terminating withdrawal rights, upon the satisfaction of all offer conditions.[248] We solicited comment on whether we should codify existing staff no-action guidance that permits a bidder in a cross-border tender offer conducted under the Tier II exemptions to terminate the initial offering period (or a voluntary extension of that period) if all offer conditions are satisfied, subject to the conditions discussed below. We received two comment letters supporting such a codification, and no objecting comments.[249] As one commenter noted, codifying this position will facilitate cross-border tender offers because it would be consistent with law and practice in certain jurisdictions, and transaction participants would not be required to seek individual relief from the staff as is currently the case.[250] Therefore, we are amending Exchange Act Rules 13e–4 and 14d–1(d) to codify the guidelines set forth in existing staff guidance to permit early termination, subject to the conditions set forth below, which will be specified in the rules.

Under new Rule 14d–1(d)(2)(ix), bidders in cross-border tender offers conducted under Tier II may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights end:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied;
- The bidder has adequately discussed the possibility and the impact of the early termination in the original offer materials;
- The bidder provides a subsequent offering period after the termination of the initial offering period;
- All offer conditions are satisfied as of the time when the initial offering period ends; and
- The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.[251]

We also are amending Rule 13e–4 to add a new provision, Rule 13e–4(i)(2)(vii), to allow issuers or affiliates in a Tier II issuer tender offer to early terminate the initial offering period, or voluntary extension of that period, under the same circumstances discussed above.

As discussed in the Proposing Release, the position we codify today does not permit early termination upon the waiver of an offer condition.[252] When a bidder waives an offer condition, the terms of the offer may be fundamentally altered, such that it may influence the investment decisions of both target holders who have tendered and those who have not yet tendered. Our rules mandate that a tender offer remain open for specified time periods after a material change in the terms of an offer, which would include the waiver of a material offer condition.[253] By contrast, when an offer condition is satisfied, we believe the change is less fundamental in nature, because target security holders know from the outset that the successful consummation of the offer is contingent on the occurrence or non-occurrence of the relevant event.[254] For this reason, a bidder may not take advantage of the rules adopted here upon the waiver of an offer condition;

[243] See letter from STB.

[244] See Proposing Release, Section II.C.5.

[245] As noted above in footnotes 186 and 224, Exchange Act Rules 13e–4(e)(3) and 14d–4(d)(2) establish minimum time periods during which an offer must remain open after notice of a material change in its terms is communicated to target holders. Although by their terms these periods apply only to early commencement exchange offers, we have stated that we view the time periods set forth in these rules as generally applicable to all tender offers, including those not subject to Rule 13e–4 or Regulation 14D. See Regulation M–A Adopting Release, Section II.E.2. See also, Exchange Act Rule 14e–1(b), which establishes comparable minimum time periods for certain kinds of material changes, such as an increase or decrease in the offer consideration or the amount of securities sought in the offer, and a change in the soliciting dealer's fees.

[246] We are advised that some of these jurisdictions include the United Kingdom, South Africa, Singapore and China (Hong Kong). See, *e.g., RWE* (U.K. practice); *Harmony Gold Mining Ltd.* (March 10, 2005) (''Harmony Gold 2005'') (South Africa); *STATs ChipPAC* (Singapore); and *Jilin Chemical Industrial Company Ltd.* (December 21, 2005) (Hong Kong Code).

[247] *Id.*

[248] See *AstraZeneca PLC* (May 23, 2006); *Harmony Gold 2005*; and *In the Matter of Central and South West Corp.* (September 27, 1995).

[249] See letters from ABA and Linklaters.

[250] Letter from Linklaters.

[251] A mandatory extension is one required because of a change in the offer consideration, the number of securities sought by the bidder in the tender offer, or in the dealer's soliciting fees. See footnotes 224 and 245 above. See also Exchange Act Rules 13e–4(e)(3), 14d–4(d)(2), and 14e–1(b).

[252] See Proposing Release, footnote 216.

[253] See Exchange Act Rules 13e–4(e)(3) and 14d–4(d)(2)(i) [17 CFR 240.14d–4(d)(2)(i)].

[254] In our experience, foreign rules in certain jurisdictions may limit the number of offer conditions a bidder may impose and may also restrict a bidder's ability to waive those conditions. Therefore, waivers of material offer conditions may occur less frequently in cross-border offers. See, *e.g., Gas Natural.*

the offer (including withdrawal rights) must be extended upon a waiver. To the extent that foreign law in a particular jurisdiction mandates that a bidder terminate an initial offering period and withdrawal rights upon the waiver of all or some offer conditions, requests for relief will be considered on a case-by-case basis.

7. Exceptions From Rule 14e–5 for Tier II Cross-Border Tender Offers

We are adopting the proposed amendments to Exchange Act Rule 14e–5, with some minor clarification and one revision. The amendments to the application of Rule 14e–5 for Tier II tender offers that we adopt today seek to modernize and enhance the utility of the rule by codifying three class exemptive letters in the cross-border tender offer context.[255] In our view, the codification of Rule 14e–5 exemptive class letters will simplify the procedural requirements for foreign tender offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of the rule.

Rule 14e–5 safeguards the interests of persons who sell their securities in response to a tender offer. The rule protects investors by prohibiting an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms.[256] The rule prohibits the disparate treatment of security holders, prohibits the avoidance of proration requirements, and guards against the dangers posed by a bidder's purchases outside an offer that may involve fraud, deception and manipulation.[257] Specifically, the rule prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer. The rule's prohibitions apply from the time of public announcement of the tender offer until the offer expires.

As amended, new Rules 14e–5(b)(11) and (b)(12) would codify class exemptive letters in three areas: purchases and arrangements to purchase securities of a foreign private issuer (1) pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers; (2) by offerors and their affiliates outside of a tender offer; and (3) by financial advisor's affiliates outside of a tender offer.

We received seven comment letters that specifically address the proposed amendments to Rule 14e–5.[258] In general, commenters expressed support for the proposed codification of the three class letters. The majority of comments relate to Rule 14e–5(b)(12), the second of the two proposed rule amendments. Consequently, we are adopting proposed Rule 14e–5(b)(11) without modification. As discussed below, we are adopting proposed Rule 14e–5(b)(12), with one revision and minor clarification, in response to comments received and upon further analysis.

a. Purchases or Arrangements To Purchase Pursuant to a Foreign Tender Offer(s)

As previously noted, we are adopting proposed Rule 14e–5(b)(11) without modification. Commenters expressed general support for the proposal to permit purchases or arrangements to purchase pursuant to a foreign offer(s) during the Rule 14e–5 prohibited period if certain conditions are satisfied.[259] There were no comments opposing this proposed amendment to Rule 14e–5. The exception is conditioned on the existence of specified safeguards to help protect U.S. security holders.[260] The exception permits purchases in a foreign offer(s) made concurrently or substantially concurrently with a U.S. offer if each of the conditions of the exception are met.[261]

b. Purchases or Arrangements To Purchase by an Affiliate of the Financial Advisor and an Offeror and its Affiliates

We are adopting, with one revision, proposed Rule 14e–5(b)(12), which would permit purchases or arrangements to purchase outside of a Tier II tender offer by an affiliate of the financial advisor and an offeror and its affiliates if certain conditions are satisfied, including that the subject company must be a foreign private issuer, and the covered person must reasonably expect that the tender offer qualifies as Tier II. Four commenters expressed support for the proposal.[262] No commenters opposed codification of the *Sulzer* and *Financial Advisors* class exemptive letters. Some commenters suggested revision or clarification, as discussed below.

We proposed to exclude risk arbitrage trading from the exception applicable to purchasing activity by an affiliate of a financial advisor. We received only one comment letter in response to the request for comment in the proposal to provide information concerning other activity in addition to risk arbitrage that should be excluded from the exception as well as definitions related to risk arbitrage activity. The commenter proposed that we delete proposed paragraph (b)(12)(ii), which would exclude risk arbitrage trading by an affiliate of a financial advisor from the relief afforded to other trading activities that meet the provisions of paragraph (b)(12)(i).[263] We have determined not to adopt an exclusion limited to one particular type of activity and, thus, we are removing paragraph (b)(12)(ii). The condition that purchases or arrangements to purchase cannot be made to facilitate the tender offer should continue to address abusive purchasing activity that the rule is designed to prevent. Any purchasing activity by an affiliate of a financial advisor, including risk arbitrage, made to facilitate the tender offer would not be eligible for the exception. Accordingly, the exception as adopted contains no risk arbitrage exclusion.

The exception is conditioned on the existence of specified safeguards to help protect U.S. security holders.[264] As adopted, Rule 14e–5(b)(12) excepts purchases or arrangements to purchase outside of a Tier II tender offer by an affiliate of the financial advisor and an offeror and its affiliates if the conditions in the adopted rule are met.[265]

One commenter requested clarification with respect to language contained in the proposing release concerning purchases by financial advisor affiliates outside of a tender offer.[266] Adopted Rule 14e–5(b)(12) is premised on the financial advisor's affiliate carrying out its normal business activity when purchasing outside a tender offer, and would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. In order to comply with the adopted exception, the financial advisor's purchasing activities must be ''consistent with the [f]inancial [a]dvisor's [a]ffiliates' normal and usual business practices, and * * * not

[255] See *Mittal; Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc* (March 2, 2007) (''*Sulzer*''); and *Rule 14e–5 Relief for Certain Trading Activities of Financial Advisors* (April 4, 2007) (''*Financial Advisors*'').

[256] 1999 Cross-Border Adopting Release, Section II.C.1.

[257] Regulation M–A Adopting Release, Section II.G.5.

[258] See letters from ABA, ABCNY, Cleary, Cravath, DPW, Osler Hoskin Harcourt LLP (''Osler''), S&C.

[259] See, *e.g.*, letters from Cleary, Cravath, and S&C.

[260] See Proposing Release, Section II.C.7.

[261] New Exchange Act Rule 14e–5(b)(11)(i) through (v).

[262] Letters from Cleary, Cravath, S&C, and Osler.

[263] Letter from Cleary.

[264] See Proposing Release, Section II.C.7.

[265] New Exchange Act Rule 14e–5(b)(12).

[266] Letter from Cleary.

conducted for the purpose of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the subject company.''[267] The commenter noted a statement in the Proposing Release that purchasing activity effected in reliance on the proposed exception be consistent with the affiliate's prior levels of activity is more restrictive than previous relief granted to financial advisors. The contention is that we previously have focused on the *nature* of the activity, rather than the *level* of the activity.

We acknowledge that the barometer for what constitutes the level of *normal* business activity may fluctuate once there is an announcement of a tender offer. However, if the level of purchasing activity far exceeds the usual or expected level of purchasing activity following the announcement of a tender offer, this could certainly be a red flag of improper facilitation.

Four commenters opposed the condition in proposed Rule 14e–5(b)(12)(i)(G)(2) that financial advisors have an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act in order for such an affiliate to make purchases or arrangements to purchase outside of a tender offer in the Tier II context.[268] In general, the commenters stated that the requirement that an affiliate of a financial advisor seeking Rule 14e–5 protection be a U.S. registered broker or dealer provides disincentives to foreign acquirors to include U.S. investors in deals. Two commenters stated that the condition favors financial institutions with U.S. affiliates over international institutions.[269] One commenter stated that if the necessary information barriers are in place, there would be adequate protection to U.S. investors despite the absence of a U.S. broker or dealer affiliate.[270]

While we appreciate that the U.S. broker or dealer affiliate requirement for financial advisors may potentially lead to the exclusion of U.S. investors from certain transactions, we continue to believe this is a fundamental provision to safeguard the interests of U.S. investors. We believe that this requirement strikes the proper balance among the investor protection goals of Rule 14e–5 and the interest of U.S. investors in being included in tender offers.

We received a comment requesting clarification of Rule 14e–5(b)(12)(i)(C) that, ''No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States.''[271] We note that, notwithstanding this condition, in certain circumstances covered persons may engage in such purchases or arrangements to purchase if relying on other existing exceptions from this condition or through attaining no-action relief or exemptive order from the Commission. For example, reliance on the adopted (b)(12) exception would not necessarily preclude reliance on an existing exception, such as the exception in Rule 14e–5(b)(7) for purchases pursuant to contractual obligations.

We received one comment relating to the condition in Rule 14e–5(b)(12)(i)(D) concerning the term ''offering materials.'' The term ''offering materials'' refers to definitive offer materials and not earlier announcements in relation to the tender offer.[272]

We received one comment concerning the condition in proposed Rule 14e–5(b)(12)(i)(F) that for purchases or arrangements to purchase by an offeror and its affiliates the following condition be satisfied: tender offer prices will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price.[273] The condition to increase the offer consideration to match any higher consideration paid outside the tender offer is satisfied if the laws of the relevant home jurisdiction or the terms of the tender offer provide for matching the higher consideration and the offeror complies with such provision.

Other commenters requested codification of additional Rule 14e–5 or Regulation M relief that was not proposed, including Rule 14e–5 relief for financial institutions.[274] Individual requests for relief will continue to be considered on a case-by-case basis for activity that does not fall within the exceptions adopted today or other existing exceptions.

In our view, today's adoption codifying the three Rule 14e–5 exemptive class letters concerning cross-border tender offers will simplify the procedural requirements for foreign tender offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of the rule.

D. Expanded Availability of Early Commencement

We proposed rule changes expanding the ability of a bidder to commence an exchange offer before effectiveness of the registration statement filed to register the bidder's securities.[275] Under existing rules, the ability to ''early commence'' an exchange offer is available only when an exchange offer is subject to Rule 13e–4 or Regulation 14D.[276] Specifically, we proposed to allow issuers and third-party bidders in cross-border exchange offers conducted under Tier II to commence the exchange offer immediately upon the filing of the registration statement filed to register the bidder's securities, even if they were not subject to those rules.[277]

In the Proposing Release, we solicited comment on whether we should similarly expand the availability of early commencement to exchange offers for domestic companies. Three commenters supported our proposal to make early commencement available for Tier II exchange offers subject only to Regulation 14E.[278] All three also advocated making this change as to all exchange offers, including those conducted for U.S. target companies.[279] We agree that this option should be available in exchange offers for both domestic and foreign target companies. When we adopted rule revisions permitting early commencement for exchange offers subject to Rule 13e–4 or Regulation 14D, we did so to address a disparity in the regulatory process for cash tender offers and exchange offers. Extending the early commencement option to domestic and foreign exchange offers not subject to Rule 13e–4 or Regulation 14D will further our goal of reducing the regulatory disparity. Therefore, we are amending our rules to allow all exchange offers, including those for domestic target companies not subject to Rule 13e–4 or Regulation 14D,

[267] Letter from Cleary (citing Condition 4 in the *Financial Advisor* letter).

[268] Letters from ABA, ABCNY, DPW, and S&C.

[269] See letters from ABA and S&C.

[270] Letter from ABCNY.

[271] Letter from Cleary.

[272] Letter from Cravath.

[273] *Id.*

[274] See, *e.g.*, letter from S&C (stating that financial advisor's affiliates should also be exempted from Regulation M since there are also several class letters for Regulation M that have provided exemptions but have not yet been codified). See also, letter from ABCNY.

[275] See proposed Securities Act Rule 162(a) and proposed Exchange Act Rules 13e–4(i)(2)(vi) and 14d–1(d)(2)(x).

[276] Securities Act Rule 162(a) [17 CFR 230.162(a)].

[277] See Proposing Release, Section II.D., proposed Securities Act Rule 162(a) and proposed Exchange Act Rules 13e–4(i)(2)(vi) and 14d–1(d)(2)(x). Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore could enhance the speed with which such offers may be effected.

[278] See letters from ABA, Cleary, and STB.

[279] *Id.*

to commence upon the filing of the registration statement registering the offer, under the conditions proposed.[280] Amended Securities Act Rule 162(a) will allow early commencement for a ''Regulation 14E-only'' exchange offer only under the following conditions:

- The bidder provides withdrawal rights to the same extent as would be required under Rule 13e–4 and Regulation 14D; [281] and
- If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as required under Exchange Act Rules 13e–4(e)(3) and 14d–4(d) and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.[282]

As is currently the case with exchange offers subject to Rules 13e–4 and Regulation 14D, early commencement will be available for ''Regulation 14E–only'' offers so long as no securities are purchased until the registration statement is declared effective. The requirement to provide withdrawal rights generally, including after information about a material change is published, sent or given to target security holders, is a critical safeguard where an exchange offer may commence before effectiveness of the underlying registration statement. Without the ability to withdraw tendered securities, the prohibition on purchasing tendered securities before the effectiveness of the underlying registration statement would be rendered ineffective because the tender decision would be irrevocable and security holders would be ''locked in'' to the offer. The minimum time periods after which an offer must remain open from the time that revised information is disseminated to security holders set forth in Exchange Act Rules 13e–4(e) and 14d–4(d) are important because they allow time for security holders to consider new information.[283]

Our revised rules require offerors to provide withdrawal rights in early commencement offers not subject to Exchange Act Rule 13e–4 or Regulation 14D, to the same extent as would be required if the offer were subject to those provisions.[284] We note that today we adopt a number of rule revisions that limit the need to provide withdrawal rights for Tier II cross-border tender offers, under the circumstances outlined in our revised rules.[285] Offerors not subject to the provisions of Rule 13e–4 or Regulation 14D because, for example, the subject securities are not registered under Section 12 of the Exchange Act, will be able to rely on the revised exemptions available for Tier II cross-border tender offers, to the same extent they would be able to do so were the offer subject to Rule 13e–4 or Regulation 14D. Similarly, bidders may rely on the modified interpretive position we issue today concerning the ability to waive or reduce a minimum acceptance condition without providing withdrawal rights after the waiver or reduction occurs.[286] Some of the existing cross-border exemptions also limit the need to provide withdrawal rights in certain circumstances; [287] we do not believe that bidders in cross-border tender offers not subject to Rule 13e–4 or Regulation 14D should be precluded from relying on these exemptions when they use early commencement.

Concerns about the complex nature of the disclosure and accounting issues that may arise in business combination transactions and the need for adequate time for staff review caused us to reject automatic effectiveness of exchange offer registration statements when we initially made early commencement available in 1999.[288] When we adopted early commencement in 1999, we recognized that early commencement alone would not be helpful in reaching our stated goal of equalizing the regulatory treatment of cash versus stock tender offers if the staff review process significantly delayed the ability of the exchange offer to close.[289] For that reason, we committed to expediting the staff review process for exchange offers so that they can compete more effectively with cash offers.

The rule changes we adopt today will significantly expand the universe of exchange offers that may commence early. This could result in an increased burden on the staff to complete the review process for such offers on an expedited basis. While the staff intends to continue to afford expedited treatment for these filings, the review process may be somewhat longer in cases involving novel or unusually complex issues, such as exchange offers where the bidder is registering its initial public offering.

Current rules do not permit early commencement for specific types of exchange offers. Early commencement is not available for roll-ups and going-private transactions subject to Exchange Act Rules 13e–4 or Regulation 14D, which are subject to heightened scrutiny under our rules.[290] We retain this limitation in our revised rule. Although our revised rules expand the types of exchange offers that may commence before the effectiveness of a registration statement, we do not extend early commencement to offers that are roll-ups or going-private transactions.[291]

Today we also amend Securities Act Rule 162(b) to make it clear that the prospectus delivery requirements, including the requirement to deliver revised prospectuses and prospectus supplements contained in that provision, also will extend to offers not subject to Rule 13e–4 or Regulation 14D.[292] Under our revised rules as discussed above, offers not subject to Rule 13e–4 or Regulation 14D, such as those where the subject securities are not registered under Section 12 of the Exchange Act, may now commence before the filing of a registration statement, but only under the same conditions as would offers subject to Exchange Act Rule 13e–4 or Regulation 14D. The prospectus delivery requirements set forth in Securities Act Rule 162(b) and the dissemination requirements set forth in Exchange Act Rules 13e–4(e) and 14d–4(b) are important safeguards that are designed to ensure that target security holders receive adequate information and adequate time to consider it before their

[280] See amended Securities Act Rule 162(a) and (b).

[281] This includes back-end withdrawal rights as well as withdrawal rights during an offer.

[282] In addition, see below for a discussion of prospectus delivery requirements.

[283] See discussion in footnotes 186, 225, and 245.

[284] The offer materials disseminated to security holders should provide information about withdrawal rights and include the dates before and after which security holders may withdraw securities tendered in the offer.

[285] See new Exchange Act Rules 13e–4(i)(2)(vii) and 14d–1(d)(2)(ix) (allowing bidders to terminate an initial offering period immediately upon satisfaction of all offer conditions). See also new Exchange Act Rules 13e–4(i)(2)(v) and 14d–1(d)(2)(vii) (permitting suspension of back-end withdrawal rights while securities are being counted).

[286] See Section II.C.5 above.

[287] See, *e.g.*, Exchange Act Rule 14d–1(d)(2)(v) (providing that a bidder need not extend withdrawal rights after the close of the initial offering period and before the beginning of the subsequent offering period, notwithstanding the provisions of Section 14(d)(5) of the Exchange Act).

[288] See Regulation M–A Adopting Release, Section II.E. The proposing release for Regulation M–A solicited comment on whether automatic effectiveness would be appropriate. *Regulation of Takeovers and Security Holder Communications,* Release No. 33–7607 (November 3, 1998) [63 FR 67331].

[289] This is because of the requirement that securities tendered into an exchange offer that commences early may not be purchased before the registration statement registering the bidder's securities is declared effective. Therefore, although an exchange offer may commence upon the filing of the registration statement, the bidder cannot close the offer and purchase tendered securities until the Commission, through its staff, pursuant to delegated authority, takes the affirmative step of declaring the registration statement effective. *Id.*

[290] See Exchange Act Rules 13e–4(e)(2) and 14d–4(b) [17 CFR 240.13e–4(e)(2) and 240.14d–4(b)].

[291] See the Instruction to amended Securities Act Rule 162.

[292] See amended Securities Act Rule 162(b).

investment decision becomes final. Therefore, offers such as those for unregistered securities that may now commence early under our revised rules must provide those safeguards, including the prospectus delivery requirements in amended Securities Act Rule 162(b).

E. Changes to Schedules and Forms

1. Form CB

An offeror or issuer relying on the Tier I cross-border exemption in connection with a cross-border business combination transaction or rights offer may be required to furnish to the Commission a Form CB, including an English translation of the offering materials. Under existing rules, only persons already filing reports with the Commission under Section 13(a) or 15(d) of the Exchange Act are required to submit Form CB electronically via the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system.[293] If the person furnishing the Form CB is not an Exchange Act reporting entity, the Form CB may be submitted in paper; a non-reporting person may submit a Form CB electronically but is not required to do so.[294]

We proposed to amend Rule 101(a) of Regulation S–T to require that all Form CBs be submitted electronically. We also proposed to require the electronic filing of Form F–X for appointment of an agent in the United States for service of process when that Form is filed in connection with a Form CB.[295] One commenter supported the proposed changes, but voiced concern regarding the potential deterrent effect of mandating electronic filing of these forms.[296] This commenter expressed concern that requiring electronic submission of Form CB could present a significant hardship for some non-reporting entities that could tip the balance in favor of complete exclusion of U.S. target holders even where the Tier I cross-border exemption is available. The same commenter noted that the international perceptions of U.S. litigation risk could be compounded by the requirement to file a Form CB on EDGAR. Another commenter did not support the proposal due to the costs and practical issues involved with timely filing of Forms CB and F–X electronically, which the commenter suggested might deter bidders from including U.S. target holders in business combinations.[297]

We understand that requiring electronic submission of these forms may result in additional costs and timing concerns for foreign companies that are not otherwise required to file Exchange Act reports electronically with the Commission.[298] While we understand the commenters' concerns, we do not believe that requiring the electronic submission of Form CB and the accompanying Form F–X will be a significant burden compared with other considerations that enter into the decision to include or exclude U.S. target holders, and that it will be a benefit to U.S. security holders to have electronic access to this information.[299] Additionally, the Form CB is furnished, not filed, and therefore not subject to the liabilities of Section 18 of the Exchange Act.[300] With regard to the concern about widespread availability on EDGAR, investors currently can see that a paper Form CB has been submitted when they view a company's filings on EDGAR, although they cannot view the actual document. They can request a copy of the submission from the public reference room. Therefore, we do not believe that requiring electronic submission of the forms will increase potential liability.

We also solicited comment on whether the cover page of Form CB should be modified so that the person submitting the form would be required to specify the level of U.S. ownership supporting reliance on the cross-border exemptions claimed. We are not adopting this change, based on commenters' concerns described in the next section.

2. Schedule TO, Form F–4 and Form S–4

As proposed, we are adopting changes to Schedule TO and Forms F–4 and S–4 to include boxes on the cover page of the forms that a filing person will be required to check to indicate reliance on one or more applicable cross-border exemptions. The only commenter that addressed this proposal supported it.[301] We believe the inclusion of this information on the cover page of a tender offer statement or registration statement, filed in connection with a cross-border transaction in which the filer is seeking to rely on an applicable cross-border exemption, will enable the staff to perform the review process more efficiently. The availability of this information will eliminate staff comments that may be based on misperceptions about which exemption the filer is seeking and which U.S. rules apply to the transaction, thereby reducing the time and cost involved for the filer in responding to staff comments. In addition, the availability of this information may expedite staff review, which ultimately will benefit both investors and offerors.

We also solicited comment on whether we should require filers to specify on the cover page of the schedule and forms the percentage of U.S. ownership permitting reliance on the cross-border exemption(s) claimed in connection with the transaction. This information would be available to the filer, because it must be calculated to determine eligibility to rely on the exemptions. Commenters did not support making such a change to the schedule and forms.[302] They expressed concerns that such a requirement might subject the filer to litigation risks, given the uncertainties associated with determining U.S. target ownership levels.[303] We are mindful of these concerns and do not believe this information is critical for investors at this time. Therefore, we are not adopting this requirement.

F. Beneficial Ownership Reporting by Foreign Institutions

The beneficial ownership reporting requirements in Sections 13(d)[304] and 13(g)[305] of the Exchange Act and corresponding regulations[306] provide investors and the issuer with information about accumulations of

[293] See Rules 101(a)(1)(vi) and (vii) of Regulation S–T [17 CFR 230.101(a)(1)(vi) and 17 CFR 230.101(a)(1)(vii)].

[294] See Rules 101(b)(7) and (8)(i) of Regulation S–T [17 CFR 230.101(b)(7) and 17 CFR 230.101(b)(8)(i)].

[295] Form F–X must be filed by all foreign companies that furnish a Form CB to the Commission and in other circumstances.

[296] Letter from ABA.

[297] Letter from S&C.

[298] In order to file electronically, an offeror or issuer that is not already doing so will need to obtain filing codes required to file on EDGAR. An offeror or issuer that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a ''Central Index Key (CIK)'' code, will obtain the codes by filing electronically a Form ID at *https://www/filermanagement.edgarfiling.sec.gov* and submitting, in paper, by fax, within two business days before or after filing the Form ID, a notarized authenticating document. The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID.

[299] We note that in situations in which the electronic submission poses a significant burden, a hardship exemption is available. See Rules 201 and 202 of Regulation S–T [17 CFR 232.201 and 230.202].

[300] 15 U.S.C. 78r.

[301] Letter from ABA.

[302] Letters from ABA and STB.

[303] *Id.*

[304] 15 U.S.C. 78m(d).

[305] 15 U.S.C. 78m(g).

[306] Regulation 13D Exchange Act Rule 13d–1 *et seq.* [17 CFR 240.13d–1 *et seq.*].

securities that may have the potential to change or influence control of the issuer. The statutory and regulatory framework establishes a comprehensive reporting system for gathering and disseminating information about the ownership of equity securities.

As discussed in the Proposing Release, the beneficial ownership reporting provisions require, subject to exceptions, that any person who acquires more than five percent of a class of equity securities registered under Section 12 of the Exchange Act and other specified equity securities report the acquisition on Schedule 13D within ten days. Persons holding more than five percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include persons exempt from the requirements of Section 13(d), as well as specified institutional investors holding securities in the ordinary course of business and not with a control purpose. As specified in Rule 13d–1(b)(1)(ii) before the changes adopted today, the types of institutional investors that may file on Schedule 13G under that rule include a broker or dealer registered under Section 15(a) of the Exchange Act,[307] a bank as defined in Section 3(a)(6) of the Exchange Act,[308] an insurance company as defined in Section 3(a)(9) of the Exchange Act,[309] an investment company registered under Section 8 of the Investment Company Act of 1940,[310] an investment adviser registered under Section 203 of the Investment Advisers Act of 1940,[311] an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act,[312] and related holding companies and groups.

Under the rules before today's amendment, the list of institutional investors in Rule 13d–1(b)(1)(ii) did not include non-domestic institutions generally, and was limited to institutions such as brokers, dealers, investment advisers and companies registered with the Commission, or regulated banks or insurance companies. Historically, foreign institutions that sought to use Schedule 13G as qualified institutions under Rule 13d–1(b)(1)(ii) needed to obtain an exemptive order from the Commission or, under the current practice, a no-action position from the Division of Corporation Finance. Relief was based upon the requester's undertaking to grant the Commission or the staff access to information that would otherwise be disclosed in a Schedule 13D and the comparability of the foreign regulatory scheme applicable to the particular category of institutional investor.[313]

In the Proposing Release, we proposed to amend Rule 13d–1(b)(1)(ii) to include foreign institutions that are subject to a foreign regulatory scheme substantially comparable to the regime applicable to the U.S. institutions listed in subparagraphs (A)–(J) of the current rule. As proposed, to be eligible to file on Schedule 13G, the foreign institution would be required to determine, and certify on Schedule 13G, that it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its U.S. counterparts. In addition to the certification on Schedule 13G, the foreign institution would be required to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D.

The comment letters that addressed this proposal generally supported the amendment. One commenter requested that the Commission clarify that a foreign institution that previously had received a no-action letter regarding the ability to file on Schedule 13G qualifies as a substantially comparable regulated institution for purposes of the amended rule.[314] Another commenter requested clarification that if an institutional investor previously received no-action relief on the basis that a particular regulatory scheme was substantially comparable to the applicable regulatory scheme in the U.S., that the regulatory schemes will be deemed substantially comparable.[315] Several commenters suggested that we not adopt the requirement that foreign institutional investors undertake to provide the Commission or staff with the information that would be required in a Schedule 13D upon request.[316]

We are adopting the rule revision substantially as proposed, although we are moving the text to Rule 13d–1(b)(1)(ii)(J) and moving the current provision for groups to new subsection (b)(1)(ii)(K).[317] We are also making a minor modification to the text of new Rule 13d–1(b)(1)(ii)(J) and the certification on Schedule 13G. The modification adds the word ''substantially'' before ''comparable'' in the rule text and certification, consistent with our discussion of the standard here and in the Proposing Release.[318]

We do not believe that the requested clarification and elimination of the undertaking are appropriate. Our proposal to extend the ability to file on Schedule 13G to foreign institutional investors was intended to codify the no-action relief granted to certain institutions. The no-action letters issued by the staff are dependent upon the facts presented in each request, including the institution's assessment and determination that the foreign law that governs the institution is substantially comparable to the law applicable to its U.S. institutional counterparts and that it undertake to provide the information otherwise required by Schedule 13D upon request. Specifically, the letters state:

> [t]he foregoing no-action position taken under Rule 13d–1(b)(1)(ii) is based solely upon the facts described and the representations made in your letter. In particular, we note your representations regarding the comparability of the relevant foreign laws that govern [the requesting parties and subsidiaries] and the U.S. laws governing entities of the type listed in Rule 13d–1(b)(1)(ii). We also note your undertaking to furnish upon request the information that would be required by Schedule 13D.[319]

Therefore, an institution's continued reliance upon a no-action letter it received from the staff would be appropriate to the extent that the facts

[307] 15 U.S.C. 78o(b).

[308] 15 U.S.C. 78c(a)(6).

[309] 15 U.S.C. 78c(a)(9).

[310] 15 U.S.C. 80a–8.

[311] 15 U.S.C. 80b–3.

[312] Codified principally in 29 U.S.C. 1001–1461.

[313] See, *e.g., Canada Pension Plan Investment Board* (May 5, 2006) (granting relief for the Canada Pension Plan (CPP) Investment Board to file on Schedule 13G where the Board represented that the Canadian Pension Plan was the functional equivalent of a U.S. private pension fund and the regulatory regime governing the CPP Investment Board was substantially similar to the regulations applicable to U.S. pension funds under the Employee Retirement Income Security Act of 1974) and *Citigroup Inc.* (May 27, 2004) (granting relief for certain qualifying subsidiaries of Citigroup organized under the laws of England and Wales; the subsidiaries conducted investment banking business, including market-making, through trading in their own accounts and for their customers and represented that they were subject to regulation in the United Kingdom that was comparable to U.S. regulations).

[314] Letter from Ontario Teachers' Pension Plan Board (''Teachers'').

[315] Letter from Cleary.

[316] Letter from ABA, Cleary, and Teachers.

[317] We are revising the references in the group provision to include the new subsection (J). Additionally, we are revising the references in subsection (G) to include the new subsection (J).

[318] In the Proposing Release, we stated ''we propose to amend Rule 13d–1(b)(1)(ii) to include foreign institutions that are *substantially comparable* to the U.S. institutions listed in subparagraphs (A)–(J) of the current rule.'' (emphasis added) The proposed rule text and certification inadvertently omitted the word ''substantially.''

[319] See, *e.g, Nataxis S.A., Banque Federale des Banques Populaires and Caisse National des Caisses d'Epargne* (October 9, 2007).

presented in the letter did not differ materially in the future. A foreign institutional investor relying upon a prior letter received from the staff would be responsible for assessing whether or not a subsequent filing of a Schedule 13G was in compliance with the applicable regulations and no-action letter. Nevertheless, when these institutions otherwise will be required to file an amendment to the Schedule 13G, they must provide the certification required under our revised rules in order to continue to file on that Schedule. We do not believe that the amendment, which we are adopting as proposed, changes the obligations of a foreign institutional investor that previously relied upon a no-action letter issued to it by the staff. We believe that this amendment reduces the burden upon investor by eliminating the need to submit a no-action request to the staff and providing more certainty to the investor as to the availability of Schedule 13G.

We also do not believe that the undertaking to furnish Schedule 13D information is contrary to the Section 13(d) and 13(g) reporting structure or inconsistent with the underlying policy, as asserted by two commenters.[320] We believe that permitting certain foreign institutions to file on Schedule 13G in the same manner as their domestic counterparts is a significant benefit to those foreign institutions, due to the relaxed filing requirements for filing under Rule 13d–1(b)(1)(ii) as compared to Rule 13d–1(a), or even as a passive investor under Rule 13d–1(c). Therefore, we are retaining the undertaking in the certification.

We also solicited comment regarding whether the use of Schedule 13G by foreign institutions relying on the rule should be limited to institutions from jurisdictions that have a bilateral enforcement memorandum with the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation, and the exchange of information. Only one commenter responded to this question, and stated that it would not object if such a limitation were imposed.[321] At this time, we are not so limiting the use of the new rule. We are concerned that such a requirement could unduly restrict foreign institutions' ability to rely on the new rule, and we believe that that the certification requirement provides a sufficient safeguard against the abuse of the amended rule.

[320] See letters from Teachers and ABA.

[321] Letter from ABA.

The extension of Schedule 13G filing eligibility pursuant to Rule 13d–1(b)(1)(ii) to foreign institutions will be available only to institutions that acquire and hold the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d–3(b).[322] Similar to a domestic institution, a foreign institution will need to determine whether it is qualified to use the short-form Schedule 13G at the time it exceeds the beneficial ownership threshold. This initial determination as to form eligibility will require a foreign institution to determine, at the time it exceeds the beneficial ownership threshold, whether it is subject to a foreign regulatory scheme substantially comparable to the regulatory scheme applicable to the corresponding category of U.S. institutional investor.

If the foreign institution made such a determination, it would be eligible to file on Schedule 13G as a qualified institutional investor, as long as it could provide the certification required by Schedule 13G. If at any time before filing a Schedule 13G pursuant to new Rule 13d–1(b)(1)(ii)(J) the foreign institution determined that it was no longer able to rely on the provision, it would be required to file a Schedule 13D in accordance with the rules. Similarly, a foreign institution filing a Schedule 13G would be required to file a Schedule 13D (or a Schedule 13G if it met the requirement for filing as a passive investor) in the event that circumstances change and it determines that it is no longer eligible to rely on new Rule 13d–1(b)(1)(ii)(J). As is the case now, a foreign institution also may rely on the passive investor provision in Rule 13d–1(c) to the extent it meets the conditions to do so and file a Schedule 13G rather than a Schedule 13D.

In response to commenters' suggestions,[323] we also are adopting a corresponding change to Exchange Act Rule 16a–1(a)(1) to include the foreign institutions eligible to rely on Rule 13d–1(b)(1)(ii)(J).[324] While we did not propose this change, it is consistent with our past practice in this area. When we adopted changes to expand the list of qualified institutional investors under Rule 13d–1(b)(1)(ii) to state and local government employee benefit plans, savings associations, and church plans, we also adopted corresponding amendments to Rule 16a–1(a)(1) to include those institutions in the list of persons that are not deemed to be the beneficial owners of securities held for the benefit of third parties.[325]

Rule 16a–1(a) sets forth the definition of beneficial ownership for purposes of determining who is a more than 10 percent beneficial owner for purposes of Exchange Act Section 16. Rule 16a–1(a)(1) allows the institutions identified in the rule to exclude from beneficial ownership calculations the shares they hold for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, without the purpose or effect of changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d–3(b). Therefore, these institutions typically will not be 10 percent owners subject to Section 16(a) reporting, Section 16(b) short-swing profit recovery and Section 16(c) restrictions on short sales; however, the public will still be provided with information about their holdings through the Schedule 13G that they file.

When adopting Rule 16a–1(a)(1), the Commission noted that the rule was modeled after Rule 13d–1(b)(1)(ii).[326] We note that this change also codifies a staff interpretive position stating that a foreign institution permitted to file on Schedule 13G rather than Schedule 13D pursuant to a no-action letter is not deemed, for purposes of Section 16, the beneficial owner of securities held for the benefit of third parties or in customer or fiduciary accounts.[327]

[322] See Exchange Act Rule 13d–1(b)(1)(i) [17 CFR 240.13d–1(b)(1)(i)].

[323] See letters from ABA and S&C.

[324] See new Exchange Act Rule 16a–1(a)(1)(x). Existing Rule 16a–1(a)(1)(x) and (xi) contain redundant provisions regarding groups. Today's rule amendment replaces the text of subsection (x) with a new provision for foreign institutions. Accordingly, we are revising the references in subsection (xi) to include subsections (i) through (x). We also are revising the reference in subsection (a)(1)(vii) to include new subsection (x).

[325] See *Amendments to Beneficial Ownership Reporting Requirements,* Release 34–39538 (January 12, 1998).

[326] See *Ownership Reports and Trading By Officers, Directors and Principal Security Holders,* Release No. 34–28869 (February 8, 1991). In proposing that Rule 16a–1(a)(1) rely on the Section 13(d) definitions for determining who is a ten percent holder, we stated: ''Congress, in applying Section 16 to ten percent holders, intended to reach those persons who could be presumed to have access to inside information because of their interest in the issuer's securities. Thus, in determining beneficial ownership for purposes of ascertaining who is a ten percent holder, the analysis properly should turn on the person's potential for control.'' See *Ownership Reports and Trading By Officers, Directors and Principal Stockholders*, Release No. 34–26333 (December 2, 1988).

[327] *CS Holding* (January 16, 1992).

With respect to transitional matters, foreign institutions comparable to those listed in current Rule 13d–1(b) that are currently filing on Schedule 13G under a no-action letter from the staff may continue to do so, to the extent they continue to meet the conditions upon which the no-action relief was granted; however, as noted above, when these institutions otherwise would be required to file an amendment to the Schedule 13G, they must provide the certification required under our revised rules in order to continue to file on that Schedule. Foreign institutions that do not have no-action letters eligible to rely on the revised rule to file on Schedule 13G may do so, to the extent that the filing deadline for the Schedule 13D they would otherwise be required to file falls after the effective date of these revised rules.

G. Interpretive Guidance

1. Foreign Target Security Holders and U.S. All-Holders Requirements

Most of this release deals with cross-border business combination transactions where the target is a foreign private issuer. In this section, however, we address an issue involving the treatment of foreign target security holders in tender offers generally, including those for U.S. target companies. The issue of bidders' ability to exclude foreign target security holders is addressed here because it closely relates to the issue of the exclusion of U.S. target security holders in cross-border tender offers, which we discuss in the next section.[328] As we continue to encourage our fellow international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders from business combination transactions, we recognize the need to take similar steps with regard to the ability of bidders to exclude non-U.S. holders pursuant to our rules.

In the Proposing Release, we provided guidance on the ability of bidders in tender offers for U.S. target companies to exclude foreign target holders in tender offers subject to U.S. all-holders provisions.[329] As we stated previously, the all-holders provisions in Rules 13e–4(f) and 14d–10 apply equally to U.S. as well as non-U.S. target holders.[330] Tender offers subject to those requirements must be open to all target security holders, and all target holders must be treated equally.[331] The guidance expressed here and in the comparable section of the Proposing Release does not represent new thinking or a change in the Commission's interpretation of existing all-holders rules. Rather, it is simply an effort to remind bidders and others of the position expressed by the Commission when the all-holders rules were adopted in 1986:

- Tender offers subject to the provisions of Section 13(e) or 14(d) of the Exchange Act must be open to all target security holders, including foreign persons; [332] and
- Although foreign target holders may not be excluded from U.S. tender offers under these provisions, our rules do not require dissemination of offer materials outside the United States.[333]

Because this is not a new position, and generally bidders have not expressed concerns about U.S. all-holders requirements and the ability to exclude foreign target holders, it is not apparent that rule revisions are needed at this time. We note that this may be a function of the jurisdictional predicate for the application of foreign rules to tender offers for U.S. companies. Although U.S. tender offer rules are triggered by making a tender offer using U.S. jurisdictional means, foreign tender offer rules may apply under more limited circumstances, based on the target's country of incorporation or the location of a trading market for its securities.[334] Thus, particularly for cash tender offers, it is not clear that allowing foreign target holders to participate in a U.S. offer generally would present significant burdens or risks for bidders, where no offer materials are distributed outside the United States.

For these reasons, we are not adopting a de minimis or other exception to U.S. all-holders provisions at this time. In special circumstances, however, requests for relief will be considered on a case-by-case basis, particularly where a bidder can demonstrate unusual facts warranting an accommodation from the all-holders provisions of Rules 13e–4(f) and 14d–10. For example, relief has been granted in situations where restrictions exist on the levels of securities of a company that may be held by non-U.S. persons.[335] In an exchange offer where unusual facts require relaxation of U.S. all-holders principles, this may include allowing the bidder to provide a cash alternative to foreign target holders in a jurisdiction in which securities may not be issued.[336] However, we believe such relief will rarely be warranted. We generally believe it is in the interests of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders, particularly in light of the fact that comparable foreign all-holders requirements often protect U.S. investors by preventing their exclusion from cross-border offers.

In the Proposing Release, we solicited comment on whether any amendments to the U.S. equal treatment provisions were necessary or advisable to allow certain target security holders to be excluded from the offer. Commenters' reactions were mixed.[337] For the reasons

[328] See Section II.G.2. below.

[329] See Exchange Act Rules 13e–4(f) and 14d–10. Some tender offers are not subject to U.S. all-holders requirements, such as offers subject only to Regulation 14E because the target securities are not registered under Section 12 of the Exchange Act.

[330] See All-Holders and Best-Price Adopting Release, Section III.A.2., which stated ''While a tender offer subject to Sections 13(e) and 14(d) of the Williams Act must be held open to all holders of the subject class of securities, *including foreign persons,* Rules 14d–10(b)(1) and 13e–4(f)(9)(i) make clear that the all-holders requirement does not affect the required dissemination of tender offers. * * * The Commission has not interpreted these provisions as requiring dissemination of tender offer materials outside of the United States, and the adoption of the all-holders requirement is not intended to impose any additional requirements in this regard.'' (emphasis added; footnotes omitted).

[331] The equal treatment provision of Rules 13e–4(f) and 14d–10 does not prohibit tender offers for less than all outstanding securities of a subject class, but it does require that all security holders be able to accept the tender offer if they choose.

[332] Pursuant to Exchange Act Rules 13e–4(f) and 14d–10, a bidder may not restrict the offer to target holders as of a particular record date only. See footnote 35 in All-Holders and Best Price Adopting Release. While as a practical matter, the bidder will look to beneficial holders as of a recent date in distributing the offer materials, the offer must be open to all target security holders, including those who purchase after the tender offer commences. See *In the Matter of Application of WHX Corp.,* Exchange Act Release No. 47980 (June 4, 2003), *vacated on other grounds, WHX Corp.* v. *SEC,* 362 F.3d 854 (D.C. Cir. 2004).

[333] See *Amendments to Tender Offer Rules: All-Holders and Best-Price,* Release No. 34–23421 (July 11, 1986) [51 FR 25873] (''All-Holders and Best-Price Adopting Release''), Section III.A.2. Based on the guidance provided here, a statement that a tender offer is not being made into a particular jurisdiction is permissible where it means that tender offer materials are not being distributed into that jurisdiction. As discussed here, however, it may not mean that tenders from foreign target holders resident there will not be accepted, where an offer is subject to U.S. all-holders requirements. Statements that tenders from target security holders in certain jurisdictions will not be accepted are impermissible, for the reasons discussed above.

[334] See letter from DPW.

[335] See *Hallwood Energy Partners, LP* (May 1, 1990) and *Freeport-McMoran Energy Partners Ltd.* (June 19, 1989).

[336] See *The Korea Fund* (July 1, 2005) (permitting cash alternative for security holders in Japan, where a redemption offer by a fund featured in-kind distribution of the fund's securities, which would require registration in Japan for each issuer of the underlying securities).

[337] Four of the commenters suggested allowing bidders in domestic tender offers to exclude foreign holders under various circumstances. See letters from ABA, ABCNY, Cleary, and Linklaters. Three commenters proposed a *de minimis* exception to the all-holders rules for both cash and non-cash offers. See letters from ABA, ABCNY, and DPW.

discussed above, at this time, we do not believe it is necessary to amend Rules 13e–4(f) and 14d–10 to permit exclusion of foreign target holders from U.S. tender offers. We will monitor this issue with respect to future tender offers to determine whether further Commission action is needed.

Further, as we noted in the Proposing Release, it is inappropriate for bidders to shift the burden of assuring compliance with the relevant jurisdiction's laws to target security holders by requiring them to certify that tendering their securities complies with local laws or that an exemption applies that allows such tenders without further action by the bidder to register or qualify its offer. Target security holders may not be in possession of relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make such a determination.

2. Exclusion of U.S. Target Security Holders From Cross-Border Tender Offers

In the Proposing Release, we provided guidance on the circumstances in which bidders in cross-border tender offers may avoid triggering U.S. tender offer and registration rules.[338] The Commission previously issued interpretive guidance on this subject when the cross-border exemptions were adopted in 1999,[339] and addressed issues raised by the use of the Internet in 1998.[340] The guidance expressed here supplements the guidance previously issued in those releases. Several principles have guided the Commission when considering this issue. First, we seek to encourage bidders in cross-border business combination transactions to include U.S. holders [341] in those transactions. The amendments we adopt today expand the scope of the cross-border exemptions adopted in 1999. Therefore, we believe these amendments will further limit the circumstances under which bidders will exclude U.S. target holders because of conflicts between U.S. and foreign law or practice. In addition, we believe that when a bidder knowingly permits U.S. holders to participate in a cross-border offer, it must do so in compliance with U.S. rules.

While we encourage bidders to extend cross-border offers to U.S. holders, we recognize that bidders will not always do so and may have legitimate reasons for excluding U.S. holders, particularly where the percentage of target securities they hold is small. Where the subject class of securities is registered under Section 12 of the Exchange Act, and particularly where the subject securities trade on a U.S. exchange, we believe bidders should make every effort to include U.S. holders on the same terms as all other target holders. Exclusionary offers [342] for securities of foreign private issuers that trade on a U.S. exchange will be viewed with skepticism where the participation of those U.S. holders is necessary to meet the minimum acceptance condition in the tender offer. When purportedly exclusionary offers are made under those circumstances, we will look closely to determine whether bidders are taking reasonable measures to keep the offer out of the United States.

Where a bidder makes an exclusionary offer, we believe it must take appropriate measures to avoid the application of U.S. jurisdictional means. We identified some precautionary measures bidders may take to avoid triggering U.S. rules in prior releases. The offer materials (and the Web site where they are posted, if any) should clearly state that it is not available to U.S. holders.[343] In addition, we noted that bidders in offshore tender and exchange offers can put in place measures to ensure that tenders are not accepted from, nor securities issued (in the case of an exchange offer) to, U.S. holders.[344] These may include, in responding to inquiries and processing letters of transmittal, obtaining adequate information to identify U.S. holders.[345] Bidders also could obtain representations from tendering holders, or persons tendering on others' behalf, that the investor(s) tendering the securities are not U.S. holders.[346] Similarly, in disseminating the cash or securities consideration to tendering holders, special care should be taken to avoid mailing into the United States.[347] A legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself because, if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales to or tenders from U.S. target holders.[348]

In some foreign jurisdictions, local law may prohibit the exclusion of any target security holders in a tender offer for all outstanding securities of a subject class. Such foreign all-holders requirements, like similar U.S. rules, may not require that offer materials be disseminated into another jurisdiction; however, they generally provide that a bidder in a tender offer for all target securities may not reject tenders from security holders from any jurisdiction, including the United States, should those holders learn of and tender into the offer on their own initiative. Regulators in these jurisdictions may not permit contrary statements about the exclusion of U.S. target security holders in the offer materials. Where a foreign all-holders requirement does not permit a bidder to reject tenders from U.S. holders and does not permit statements that the offer may not be accepted by U.S. holders, it may not be possible for the bidder to take adequate precautionary measures to avoid U.S. jurisdictional means.[349]

We recognize that bidders may conduct offshore exclusionary offers that are not open to U.S. target holders. However, a bidder may implicate U.S. jurisdictional means if it fails to take adequate measures (whether by choice or because it is unable to do so under applicable foreign law) to prevent tenders by U.S. target holders while purporting to exclude them. Conversely, where tenders are made by nominees on behalf of U.S. holders, and those nominees or holders misrepresent their

[338] See Proposing Release, Section II.G.2.

[339] See 1999 Cross-Border Adopting Release, Section II.G.

[340] See *Statement of the Commission regarding use of Internet Web sites to offer securities, solicit securities transactions or advertise investment services offshore,* Release No. 33–7516 (March 23, 1998) [63 FR 14806] (''1998 Internet Release'').

[341] As noted in footnote 23, the term ''U.S. holder'' is defined as ''any security holder resident in the United States.'' See amended Securities Act Rule 800(h) (although we amended other aspects of this provision, the definition of U.S. holder remains unchanged from the definition in the existing rule).

[342] By ''exclusionary offer,'' we mean a tender offer, including an exchange offer, that excludes U.S. holders of the subject class of securities for which the offer is made.

[343] See 1998 Internet Release, Section III.B.

[344] See 1999 Cross-Border Adopting Release, Section II.G.2. As noted in the Proposing Release, bidders should not avoid payments to U.S. target holders in business combinations other than tender offers, where the target company is being merged out of existence, because in these kinds of transactions, unlike in tender offers, all target securities will be acquired in a single transaction.

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] See Proposing Release, Section II.G.3. We understand that in many foreign jurisdictions that have such all-holders rules, foreign regulators may grant exemptions to permit exclusion of U.S. and other foreign holders under certain circumstances, such as when U.S. holders make up only a small percentage of the total target security holder base. We are troubled when a bidder announces to the marketplace that it will exclude U.S. target holders before it receives the required approvals from foreign regulatory authorities to do so, and where the announcement itself causes U.S. holders to sell into the marketplace, thereby reducing their numbers to the point at which an exemption to allow exclusion of U.S. holders is acceptable to the foreign regulator.

status as U.S. persons in order to participate in exclusionary offers, the bidder will not be viewed as having targeted the United States.[350] However, this position is premised on the bidder having taken adequate measures reasonably intended to prevent sales to and tenders from U.S. holders.[351] Indicia that would put the bidder on notice that the tendering holder is a U.S. holder would include receipt of payment drawn on a U.S. bank, provision of a U.S. taxpayer identification number or statements by the tendering holder that notwithstanding a foreign address, the tendering holder is a U.S. investor. We have explicitly noted that if, after implementing measures intended to safeguard against tenders by U.S. persons, the bidder discovers it has purchased securities from U.S. holders, it should consider other measures that may avoid this lapse in the future.[352]

Where a bidder knowingly permits U.S. holders to tender into offers made offshore, whether directly or through foreign intermediaries, we believe it may be difficult to avoid the use of U.S. jurisdictional means. This is especially true where foreign all-holders principles preclude the bidder from preventing tenders from U.S. holders. Several commenters argue that we should expressly permit U.S. institutional holders to participate in offshore exclusionary offers, without triggering U.S. tender offer rules.[353] For exchange offers, they advocate that the provisions of Regulation S would allow such institutional holders to participate in offshore offers without the need for registration under Section 5 of the Securities Act. While this may be true with respect to the registration requirements of the Securities Act, we believe that business combinations are fundamentally different from capital-raising transactions outside the context of a business combination. In the latter case, the U.S. federal securities laws do not establish a right of any person to participate in a securities offering; the issuer sets the terms of its offer and determines who may participate, whether through a private placement or otherwise. U.S. tender offer rules, by contrast, establish an all-holders requirement for certain kinds of business combinations, whereby all target holders have a right to participate in an offer on the same terms as all other holders.[354] We noted in a prior release that permitting U.S. institutional holders to participate in an offshore offer pursuant to a private placement or under Regulation S while excluding other U.S. holders is inconsistent with all-holders provisions in our tender offer rules.[355] In the face of these requirements, we view the ability of institutional holders to participate in an offshore offer very differently under the Williams Act than we do under the provisions that may apply to allow their participation in offshore securities offerings under Regulation S. We continue to believe this fundamental difference warrants different treatment with respect to offshore offers under the Williams Act.

With the expansion of the cross-border exemptions adopted today, we believe there will be fewer circumstances warranting exclusionary offers because it will be easier for bidders to balance the regulatory requirements of foreign and U.S. rules. We note that many bidders do not exclude U.S. target holders from cross-border business combinations, where those offers are eligible for the Tier I or Rule 802 exemptions. In addition, several commenters stated that there is no valid reason to prohibit participation by U.S. holders in cash tender offers, where there is no registration requirement.[356] We agree that the burden on bidders to include U.S. holders in cash cross-border tender offers is not significant and whatever litigation risk would be associated with inclusion is not greater than is present under Tier I and Rule 802.

3. Vendor Placements

In the Proposing Release, we included an interpretive section discussing existing staff no-action precedent involving the use of a vendor placement structure. A vendor placement in a cross-border exchange offer occurs when a bidder offers securities to foreign target holders in an offer, but establishes an arrangement whereby securities that would be issued to tendering U.S. target holders are sold offshore by third parties. The bidder (or the third party) remits the proceeds of the sale (minus expenses) to tendering U.S. target holders. In a vendor placement, U.S. holders are not excluded from participating in the offer, but they participate on terms different from those afforded other target security holders.[357] Where permissible, the vendor placement procedure allows a bidder in a cross-border exchange offer to extend the offer into the United States without registering the issuance of the securities offered under Section 5 of the Securities Act.

We included a discussion of existing vendor placement no-action letters in the Proposing Release because the staff continues to receive frequent inquiries on the use of this mechanism for cross-border exchange offers.[358] When the existing cross-border exemptions were adopted in 1999, they codified the ability of bidders in exchange offers conducted under Tier I to offer cash to U.S. holders in lieu of cash and stock or stock only offered to foreign holders. This ability was conditioned on the bidder having a reasonable basis to believe that the cash offered is substantially equivalent in value to the non-cash consideration offered to foreign target holders.[359] When U.S. holders receive a cash alternative as permitted under the Tier I exemption, the process is different than in a vendor placement because the bidder issues a fixed amount of cash directly to U.S. holders. In a vendor placement, by contrast, the bidder technically issues securities, which are then sold abroad on behalf of U.S. persons, who receive the cash proceeds from that sale. The amount of the proceeds a U.S. person receives will depend on the market price of the securities sold.

Since 1999, Tier I has afforded a method by which bidders in cross-border exchange offers may issue cash to U.S. target holders. Therefore, the staff no longer intends to issue vendor placement no-action letters regarding the registration requirements of Section 5. Bidders should employ the vendor placement procedure only to the extent that such procedure does not result in an offer or sale of securities for which registration under Section 5 would be required.

[350] See generally, 1998 Internet Release, Section III.C. and Proposing Release, Section II.G.2.

[351] See *id.*

[352] *Id.*

[353] See, *e.g.*, letter from ABA.

[354] We recognize that some tender offers, such as those where the target class of securities is not registered under Section 12, are not subject to the all-holders rule.

[355] See 1999 Cross-Border Adopting Release at footnote 91.

[356] See, *e.g.*, letter from DPW.

[357] We are advised that some foreign regulators object to the use of the vendor placement procedure on equal treatment and other grounds. Where a vendor placement structure is used in a cross-border exchange offer, it should comply with the laws of the applicable foreign jurisdiction. We do not intend to imply by the discussion here or in the Proposing Release that the use of this structure is required under U.S. law.

[358] See Proposing Release, Section II.G.3.

[359] See Exchange Act Rules 13e–4(h)(8)(ii)(C) [17 CFR 240.13e–4(h)(8)(ii)(C)] and 14d–1(c)(2)(iii) [17 CFR 240.14d–1(c)(2)(iii)]. U.S. holders who receive cash pursuant to these rules may under specified circumstances request from the bidder an opinion of an independent expert stating that the consideration offered them is substantially equivalent to the non-cash consideration offered to foreign holders. See *id.*

The guidance we provide here, which reiterates the guidance set forth in the Proposing Release and previous relief,[360] is intended to provide clarity about the factors that bidders should consider when contemplating the use of the vendor placement procedure. It is not intended to expand the circumstances under which we believe this procedure should be available.[361] The factors include:

- The level of U.S. ownership in the target company; [362]
- The number of bidder securities to be issued in the business combination transaction as a whole as compared to the amount of bidder securities outstanding before the offer;
- The amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer;
- The liquidity and general trading market for the bidder's securities;
- The likelihood that the vendor placement can be effected within a very short period of time after the termination of the offer and the bidder's acceptance of shares tendered in the offer;
- The likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and
- The process used to effect the vendor placement sales.[363]

We believe the liquidity of the market for the bidder's securities is relevant to whether registration under Section 5 should be required. Unless the market for the bidder's securities to be sold through the vendor placement process is highly liquid and robust and the number of bidder securities to be issued for the benefit of U.S. target holders relatively small compared to the total number of bidder securities outstanding, a vendor placement arrangement in a cross-border exchange offer would in our view be subject to Securities Act registration under Section 5.

In addition to the factors listed above, we believe it is relevant whether sales of a bidder's securities in the vendor placement process are accomplished within a few business days of the close of the offer and whether the bidder announces material information, such as earning results, forecasts or other financial or operating information, before the sales process is complete. In addition, whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder is relevant. These factors are important because they indicate whether the market price which U.S. investors will receive when the bidder's securities are sold on their behalf is representative. The factors also are designed to ensure that U.S. investors are not effectively making an investment decision with respect to a purchase of securities (which would require registration under the Securities Act), but rather, are making a decision to tender their target securities in exchange for an amount of cash that, although it is not for a fixed sum,[364] can be readily determined and estimated based on historic trading prices.

Bidders may continue to use the vendor placement procedure in accordance with the guidance set forth here. The vendor placement process, where appropriately used, avoids the need for registration of the bidder securities sold on behalf of U.S. holders under Section 5 of the Securities Act. Where the tender offer also is subject to the equal treatment provisions of U.S. tender offer rules,[365] bidders also must seek an exemption from those rules in order to offer U.S. security holders a different form of consideration than what is provided to foreign target holders. In offers subject to the equal treatment provisions of the U.S. tender offer rules, it is not permissible under those rules to exclude most U.S. target holders and include only the U.S. holders (such as large institutional investors) for whom an exemption from Section 5 of the Securities Act is available.[366] For the same reasons, issuing securities to some U.S. holders, such as U.S. institutions, while providing cash to all others pursuant to a vendor placement arrangement is inconsistent with the equal treatment requirements of U.S. tender offer rules.[367]

Most of the vendor placement no-action letters issued by the staff involved tender offers that were not subject to U.S. equal treatment provisions.[368] In the future, the staff will consider whether requests for relief from the equal treatment provisions of U.S. tender offer rules where a vendor placement procedure is used are appropriate and in the best interests of U.S. security holders.[369] We generally believe that cross-border tender offers eligible to be conducted under the Tier I exemption represent the appropriate circumstances under which bidders may provide cash to U.S. target holders while offering securities to foreign target holders.

III. Paperwork Reduction Act

Some provisions of the rule amendments adopted today constitute a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (the ''PRA'').[370] We have submitted the revisions to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[371]

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by this regulation constitute reporting and cost burdens imposed by each collection of information. 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 titles for the collection of information are:

(1) ''Form S–4'' (OMB Control No. 3235–0065);

(2) ''Form F–4'' (OMB Control No. 3235–0325);

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[360] See, *e.g., Singapore Telecommunications Ltd.* (May 15, 2001); *Oldcastle, Inc.* (July 3, 1986); *Electrocomponents PLC* (September 23, 1982); *Equitable Life Mortgage and Realty Investors* (December 23, 1982); *Getty Oil (Canadian Operations) Ltd.* (May 19, 1983); and *Hudson Bay Mining and Smelting Co. Ltd.* (June 19, 1985).

[361] One commenter requested that we expand the availability of the vendor placement procedure by making this procedure available whenever the target securities that are the subject of the tender offer are not registered under Section 12 of the Exchange Act. See letter from Cravath. We believe the factors we articulate here, rather than the unregistered status of the target securities, are the appropriate measure of when the vendor placement procedure should be available.

[362] As we stated in the Proposing Release, offerors should be particularly cognizant of this factor. See Proposing Release, Section II.G.3.

[363] We assume that the sales will be effected pursuant to the procedure under Category 1 of Regulation S [17 CFR 230.903(b)(1)].

[364] Early vendor placement letters featured a fixed price guaranteed by the bidder. However, most letters, including all of the more recent ones, do not include a floor on the cash value to be received by U.S. holders. Rather, they receive whatever proceeds are generated from the sale of the bidder's securities in an overseas market.

[365] See Exchange Act Rules 13e–4(f)(8) [17 CFR 240.13e–4(f)(8)] and 14d–10 [17 CFR 240.14d–10].

[366] See Proposing Release, Section II.G.3 and footnote 91 in the 1999 Cross-Border Adopting Release.

[367] See Proposing Release, Section II.G.3.

[368] See footnote 360 above. But see *TABCORP Holdings Ltd.* (August 20, 1999) (''*TABCORP*'').

[369] One commenter requested clarification on the circumstances under which the Commission will grant relief from the equal treatment provisions of U.S. tender offer rules where a vendor placement procedure is used. See letter from Cleary. The staff no-action letters in this area provide some guidance on the limited circumstances under which the staff has done so in the past. See *TABCORP*. While each transaction presents unique facts and circumstances, in our view, such relief is not always appropriate, even where a vendor placement procedure otherwise could be used to avoid the registration requirements of Section 5 of the Securities Act.

[370] 44 U.S.C. 3501 *et seq.*

[371] 44 U.S.C. 3507(d); 5 CFR 1320.11.

(3) ''Form ID'' (OMB Control No. 3235–0328);
(4) ''Form CB'' (OMB Control No. 3235–0518);
(5) ''Form F–X'' (OMB Control No. 3235–0379);
(6) ''Schedule TO'' (OMB Control No. 3235–0515);
(7) ''Securities Ownership—Regulation 13D (Commission Rules 13d–1 through 13d–7 and Schedules 13D and 13G)'' (OMB Control No. 3235–0145);
(8) ''Form 3'' (OMB Control No. 3235–0104); and
(9) ''Form 4'' (OMB Control No. 3235–0287).

A. Summary of the Amendments

1. Amendments to the Tier I Exemption and Form CB

The rule amendments add to the types of affiliated transactions that may be effected in reliance on the Tier I exemption from Exchange Act Rule 13e–3(g)(6). A Form CB will be required when an issuer or acquiror relies on the expanded Tier I exemption from Rule 13e–3(g)(6) and publishes or otherwise disseminates an informational document to holders of the subject securities. Because more transactions will be eligible to rely on the exemption from Rule 13e–3 for cross-border transactions, this rule change may result in additional submissions of Form CB. If the exemption were not expanded, however, the issuer or affiliate would be required to comply with the more burdensome filing requirements of Schedule 13E–3 if the issuer or affiliate sought to include U.S. security holders in the transaction. We believe the amended rule and reduced filing requirement will encourage issuers or affiliates to include U.S. security holders in transactions that otherwise may have excluded them to avoid complying with Rule 13e–3 and the corresponding Schedule 13E–3 filing requirements. Domestic or foreign entities or persons engaged in cross-border business combination transactions will likely be the respondents to the collection of information requirements.

Unlike Schedule 13E–3, Form CB is a notice filing that is little more than a cover sheet that incorporates offer documents sent to security holders pursuant to applicable foreign rules in the issuer's or target's home country. The party furnishing the form must attach an English translation of the offer materials disseminated abroad. Form CB must be submitted by the next U.S. business day after that document is disseminated under home country rules. For purposes of the PRA, we estimate that the additional burden cost resulting from the amendment will be zero.

2. Amendments to Form CB, Forms S–4 and F–4, and Schedule TO

We are adopting amendments to require that all Forms CB, and accompanying Forms F–X, be filed electronically. A person that is not already filing reports electronically with the Commission will be required to obtain access codes to permit the filing of documents on EDGAR. Registrants, individuals, transfer agents, third-party filers or their agents must file a Form ID to request the assignment of access codes that permit the filing of securities documents on EDGAR. This form enables the Commission to assign an identification number (CIK), confirmation code, password and password modification authorization code to each EDGAR filer, each of which is designed to protect the security of the EDGAR system. While we do not expect that the amendments will affect the overall collection of information burden of Forms CB and F–X, we do expect that it will cause additional respondents to file a Form ID each year and, as a result, will increase the annual collection of information burden for that form. We estimated that 65,700 respondents file Form ID each year at an estimated burden of .15 hours per response, all of which is borne internally by the respondent for a total annual burden of 9,855 hours. For fiscal year 2007, a total of 189 Form CBs were filed with the Commission. Of those 189 Form CBs, 100 were filed in paper. We expect the amendments will cause an additional 100 respondents to file a Form ID each year and, as a result, cause an additional annual burden of 15 hours ($100 \times .15$). For purposes of the PRA, we estimated that the additional burden cost resulting from the proposed amendments will be zero.

We are adopting amendments to the cover page of Forms S–4 and F–4 and Schedule TO that will require the filer to check a box specifying the applicable cross-border exemption being relied upon in connection with the transaction. Domestic and foreign persons or entities filing these documents will be the respondents to the collection of information requirement. This change will not affect the substantive obligation to file the forms or schedule. This additional information will allow the staff to better process such filings and monitor the application of the cross-border exemptions. The amount of information required to be included in each Schedule TO and Forms S–4 and F–4 will change minimally with the addition of a check box. Accordingly, for purposes of the PRA, our estimate is that the amount of time necessary to prepare each schedule or form, and hence, the total amount of burden hours, will not change.

3. Amendments to Schedule 13G

Exchange Act Schedule 13G is a short-form filing for persons to report ownership of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act. Generally, the filer must certify that the securities have not been acquired and are not held for the purpose of, or with the effect of, changing or influencing the control of the issuer of the securities. For purposes of the PRA, we estimate that compliance with the Schedule 13G requirements under Regulation 13D requires 98,800 burden hours in aggregate each year, broken down into 24,700 hours (or 2.6 hours per respondent) of respondent personnel time and costs of $29,640,000 (or $3,120 per respondent) for the services of outside professionals.[372]

The amendment to Exchange Act Rule 13d–1 will expand the availability of Schedule 13G to foreign institutions governed by a regulatory system substantially comparable to the U.S. regulatory system for domestic institutions. The amendment will allow specified foreign institutions to report beneficial ownership of more than five percent of a subject class of securities on Schedule 13G instead of Schedule 13D. Foreign institutions of the type specified in amended Rule 13d–1(b) will be the likely respondents to the collection of information requirements. If the amendment was not adopted, these institutions either would have to file on Schedule 13D or would be required to seek no-action letters from the staff to permit them to file on Schedule 13G to the same extent as their domestic counterparts, so long as they satisfy certain conditions. Amending the rule will enable foreign institutions meeting the conditions in the rule to file the Schedule 13G without seeking a no-action letter. Therefore, the amended

[372] These figures assume 9,500 respondents file Schedule 13G with the Commission annually. We estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer. These figures estimate an average cost of $400 per hour for the services of outside professionals, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission.

rule may result in only a slight increase in the number of Schedule 13G filers.[373]

For purposes of the PRA, we estimate that the amendments to Schedule 13G will create an incremental burden of two hours per response, which we will add to the existing Schedule 13G burden resulting in a total burden of 117,800 hours.[374] We note that the burden associated with the amendments to Schedule 13G initially will be higher with an estimated burden of five hours. Over time, however, we believe that on average the burden will lessen and therefore estimate an incremental burden of two hours per response. Each additional filer will incur a burden of approximately .50 hours of respondent personnel time (25 percent of the total burden) and costs of $600 for the services of outside professionals (75 percent of the total burden). In sum, we estimate that the amendments to Schedule 13G will increase the annual paperwork burden by approximately 1.50 hours of respondent personnel time [375] and a cost of approximately $1,800 for the services of outside professionals.[376]

We previously have estimated that Schedule 13D has a total burden of approximately 14.5 hours per response to prepare and is filed by 3,000 respondents annually. For purposes of the PRA, we have estimated that compliance with the Schedule 13D requirements under Regulation 13D requires 43,500 burden hours in aggregate each year, broken down into 10,875 hours (or 3.6 hours per respondent) of respondent personnel time and costs of $13,050,000 (or $4,350 per respondent) for the services of outside professionals.

Based upon these estimates, a foreign institution currently filing a Schedule 13D that will be eligible to file a Schedule 13G pursuant to the amended rule will benefit from a cost reduction of $630 per respondent.[377] As noted above, however, for a number of years, the staff has provided no-action relief to foreign institutions seeking to file a Schedule 13G rather than a Schedule 13D. For those institutions that are already filing a Schedule 13G pursuant to no-action relief, the amended rules will likely only increase the cost associated with providing the required certification in Schedule 13G and will not significantly impact the cost of complying with the requirements of Regulation 13D.

For purposes of PRA, we estimate that the amendments to Exchange Act Rule 16a–1 will reduce the number of Form 3 filers by three respondents, which will reduce the incremental burden by .5 hours per filer, or 1.5 total hours.[378] The reduction in three respondents corresponds with the estimated increase in respondents for Schedule 13G relying on the new provision for foreign institutions. In addition, we estimate that the amendments will reduce the number of Form 4 filings by 3 filings, which will reduce the incremental burden by .5 hours per filing, or a total of 1.5 total hours.[379] For purposes of the PRA, we estimate that the burden cost resulting from the amendments will be zero.

IV. Cost-Benefit Analysis

We are adopting amendments to our rules that are expected to reduce the overall cost for issuers and acquirors engaged in cross-border business combination transactions. We also provide interpretive guidance regarding the application of certain rules. Under the rule amendments adopted today, much of the no-action and exemptive relief sought in the past will be available without the need for no-action or exemptive letters. As a result, issuers and acquirors will benefit from an increase in regulatory certainty about the U.S. rules governing cross-border business combination transactions and a substantial savings in the cost of preparing letters requesting relief. Decreasing the burden on acquirors of complying with U.S. rules governing business combination transactions is designed to encourage them to extend more transactions to U.S. target holders; therefore, we believe the rule revisions are in the interests of U.S. investors, while continuing to provide appropriate protections. We did not receive any comments regarding the cost of preparing such letters and the amount of time spent working through concerns raised during the review of such letters.

In analyzing the costs and benefits of the revised rules, we compared estimated future cross-border transaction activity that will likely occur under the revised rules with what will likely occur in a benchmark case without the rules.

A. Changes to the Eligibility Test for Determining Eligibility To Rely on the Cross-Border Exemptions

1. Amendments

a. Adoption of the Alternate Test and Revision To Test for Non-Negotiated Transactions

The changes we proposed to the test for determining eligibility to rely on the cross-border exemptions for business combination transactions were limited in nature and scope, as are the changes we are adopting today. The changes are intended to address specific problems acquirors have faced in determining whether they can rely on the cross-border exemptions. We are adopting many of the changes as proposed, but we also are adopting an alternate test for situations in which an acquiror is unable to conduct the look-through analysis in a negotiated transaction. The alternative test uses ADTV as one of three elements that must be satisfied. The alternate test we are adopting will replace the hostile presumption. We do not believe the amendments we are adopting will materially affect the cost of undertaking such transactions because an acquiror will continue to be required to conduct the look-through analysis in a negotiated transaction, as it is required to do today. The alternate test will aid acquirors that are unable to conduct the look-through analysis by permitting them to use readily available average daily trading volume numbers to determine eligibility.

We also proposed limited changes to the manner in which U.S. ownership may be calculated for cross-border tender offers accomplished on a non-negotiated or hostile basis. These changes are intended to clarify certain elements of the former ''hostile presumption'' test, which are now incorporated into the alternate test, that have created uncertainty for acquirors in the past. As discussed above, the alternate test uses public announcement as the reference date when determining

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[373] Based on the number of no-action requests in this area in recent years, we believe that approximately three filers per year will benefit from this proposed change and will avoid the time and expense of submitting a no-action request to the staff. In addition, foreign institutions currently filing on Schedule 13D who have not sought no-action relief to file on Schedule 13G will also benefit by becoming eligible to use the shorter Schedule 13G. See discussion above.

[374] We currently estimate the burden for preparing a Schedule 13G filing to be 10.4 hours, resulting in a total of 98,800 burden hours in aggregate each year. If each additional filer incurred an additional two hours, the resulting burden would be 117,800 total burden hours ((10.4 hours + two hours) × 9500 respondents).

[375] Three additional filers × .50 hours of respondent personnel time = 1.50 aggregate burden hours.

[376] Three additional filers × $600 = $1,800.

[377] We calculate this figure in the following manner: $4,350—($3,120 + $600) = $630. The total cost burden of Schedule 13G is estimated currently at an aggregate burden of $29,640,000 or $3,120 per respondent ($29,640,000/9,500 respondents = $3,120).

[378] We calculate this figure in the following manner: 14,500 hours/29,000 filers = .5 hours reporting burden per filer.

[379] We calculate this figure in the following manner: 112,500 hours/225,000 filings annually = .5 hours reporting burden per filing. Our estimates account for one Form 4 filing per year per filer.

eligibility to use the exemptions. Finally, in this release and the amended rules, we provide some guidance on the ''reason to know'' element of the alternate test, which we hope will make the application of the test simpler and more certain for acquirors.

i. Benefits

The alternate test we are adopting is expected to reduce costs involved in certain cross-border transactions. As discussed above, a bidder will be able to take advantage of the alternate test in situations where it is unable to conduct the look-through analysis. This may allow an acquiror to avail itself of an exemption that it otherwise would not have been able to use due to its inability to conduct the look-through analysis.

The relative easing of the burden on potential acquirors is expected to translate to monetary benefits to U.S. investors. When an acquiror is unable to conduct the look-through inquiry but is able to satisfy the alternate test, U.S. investors who own securities of the target company may benefit from being included in the tender offer and being eligible to receive tender offer premiums.

ii. Costs

Although the new alternate test is not designed to increase the cost of enacting cross-border transactions, there may be economic costs that arise from the low correlation between ADTV and the level of U.S. beneficial ownership. There may be an economic cost to U.S. investors owning securities in a target company if these U.S. investors no longer receive the Williams Act protection based on the acquiror's reliance on the alternate test. We believe these costs are balanced by the benefit of facilitating U.S. participation in the offer as a result of the availability of the alternate test.

The staff conducted an empirical analysis on the relationship between U.S. beneficial ownership and ADTV and found their correlation to be low.[380] Based on the transactions considered, the analysis suggests that the level of trading activity of certain securities in the United States may not accurately reflect the level of U.S. beneficial ownership of those securities. In turn, we may have situations in which U.S. beneficial ownership of a security is high but its trading activity is low, and vice versa.

b. Revised Calculation Date and Inclusion of More Than 10 Percent Holders

Acquirors will now be permitted to calculate the required U.S. beneficial ownership figure within a range of dates that is no more than 60 days before announcement of the transaction and no more than 30 days after the announcement. Before today's amendments, the calculation was required to be done as of the 30th day before *commencement* of a cross-border business combination transaction. The revision to allow a range of dates is expected to provide acquirors with additional flexibility in structuring transactions and availing themselves of the cross-border exemptions.

Additionally, under the amended rules, the calculation of U.S. beneficial ownership for the look-through analysis will include the securities held by security holders who own more than 10 percent of the target securities. Because we are changing the manner in which the ratio must be calculated, the amendment will result in a change in the transactions that will qualify for the exemption. In most cases, as noted above, this amendment will increase the availability of the exemptions. It is possible, however, that under the amended rules transactions that may have qualified for an exemption previously may no longer qualify. Specifically, the amendment eliminates any possibility of relying on the Tier I exemption in cases where there is at least one U.S. security holder who owns more than 10 percent of the target securities. A similar situation could arise in which transactions that previously would have qualified for the Tier II exemptions no longer qualify, if there were an unusually large proportion of large U.S. target security holders. Nevertheless, based on our experience and the comment letters received, we believe that the practical effect is to increase the number of transactions that will qualify for exemption.

i. Benefits

We anticipate that the enhanced flexibility to choose a date within a range may make it easier for acquirors to accomplish the required calculation as specified under our rules, thereby promoting use of the exemptions and the inclusion of U.S. holders while reducing the acquirors' burden of seeking no-action or exemptive letters in this area. Allowing the calculation of U.S. ownership to be conducted within 60 days before public announcement of the transaction will enable acquirors to perform the calculation as of a date when the target's security holder base may be unaffected (or less affected, if there are some changes in response to rumors in the market) by the announcement of the transaction, which is expected to provide a more accurate picture of the security holder base. This change also will allow acquirors more flexibility in planning cross-border business combination transactions, and therefore we expect bidders will be encouraged to engage in these transactions. Additionally, extending the range for calculation of U.S. ownership to no more than 30 days after public announcement is expected to benefit acquirors who, for confidentiality reasons, wish to announce a business combination transaction prior to conducting a calculation of U.S. ownership. It is unclear whether using public announcement as the reference point for the calculation will have the effect of increasing or reducing U.S. ownership in the target company.

To the extent that inclusion of large target security holders in the calculation of U.S. beneficial ownership will allow for a number of new foreign private issuers to qualify for exemption, the amended rules provide an economic benefit both to U.S. investors and potential acquirors. In particular, primary benefits will accrue to U.S. shareholders of target securities in which U.S. investors hold a relatively large fraction of the securities held by small security holders but a relatively small fraction of securities held by large security holders. In such cases, the securities may not have been eligible for exemption under the prior rules, but will now be eligible. Because all shares held by U.S. investors represent U.S. aggregate economic interest, this extension of the exemption is a benefit to U.S. investors because it may encourage bidders to include U.S. security holders in their offers that otherwise would not have done so.

Even cases where transactions that previously would have qualified for an exemption no longer qualify for it could offer an economic benefit to U.S. investors. The presence of a U.S. investor who is a large target security holder indicates that U.S. investors collectively own a significant portion of the securities. Therefore, it is in the potential bidder's interest to include them in the transaction despite the cost of complying with the Williams Act rules. In this case, U.S. investors will gain from additional disclosure of information from the bidder. This

[380] This analysis was based on U.S. beneficial ownership figures that were reported in no-action requests submitted to the staff. In those no-action requests, however, the calculation would have excluded large target security holders, consistent with the Commission's rules at the time. The memorandum outlining the analysis appears in the comment file for the Proposing Release, on our Web site at *http://www.sec.gov/comments/s7–10–08/s71008–8.pdf.*

expected benefit will dissipate, however, if the bidder chooses to exclude U.S. holders from the offer.

ii. Costs

The amendments also will impose additional costs, but these costs are expected to be borne mainly by potential bidders. As explained above, when large U.S. holders own a sufficiently large proportion of the target securities, the transaction may no longer qualify for the previously available exemption. For the reasons discussed above, we believe that where there are significant U.S. holdings, potential bidders are likely to continue to include U.S. shareholders in their transactions in order to gain control of the majority of securities. It is possible, however, that in some cases there would be a cost to U.S. investors, if the bidder excluded them from the transaction.

Under the amendments, U.S. investors may lose certain protections under the U.S. rules governing cross-border business combination transactions if the foreign private issuer in which they own securities becomes the subject of such a transaction and the acquiror relies on the cross-border exemptions. To the extent that the applicable cross-border exemptions will exempt the acquiror from compliance with U.S. registration, filing and disclosure requirements, U.S. investors will lose these protections. In such circumstances, however, we believe that the benefit to U.S. investors of being included in the transaction rather than being excluded justifies the cost of reduced protections under U.S. law. Otherwise, we do not believe that U.S. investors will be harmed by the flexibility in calculation of U.S. ownership.

B. Changes to the Tier I Exemption

1. Expansion of the Tier I Exemption From Exchange Act Rule 13e–3

We are expanding the set of cross-border business combination transactions that are exempt from the requirements of Rule 13e–3. Before these amendments, the cross-border exemption from Rule 13e–3 applied only to tender or exchange offers or business combinations conducted under Tier I. We are amending the exemption to encompass any kind of affiliated transaction that otherwise meets the conditions of the Tier I exemption, including schemes of arrangement, cash mergers, compulsory acquisitions for cash, and other types of transactions.

a. Benefits

The expansion of the Tier I exemption from Rule 13e–3 will likely result in fewer filings of Schedule 13E–3, thus reducing the costs for issuers and affiliates in cross-border transactions that would otherwise be subject to those rules. As we noted in the Proposing Release, under the rules before today's amendments, the burden of complying with Rule 13e–3 and Schedule 13E–3 may be greater for foreign filers than domestic filers.[381] Foreign filers may not have a counterpart to these rule provisions in their home jurisdiction and may not be subject to the same fiduciary duty standards that form the basis for this heightened disclosure system for affiliated transactions.

Before the amendment we are adopting today, some entities engaged in affiliated cross-border business combination transactions would have been subject to Rule 13e–3 unless they requested individual exemptive relief. These requests have routinely been granted. To the extent that these kinds of requests will no longer be necessary as a result of the rule revision we adopt today, the revision will result in reduced costs for these entities. Issuers and affiliates may have excluded U.S. holders from transactions where they would have been required to file a Schedule 13E–3. We have been told that entities may have avoided making an offer to U.S. holders to avoid application of these rules, although it is difficult to isolate the effect of this provision on the number of entities that chose not to include U.S. holders. During 2007, approximately 110 Schedules 13E–3 were filed, 10 of which were filed by foreign private issuers. During that same period, no requests for relief on this issue were granted. Therefore, we expect the overall effect would not be significant, although the number of transactions that may have been structured to avoid U.S. jurisdictional means would not be reflected by filings on Schedule 13E–3. We believe the rule amendment will result in a cost reduction because it will lower the costs and burdens associated with extending these kinds of transactions into the United States. This amendment will be in the interests of U.S. investors to the extent that the expanded exemption from Rule 13e–3 motivates an acquiror to include U.S. investors in the transaction. Because the exemption applies only where U.S. security holders make up no more than 10 percent of the subject security holder base, and because the heightened disclosure requirements of Schedule 13E–3 may be onerous for foreign filers, we believe this exemption may result in more cross-border transactions being extended to U.S. investors.

b. Costs

U.S. investors of foreign private issuer targets in cross-border business combination transactions that would have been subject to Rule 13e–3 but for our rule amendment will lose the benefits of the disclosure in Schedule 13E–3, to the extent that such disclosure is not required under applicable foreign law. This cost is mitigated by the fact that, without the exemption, U.S. holders may be excluded from the transaction.

We sought data regarding the number of Schedules 13E–3 filed with respect to the securities of foreign private issuers, the number of entities or persons that the proposed rule amendment would affect, and the increases or decreases in cost that are likely to result, so we could attempt to estimate the costs and benefits associated with any possible reduction of Schedule 13E–3 filings. We did not receive any data from commenters in response to our request. Based on the number of Schedules 13E–3 filed by foreign private issuers in 2007, we do not expect the overall impact to be significant, although the number of transactions that may have been structured to avoid U.S. jurisdictional means would not be reflected by filings on Schedule 13E–3.

2. Technical Change to Rule 802 of Regulation C

We are adopting technical changes to the language of Rule 802. These changes are not intended to substantively change the filing obligations under the current rule, and we do not believe they will have any impact on the way that rule currently functions, except to clarify how it may be used. Therefore, the change will minimally affect costs and benefits.

C. Changes to the Tier II Cross-Border Exemptions

The rule changes we adopt today represent an expansion of the cross-border exemptions available to tender offers that meet the conditions outlined in the rules. The Tier II exemptions previously applied to tender offers conducted by third parties, issuers or affiliates, where those tender offers are subject to Rule 13e–4 or Regulation 14D. Today's amendments will expand the relief provided in the Tier II exemptions to address areas of frequent conflict between U.S. and foreign law or practice

[381] See discussion in the Proposing Release, Section V.B.1.a.

for which individual relief is frequently requested, and will clarify that the Tier II exemptions also may be used for cross-border tender offers subject only to Regulation 14E of the Exchange Act. We also are expanding Tier II relief for dual offers by allowing offerors to make more than one concurrent non-U.S. offer, and to allow certain U.S. offers to include non-U.S. persons and certain foreign offers to include U.S. persons. Additionally, we are adopting changes to Rule 14e–5 to codify recent exemptive relief for Tier II-eligible tender offers.

1. Benefits

These changes to the Tier II cross-border exemptions will expand the relief provided for eligible cross-border tender offers.[382] The rule changes will reduce the need for bidders to seek individual no-action or exemptive relief from the staff. Since they represent areas in which relief is most frequently requested and granted for these kinds of transactions, the changes will reduce the associated costs and burdens of applying for relief. Where we already have reduced the associated costs and burdens of requesting and granting relief through Rule 14e–5 class exemptive letters, the codification of that relief in rule text benefits market participants by modernizing the rule and enhancing its utility by providing one readily-accessible location for exempted activities. Because the rule changes will make it easier to make purchases outside of a U.S. tender offer in a manner consistent with relief frequently granted in this area, we believe the changes also will have the effect of encouraging acquirors and bidders to extend cross-border tender offers to U.S. target holders on the same terms as all other target security holders.

To the extent that some of the relief codified in today's rule changes was not contemplated in the 1999 Cross-Border Adopting Release and came about only as a result of the staff's issuance of no-action and exemptive letters, we have analyzed the benefits and costs of the proposed revisions against the rules adopted in 1999 rather than against the perceived state of the rules as created by the issuance of no-action relief. When the Tier II exemption was adopted in 1999, by its terms it only applied to tender offers subject to Rule 13e–4 or Regulation 14D. We are expanding the Tier II exemption to apply equally to cross-border tender offers governed by Regulation 14E only. By expanding the Tier II exemption to cover such offers, the changes we are adopting today will allow more acquirors to take advantage of the exemption and thus allow more U.S. investors to benefit from being included in the offer. Expanding the category of offers for which Tier II relief is granted also will allow more flexibility in structuring offers and encourage more acquirors to take advantage of the exemption. Similarly, the changes to the Tier II relief for dual offers and the changes to Rule 14e–5 are intended to address certain foreign regulatory conflicts that were not fully appreciated when the Tier II exemption was adopted in 1999. By revising our rules to address these conflicts, we expect to enhance the applicability of the Tier II exemptions and the exemptions to Rule 14e–5 and therefore encourage more acquirors to take advantage of the exemptions and include U.S. holders in cross-border transactions.

2. Costs

As with transactions governed by Regulation 14D and Rule 13e–4, the cost of reducing the protections of the Williams Act may include reduced procedural and informational safeguards for U.S. investors; however, the exemptions have been designed to reduce such a possibility. We are not aware of any other cost that will be incurred by expanding Tier II relief to tender offers governed by Regulation 14E only. In addition, because these amendments will not change the filing obligations of acquirors, investors would not lose the benefits of any required disclosure. The amendments we are making to Tier II do not affect the registration requirements of Section 5 of the Securities Act, which are not covered by these exemptions.

The codification of Rule 14e–5 class exemptive letters into rule text is not expected to increase costs to market participants, as the substance of the relief is not being altered. Instead, the mechanism for the relief is being changed from class exemptive letters to rule exemptions. While permitting purchases outside of a tender offer might negatively impact U.S. investors by weakening the equal treatment and proration protections of our rules, we believe that the conditions imposed on the ability to purchase outside of a Tier II tender offer under the revised rules will help to safeguard the interests of U.S. security holders.

D. Expanded Availability of Early Commencement

1. Amendment to Securities Act Rule 162

The amendments we adopt today will expand the ability to commence an exchange offer before the registration statement filed with respect to the securities offered is declared effective by the Commission. Our previous rules permitted ''early commencement'' only where an exchange offer was subject to Rule 13e–4 or Regulation 14D. For tender offers conducted under Tier II, we proposed to extend the option to all exchange offers, so long as withdrawal rights and other protections were provided to the same extent as would be required under Rule 13e–4 or Regulation 14D. We solicited comment regarding whether the ability to early commence should be extended to domestic offers as well. Commenters supported the proposed extension of early commencement to all exchange offers conducted under Tier II. They also supported extending early commencement to domestic offers. As adopted, the rules will permit early commencement for both cross-border and domestic exchange offers.

a. Benefits

We believe the rule amendments will further harmonize the treatment of exchange offers and cash tender offers by eliminating the timing disparity between the commencement of cash tender offers and stock tender offers. Domestic and foreign bidders that may have used a cash tender offer for a transaction due to timing concerns may benefit from elimination of the timing disparity. The amendments will not impact the filing and disclosure obligations of the acquiror under the Securities Act, or the requirement to comply with the tender offer rules in Regulation 14E. Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore may enhance the speed with which such offers may be effected. The amendment to Tier II also may allow combined offers to compete with cash bids.

When used, the rule will provide the benefit to investors of receiving withdrawal rights when they otherwise would not have been required under U.S. rules. The rule amendment also may cause offerors to extend an exchange offer to U.S. target security holders, where concerns about delays

[382] See the discussion above regarding the changes to the threshold eligibility determination relating to the calculation of U.S. ownership.

arising from the U.S. registration process might otherwise have caused them to exclude U.S. investors.

b. Costs

As discussed above, allowing an early commencement option for an exchange offer may result in additional informational costs in some circumstances. To the extent that an offeror commences early and disseminates offer materials upon the filing of the underlying registration statement, it may receive staff comments after dissemination. This may present increased costs for offerors who must recirculate in circumstances where they have elected to commence their offer early, before the staff comment process (where applicable) is complete.

E. Changes to Forms and Schedules

We are adopting changes to the manner in which several forms and schedules are filed. We are requiring that all Form CBs, and Form F–Xs filed in connection with a Form CB, be filed electronically. A Form F–X filed in connection with a Form CB must be filed electronically under the same circumstances.

In addition, we proposed to add a box to the cover page of Schedule TO and Forms S–4 and F–4 where the filing person would specify the applicable cross-border exemption or exemptions being relied upon to conduct the applicable transaction.[383] We are adopting the amendments to those forms as proposed. Under the revised rules, filers relying on the Tier II cross-border exemptions and filing a Schedule TO will be required to indicate which, if any, cross-border exemption they are relying on in conducting their tender offer.

Similarly, filers of Form S–4 or F–4 that are conducting a cross-border transaction under the Tier II exemptions will be required to specify the cross-border exemption claimed on the cover page of those forms. In some cases, they also may be filing a Schedule TO, where the exchange offer is subject to Rule 13e–4 or Regulation 14D. In some instances, such as where an exchange offer commences early, a Form S–4 or F–4 may be filed before Schedule TO. It would be helpful for the staff to have this information at the earliest possible time in the offering process; therefore, we are adopting the requirement for Forms S–4 and F–4 as well. The changes we are making to Schedule TO and Forms S–4 and F–4 will have no impact on the obligation of an offeror to file those forms.

1. Benefits

Requiring electronic filing of all Form CBs will benefit investors because these Forms will be more easily accessible. Form CBs currently submitted in paper form may be accessed through our public reference room. Electronic filing will make Form CB accessible to investors more easily and more quickly.

As to the information sought in Form S–4 or F–4 or Schedule TO, we believe this information will serve an important function for purposes of the staff review process and also will benefit filers. Currently, the staff may not be aware when reviewing a registration statement or tender offer statement that the filer is relying upon an applicable cross-border exemption to modify the terms of its offer. Consequently, the staff may not know whether non-compliance with all the rules that would govern a particular transaction is a matter that the staff should pursue through the comment process. Providing this information when the Form S–4 or F–4 or Schedule TO is initially filed will eliminate the need for the staff to issue, and the bidder to respond to, unnecessary comments based on a lack of knowledge about reliance on a cross-border exemption.

2. Costs

We believe the costs associated with the changes to Schedule TO and Forms S–4 and F–4 will be minimal. As discussed above, these changes will not impact the obligation to file the schedule or form, nor will they change the substantive disclosure required. Filers will already know whether, and if so, what cross-border exemption they will rely upon in conducting their transaction. The change will require them only to specify that information for the benefit of the staff and others viewing the filings.

We received two comments in response to the proposal to require e-filing of Form CB. One commenter argued against requiring electronic filing due to the ''costs and practical issues.'' [384] Another commenter cautiously supported the proposed changes but expressed concern with the possible deterrent effects of such requirements, such as potential hardships and liability arising from widespread availability of the filings on EDGAR.[385] While we understand the commenters' concerns, we do not believe that requiring the electronic submission of Form CB and the accompanying Form F–X will be a significant burden and therefore we are adopting the revisions as proposed. We note that in situations in which the electronic submission poses a significant burden, a hardship exemption is available. Additionally, the Form CB is furnished, not filed, and therefore not subject to Section 18 liability. With regard to the concern about widespread availability on EDGAR, investors can see that a Form CB has been filed when they view a company's filings on EDGAR, although they cannot view the actual document. They can request a copy of the submission from the public reference room. Therefore, we do not believe that requiring electronic submission of the forms should increase the potential liability issues. We do not expect these amendments to materially affect the cost burden of these forms.

F. Changes to the Beneficial Ownership Reporting Rules

We are amending the beneficial ownership rules to allow foreign institutions of the same type as the domestic institutions listed in Exchange Act Rule 13d–1(b)(1)(ii) to file on Schedule 13G instead of Schedule 13D. The revised rule will permit specified types of institutions to file on Schedule 13G, where those institutions have acquired securities in the ordinary course of their business and not with the purpose or effect of changing or influencing control of the issuer of the subject securities. In order to use Schedule 13G to the same extent as their U.S. counterparts, these foreign ''qualified institutional'' filers also will have to meet the conditions specified in the revised rule and Schedule 13G. The conditions set forth in the rule and the certification now included in Schedule 13G codify the conditions previously contained in the staff's no-action letters. One such condition is the requirement to certify that the regulatory scheme applicable to that type of institution in its home country is substantially comparable to the regulatory system applicable to its U.S. counterpart. Another such condition is an undertaking to provide to the Commission staff, upon request, the information that would have been required under Schedule 13D.

1. Benefits

The staff commonly grants no-action requests from foreign institutions comparable to the types of institutions listed in Rule 13d–1(b)(1)(ii) to file on Schedule 13G if they meet the

[383] The cover page of Form CB already requires disclosure of this information. However, Form CB needs to be filed only for some cross-border transactions, and only for those conducted under Tier I or Securities Act Rules 801 or 802.

[384] Letter from S&C.

[385] Letter from ABA.

conditions outlined in the no-action letters. The release adopting amendments to the beneficial ownership rules in 1998 discussed the fact that in the past, foreign institutional investors requested exemptive and no-action letters.[386] The release also stated that foreign institutions that wanted to use Schedule 13G as a qualified institutional investor should continue to request no-action relief from the staff. Because the staff's issuance of no-action letters was contemplated at the time of the 1998 amendments to the beneficial ownership rules, we only consider the costs and benefits of the proposed rule relevant to the staff's current practice of issuing no-action letters. From this perspective, the rule change would eliminate the costs and burdens on foreign institutions of seeking such relief individually. For foreign institutions that would otherwise have been eligible to file on Schedule 13G as passive investors under the current rules, filing under Rule 13d–1(b) reduces the burden on those filers because the initial filing obligation is less onerous for qualified institutional filers. For example, qualified institutions filing under Rule 13d–1(b) are required to file a Schedule 13G within 45 days after the end of the calendar year in which they own over five percent of the subject class as of the last day of that year. By contrast, passive investors reporting on Schedule 13G pursuant to Rule 13d–1(c) must file their initial report within ten days of the acquisition of more than five percent of the class. Unlike qualified institutional filers, passive investors may not file on Schedule 13G when their ownership equals or exceeds 20 percent of the subject class. No such limit exists for qualified institutional filers.

2. Costs

Schedule 13D requires more extensive disclosure than Schedule 13G. Therefore, to the extent that a filer taking advantage of the rule revisions otherwise would be required to file a Schedule 13D (or a Schedule 13G as a passive investor), there may be some information cost to U.S. investors by permitting the filer to use Schedule 13G. For instance, Schedule 13D requires information about the purpose of the beneficial owner's transaction in the securities, investment intent, and sources of funding. To the extent that such information may be of value to investors in making informed investment decisions, there will be a cost in permitting these institutions to file on Schedule 13G. We sought comment on the usefulness to investors of requiring these foreign institutions to file on Schedule 13D; however, we did not receive any comments in response to our request. We believe that investors will be able to obtain useful information from Schedules 13G filed by foreign institutions that acquire securities in the ordinary course of business and not with the purpose or effect of influencing control of the issuer. We do not believe the reduction of the amount of information filed by these institutions will be detrimental to investors because such institutions will not have the purpose or effect of influencing control of the issuers in which they hold securities. Thus, some of the additional information that would be required by Schedule 13D would be inapplicable.

Foreign institutions wishing to take advantage of the rule change will incur certain costs to satisfy the conditions for filing on Schedule 13G. In particular, foreign institutions will need to assess whether their home country regulatory scheme is substantially comparable to the regulatory scheme applicable to their U.S. counterparts. This might involve seeking the advice of home country or U.S. legal counsel. However, we believe the incremental costs of complying with the revised rule will be minimal because foreign institutions are commonly granted no-action relief to file on Schedule 13G under the same circumstances as permitted under the new rule.

We also are adopting a corresponding change to Exchange Act Rule 16a–1(a)(1) to include the foreign institutions eligible to rely on Rule 13d–1(b)(1)(ii)(J) in response to two commenters who requested it;[387] such a change would be consistent with the agency's regulatory history of aligning the scope of these two rules. Rule 16a–1(a) includes the definition of beneficial ownership for purposes of determining who is a more than 10 percent beneficial owner for purposes of Exchange Act Section 16. Rule 16a–1(a)(1) allows the institutions identified in the rule to exclude from 10 percent ownership calculations the shares they hold for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, without the purpose or effect of changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d–3(b). Similar to the change to Rule 13d–1(b)(1)(ii)(J), the change we are adopting to Rule 16a–1(a)(1) may have an information cost to U.S. investors because it will exempt certain foreign institutions from Section 16(a) reporting. We do not believe the reduction of the amount of information filed by these institutions will be detrimental to investors because investors will have access to the information provided by these institutions in Schedule 13G.

V. Consideration of Impact on Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act[388] and Section 3(f) of the Exchange Act[389] require us, when engaged in rulemaking, to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act[390] requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The amendments generally are expected to enhance efficiency in conducting cross-border tender offers and business combination transactions by streamlining the application of U.S. and foreign rules that may apply to those transactions. We expect that they will promote capital formation by facilitating cross-border business combination transactions conducted under multiple, and possibly conflicting, regulatory systems. Some of the rule revisions, such as the changes that broaden the availability of early commencement for exchange offers and the applicability of the Tier II exemptions for tender offers not subject to Exchange Act Rule 13e–4 or Regulation 14D, may be viewed as enhancing competition between competing offers for the same target securities, because they will make these provisions available to different kinds of offers. Furthermore, the rule changes are expected to reduce the regulatory burden on entities engaging in cross-border business combination transactions generally, which may promote competition by encouraging additional entities to engage in these types of transactions.

[386] See *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34–39538 (January 12, 1998) [63 FR 2854].

[387] See letters from ABA and S&C.

[388] 15 U.S.C. 77b(b)

[389] 15 U.S.C. 78c(f).

[390] 15 U.S.C. 78w(a)(2).

The changes to the test for determining eligibility to rely on the Tier I and Tier II cross-border exemptions and Securities Act Rule 802 under Regulation C are intended to facilitate the application of those exemptions. When the exemptions were adopted in 1999, we determined that the cross-border exemptions would serve to promote the inclusion of U.S. investors in transactions required to be conducted in accordance with a foreign regulatory system. The amendments we adopt today enhance the utility of the exemptions by addressing recurring conflicts between U.S. law and foreign law and practice.

The purpose of the amendment to Exchange Act Rule 13e–3(g)(6) is to expand the exemption from Rule 13e–3 for cross-border transactions meeting the conditions of Tier I. This amendment is expected to reduce regulatory compliance burdens for issuers and affiliates engaged in affiliated cross-border transactions that would otherwise be subject to Rule 13e–3. The ability to avoid the application of Rule 13e–3 for certain cross-border transactions is expected to benefit U.S. investors, because an issuer or affiliate may choose to exclude them if that is the only means to avoid the heightened disclosure burdens of Rule 13e–3. This amendment may increase efficiency for issuers and affiliates engaged in cross-border transactions because they will be able to use transaction structures that are common abroad but that were not permitted under the exemption before these amendments.

The purpose of the changes to the Tier II tender offer exemptions in Exchange Act Rules 13e–4(i), 14d–1(d) and 14e–5 is to expand those exemptions to better address areas of recurring regulatory conflict. By codifying relief previously granted for individual transactions, the changes are expected to reduce compliance burdens on issuers and bidders who no longer need to seek such relief for each individual transaction. By enhancing the flexibility of U.S. tender offer rules in cross-border transactions, where those rules conflict with common elements of foreign law or practice, we believe the changes will increase the likelihood that bidders will include U.S. investors in these transactions.

We do not anticipate that the changes to Rule 14e–5 will have a significant impact, if any, on the economy because they codify the current scope of activities exempted from that rule's prohibitions through existing class exemptive letters. We believe that the changes to Rule 14e–5 likely will not place any burden on competition, as the rule changes apply equally to all market participants covered by the rule. We believe that the Rule 14e–5 class exemptive letters concerning Tier II cross-border transactions have promoted efficiency and capital formation by eliminating the time and cost burdens associated with individual grants of relief. We believe that the codification of those letters similarly will foster efficiency and cross-border capital formation.

The amendment to Securities Act Rule 162(a), expanding the ability of offerors to commence an exchange offer early where a tender offer is not subject to Regulation 14D or Rule 13e–4, is expected to further equalize the regulatory burden between cash tender offers and exchange offers, thereby promoting competition. Because foreign rules often contain a mandatory offer requirement, obligating an offeror to make a tender offer for a given class of securities, these rule changes likely will place mandatory offers for unregistered classes of securities on an equal footing with offers for registered equity securities. The ability of offerors to commence an exchange offer early is being extended to domestic offers as well. This change likely will equalize the regulatory burden between cash tender offers and exchange offers in the United States.

The changes to Schedule TO and Forms S–4 and F–4 will likely improve efficiency because disclosure of the exemptions being relied upon by the bidder will aid the staff in its review of these documents and likely eliminate staff comments based upon assumptions as to the exemption being relied upon by the bidder.

VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis has been prepared in accordance with the Regulatory Flexibility Act.[391] It relates to revisions to the rules and forms that we are adopting today.[392] An Initial Regulatory Flexibility Act Analysis was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

A. Need for the Amendments

These amendments are necessary to facilitate the inclusion of U.S. target security holders in cross-border business combination transactions. The rule changes are expected to result in further reductions in the cost and burdens associated with including U.S. target holders in those transactions. U.S. target holders previously excluded from such transactions will benefit by having additional transactions extended to them.

The rule changes are incremental in nature and are not a significant departure from the previous cross-border exemptions. The changes further harmonize U.S. and foreign law and practice, and facilitate greater inclusion of U.S. target holders in cross-border transactions. In many instances, the changes codify existing interpretations and exemptive relief. We do not believe any less restrictive alternative to the rule amendments exists that would serve the purpose of the tender offer and registration requirements of the federal securities laws. We did not identify alternatives to the rule amendments that are consistent with their objectives and our statutory authority. The amended rules do not duplicate or conflict with any existing federal rule provisions.

B. Significant Issues Raised by Public Comments

An Initial Regulatory Flexibility Analysis was prepared in accordance with the Regulatory Flexibility Act in connection with the Proposing Release, and we solicited comments on any impact the proposed changes might have on small entities. We did not receive any public comments that responded directly to the IRFA or that dealt directly with the proposal's impact on small entities.

C. Small Entities Subject to the Final Amendments

The Regulatory Flexibility Act defines ''small entity'' to mean ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' [393] The Commission's rules define ''small business'' and ''small organization'' for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.[394] A ''small business'' and ''small organization,'' when used with reference to an issuer other than an investment company, generally means an issuer with total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers that may be considered reporting small entities.[395]

[391] 5 U.S.C. 601.

[392] Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress does not appear to have intended the Act to apply to foreign issuers. Therefore, we are analyzing the impact on small U.S. entities only.

[393] 5 U.S.C. 601(6).

[394] Securities Act Rule 157 [17 CFR 230.157] and Exchange Act Rule 0–10 [17 CFR 240.0–10] contain the applicable definitions.

[395] The estimated number of reporting small entities is based on 2007 data, including the

The revised rules may affect each of the approximately 1,100 issuers that may be considered reporting small entities. The number of reporting or non-reporting small businesses that actually rely on the revised rules, or may otherwise be impacted by the rule revisions, will depend on many factors. Acquirors relying on the exemptions may or may not have reporting obligations under the Exchange Act before engaging in a cross-border business combination transaction. An acquiror's ability to rely on the exemptions is not determined by the acquiror's size or market capitalization; however, we believe that small businesses are not typically acquirors in cross-border transactions. We believe that the amendments likely will result in savings to entities (both small and large) that qualify for the exemptions.

D. Reporting, Recordkeeping and Other Compliance Requirements

The amended rules do not impose any new reporting, recordkeeping or other compliance requirements on small entities.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments adopted today, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (ii) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage from the amendments, or any part thereof, for small entities. Our objective in adopting the amendments is to facilitate the inclusion of U.S. holders in cross-border business combinations. While we considered the above alternatives to accomplish our stated objective, we believe that different compliance or reporting requirements are not necessary because the amendments do not establish any new reporting, recordkeeping, or compliance requirements for small entities. Establishing a different standard for small business entities would impose a greater compliance burden on small entities and would be inconsistent with the benefits provided for all entities that are able to avail themselves of the exemptions.

VII. Statutory Basis and Text of Amendments

We are amending the forms and rules under the authority set forth in Sections 3(b), 7, 8, 9, 10, 19 and 28 of the Securities Act, and Sections 12, 13, 14, 23, 35A, and 36 of the Exchange Act.

List of Subjects in 17 CFR Parts 230, 231, 232, 239, 240, 241, and 249

Reporting and recordkeeping requirements, Securities.

Text of Amendments

■ For the reasons set out in the preamble, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78j, 78*l*, 78m, 78n, 78o, 78t, 78w, 78*ll*(d), 78mm, 80a–8, 80a–24, 80a–28, 80a29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

■ 2. Revise § 230.162 to read as follows:

§ 230.162 Submission of tenders in registered exchange offers.

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), an offeror may solicit tenders of securities in an exchange offer before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules, and either:

(1) The exchange offer is subject to § 240.13e–4 or §§ 240.14d–1 through 14d–11 of this chapter; or

(2) The offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.13e–4 or §§ 240.14d–1 through 14d–11 of this chapter; and if a material change occurs in the information published, sent or given to security holders, the offeror complies with the provisions of § 240.13e–4(e)(3) or § 240.14d–4(b) and (d) of this chapter in disseminating information about the material change to security holders, and including the minimum periods during which the offer must remain open (with withdrawal rights) after notice of the change is provided to security holders.

(b) Notwithstanding Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer that commences before the effectiveness of a registration statement in accordance with the provisions of § 230.162(a) of this section, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e–4(e)(2) or § 240.14d–4(b) of this chapter. This applies not only to exchange offers subject to those provisions, but also to exchange offers not subject to those provisions that meet the conditions in § 230.162(a)(2) of this section.

Instruction to § 230.162 of this section: Notwithstanding the provisions of § 230.162 of this section above, for going-private transactions (as defined by § 240.13e–3) and roll-up transactions (as described by Item 901 of Regulation S–K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

■ 3. Amend § 230.800 by revising paragraph (h)(1) and(h)(2) and adding paragraphs (h)(6) and (h)(7) to read as follows:

§ 230.800 Definitions for §§ 230.800, 230.801 and 230.802.

* * * * *

(h) * * *

(1) Calculate the percentage of outstanding securities held by U.S. holders as of a date no more than 60 days before or 30 days after the public announcement of a business combination conducted under § 230.802 under the Act or of the record date in a rights offering conducted under § 230.801 under the Act. For a business combination conducted under § 230.802, if you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before public announcement.

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculation other types of securities that are convertible or

Commission's EDGAR database and Thomson Financial's Worldscope database.

exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the acquiror in an exchange offer or business combination;

* * * * *

(6) For exchange offers conducted pursuant to § 230.802 under the Act by persons other than the issuer of the subject securities or its affiliates that are not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless paragraphs (h)(7)(i), (ii) or (iii) of this section indicate otherwise.

(7) For rights offerings and business combinations, including exchange offers conducted pursuant to § 230.802 under the Act, where the offeror is unable to conduct the analysis of U.S. ownership set forth in paragraph (h)(3) of this section, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities so long as there is a primary trading market for the subject securities outside the United States, as defined in § 240.12h–6(f)(5) of this chapter, unless:

(i) Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the business combination or of the record date for a rights offering exceeds 10 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

(ii) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(iii) The acquiror or issuer knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent of such securities. As an example, an acquiror or issuer is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The acquiror in a business combination is deemed to know information about U.S. ownership available from the issuer. The acquiror or issuer is deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

* * * * *

■ 4. Amend § 230.802 by revising paragraphs (a)(2) and (a)(3) and removing paragraph (c).

The revisions read as follows:

§ 230.802 Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

* * * * *

(a) * * *

(2) *Equal treatment.* The offeror must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The offeror, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the offeror must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) *Informational documents.* (i) If the offeror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the offeror must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the offeror is a foreign company, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of the Form CB to appoint an agent for service of process in the United States.

(ii) The offeror must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction.

(iii) If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

* * * * *

PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 5. Part 231 is amended by adding Release No. 33–8957 and the release date of September 19, 2008, to the list of interpretative releases.

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 6. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 7. Amend § 232.101 by:

■ a. Revising paragraphs (a)(1)(vi) and (a)(1)(vii);

■ b. Removing and reserving paragraph (b)(7); and

■ c. Revising paragraph (b)(8).

The revisions read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(vi) Form CB (§§ 239.800 and 249.480 of this chapter) filed or submitted under § 230.801 or 230.802 of this chapter or § 240.13e–4(h)(8), 240.14d–1(c), or 240.14e–2(d) of this chapter;

(vii) Form F–X (§ 239.42 of this chapter) when filed in connection with a Form CB (§§ 239.800 and 249.480 of this chapter);

* * * * *

(b) * * *

(8) Form F–X (§ 232.42 of this chapter) if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251 230.263 of this chapter); and

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 8. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*, 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

■ 9. Form S–4 (referenced in § 239.25) is amended by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the ''Calculation of Registration Fee'' table to read as follows:

Note— The text of Form S–4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM S–4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e–4(i) (Cross-Border Issuer Tender Offer) □

Exchange Act Rule 14d–1(d) (Cross-Border Third-Party Tender Offer) □

* * * * *

■ 10. Amend Form F–4 (referenced in § 239.34) by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the ''Calculation of Registration Fee'' table to read as follows:

Note— The text of Form F–4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM F–4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e–4(i) (Cross-Border Issuer Tender Offer) □

Exchange Act Rule 14d–1(d) (Cross-Border Third-Party Tender Offer) □

* * * * *

■ 11. Amend Form F–X (referenced in § 239.42) by revising the Note to General Instruction II.B.(2) to read as follows:

Note— The text of Form F–X does not and this amendment will not appear in the Code of Federal Regulations.

FORM F–X

APPOINTMENT OF AGENT FOR SERVICE OF PROCESS AND UNDERTAKING

GENERAL INSTRUCTIONS

* * * * *

II. * * *

B. * * *

(2) * * *

Note: Regulation S–T Rule 101(b)(8) only permits the filing of the Form F–X in paper if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251–230.263 of this chapter).

* * * * *

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 12. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 13. Amend § 240.13d–1 by:

■ a. Revising paragraph (b)(1)(ii)(G) and (J);

■ b. Removing ''and'' from the end of paragraph (b)(1)(ii)(I);

■ c. Adding paragraph (b)(1)(ii)(K); and

■ d. Removing the authority citation following the section.

The revisions and addition reads as follows:

§ 240.13d–1. Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(ii) * * *

(G) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in § 240.13d–1(b)(1)(ii)(A) through (J), does not exceed one percent of the securities of the subject class;

* * * * *

(J) A non-U.S. institution that is the functional equivalent of any of the institutions listed in § 240.13d–1 (b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution; and

(K) A group, provided that all the members are persons specified in § 240.13d–1(b)(1)(ii)(A) through (J).

* * * * *

■ 14. Amend § 240.13d–102 by:

■ a. Revising Instruction 12 to the Instruction for the Cover Page before the Notes;

■ b. In Item 3 removing the period at the end of paragraphs (a), (b), (c), and (d) and in each place adding a semicolon;

■ c. In Item 3 revising paragraph (j) and adding paragraph (k); and

■ d. In Item 10 redesignating paragraph (b) as paragraph (c) and adding new paragraph (b).

The revision and additions read as follows:

§ 240.13d–102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d–1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d–2.

* * * * *

Instructions for Cover Page:

* * * * *

(12) *Type of Reporting Person*—Please classify each ''reporting person'' according to the following breakdown (see Item 3 of Schedule 13G) and place the appropriate Symbol on the form:

Category	Symbol
Broker Dealer	BD
Bank	BK
Insurance Company	IC
Investment Company	IV
Investment Adviser	IA
Employee Benefit Plan or Endowment Fund	EP
Parent Holding Company/Control Person	HC
Savings Association	SA
Church Plan	CP
Corporation	CO
Partnership	PN
Individual	IN
Non-U.S. Institution	FI
Other	OO

* * * * *

Item 3. * * *

(j) [ ] A non-U.S. institution in accordance with § 240.13d–1(b)(1)(ii)(J);

(k) [ ] Group, in accordance with § 240.13d–1(b)(1)(ii)(K). If filing as a non-U.S. institution in accordance with § 240.13d–1(b)(1)(ii)(J), please specify the type of institution: _____

* * * * *

Item 10. Certification

* * * * *

(b) The following certification shall be included if the statement is filed pursuant to § 240.13d–1(b)(1)(ii)(J), or if the statement is filed pursuant to § 240.13d–1(b)(1)(ii)(K) and a member of the group is a non-U.S. institution eligible to file pursuant to § 240.13d–1(b)(1)(ii)(J):

By signing below I certify that, to the best of my knowledge and belief, the foreign regulatory scheme applicable to [insert particular category of institutional investor] is substantially comparable to the regulatory scheme

applicable to the functionally equivalent U.S. institution(s). I also undertake to furnish to the Commission staff, upon request, information that would otherwise be disclosed in a Schedule 13D.

* * * * *

■ 15. Amend § 240.13e–3 by revising paragraph (g)(6) to read as follows:

§ 240.13e–3 Going private transactions by certain issuers or their affiliates.

* * * * *

(g) * * *

(6) Any tender offer or business combination made in compliance with § 230.802 of this chapter, § 240.13e–4(h)(8) or § 240.14d–1(c) or any other kind of transaction that otherwise meets the conditions for reliance on the cross-border exemptions set forth in § 240.13e–4(h)(8), 240.14d–1(c) or 230.802 of this chapter except for the fact that it is not technically subject to those rules.

Instruction to § 240.13e–3(g)(6): To the extent applicable, the acquiror must comply with the conditions set forth in § 230.802 of this chapter, and §§ 240.13e–4(h)(8) and 14d–1(c). If the acquiror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the transaction, the acquiror must furnish an English translation of that informational document, including any amendments thereto, to the Commission under cover of Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the acquiror is a foreign entity, it must also file a Form F–X (§ 239.42 of this chapter) with the Commission at the same time as the submission of the Form CB to appoint an agent for service in the United States.

■ 16. Amend § 240.13e–4 by:

■ a. Revising paragraph (h)(8)(i);

■ b. Revising the introductory text of paragraph (i);

■ c. Revising paragraph (i)(1)(ii);

■ d. Revising paragraph (i)(2)(ii);

■ e. Adding paragraphs (i)(2)(v) and (vi);

■ f. Revising paragraphs 2.i. and ii. to the Instructions to paragraph (h)(8) and (i);

■ g. Redesignating Instructions 3 and 4 to paragraphs (h)(8) and (i) as Instructions 4 and 5 respectively;

■ h. Adding a new Instruction 3 to paragraphs (h)(8) and (i); and

■ i. Revising the newly redesignated Instructions 4 and 5 to paragraphs (h)(8) and (i).

The revisions and additions read as follows:

§ 240.13e–4 Tender offers by issuers.

(h) * * *

(8) * * *

(i) Except in the case of an issuer tender offer that is commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d–1(c), U.S. holders do not hold more than 10 percent of the subject class sought in the offer (as determined under Instructions 2 or 3 to paragraph (h)(8) and paragraph (i) of this section);

* * * * *

(i) *Cross-border tender offers (Tier II).* Any issuer tender offer (including any exchange offer) that meets the conditions in paragraph (i)(1) of this section shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section, provided that such issuer tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section. In addition, any issuer tender offer (including any exchange offer) subject only to the requirements of section 14(e) of the Act and Regulation 14E (§§ 240.14e–1 through 240.14e–8) thereunder that meets the conditions in paragraph (i)(1) of this section also shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section, to the extent needed under the requirements of Regulation 14E, so long as the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section:

* * * * *

(1) * * *

(ii) Except in the case of an issuer tender offer commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d–1(d), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined in accordance with Instructions 2 or 3 to paragraphs (h)(8) and (i) of this section).

(2) * * *

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders, which also may include all holders of American Depositary Shares representing interests in the subject securities, and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(v) *Suspension of withdrawal rights during counting of tendered securities.* The issuer or affiliate may suspend withdrawal rights required under paragraph (f)(2) of this section at the end of the offer and during the period that securities tendered into the offer are being counted, provided that:

(A) The issuer or affiliate has provided an offer period, including withdrawal rights, for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the issuer or affiliate is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(vi) *Early termination of an initial offering period.* An issuer or affiliate conducting an issuer tender offer may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

(A) The initial offering period has been open for at least 20 U.S. business days;

(B) The issuer or affiliate has adequately discussed the possibility of and the impact of the early termination in the original offer materials;

(C) The issuer or affiliate provides a subsequent offering period after the termination of the initial offering period;

(D) All offer conditions are satisfied as of the time when the initial offering period ends; and

(E) The issuer or affiliate does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

Instructions to paragraph (h)(8) and (i) of this section:

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 days before and no more than 30 days after the public announcement of the tender offer. If you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before announcement;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities;

* * * * *

3. If you are unable to conduct the analysis of U.S. ownership set forth in Instruction 2 above, U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities (40 percent for Tier II) so long as there is a primary trading market outside the United States, as defined in § 240.12h–6(f)(5) of this chapter, unless:

i. Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the tender offer exceeds 10 percent (or 40 percent) of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

ii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (or 40 percent) of the outstanding subject class of securities; or

iii. You know or have reason to know, before the public announcement of the offer, that the level of U.S. ownership of the subject securities exceeds 10 percent (or 40 percent) of such securities. As an example, you are deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the home jurisdiction and, if different, the non-U.S. jurisdiction in which the primary trading market for the subject class of securities is located. You are also deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons you have retained to advise you about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

4. *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

5. The exemptions provided by paragraphs (h)(8) and (i) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (h)(8) and (i) of this section but are part of a plan or scheme to evade the provisions of this section.

* * * * *

■ 17. Amend § 240.14d–1 by:
■ a. Revising paragraph (a);
■ b. Revising paragraph (c)(1);
■ c. Revising the introductory text of paragraph (d), paragraphs (d)(1)(ii), (d)(2)(ii) and (d)(2)(iv);
■ d. Adding paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), and (d)(2)(ix); and
■ e. Revising Instructions 2.i., 2.ii., 3. introductory text, 3.i., 3.ii., and 3.iii. to the Instructions to paragraphs (c) and (d).

The revisions and additions read as follows:

§ 240.14d–1 Scope of and definitions applicable to Regulations 14D and 14E.

(a) *Scope.* Regulation 14D (§§ 240.14d–1 through 240.14d–101) shall apply to any tender offer that is subject to section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), including, but not limited to, any tender offer for securities of a class described in that section that is made by an affiliate of the issuer of such class. Regulation 14E (§§ 240.14e–1 through 240.14e–8) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.

* * * * *

(c) * * *

(1) *U.S. ownership limitation.* Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e–4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section).

* * * * *

(d) *Tier II.* A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section. In addition, a person conducting a tender offer subject only to the requirements of section 14(e) of the Act (15 U.S.C. 78n(e)) and Regulation 14E thereunder (§§ 240.14e–1 through 240.14e–8) that meets the conditions in paragraph (d)(1) of the section also shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, to the extent needed under the requirements of Regulation 14E, so long as the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

(1) * * *

(ii) Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e–4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section); and

(2) * * *

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of § 240.14d–10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into multiple offers: One offer made to U.S. holders, which also may include all holders of American Depositary Shares representing interests in the subject securities, and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(c). Where payment may not be made on a more expedited basis

under home jurisdiction law or practice, payment for securities tendered during any subsequent offering period within 20 business days of the date of tender will satisfy the prompt payment requirements of § 240.14d–11(e). For purposes of this paragraph (d), a business day is determined with reference to the target's home jurisdiction.

* * * * *

(vi) *Payment of interest on securities tendered during subsequent offering period.* Notwithstanding the requirements of § 240.14d–11(f), the bidder may pay interest on securities tendered during a subsequent offering period, if required under applicable foreign law. Paying interest on securities tendered during a subsequent offering period in accordance with this section will not be deemed to violate § 240.14d–10(a)(2).

(vii) *Suspension of withdrawal rights during counting of tendered securities.* The bidder may suspend withdrawal rights required under section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) at the end of the offer and during the period that securities tendered into the offer are being counted, provided that:

(A) The bidder has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(viii) *Mix and match elections and the subsequent offering period.* Notwithstanding the requirements of § 240.14d–11(b), where the bidder offers target security holders a choice between different forms of consideration, it may establish a ceiling on one or more forms of consideration offered. Notwithstanding the requirements of § 240.14d–11(f), a bidder that establishes a ceiling on one or more forms of consideration offered pursuant to this subsection may offset elections of tendering security holders against one another, subject to proration, so that elections are satisfied to the greatest extent possible and prorated to the extent that they cannot be satisfied in full. Such a bidder also may separately offset and prorate securities tendered during the initial offering period and those tendered during any subsequent offering period, notwithstanding the requirements of § 240.14d–10(c).

(ix) *Early termination of an initial offering period.* A bidder may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

(A) The initial offering period has been open for at least 20 U.S. business days;

(B) The bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;

(C) The bidder provides a subsequent offering period after the termination of the initial offering period;

(D) All offer conditions are satisfied as of the time when the initial offering period ends; and

(E) The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

Instructions to paragraphs (c) and (d):

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 before and no more than 30 days after public announcement of the tender offer. If you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before announcement;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the bidder;

* * * * *

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities that is not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 10 percent (40 percent in the case of paragraph (d) of this section) of such outstanding securities, unless paragraphs 3.i., ii., or iii. of the instructions to paragraphs (c) and (d) of this section indicate otherwise. In addition, where the bidder is unable to conduct the analysis of U.S. ownership set forth in Instruction 2 to paragraphs (c) and (d) of this section, the bidder may presume that the percentage of securities held by U.S. holders is less than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding securities so long as there is a primary trading market for the subject securities outside the U.S., as defined in § 240.12h–6(f)(5) of this chapter, unless:

i. Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the offer exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

ii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding subject class of securities; or

iii. The bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of such securities. As an example, a bidder is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The bidder is deemed to know information about U.S. ownership available from the issuer or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

* * * * *

■ 18. Amend § 240.14d–11 by revising the introductory text to read as follows:

§ 240.14d–11. Subsequent offering period.

A bidder may elect to provide a subsequent offering period of at least three business days during which tenders will be accepted if:

* * * * *

■ 19. Amend § 240.14d–100 by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the General Instructions to read as follows:

§ 240.14d–100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

* * * * *

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

[ ] Rule 13e–4(i) (Cross-Border Issuer Tender Offer)

[ ] Rule 14d–1(d) (Cross-Border Third-Party Tender Offer)

* * * * *

■ 20. Amend § 240.14e–5 by:
■ a. Removing ''and'' at the end of paragraphs (b)(9)(v) and (c)(6);
■ b. Removing the period at the end of paragraphs (b)(10)(v) and (c)(7) and adding in its place ''; and''; and
■ c. Adding paragraphs (b)(11), (b)(12), (c)(8), and (c)(9).

The additions read as follows:

§ 240.14e–5. Prohibiting purchases outside of a tender offer.

* * * * *

(b) * * *

(11) *Purchases or arrangements to purchase pursuant to a foreign tender offer(s).* Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

(i) The U.S. and foreign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d–1(d);

(ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;

(iii) The procedural terms of the U.S. tender offer are at least as favorable as the terms of the foreign tender offer(s);

(iv) The intention of the offeror to make purchases pursuant to the foreign tender offer(s) is disclosed in the U.S. offering documents; and

(v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and

(12) *Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.*

(i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company's home jurisdiction, if the following conditions are satisfied:

(A) The subject company is a foreign private issuer as defined in § 240.3b–4(c);

(B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d–1(d);

(C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;

(D) The United States offering materials disclose prominently the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;

(E) There is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of subject securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(*1*) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws and regulations through the establishment of information barriers;

(*2*) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(*3*) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(*4*) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) Reserved.

(c) * * *

(8) *Subject company* has the same meaning as in § 229.1000 of this chapter; and

(9) *Home jurisdiction* has the same meaning as in the Instructions to paragraphs (c) and (d) of § 240.14d–1.

* * * * *

■ 21. Amend § 240.16a–1 by:
■ a. Revising paragraph (a)(1)(vii);
■ b. Removing ''and'' from the end of paragraph (a)(1)(ix); and
■ c. Revising paragraphs (a)(1)(x) and (xi).

The revisions read as follows:

§ 240.16a–1 Definition of terms.

* * * * *

(a) * * *

(1) * * *

(vii) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in § 240.16a–1 (a)(1)(i) through (x), does not exceed one percent of the securities of the subject class;

* * * * *

(x) A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (a)(1)(i) through (ix) of this section, so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution and the non-U.S. institution is eligible to file a Schedule 13G pursuant to § 240.13d–1(b)(1)(ii)(J); and

(xi) A group, provided that all the members are persons specified in § 240.16a–1 (a)(1)(i) through (x).

* * * * *

PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

■ 22. Part 241 is amended by adding Release No. 34–58597 and the release date of September 19, 2008, to the list of interpretative releases.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 23. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.*, 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 24. Amend Form CB (referenced in § 239.800 and § 249.480) by:

■ a. Revising General Instruction II.A.(1); and

■ b. Revising General Instruction II.A.(4).

Note: The text of Form CB does not and this amendment will not appear in the Code of Federal Regulations.

Form CB

TENDER OFFER/RIGHTS OFFERING NOTIFICATION FORM

(AMENDMENT NO. _____)

* * * * *

GENERAL INSTRUCTIONS

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II. Instructions for Submitting Form

A. (1) Regulation S–T Rule 101(a)(1)(vi) (17 CFR 232.101(a)(1)(vi)) requires a party to submit the Form CB in electronic format via the Commission's Electronic Data Gathering and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR Part 232). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551–8900.

* * * * *

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* * * * *

By the Commission.

Dated: September 19, 2008.

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E8–22515 Filed 10–8–08; 8:45 am]

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H.R. 5834/P.L. 110–346

North Korean Human Rights Reauthorization Act of 2008 (Oct. 7, 2008; 122 Stat. 3939)

H.R. 5975/P.L. 110–347

To designate the facility of the United States Postal Service located at 101 West Main Street in Waterville, New York, as the ''Cpl. John P. Sigsbee Post Office''. (Oct. 7, 2008; 122 Stat. 3944)

H.R. 6092/P.L. 110–348

To designate the facility of the United States Postal Service located at 101 Tallapoosa Street in Bremen, Georgia, as the ''Sergeant Paul Saylor Post Office Building''. (Oct. 7, 2008; 122 Stat. 3945)

H.R. 6437/P.L. 110–349

To designate the facility of the United States Postal Service located at 200 North Texas Avenue in Odessa, Texas, as the ''Corporal Alfred Mac Wilson Post Office''. (Oct. 7, 2008; 122 Stat. 3946)

H.R. 6889/P.L. 110–350

To extend the authority of the Secretary of Education to purchase guaranteed student loans for an additional year,

and for other purposes. (Oct. 7, 2008; 122 Stat. 3947)

H.R. 6893/P.L. 110–351

Fostering Connections to Success and Increasing Adoptions Act of 2008 (Oct. 7, 2008; 122 Stat. 3949)

S. 3015/P.L. 110–352

To designate the facility of the United States Postal Service located at 18 S. G Street, Lakeview, Oregon, as the ''Dr. Bernard Daly Post Office Building''. (Oct. 7, 2008; 122 Stat. 3982)

S. 3082/P.L. 110–353

To designate the facility of the United States Postal Service located at 1700 Cleveland Avenue in Kansas City, Missouri, as the ''Reverend Earl Abel Post Office Building''. (Oct. 7, 2008; 122 Stat. 3983)

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