12–3–08 Wednesday
Vol. 73 No. 233 Dec. 3, 2008

Pages 73545–73760

# Federal Register

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

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2007–28881; Directorate Identifier 2006–NM–263–AD; Amendment 39–15663; AD 2008–18–06]**

**RIN 2120–AA64**

## Airworthiness Directives; McDonnell Douglas Model DC–9–10, DC–9–20, DC–9–30, DC–9–40, and DC–9–50 Series Airplanes, Equipped With a Tail Cone Evacuation Slide Container Installed in Accordance With Supplemental Type Certificate (STC) ST735SO

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** We are adopting a new airworthiness directive (AD) for McDonnell Douglas Model DC–9–10, DC–9–20, DC–9–30, DC–9–40, and DC–9–50 series airplanes, equipped with tail cone evacuation slide containers as specified above. This AD requires modifying the tail cone slide. This AD also requires additional tail cone drops and slide deployments, and repair if necessary. This AD results from several reports of inadvertent tail cone deployments in which the tail cone slide failed to deploy. We are issuing this AD to ensure that the tail cone evacuation slide deploys correctly. Failure of the slide to deploy during an emergency evacuation could result in injury to flightcrew and passengers.

**DATES:** This AD is effective January 7, 2009.

### 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:** Ken Sujishi, Aerospace Engineer, Cabin Safety Branch, ANM–150L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5353; fax (562) 627–5210.

**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 McDonnell Douglas Model DC–9–10, DC–9–20, DC–9–30, DC–9–40, and DC–9–50 series airplanes, equipped with certain tail cone evacuation slide containers. That NPRM was published in the **Federal Register** on August 6, 2007 (72 FR 43578). That NPRM proposed to require modifying the tail cone slide. That NPRM also proposed to require additional tail cone drops and slide deployments, and repair if necessary.

### Comments

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

### Request To Clarify Paragraph (g) of the NPRM

Northwest Airlines (NWA) requests that we clarify whether the 150-flight-cycle compliance time specified in paragraph (g) of the NPRM starts after the first airplane is modified or after the last airplane is modified. Unless the FAA intends to have operators perform slide deployments while the fleet is still being modified, NWA recommends that the 150-flight-cycle clock start after the modification, or within 24 months after the effective date of the AD, whichever occurs first. NWA also states that it assumes the 150-day compliance clock in that same paragraph is intended for those operators who have already complied with the intent of the AD or who will comply very quickly after issuance of the AD. NWA states that it would be helpful if this was stated.

We agree with NWA's request for clarification. Our intent was for the operator to start and complete the tail cone modification and fly a minimum of 150 flight cycles before the additional tail cone deployment test, accomplished within 24 months after the effective date of the AD. When there are multiple airplanes, the 150 flight cycles apply to each individual airplane, and start after the modification is done to each airplane individually.

Scenario: An operator completes the modification on the first airplane, and then completes the minimum 150 flight cycles two months after the modification. After the operator successfully performs the tail cone slide deployment test on the first airplane, the second airplane is modified a week later. The second airplane will also be required to fly a minimum of 150 flight cycles before the deployment test of the tail cone slide. If the operator has 100 airplanes, then the operator must demonstrate a successful deployment test on 10 percent (ten) of the modified airplanes as terminating action for the AD.

We agree that the proposed 150-day compliance time specified in paragraph (g) of the NPRM needs not only to be clarified, but also revised. The 150-day requirement could impose a schedule hardship for some operators who might need more time to complete the modification. Our intent was to allow the operator time to modify the tail cone slide cover and to perform the deployment test after a minimum of 150 flight cycles after modification, and no later than 24 months after the effective date of this AD.

For all these reasons, we have revised paragraph (g) and added a new paragraph (h) to the AD to clarify the compliance time. The new paragraph (g) begins as follows: ''* * * no earlier than 150 flight cycles after doing the modification required by paragraph (f) of this AD, and no later than 24 months after the effective date of this AD. * * *'' The new paragraph (h) states that operators should contact the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, if the

repeat deployment cannot be performed as required by paragraph (g) of this AD.

**Request for Exemption From Proposed Requirements**

NWA also requests exemption from the proposed requirements of paragraph (g) of the NPRM. NWA states that while performing testing to obtain Supplemental Type Certificate (STC) ST01967CH, it successfully performed 5 tail cone drops and slide deployments with the new design slide installation. NWA believes that the requirement to perform additional slide deployments is arbitrary, and that the 5 tail cone drops performed as part of the STC approval are sufficient to prove the design reliability of its airplanes.

We disagree with the request for exemption. The 5 tail cone drops and slide deployments that NWA did during the STC approval process did not represent the severity of the actual operating environment for the tail cone, including temperature and high takeoff and landing loads, nor did they represent repeated flight cycles with various types of contamination such as dirt and fuel. Tail cone slides must be overhauled, repacked and re-rigged every 3 years and have no other maintenance requirements in order to verify successful deployment. We have not changed the AD in this regard.

**Explanation of Change to Paragraph (f) and Removal of Note 1 of the NPRM**

We have revised paragraph (f) of this AD, and have removed Note 1 of this AD, to remove reference to Northwest Airlines STC ST01967CH and Northwest Airlines Drawing 9B25–41477, Revision B, dated September 14, 2006; and Northwest Airlines Drawing 9B25–90399, Revision D, dated December 21, 2006. However, we have approved Northwest Airlines STC ST01967CH as a method for modifying the tail cone slide. Operators may contact the Manager, Los Angeles ACO, for information regarding Northwest Airlines STC ST01967CH for modifying the tail cone slide, as required by paragraph (f) of this AD.

**Conclusion**

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

**Costs of Compliance**

There are about 400 airplanes of the affected design in the worldwide fleet. This AD affects about 300 airplanes of U.S. registry. The tail cone drops/slide deployments take about 16 work hours per airplane, at an average labor rate of $80 per work hour. Required parts cost about $1,300 per airplane. Based on these figures, the estimated cost of the AD for U.S. operators is $774,000, or $2,580 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**

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, 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:

**2008–18–06 McDonnell Douglas:** Amendment 39–15663. Docket No. FAA–2007–28881; Directorate Identifier 2006–NM–263–AD.

**Effective Date**

(a) This airworthiness directive (AD) is effective January 7, 2009.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to McDonnell Douglas Model DC–9–11, DC–9–12, DC–9–13, DC–9–14, DC–9–15, DC–9–15F, DC–9–21, DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–33F, DC–9–34, DC–9–34F, DC–9–32F (C–9A, C–9B), DC–9–41, and DC–9–51 airplanes, certificated in any category, equipped with a tail cone evacuation slide container installed in accordance with supplemental type certificate (STC) ST735SO.

**Unsafe Condition**

(d) This AD results from several reports of inadvertent tail cone deployments in which the tail cone slide failed to deploy. We are issuing this AD to ensure that the tail cone evacuation slide deploys correctly. Failure of the slide to deploy during an emergency evacuation could result in injury to flightcrew and passengers.

**Compliance**

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

**Initial Actions to Address Slide Deployment Failures**

(f) Within 24 months after the effective date of this AD: Modify the tail cone slide in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA.

**Repeat Deployment and Terminating Action**

(g) Except as provided by paragraph (h) of this AD, no earlier than 150 flight cycles after doing the modification required by paragraph (f) of this AD, and no later than 24 months after the effective date of this AD: Do additional tail cone drops and slide deployments on a minimum of 10 percent of an operator's fleet of affected airplanes (if fewer than 10 airplanes in the fleet: at least one airplane).

(1) If the tailcone and slide deployments are successful according to the applicable McDonnell Douglas DC–9 airplane maintenance manual, no further action is required by this AD.

(2) If any tailcone and slide deployment is unsuccessful according to the applicable McDonnell Douglas DC–9 airplane maintenance manual, before further flight, repair in accordance with a method approved by the Manager, Los Angeles ACO, FAA.

**Exception to Compliance Time for Repeat Deployment**

(h) For any airplane on which the repeat tail cone drop deployment cannot be performed within 24 months after the effective date of this AD as required by paragraph (g) of this AD: Repeat the deployment as approved by the Manager, Los Angeles ACO, FAA, in accordance with the procedures specified in paragraph (i) of this AD.

**Alternative Methods of Compliance (AMOCs)**

(i)(1) The Manager, Los Angeles ACO, FAA, ATTN: Ken Sujishi, Aerospace Engineer, Cabin Safety Branch, ANM–150L, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5353; fax (562) 627–5210; 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**

(j) None.

Issued in Renton, Washington, on November 16, 2008.

**Stephen P. Boyd,**

*Assistant Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. E8–27937 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## Bureau of Industry and Security

## 15 CFR Parts 770 and 774

**[Docket No. 080305374–81467–01]**

**RIN 0694–AE31**

## Clarification of Export Control Jurisdiction for Civil Aircraft Equipment Under the Export Administration Regulations

**AGENCY:** Bureau of Industry and Security, Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Export Administration Regulations (EAR) to clarify how Section 17(c) of the Export Administration Act of 1979 (EAA) is implemented in the EAR in accordance with the Department of Commerce's authority under the EAA. On August 14, 2008, the Department of State published a final rule amending Part 121 of the International Traffic in Arms Regulations (ITAR) to clarify how Section 17(c) of the EAA is implemented in relation to the ITAR (73 FR 47523).

This final rule provides guidance to assist the regulated public in determining what civil aircraft equipment (including parts, accessories, attachments, and components) is subject to the EAR based upon the statutory criteria of the EAA.

**DATES:** This rule is effective: December 3, 2008. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis.

**ADDRESSES:** You may submit comments, identified by RIN 0694–AE31, by any of the following methods:

*E-mail: publiccomments@bis.doc.gov*. Include ''RIN 0694–AE31'' in the subject line of the message.

*Fax:* (202) 482–3355. Please alert the Regulatory Policy Division, by calling (202) 482–2440, if you are faxing comments.

*Mail or Hand Delivery/Courier:* Timothy Mooney, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, *Attn:* RIN 0694–AE31.

Send comments regarding the collection of information associated with this rule, including suggestions for reducing the burden, to Jasmeet Seehra, Office of Management and Budget (OMB), by e-mail to *jseehra@omb.eop.gov*, or by fax to (202) 395–7285; and to the U.S. Department of Commerce, Bureau of Industry and Security, Regulatory Policy Division, 14th St. & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230. Comments on this collection of information should be submitted separately from comments on the final rule (i.e. RIN 0694–AE31)—all comments on the latter should be submitted by one of the three methods outlined above.

**FOR FURTHER INFORMATION CONTACT:** Gene Christiansen, Senior Engineer/Licensing Officer, Office of National Security and Technology Transfer Controls, telephone: (202) 482–2984.

**SUPPLEMENTARY INFORMATION:**

### Background

*Amendments to the ITAR To Clarify Application of Section 17(c) of the EAA*

On April 11, 2008 (73 FR 19778), the Department of State published the proposed rule, ''Amendments to the International Traffic in Arms Regulations: The United States Munitions List''. That proposed rule noted that there have been an increasing number of Commodity Jurisdiction (CJ) requests submitted to the Department of State for certain parts and components that have a long history of use on both civil and military aircraft. To provide guidance to the public regarding the proper export control jurisdiction for these parts and components, State proposed in that rule to amend the ITAR, Part 121, to add language clarifying how the criteria of Section 17(c) of the EAA are implemented in accordance with the Department of State's authority under the Arms Export Control Act (AECA). The State Department adopted the proposed rule, which was published, with minor edits, as a final rule on August 14, 2008 (73 FR 47523).

The State Department final rule added a new Note after Category VIII(h) to clarify that any part or component that (a) is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for civil, non-military aircraft (which expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft, defined by FAA Order 8110.101 effective date September 7, 2007 as ''civil aircraft procured or acquired by the military''); and (c) is an integral part of such civil aircraft, is subject to the EAR.

Pursuant to the Note to Category VIII(h) of the ITAR, exporters may generally determine whether an item meets the 17(c) criteria. However, where a part or component would fall under a paragraph within ITAR Category VIII designated as Significant Military Equipment (SME) or any other USML category designated as Significant Military Equipment (SME), were such item to be found subject to the ITAR, the exporter is required to submit a CJ request to determine whether the 17(c) criteria are met, except where an SME part or component was integral to civil aircraft prior to August 14, 2008. The Department of Commerce, based on its licensing authority under the EAA, will participate in the review of CJ requests under established interagency procedures. In the course of its review

of a CJ request, the Department of Commerce will apply the criteria of Section 17(c) in its review and recommendation, including an assessment of whether a part or component meets the definition of ''standard equipment'' included in the Note to Category VIII(h) of the ITAR. ''Standard equipment'' includes parts and components that are manufactured in compliance with an established and published industry specification or an established and published government specification (e.g., AN, MS, NAS, or SAE). Parts and components that are manufactured and tested to established but unpublished (e.g., proprietary) civil aviation industry specifications and standards are also ''standard equipment,'' e.g., pumps, actuators, and generators.

*Purpose of This EAR Rule To Clarify Application of Section 17(c) of the EAA*

The purpose of this final rule amending the EAR is to clarify what parts and components meet the criteria of Section 17(c). Those that meet the Section 17(c) criteria are subject to the jurisdiction of the EAR.

Section 17(c) provides that notwithstanding any other provision of law, any product (1) which is standard equipment, certified by the Federal Aviation Administration (''FAA''), in civil aircraft and is an integral part of such aircraft, and (2) which is to be exported to a country other than a controlled country, shall be subject to export controls exclusively under the EAA. Since its passage, the Departments of State and Commerce have implemented Section 17(c) through various regulatory amendments and notices consistent with the aims of the EAA and the AECA.

*Amendments to the EAR To Clarify Application of Section 17(c) of the EAA*

In Section 770.2 (Item Interpretations), this rule revises paragraph (i) (*Interpretation 9: aircraft, parts, accessories and components*) to provide jurisdictional guidance for aircraft, parts, accessories and components, as follows:

This revised interpretation clarifies what (1) aircraft and related training equipment, (2) aircraft engines, and (3) components, parts, accessories, attachments, and associated equipment are subject to the jurisdiction of the Department of Commerce.

In Supplement No. 1 to Part 774 (Commerce Control List), this rule also makes a conforming change to paragraph (a) of the ''Items'' paragraph in the List of Items Controlled Section of ECCN 9A991 to conform this paragraph to Section 121.3 of the ITAR.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of July 23, 2008, 73 FR 43603 (July 25, 2008), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This final rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule involves a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). This collection has been approved by the Office of Management and Budget under control number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 58 minutes for a manual or electronic submission.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form.

**List of Subjects**

*15 CFR Part 770*

Exports.

*15 CFR Part 774*

Exports, Reporting and recordkeeping requirements.

■ Accordingly, parts 770 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

## PART 770—[AMENDED]

■ 1. The authority citation for 15 CFR part 770 is revised to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 2. Section 770.2 is amended by revising paragraph (i), to read as follows:

**§ 770.2 Item interpretations.**

* * * * *

(i) *Interpretation 9: Civil aircraft and Civil aircraft equipment (including parts, accessories, attachments, components, and related training equipment).* Aircraft and related training equipment, parts, accessories, and components defined in Categories VIII and IX of the Munitions List are under the export licensing authority of the U.S. Department of State (22 CFR parts 120 through 130). All other aircraft, parts, accessories and components are subject to the EAR and under the export licensing authority of the U.S. Department of Commerce, as follows:

(1) *Aircraft and related training equipment.* (i) Aircraft not specifically designed, modified or equipped for military purposes, and

(ii) The following aircraft, so long as they have not been specifically equipped, re-equipped, or modified for military operations:

(A) Cargo aircraft bearing ''C'' designations and numbered C–45 through C–118 inclusive, C–121 through C–125 inclusive, and C–131, using reciprocating engines only.

(B) Trainer aircraft bearing ''T'' designations and using reciprocating engines or turboprop engines with less than 600 horsepower (s.h.p.).

(C) Utility aircraft bearing ''U'' designations and using reciprocating engines only.

(D) All liaison aircraft bearing an ''L'' designation.

(E) All observation aircraft bearing ''O'' designations and using reciprocating engines.

(2) *Engines.* (i) All reciprocating engines, and

(ii) All other aircraft engines not specifically designed or modified for military aircraft, except those defined in category VIII(f) of 22 CFR part 121.

(3) *Components, parts, accessories, attachments, and associated equipment.* Any aircraft tires as well as any

components, parts, accessories, attachments and associated equipment that are not specifically designed or modified for aircraft on the Munitions List and all components and parts not on the Munitions List by virtue of the criteria set forth in the note to Category VIII(h) of 22 CFR part 121.

* * * * *

## PART 774—[AMENDED]

■ 3. The authority citation for 15 CFR part 774 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 4. In Supplement No. 1 to part 774 (the Commerce Control List), Category 9—Propulsion Systems, Space Vehicles and Related Equipment, Export Control Classification Number (ECCN) 9A991 is amended by revising paragraph (a) of the ''Items'' paragraph in the List of Items Controlled section, to read as follows:

### Supplement No. 1 to Part 774—The Commerce Control List

* * * * *

**9A991 ''Aircraft'', n.e.s., and gas turbine engines not controlled by 9A001 or 9A101 and parts and components, n.e.s.**

* * * * *

**List of Items Controlled**

*Unit:* * * *

*Related Controls:* * * *

*Related Definitions:* * * *

*Items:*

a. Military aircraft, demilitarized (not specifically equipped or modified for military operation), as follows:

a.1 Cargo aircraft bearing ''C'' designations and numbered C–45 through C–118 inclusive, C–121 through C–125 inclusive, and C–131, using reciprocating engines only.

a.2 Trainer aircraft bearing ''T'' designations and using reciprocating engines or turboprop engines with less than 600 horsepower (s.h.p.).

a.3 Utility aircraft bearing ''U'' designations and using reciprocating engines only.

a.4 All liaison aircraft bearing an ''L'' designation.

a.5 All observation aircraft bearing ''O'' designations and using reciprocating engines.

* * * * *

Dated: November 26, 2008.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc. E8–28654 Filed 12–2–08; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

### 21 CFR Parts 1300, 1315, and 1316

**[Docket No. DEA–293F]**

**RIN 1117–AB08**

## Import and Production Quotas for Certain List I Chemicals

**AGENCY:** Drug Enforcement Administration (DEA), Justice.

**ACTION:** Final rule.

**SUMMARY:** On March 9, 2006, the President signed the Combat Methamphetamine Epidemic Act of 2005, which mandates that DEA establish total annual requirements, and individual import, manufacturing, and procurement quotas for ephedrine, pseudoephedrine, and phenylpropanolamine. DEA issued an Interim Final Rule establishing procedures for applying for individual import, manufacturing, and procurement quotas. DEA is finalizing the rule with one change, to extend the authority to sign certifications to persons granted power of attorney to do so by the registrant.

**DATES:** *Effective Date:* December 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** Christine A. Sannerud, Ph.D., Chief, Drug and Chemical Evaluation Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152; at (202) 307–7183.

**SUPPLEMENTARY INFORMATION:**

### DEA's Legal Authority

DEA implements the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act (21 U.S.C. 801–971), as amended. DEA publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations (CFR), Parts 1300 to 1399. These regulations are designed to ensure that there is a sufficient supply of controlled substances for legitimate medical, scientific, research, and industrial purposes, for lawful exports, and for maintenance of reserve stocks, while deterring the diversion of controlled substances to illegal purposes. The CSA mandates that DEA establish a closed system of control for manufacturing, distributing, and dispensing, importing, and exporting controlled substances. Any person who manufactures, distributes, dispenses, imports, exports, or conducts research or chemical analysis with controlled substances must register with DEA (unless exempt) and comply with the applicable requirements for the activity. The CSA as amended also requires DEA to regulate the manufacture, distribution, import, and export of chemicals that may be used to manufacture controlled substances illegally. Listed chemicals that are classified as List I chemicals are important to the manufacture of controlled substances. Those classified as List II chemicals may be used to manufacture controlled substances.

On March 9, 2006, the President signed the Combat Methamphetamine Epidemic Act of 2005 (CMEA), which is Title VII of the USA PATRIOT Improvement and Reauthorization Act of 2005 (Pub. L. 109–177). The Act amends the CSA by adding new provisions related to the importation, production, and sale of ephedrine, pseudoephedrine, and phenylpropanolamine, their salts, optical isomers, and salts of optical isomers, and products that contain any of the three chemicals.

### Combat Methamphetamine Epidemic Act of 2005

The Combat Methamphetamine Epidemic Act of 2005 (CMEA) amends the CSA to tighten controls on the manufacture, distribution, import, export, and retail sale of three List I chemicals—ephedrine, pseudoephedrine, and phenylpropanolamine, and drug products containing them. CMEA imposes the following changes:

• Sales limits apply to retail sales of nonprescription (over-the-counter) (OTC) products, which the CMEA defined as ''scheduled listed chemical products.'' Regulated sellers are required to store the products behind the counter or in locked cabinets and maintain records on each sale, including verifying the name of the purchaser against an approved form of identification supplied by the purchaser. The exemption for blister packs has been removed. Thus, all products sold at retail are regulated under the CSA. (The law contained an exception from recordkeeping requirements for individual sales transactions consisting of a single

package of pseudoephedrine where the package contains not more than 60 milligrams.)

- DEA must establish an assessment of the annual needs for the estimated medical, scientific, research, and industrial needs of the United States, for lawful exports, and for maintenance of reserve stocks, for the three chemicals. That assessment establishes an upper limit on the quantity of the chemicals and products containing the chemicals that can be produced in or imported into the United States.
- Bulk manufacturers must obtain a manufacturing quota to produce any of the three chemicals.
- Manufacturers who purchase the bulk chemicals to produce products must obtain a procurement quota.
- Importers must obtain a quota to import the chemicals in bulk or in drug products.
- Importers, exporters, brokers, and traders must provide additional information on the persons to whom they intend to sell the chemicals prior to the sale. They must also provide a return declaration, providing actual information regarding the import, export, or international transaction.

**Interim Final Rule**

On July 10, 2007, DEA published an Interim Final Rule to establish the procedures for manufacturers to apply for manufacturing and procurement quotas and for importers to apply for import quotas, as required under CMEA (72 FR 37439). The Interim Final Rule created a new part 1315, which parallels the existing part 1303, which covers the same processes for controlled substances. The Interim Final Rule established the following requirements:

*Production Quotas*

Bulk manufacturers of the three chemicals are required to obtain annual manufacturing quotas. A separate quota is required for each chemical. A bulk manufacturer must be registered as a manufacturer to handle the chemical for which a quota is applied. A bulk manufacturer must complete and file a DEA Form 189 on or before May 1 of each year for the following calendar year, as discussed further below. The applicant must provide the following information on the form:

- For the current and preceding two calendar years, the actual quantity manufactured, actual net disposals, and actual inventory as of December 31.
- For the next year, the desired quota, the name and registration number of each customer and the amount estimated to be sold to each, and any additional factors the applicant finds relevant to fixing the quota.

The above requirements are consistent with existing requirements for controlled substances quotas found in 21 CFR Part 1303.

Each manufacturer that purchases the chemicals in bulk or in dosage forms is required to obtain a procurement quota to obtain the bulk chemicals or dosage forms. A separate procurement quota is required for each chemical. A manufacturer must be registered as a manufacturer to handle the chemical for which a quota is applied. A manufacturer must complete and file a DEA Form 250 on or before April 1 of each year for the following calendar year. The applicant must provide the following information:

- A statement about the purpose(s) of the requested chemical and the quantity which will be used for each purpose during the next calendar year. The applicant should provide information about the quantities used (acquired, distributed, and inventory) for the current and preceding two calendar years.
- If the purpose is to manufacture dosage forms, the applicant must state the official name, common or usual name, chemical name, or brand name of that dosage form, and must include the strength.
- The applicant must state the type of activity intended: Product development, repackaging, relabeling, manufacturing OTC finished product, or manufacturing prescription finished product.
- If the purpose is to manufacture a controlled substance listed in Schedule I or II or another List I chemical, the applicant must state the quantity of the other substance or chemical that the applicant has applied to manufacture under § 1303.22 and the quantity of the first chemical needed to manufacture a specified unit of the second chemical.

The above requirements are consistent with existing requirements for controlled substances quotas found in 21 CFR Part 1303.

DEA recognizes that applicants may not have complete data on inventories and records for previous years because DEA has not required registrants to keep these records. Most manufacturers of OTC products should have the information in the records they maintain on regulated transactions. Applicants who manufacture prescription products may not have full records for the initial filings. DEA notes that the provision of incomplete information as part of an application for quota in the initial year of implementation of quotas for ephedrine, pseudoephedrine, and phenylpropanolamine may not, in and of itself, prevent an applicant from obtaining quota. DEA has significant experience regarding the processing of quota applications for which incomplete information is present at the initial establishment of quota (e.g., a new formulation of a controlled substance). DEA will work with quota applicants to obtain information that could be used in the processing of the applicant's initial application.

*Import Quotas*

To track and control the quantity of each of the chemicals and drug products containing the chemicals, DEA must limit imports to a quantity consistent with the national needs. CMEA amended 21 U.S.C. 952(a) to state that ''It shall be unlawful to import * * * ephedrine, pseudoephedrine, and phenylpropanolamine * * * except that such amounts of * * * ephedrine, pseudoephedrine, and phenylpropanolamine as the Attorney General [DEA by delegation] finds necessary to provide for the medical, scientific, or other legitimate purposes * * *.'' Importers are required to obtain an import quota for each chemical covering both bulk chemicals and dosage forms. An importer must be registered as an importer of the chemical for which a quota is applied. An importer must complete and file a DEA Form 488 on or before April 1 of each year for the following calendar year. The applicant must provide the following information:

- The type of product (bulk chemical or finished forms to be transferred to a manufacturer or product to be sold for distribution).
- The quantity of each type of product.
- For the previous two calendar years, the name, address, and DEA registration number (if applicable) of each customer and the amount sold; inventory as of December 31 for each form of the product (i.e., bulk chemical, in-process material, or finished dosage form); and acquisitions (imports).

DEA recognizes that importers handling prescription products may not have historical records for their initial filings. If an importer is handling prescription drug products, it is possible that some of its customers may not be DEA registrants. DEA notes that the provision of incomplete information as part of an application for quota in the initial year of implementation of quotas for ephedrine, pseudoephedrine, and phenylpropanolamine may not, in and of itself, prevent an applicant from obtaining quota. As noted above, DEA

has significant experience regarding the processing of quota applications for which incomplete information is present at the initial establishment of quota (e.g., a new formulation of a controlled substance). DEA will work with quota applicants to obtain information that could be used in the processing of the applicant's initial application.

Depending on the activities that a firm engages in, a firm may have to apply for multiple quotas. For example, a firm that imports ephedrine to bulk manufacture pseudoephedrine would need to obtain an import quota and a procurement quota for ephedrine and a manufacturing quota for pseudoephedrine. A manufacturer that imports bulk ephedrine and pseudoephedrine to produce dosage units of drugs containing the chemicals would need to obtain separate import and procurement quotas for each chemical.

DEA uses the information filed in support of the quota applications as one factor in the determination of an initial assessment of annual needs for each of the chemicals to ensure that the United States has sufficient quantities to meet medical, scientific, research, industrial, exportation, and reserve stock needs. The criteria to be considered in setting quotas are set forth in the CSA. Specifically, the CSA requires the Attorney General, DEA by delegation, to establish production quotas, referred to here as the assessment of annual national needs for the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, in terms of quantities of the listed chemical and not in terms of individual dosage forms (21 U.S.C. 826(a); 21 CFR 1315.11). The actual setting of the annual assessment is done after considering the factors in 21 CFR 1315.11, publishing a proposed annual assessment, and giving the regulated community an opportunity to comment before finalizing the annual assessment (21 CFR 1315.13). DEA published the initial established assessment of annual needs for 2008 on December 27, 2007 (72 FR 73361), proposed revisions and accepted comments thereto (73 FR 35410, June 23, 2008), and published the final 2008 assessment of annual national needs (73 FR 63732, October 27, 2008). DEA must limit or reduce individual production quotas to the extent necessary to prevent the aggregate of all individual quotas from exceeding the assessment of annual national needs (21 U.S.C. 826(b)). In establishing individual manufacturing quotas based on the assessment of annual national needs, DEA considers the manufacturer's estimated disposal, inventory, and other requirements for the calendar year; DEA also considers the manufacturer's current rate of disposal, the trend of the national disposal rate during the preceding calendar year, the manufacturer's production cycle and inventory position, the economic availability of raw materials, yield and stability problems, emergencies such as strikes and fires, and other factors (21 U.S.C. 826(c); 21 CFR 1315.23). DEA notes that the rule being finalized today does not establish the assessment or individual quotas; today's rule simply finalizes the establishment of procedures for collecting information from manufacturers and importers.

The assessment of annual needs establishes a ceiling on domestic manufacturing and importation of these chemicals. DEA may, at its discretion, seek additional information from applicants if needed to determine an appropriate level for the annual assessment ceiling. For example, because repackagers and relabelers handle products that are covered by other procurement or import quotas, DEA may need more details on customers from those seeking procurement quotas to ensure that it is not double counting quantities. This issue may arise particularly in reference to OTC products, where a manufacturer may produce dosage units that are repackaged or relabeled to be sold under multiple store brand labels.

DEA adopted the same process for manufacturing and procurement quotas for the three chemicals as was already in place for manufacturing and procurement quotas for controlled substances. Manufacturers may apply for increases in their manufacturing quotas (21 CFR 1315.25); DEA may reduce individual manufacturing quotas to prevent the total amount produced from exceeding the assessment of annual needs (21 CFR 1315.26). Manufacturers may abandon their quota by notifying DEA (21 CFR 1315.27).

Manufacturers holding a procurement quota may apply for adjustment of the quota by applying to DEA with a statement indicating the need for an adjustment (21 CFR 1315.32(g)). Any manufacturer who holds a procurement quota must, before giving an order to another manufacturer or importer requiring the distribution of a covered chemical, certify in writing that the quantity being ordered does not exceed the unused portion of the person's procurement quota for the year (21 CFR 1315.32(h)).

As specified in the CMEA amendment to section 952 of the CSA, importers may apply for an increase in their quota and DEA may approve the application if DEA determines that the increase is needed to meet medical, scientific, or other legitimate purposes (21 CFR 1315.36). For changes in the import quota, DEA will approve or deny the application within 60 days of receiving the application; if DEA does not reach a decision within the 60 days, the application is considered to be approved until DEA notifies the applicant in writing that the approval is terminated (21 U.S.C. 952(d); 21 CFR 1315.36(c)).

DEA may hold hearings, at the Administrator's sole discretion, to obtain factual evidence regarding the determination or adjustment of any assessment of annual national needs (21 CFR 1315.52(a)). Applicants or quota holders may request hearings on the issuance, adjustment, suspension, or denial of a quota (21 CFR 1315.52(b)). In hearings on the assessment of annual national needs, each interested party has the burden of proving any propositions of fact or law that the party asserts (21 CFR 1315.58(a)). At hearings on the issuance, adjustment, suspension, or denial of an individual quota, DEA has the burden of proving that the requirements for issuance, adjustment, suspension, or denial of an individual quota are met (21 CFR 1315.58(b)).

**Discussion of Comments**

DEA received five comments on the Interim Final Rule. Commenters included an association representing distributors of drug products containing ephedrine, pseudoephedrine, and phenylpropanolamine; two manufacturers; one distributor; and an association representing manufacturers and distributors of OTC products.

*General Comments*

One commenter supported the rule as written, three commenters requested clarification of certain aspects of the rule, and one commenter raised objections to the rule, although its comments actually addressed issues that were not the subject of the Interim Final Rule.

Three of the commenters raised issues about the actual assessment of annual needs for the List I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine rather than the process manufacturers and importers will use to apply for a quota, which is the subject of this rulemaking. One distributor stated that DEA had failed to prove that convenience stores are a ''gray market'' for these products.

*DEA Response:* The issues raised about the assessment of annual needs

are beyond the scope of this Final Rule, which deals only with the procedures for applying for and obtaining quotas in general. Any comments on the establishment or revision of the annual assessment and the methodology used to develop it should be submitted in response to notices DEA may publish regarding the assessment of annual needs. This rule includes only the general approach for establishing and issuing the proposed and final assessments of annual needs and individual quotas and contains only the statutory criteria. The issues related to the sale of products containing the three List I chemicals at nonconventional outlets are also beyond the scope of this rule, which does not regulate distributors or retailers. Therefore, these comments are not addressed in this Final Rule.

*Obtaining a Procurement Quota*

One pharmaceutical manufacturer asked DEA to revise the requirement that the certification that an order is within the manufacturer's procurement quota be signed by a person eligible to sign a registration. The commenter noted that for controlled substances, the certification may be signed by a person who is eligible to sign the DEA Form 222 ''U.S. Official Order Form for Schedule I and II Controlled Substances'', which may be a person granted signing authority through a power of attorney.

*DEA Response:* DEA agrees with the commenter and is revising 21 CFR 1315.32(h) to permit the signature of a certification for procurement quota to be by an individual authorized to sign the registration, or a person granted power of attorney to sign the certification. DEA is also amending the regulations to add 21 CFR 1315.33, which establishes a process for granting and revoking power of attorney delegations. This process parallels the process in existence for controlled substance orders under part 1305.

*Distinction Among Types of Outlets*

One association representing manufacturers and distributors of OTC drug products supported the rule and DEA's tripartite distinction among manufacturers and importers: Those that handle prescription drugs, those that produce products sold mainly through conventional outlets, and those that sell certain high dosage unit products almost exclusively through nonconventional outlets. The commenter noted some inconsistencies in the references to these groups that the commenter stated could be confusing. A manufacturer also raised concerns about DEA's review of quota applications where the manufacturer's products are sold through conventional and nonconventional outlets.

*DEA Response:* DEA appreciates the support for this rulemaking expressed by the association. DEA emphasizes that each quota application will be reviewed on its own merits. DEA recognizes that many products are sold through both conventional and nonconventional outlets. As the 2002 Economic Census of the Retail Trade, Product Line, data indicate, nonconventional outlets handle only about three percent of sales of OTC medications. Products sold through both types of retail outlets, therefore, will be mainly sold through conventional outlets. As DEA stated in the Interim Final Rule, its concern with products sold through nonconventional outlets is with a limited number of high-dosage-unit products, sold almost exclusively through these outlets and the Internet. These high-dosage-unit products are generally not the bronchodilators used for asthma that commenters cited as a concern.

*Assessment of Annual Needs*

One manufacturer raised concerns about the consideration of data in the assessment of annual needs. The commenter stated that the trends in demand for ephedrine and pseudoephedrine appear to be changing as customers find the substitutes inadequate. The commenter asked that DEA consider both present and past trends.

*DEA Response:* DEA agrees with the commenter that changing trends in use need to be considered when establishing the assessment of annual needs for ephedrine, pseudoephedrine, and phenylpropanolamine. DEA notes that manufacturers and importers had an opportunity to comment on the proposed 2008 assessment of annual needs (72 FR 53911, September 20, 2007), and to submit additional information on demand to assist DEA in ensuring that the initial established assessment (72 FR 73361, December 27, 2007) met the legitimate medical, scientific, research, and industrial needs of the United States, for lawful exports, and for maintenance of reserve stocks. As required, DEA will revise the assessment of annual needs and will again seek comment from importers and manufacturers (21 CFR 1315.13).

*Inventory Allowances*

One manufacturer raised issues related to the inventory allowance for bulk manufacturers and asked that importers also be given inventory allowances. The commenter stated that unlike controlled substances, where imports are allowed only if domestic manufacturers cannot meet the need, with these chemicals most of the chemicals are imported. The commenter stated that providing inventory allowances only to bulk manufacturers would place other manufacturers that rely on imports for the chemical at a disadvantage. The commenter suggested that both manufacturers and importers be given a 20 percent inventory allowance.

*DEA Response:* DEA agrees with the commenter that the inventory allowance is an issue. Congress clearly intended that these chemicals should be closely regulated. In its Interim Final Rule establishing the procedures to implement individual procurement quotas, DEA established a 50 percent inventory allowance, the same allowance permitted for manufacturers of controlled substances. DEA believes that the 50 percent inventory allowance may be too great in some circumstances. Because this issue was not raised in the Interim Final Rule, however, DEA plans to address it in a separate rulemaking to give regulated entities an opportunity to comment.

Regarding the commenter's suggestion for an inventory allowance for importers and manufacturers obtaining procurement quotas, as noted previously, all importation of ephedrine, pseudoephedrine, and phenylpropanolamine is prohibited except such amounts as the Attorney General finds to be necessary to provide for the medical, scientific, and other legitimate needs of the United States (21 U.S.C. 952(a)). Further, CMEA specifically amended the CSA to require that importers specify, as part of the import declaration for all listed chemicals, the name of the transferee (''downstream customer'') of the chemicals and the quantity of the chemicals to be transferred (21 U.S.C. 971(d)). Thus, as importers must provide, prior to importation, the name of the transferee to whom the chemicals are to be transferred, there should be limited need for the importer to maintain an inventory of these chemicals.

*Petition for Repeal*

One distributor stated that the Interim Final Rule will cause harm to the national economy through loss of jobs at convenience stores due to loss of sales of ephedrine-based products. The commenter also claimed that the Interim Final Rule would cause harm to rural communities which would not be able to obtain the products and that DEA had underestimated the cost of the rule. The

commenter asked DEA to stay the Final Rule until DEA has ruled on its petition for repeal. The commenter also claimed that the Interim Final Rule quota was based on incomplete data and was, therefore, arbitrary and capricious and a violation of the Administrative Procedure Act. The commenter stated that DEA should have used notice and comment rulemaking for the Interim Final Rule. Finally, the commenter stated that the rule would not affect diversion and methamphetamine abuse.

*DEA Response:* The commenter appears to have misunderstood the nature of this rulemaking. The Interim Final Rule addressed only the procedures that importers and manufacturers must follow to apply for import, manufacturing, and procurement quotas for ephedrine, pseudoephedrine, and phenylpropanolamine. The rule did not establish the assessment of annual needs for ephedrine, pseudoephedrine, and phenylpropanolamine or individual quotas, nor did it address the subsequent distribution of scheduled listed chemical products. The Interim Final Rule had no impact on the convenience store industry, nor on the availability of scheduled listed chemical products at retail—either in urban or rural communities.

Regarding the cost of the Interim Final Rule, as DEA discussed in that rule, the only cost associated with this rulemaking is the cost of applying for import, manufacturing, or procurement quota. DEA estimates that the cost of applying for a quota is about $96 for importers and $113 for manufacturers, which includes data collection and mailing.

Regarding the commenter's claim that the Interim Final Rule was arbitrary and capricious, and that DEA should have used notice and comment rulemaking to implement the provisions of CMEA, DEA believes that it had good cause under the Administrative Procedure Act to publish the rule as an Interim Final Rule. As DEA explained in the Interim Final Rule, it published this procedural rule as an Interim Final Rule to ensure that it would have a process in place for importers and manufacturers to apply for quotas. Without publication of the Interim Final Rule, DEA would not be able to issue quotas, but the rule does not set quotas. Given that Congress mandated that these chemicals and products containing these chemicals could only be imported and manufactured if the importer or manufacturer had obtained a quota from DEA, delaying the implementation of the procedural steps for seeking quotas would have cut off the supply of the chemicals and products containing those chemicals.

In regard to the commenter's discussion of the economic impact of the Interim Final Rule, the comments regarding the actual availability of those List I chemicals, the establishment of the assessment of annual national needs, and the issuance of individual import, manufacturing, and procurement quotas, are beyond the scope of the Interim Final Rule. The comments apply to the assessment of annual needs, not the application procedures; there are no provisions in this procedural rule that affect the supply or distribution of these chemicals or that impose significant costs on applicants. DEA notes that this commenter provided almost identical comments to this Interim Final Rule as it did to DEA's notice ''Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2008: Proposed'' [Docket No. DEA–306] (72 FR 53911, September 20, 2007).[1] DEA provided an extensive response to the commenter's economic arguments to that notice in its notice ''Established Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2008'' [Docket No. DEA–306] (72 FR 73361, December 27, 2007).

The commenter claimed that DEA had not assessed the impact on small entities. DEA, however, did precisely that even though it was not required to do so. The Regulatory Flexibility Act (RFA) applies only to rules that have been proposed; it does not apply to Interim Final Rules. Nonetheless, DEA did consider the issue. The Interim Final Rule simply sets out the process by which importers and manufacturers may apply for quotas. The costs of the application process are very low and do not impose a significant economic impact on small entities. DEA notes that distributors, such as the commenter, are not subject to this rule. DEA included the wholesale sector in its economic analysis in the Interim Final Rule because that is where importers are usually classified under the North American Industry Classification System.

Finally, the commenter stated that the rule would not affect diversion and methamphetamine abuse. Congress mandated these rules as part of a series of actions to prevent diversion of scheduled listed chemical products, and the chemicals used to manufacture them, to clandestine laboratories. Since the states and, in 2006, DEA, imposed sales limits on these products, the number of clandestine laboratory seizures in the United States has fallen dramatically, indicating that the Congressionally mandated actions have been effective in limiting diversion of products to clandestine laboratories in the United States. International sources of methamphetamine are addressed by other parts of CMEA.

**Technical Corrections**

While drafting this Final Rule, DEA noted that it had inadvertently required bulk manufacturers to complete and file DEA Form 189, Application for Individual Manufacturing Quota for a Basic Class of Controlled Substance and for Ephedrine, Pseudoephedrine, and Phenylpropanolamine, on or before April 1 of each year for the following calendar year (21 CFR 1315.22). This differs from the requirement for controlled substances; DEA Form 189 to request manufacturing quota for any basic class of controlled substance in Schedules I and II must be completed and filed on or before May 1 of each year for the following calendar year (21 CFR 1303.22). To alleviate potential confusion and ensure that the systems for controlled substances and ephedrine, pseudoephedrine, and phenylpropanolamine are as similar as possible, DEA is revising 21 CFR 1315.22 to require applicants for manufacturing quota for ephedrine, pseudoephedrine, and phenylpropanolamine to complete and file DEA Form 189 on or before May 1 of the year preceding the calendar year for which the manufacturing quota is being applied. DEA notes that only one registrant has applied for manufacturing quota. Therefore, DEA believes that this change will not significantly impact any registrant and will benefit the one registrant that currently utilizes this form.

Further, DEA noted that it had inadvertently not revised 21 CFR 1316.41, the section discussing the scope of the subpart related to administrative hearings, to include in the listing of CFR sections in which specific procedures regarding administrative hearings can be found sections 1315.50–1315.62. Therefore, for clarity, DEA is adding these sections to the listing of sections in which specific procedures regarding administrative hearings are found in 21 CFR 1316.41.

**Adoption as Final Rule**

The Interim Final Rule amending Parts 1300 and 1315 of Title 21, Code of Federal Regulations, which was

[1] All comments to both dockets may be found at *http://www.regulations.gov.*

published in the **Federal Register** on July 10, 2007 at 72 FR 37439, is hereby adopted as a Final Rule as published, with one change. DEA is revising the provision in 21 CFR 1315.32(h) regarding who may sign the required certification that an order is within the ordering company's quota. This revision provides a benefit to registrants, permitting the signature of a certification for procurement quota to be by an individual authorized to sign the registration, or a person granted power of attorney to sign the certification. To accomplish this, DEA is also adding a new 21 CFR 1315.33 to establish a process for granting and revoking power of attorney status; this section parallels the provisions of 21 CFR 1305.05.

**Regulatory Certifications**

*Administrative Procedure Act (5 U.S.C. 553)*

An agency may find good cause to exempt a rule from certain provisions of the Administrative Procedure Act (5 U.S.C. 553), including making the rule effective upon the date of publication. DEA finds good cause to make this rule effective upon publication, as this Final Rule provides a benefit or relieves a restriction by permitting the signature of a certification for procurement quota to be by an individual authorized to sign the registration, or a person granted power of attorney to sign the certification. To accomplish this, DEA is adding a new 21 CFR 1315.33 to establish a process for granting and revoking power of attorney status. The rest of this Final Rule merely confirms existing regulatory requirements implemented as part of the Interim Final Rule published July 10, 2007 at 72 FR 37439.

*Regulatory Flexibility Act*

The Acting Administrator hereby certifies that this rulemaking has been drafted in accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612). Because this rule is codifying statutory provisions, DEA has determined that public notice and comment are not necessary. Consequently, the RFA does not apply.

DEA has nonetheless considered the impact of the rule on small entities. As discussed below, DEA estimates that about 310 firms in the manufacturing and wholesale sectors may be affected by this rule. About 250 of these may be small entities under the Small Business Administration definitions of small entities. For most of these firms the impact of the rule is very small; they are required to file an annual request for import or procurement quotas. DEA estimates that the cost of applying for a quota is about $96 for importers and $113 for manufacturers, which includes data collection and mailing. These costs do not represent a significant economic impact even on the smallest repackagers whose average revenues are above $54,000. The average revenues of the smallest firms in sectors subject to the rule for which the 2002 Economic Census has data are shown in Table 1.

TABLE 1—AVERAGE REVENUES OF SMALLEST FIRMS BY AFFECTED SECTOR

| Sector | Average revenue of smallest firms |
|---|---|
| Packaging and labeling | $54,271 |
| Drug wholesalers | 127,367 |
| Chemical wholesalers | 718,697 |
| Pharmaceutical manufacturers | 824,268 |

*Executive Order 12866*

The Acting Administrator further certifies that this rulemaking has been drafted in accordance with the principles in Executive Order 12866 Section 1(b). It has been determined that this is ''a significant regulatory action.'' Therefore, this action has been reviewed by the Office of Management and Budget.

*Regulated Entities.* The firms subject to this rule are manufacturers and importers. At present, only one firm in the United States manufactures any of these chemicals in bulk and, therefore, only that firm will have to apply for a manufacturing quota. DEA reviewed a list of pseudoephedrine OTC and prescription products and ephedrine prescription products and identified about 240 firms based on their labeler codes. Each of these firms, plus any firms that repackage or relabel, will need to obtain procurement quotas. Based on 2005 DEA data, DEA estimates that about 69 firms with 91 locations are currently registered to import the chemicals; these firms will need to obtain import quotas if they are actually importing the chemicals. Although 91 locations are registered to import these chemicals, import notices indicate that many of these locations do not handle the chemicals. If other firms import prescription drug products that contain the chemicals they will also have to obtain import quotas. Based on these data, DEA estimates that 332 locations may apply for quotas if the demand for the chemicals and drug products remains the same (1 bulk manufacturer, 240 manufacturers, and 91 importers). Table 2 presents the number of potential applicants by sector. Registrants must apply for quotas for each registered location rather than by firm. Consequently, the number of manufacturing locations applying may be higher than listed if the firms handle the product at multiple locations. The importers are, in some cases, also manufacturers, so that the total number of affected firms may be reduced. The total number of importer registrants includes firms with multiple registered locations.

TABLE 2—POTENTIAL QUOTA APPLICANTS BY SECTOR

| Type | Number |
|---|---|
| All Manufacturers | 240 |
| Small Manufacturers | 211 |
| Importer Registered Locations | 91 |
| Small Importer Firms | 42 |

*Costs.* As detailed in the Regulatory Flexibility Act section, there is some burden associated with applying for quotas. DEA estimates that the total cost of the quota application process is about $35,880 a year.

*Benefits.* Congress, in CMEA, imposed a set of requirements on the manufacture, import, and sale of the three chemicals. These requirements, taken together, are intended to limit production and sales of these chemicals to that needed for legitimate purposes. Reduction in the number of clandestine methamphetamine laboratories reduces costs to Federal, State, and local governments of raiding these clandestine operations and cleaning up pollution at clandestine methamphetamine laboratory sites. As DEA detailed in its Interim Final Rule implementing the retail sales provisions of CMEA (specifically 71 FR 56020, September 26, 2006), DEA, the States, and local governments spent more than $17 million in clean up costs in FY 2005. This cost covers only the removal of chemicals that could be reused from clandestine laboratory sites; the cost of cleaning up soil or property contamination is paid by the land owner, but if the owner cannot pay the cost, local governments bear the burden or the contamination remains. The costs also do not cover the time State and local governments spend investigating, arresting, and trying clandestine laboratory operators or the social costs related to children and others exposed to hazardous chemicals at these laboratories.

*Paperwork Reduction Act*

This Final Rule does not change existing requirements. Therefore, the

approved information collections that were published with the Interim Final Rule are not being revised.

*Executive Order 12988*

This regulation meets the applicable standards set forth in §§ 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

*Executive Order 13132*

This rulemaking does not preempt or modify any provision of State law; nor does it impose enforcement responsibilities on any State; nor does it diminish the power of any State to enforce its own laws. Accordingly, this rulemaking does not have federalism implications warranting the application of Executive Order 13132.

*Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $120,000,000 or more (adjusted for inflation) in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Congressional Review Act*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects**

*21 CFR Part 1315*

Administrative practice and procedure, Chemicals, Drug traffic control, Imports, Reporting and recordkeeping requirements.

*21 CFR Part 1316*

Administrative practice and procedure, Authority delegations (Government agencies), Drug traffic control, Research, Seizures and forfeitures.

■ For the reasons set out above, 21 CFR parts 1315 and 1316 are amended as follows:

## PART 1315—IMPORTATION AND PRODUCTION QUOTAS FOR EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE

■ 1. The authority citation for part 1315 continues to read as follows:

**Authority:** 21 U.S.C. 802, 821, 826, 871(b), 952.

■ 2. The introductory text of § 1315.22 is revised to read as follows:

### § 1315.22 Procedure for applying for individual manufacturing quotas.

Any person who is registered to manufacture ephedrine, pseudoephedrine, or phenylpropanolamine and who desires to manufacture a quantity of the chemical must apply on DEA Form 189 for a manufacturing quota for the quantity of the chemical. Copies of DEA Form 189 may be obtained from the Office of Diversion Control Web site, and must be filed (on or before May 1 of the year preceding the calendar year for which the manufacturing quota is being applied) with the Drug & Chemical Evaluation Section, Drug Enforcement Administration, Department of Justice, Washington, DC 20537. A separate application must be made for each chemical desired to be manufactured. The applicant must state the following:

* * * * *

■ 3. Section 1315.32(h) is revised to read as follows:

### § 1315.32 Obtaining a procurement quota.

* * * * *

(h) Any person to whom a procurement quota has been issued, authorizing that person to procure and use a quantity of ephedrine, pseudoephedrine, or phenylpropanolamine during the current calendar year, must, at or before the time of placing an order with another manufacturer or importer requiring the distribution of a quantity of the chemical, certify in writing to the other registrant that the quantity of ephedrine, pseudoephedrine, or phenylpropanolamine ordered does not exceed the person's unused and available procurement quota of the chemical for the current calendar year. The written certification must be executed by a person authorized to sign the registration application pursuant to § 1301.13 or § 1309.32(g) of this chapter or by a person granted power of attorney under § 1315.33 to sign the certifications. A copy of such certification must be retained by the person procuring the quantity of ephedrine, pseudoephedrine, or phenylpropanolamine for two years from the date of the certification. Registrants must not fill an order from persons required to apply for a procurement quota under paragraph (b) of this section unless the order is accompanied by a certification as required under this section.

* * * * *

■ 4. Section 1315.33 is added to read as follows:

### § 1315.33 Power of attorney.

(a) A registrant may authorize one or more individuals, whether or not located at his registered location, to sign certifications required under § 1315.32(h) on the registrant's behalf by executing a power of attorney for each such individual. The registrant shall retain the power of attorney in the files, with certifications required by § 1315.32(h), for the same period as any certification bearing the signature of the attorney. The power of attorney must be available for inspection together with other certification records.

(b) A registrant may revoke any power of attorney at any time by executing a notice of revocation.

(c) The power of attorney and notice of revocation must be similar to the following format:

Power of Attorney for certifications of quota for procurement of ephedrine, pseudoephedrine, and phenylpropanolamine

_____ (Name of registrant)
_____ (Address of registrant)
_____ (DEA registration number)

I, _____ (name of person granting power), the undersigned, who am authorized to sign the current application for registration of the above-named registrant under the Controlled Substances Act or Controlled Substances Import and Export Act, have made, constituted, and appointed, and by these presents, do make, constitute, and appoint _____ (name of attorney-in-fact), my true and lawful attorney for me in my name, place, and stead, to sign certifications of quota for procurement of ephedrine, pseudoephedrine, and phenylpropanolamine in accordance with Part 1315 of Title 21 of the Code of Federal Regulations. I hereby ratify and confirm all that said attorney must lawfully do or cause to be done by virtue hereof.

_____
(Signature of person granting power)

I, _____ (name of attorney-in-fact), hereby affirm that I am the person named herein as attorney-in-fact and that the signature affixed hereto is my signature.

(Signature of attorney-in-fact)

Witnesses:

1. _____
2. _____

Signed and dated on the ____ day of __, (year), at _____.

Notice of Revocation

The foregoing power of attorney is hereby revoked by the undersigned, who is authorized to sign the current application for registration of the above-named registrant under the Controlled Substances Act or the Controlled Substances Import and Export Act. Written notice of this revocation has been given to the attorney-in-fact _____ this same day.

_____

(Signature of person revoking power)

Witnesses:

1. _____
2. _____

Signed and dated on the ____ day of __, (year), at _____.

(d) A power of attorney must be executed by the person who signed the most recent application for DEA registration or reregistration; the person to whom the power of attorney is being granted; and two witnesses.

(e) A power of attorney must be revoked by the person who signed the most recent application for DEA registration or reregistration, and two witnesses.

## PART 1316—ADMINISTRATIVE FUNCTIONS, PRACTICES, AND PROCEDURES

■ 5. The authority citation for subpart D of part 1316 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), 875, 958(d), 965.

■ 6. Section 1316.41 is revised to read as follows:

### § 1316.41 Scope of subpart D.

Procedures in any administrative hearing held under the Act are governed generally by the rule making and/or adjudication procedures set forth in the Administrative Procedure Act (5 U.S.C. 551–559) and specifically by the procedures set forth in this subpart, except where more specific regulations (set forth in §§ 1301.51–1301.57, §§ 1303.31–1303.37, §§ 1308.41–1308.51, §§ 1311.51–1311.53, §§ 1312.41–1312.47, §§ 1313.51–1313.57, or §§ 1315.50–1315.62) apply.

Dated: November 26, 2008.

**Michele M. Leonhart,**

*Acting Administrator.*

[FR Doc. E8–28651 Filed 12–2–08; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### 32 CFR Part 706

### Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy has determined that USS DALLAS (SSN 700) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**DATES:** This rule is effective December 3, 2008, and is applicable beginning 19 November 2008.

**FOR FURTHER INFORMATION CONTACT:** Commander M. Robb Hyde, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., S.E, Suite 3000, Washington Navy Yard, DC 20374–5066, telephone number: 202–685–5040

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706.

This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy, under authority delegated by the Secretary of the Navy, has certified that USS DALLAS (SSN 700) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Rule 21(a) pertaining to the location of the masthead lights over the fore and aft centerline of the ship. The Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

**List of Subjects in 32 CFR Part 706**

Marine safety, Navigation (Water), and Vessels.

■ For the reasons set forth in the preamble, amend Part 706 of title 32 of the Code of Federal Regulations as follows:

## PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for 32 CFR Part 706 continues to read as follows:

**Authority:** 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by adding, in numerical order, the following entry for USS DALLAS (SSN 700):

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

* * * * *

TABLE TWO

| Vessel | Number | Masthead lights, distance to stbd of keel in meters; Rule 21(a) | Forward anchor light, distance below flight dk in meters; § 2(K), Annex I | Forward anchor light, number of; Rule 30(a)(i) | AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii) | AFT anchor light, number of; Rule 30(a)(ii) | Side lights, distance below flight dk in meters; § 2(g), Annex I | Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I | Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I |
|---|---|---|---|---|---|---|---|---|---|
| * | * | * | * | * | * | * | * | * | |
| USS DALLAS | SSN 700 | 0.41 | | | | | | | |

* * * * *

Approved: November 19, 2008.

**M. Robb Hyde,**

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

Dated: November 25, 2008.

**T.M. Cruz,**

*Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. E8–28647 Filed 12–2–08; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF DEFENSE

### Department of the Navy

### 32 CFR Part 706

### Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

**AGENCY:** Department of the Navy, DoD.

**ACTION:** Final rule.

**SUMMARY:** The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy has determined that USS DWIGHT D. EISENHOWER (CVN 69) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

**DATES:** This rule is effective December 3, 2008 and is applicable beginning 4 November 2008.

**FOR FURTHER INFORMATION CONTACT:** Commander M. Robb Hyde, JAGC, U.S. Navy, Deputy Assistant Judge Advocate General (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave., SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone number: 202–685–5040.

**SUPPLEMENTARY INFORMATION:** Pursuant to the authority granted in 33 U.S.C. 1605, the Department of the Navy amends 32 CFR Part 706.

The Secretary of the Navy previously certified that USS DWIGHT D. EISENHOWER (CVN 69) is a vessel of the Navy which, due to its special construction and purpose, cannot fully comply with 72 COLREGS. This amendment provides notice that the Deputy Assistant Judge Advocate General (Admiralty and Maritime Law) of the Navy, under authority delegated by the Secretary of the Navy, has amended that certification to reflect that certain anchor lights on USS DWIGHT D. EISENHOWER (CVN 69), previously certified as not in compliance with 72 COLREGS, now comply with the applicable 72 COLREGS requirements, to wit: The two aft anchor lights located below the flight deck were removed and replaced by a single new aft anchor light above the hull and near ship's fore-aft centerline, as required by Rules 21(e), 30(a)(i) and 30(a)(ii). The side lights were also raised closer to compliance.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

**List of Subjects in 32 CFR Part 706**

Marine Safety, Navigation (Water), and Vessels.

■ For the reasons set forth in the preamble, amend part 706 of title 32 of the Code of Federal Regulations as follows:

## PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for 32 CFR Part 706 continues to read as follows:

**Authority:** 33 U.S.C. 1605.

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by revising, in numerical order, the following entry for USS DWIGHT D. EISENHOWER (CVN 69):

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

* * * * *

TABLE TWO

| Vessel | Number | Masthead lights, distance to stbd of keel in meters; Rule 21(a) | Forward anchor light, distance below flight dk in meters; § 2(K), Annex I | Forward anchor light, number of; Rule 30(a)(i) | AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii) | AFT anchor light, number of; Rule 30(a)(ii) | Side lights, distance below flight dk in meters; § 2(g), Annex I | Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I | Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I |
|---|---|---|---|---|---|---|---|---|---|
| * | * | * | * | * | * | * | * | * | * |
| USS DWIGHT D. EISENHOWER. | CVN–69 ..... | 31.0 | ..... | ..... | ..... | ..... | 0.2 | ..... | ..... |

* * * * *

Approved: November 4, 2008.

**M. Robb Hyde,**

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

Dated: November 25, 2008.

**T.M. Cruz,**

*Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.*

[FR Doc. E8–28646 Filed 12–2–08; 8:45 am]

**BILLING CODE 3810–FF–P**

## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 53

**RIN 2900–AM26**

## Assistance to States in Hiring and Retaining Nurses at State Veterans Homes

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule.

**SUMMARY:** The Department of Veterans Affairs (VA) hereby establishes a final rule setting forth a mechanism for States to obtain payments from VA to assist a State veterans home in the hiring and retention of nurses for the purpose of reducing nursing shortages at the home. This rule implements provisions of the Veterans Health Programs Improvement Act of 2004.

**DATES:** *Effective Date:* This final rule is effective January 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Jacquelyn Bean, Chief, State Veterans Home Per Diem Program, at (202) 461–6771, or Christa M. Hojlo, PhD, Director, State Veterans Home Clinical and Survey Oversight, at (202) 461–6779; Veterans Health Administration (114), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:** In a document published in the **Federal Register** (73 FR 19785) on April 11, 2008, we proposed to establish a new 38 CFR part 53 consisting of regulations captioned ''PAYMENTS TO STATES FOR PROGRAMS TO PROMOTE THE HIRING AND RETENTION OF NURSES AT STATE VETERANS HOMES'' (referred to below as the proposed regulations). This document adopts as a final rule, with changes discussed below, those proposed regulations. This final rule sets forth a mechanism and criteria for a State to obtain payments from VA to assist a State Veterans Home (SVH) in the hiring and retention of nurses for the purpose of reducing nursing shortages at that home. The final rule establishes regulations concerning provisions in section 201 of the Veterans Health Programs Improvement Act of 2004 (Pub. L. 108–422), which are codified at 38 U.S.C. 1744.

We provided a 60-day comment period that ended June 10, 2008. We received four submissions containing a number of comments that are all discussed below.

### Definition of Nurse

The proposed regulations at § 53.02 defined the term ''nurse'' to include only those who are bedside care givers at least a majority of the time. Consequently, the proposed regulations would allow payments only to promote the hiring and retention of those nurses licensed or certified, as described in the proposed definition, and who are bedside care givers at least a majority of the time. In support of this definition, the proposed rule noted that the applicable legislative history (H. Rep. No. 108–538 at 5 (2004)) indicates that the statutory provisions were intended to assist State homes ''in hiring nurses to care for veterans.'' Two commenters asserted that VA has misinterpreted 38 U.S.C. 1744 and its legislative history. With respect to the statute, the comments specifically discussed paragraphs (a) and (b), and the final sentence of paragraph (c), which states that when prescribing criteria for programs to be funded, the Secretary shall ''take into consideration the need for flexibility and innovation.'' They asserted that the proposed definition of nurse should be changed to remove its restriction to those who are bedside care givers at least a majority of the time, and should not generally exclude such individuals as those acting in the capacity of an advance practice nurse, an administrative nurse, or a director of nursing. We made no changes based on these comments.

Even if the statute and its legislative history are viewed as permitting VA to establish a more expansive definition of the term ''nurse'' than we proposed, we do not agree with the commenters' argument that the proposed definition is not a permissible one under the statute. The provisions of 38 U.S.C. 1744(c) and (j) authorize VA to establish criteria for the award of payments and we believe that VA therefore has authority for the provisions in the proposed rule that, through the definition of ''nurse,'' limit the nurses for whom VA assistance may be provided. The greatest need for nurses is for those who are bedside care givers at least a majority of the time and we have determined that we can best use the available funding for recruiting and retaining such nurses. In establishing criteria for programs to be awarded payments, the need for flexibility and innovation is not the only permissible consideration. Our consideration of the need for flexibility and innovation has been reflected in the preambles and text of the proposed rule and of this final rule.

### Credible Evidence

The provisions of proposed § 53.11(a)(3) would require, as a condition of receiving assistance, that the State applicant document by credible evidence that an individual SVH has a nursing shortage. One commenter raised a number of issues regarding the submission of such evidence.

The commenter questioned whether a State applicant would necessarily have to provide an application for each

individual SVH within the State or whether general documentation could be used for groups of SVHs within the State. We made no changes based on this comment. The provisions of 38 U.S.C. 1744(e) require that documentation be provided for each SVH (''Any such application shall describe the nursing shortage at the State home. * * *'')

The commenter asserted that general criteria that set thresholds for defining a nursing shortage would be preferable to the proposed rule's provisions in § 53.11 for documentation of a nursing shortage, and that any SVH meeting the criteria should be able to submit an application. We made no changes based on this comment as each SVH could have a distinct factual scenario that would be subjected to specific criteria in § 53.11.

The commenter asked, what is the acceptable standard for ''credible evidence;'' and further questioned whether the States would need to hire an independent consultant to prepare their submission. We made no changes based on these comments. The proposed regulations at § 53.11(a)(3) provided a list of types of evidence that could be submitted to establish a nursing shortage, i.e., ''including but not limited to SVH records showing nursing vacancies, SVH records showing nurse overtime use, and reports documenting that nurses are difficult to hire in the local area and difficult to retain as employees at the SVH.'' A State could certainly choose to utilize consultants to gain information, but this is not a requirement.

**Programs With No Experience**

The provisions of proposed § 53.11(a)(5) would require, as a condition of receiving assistance, that the SVH submit documentation establishing that it has an employee incentive program that (i) is likely to be effective in promoting the hiring and retention of nurses for the purpose of reducing nursing shortages at that home, and (ii) is in operation or ready for immediate implementation upon receipt of payments. One commenter asked what evidence would be necessary to show likely effectiveness of a new program for which there is no experience upon which to document success. We made no changes based on this comment. To determine whether this condition has been satisfied, we would review all relevant information provided, including information about the program's design and the applicant's description of how the program would eliminate the nursing shortage, as well as how long it would take to do so. We would also use similar experiences with other programs and apply our expertise to analyze such programs in determining whether they are likely to be effective.

**Existing Projects**

One commenter interpreted the term ''improvements to working conditions'' in proposed § 53.11(b) to permit an employee incentive project to improve ''working areas.'' The commenter asked whether a project to improve working areas could qualify under a State home construction grant and also qualify for payment under the hiring and retention program. The commenter also asked whether such projects would be reviewed in a manner similar to that used for SVH construction grants. The statutory authority for the nurse hiring and retention program does not contemplate providing funds for construction projects. In addition, VA already has separate statutory authority that permits funding projects to remodel or alter working areas, under 38 U.S.C. 8131–8137. We interpret these statutory authorities to require that State applications for VA funding of all such construction projects be submitted under the State home construction grant program. Based on this comment, the final rule makes changes from the proposed regulation in § 53.11(a) by adding a new paragraph, § 53.11(a)(10), to provide that payments will not be made for projects that involve constructing, acquiring, expanding, remodeling, or altering State homes.

**Funding Projects**

One commenter asserted that ''the proposed program is looking at a three-year window for an incentive program to be successful with funding coming on an annual basis'' and suggested that VA provide assurance that, if appropriations are made by Congress, VA would not for other reasons refrain from continuing to fund a program that would take 3 years to complete. We made no changes based on this comment. VA needs to be able consider other factors in addition to appropriations in determining whether to again fund a particular program.

**Eliminating Nurse Shortages Within 3 Years**

Under the provisions of proposed § 53.11(a)(7), as a condition of receiving assistance the SVH program must ''insofar as possible'' be designed to eliminate any nursing shortage at the SVH within a 3-year period from the initiation of VA payments. One commenter asserted that ''the requirement to put a plan in place that will eliminate all nursing shortages in 3 years is not feasible.'' We made no changes based on this comment. We note that this was not an absolute since the text included the language ''insofar as possible.'' It certainly may not always be possible to eliminate a nursing shortage within this 3-year period, but we believe that such plans should, insofar as possible, be designed in accordance with this 3-year target.

**Student Forgiveness Programs**

The proposed regulations at § 53.11(b) stated that VA intends to allow flexibility and innovation in determining the types of employee incentive programs at SVHs eligible for payments. This paragraph further stated that programs could include such things as the provision of short-term scholarships for continuing nursing education, sign-on bonuses for nurses, and improvements to working conditions. One commenter asserted that the regulations should specifically state that the regulations allow student forgiveness programs. We agree that the student forgiveness programs could effectively help eliminate nursing shortages and in the final rule we are adding it to the list of examples.

**Application Submissions**

Under the provisions of proposed § 53.20(a), applications must be submitted during the first quarter of the fiscal year in which VA payments are sought. One commenter asserted that the application window should be changed to the last quarter of the preceding Federal Fiscal Year (FFY) so that approved expenditures can begin with the start of the FFY in which funds are to be expended. We agree with the suggested change and the rationale for the change. In the final rule, we changed the provisions of § 53.20(a), and a related reference to that quarter in § 53.20(c), accordingly. We have also added ''Federal'' in this section and elsewhere to clarify references to ''fiscal year''.

**Insufficient Information**

Under the provisions of proposed § 53.20(c), if an application does not contain sufficient information, VA would notify the State representative in writing that the State has 30 calendar days from the date of the notice to submit such additional information or no further action would be taken. These provisions also contain a mechanism for extending the 30-day period based on good cause. One commenter asserted that the time might be sufficient if the notice was provided electronically but it may not be sufficient if provided by mail. We are making a change in the

final rule in § 53.20(c) to specify that such notice be given ''in writing (electronically and by mail).'' We agree with the commenter that it would be appropriate to provide electronic notice and that this would enable the SVH to have more time to reply. We agree for the reason stated by the commenter and have made appropriate changes to § 53.20(c). The commenter also asserted that there should be provision to allow an extension beyond the 30 days if the information required by VA will take longer than 30 days to obtain and submit. We made no changes based on this comment. The proposed regulations at § 53.20(c) already would provide for extensions based on good cause.

**Nurse Training Costs; Nurses From Other Countries**

One commenter asked why we are ''allowing the situation with the very high tuition for nursing school to go unchanged'' and asserted that if nurses were trained on the job at hospitals the market could be flooded with nurses. The commenter also indicated her opposition to ''importing nurses from other countries.'' We made no changes based on this comment. The substance of the comment is outside the scope of our authority for this rulemaking proceeding. However, we note that the final rule does make a change to list student forgiveness programs as one of the types of incentives permitted.

The final rule also differs from the proposed rule by adding parentheticals displaying the information collection control number assigned by the Office of Management and Budget (OMB) following the sections that contain information collection provisions. In addition, the final rule differs from the proposed rule due by making nonsubstantive clarifying or technical changes.

Based on the rationale in the proposed rule and in this document, the provisions of the proposed rule are adopted as a final rule with changes discussed in this preamble.

**Executive Order 12866**

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives, and when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a regulatory action as a ''significant regulatory action,'' requiring review by OMB unless OMB waives such review, if it is a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

**Unfunded Mandates**

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

**Paperwork Reduction Act of 1995**

OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA 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.

In the proposed rule, we stated that proposed §§ 53.11, 53.20, 53.31, and 53.40 contain collection of information provisions under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), and that we had requested public comment on those provisions in notices published in the **Federal Register**. Those notices were published on April 2, 2007 (72 FR 15763), and June 27, 2007 (72 FR 35303). We did not receive any comments on the proposed collections of information, which OMB has approved through February 28, 2011, under control number 2900–0709. Following each of those sections in this final rule, we set out an information collection approval parenthetical displaying OMB control number 2900–0709.

**Regulatory Flexibility Act**

The Secretary hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The funding for this program would be made by the Federal government. The amount contributed by a SVH to fund an incentive program would be an insignificant amount of the costs for operating the SVH. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

**Catalog of Federal Domestic Assistance**

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation—Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.026, Veterans State Adult Day Health Care.

**List of Subjects in 38 CFR Part 53**

Administrative practice and procedure, Adult day health care, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: September 9, 2008.

**Gordon H. Mansfield,**

*Deputy Secretary of Veterans.*

■ For the reasons set forth in the preamble, the Department of Veterans Affairs amends 38 CFR chapter I by adding part 53 to read as follows:

## PART 53—PAYMENTS TO STATES FOR PROGRAMS TO PROMOTE THE HIRING AND RETENTION OF NURSES AT STATE VETERANS HOMES

Sec.
53.1 Purpose and scope.
53.2 Definitions.
53.10 Decision makers, notifications, and additional information.
53.11 General requirements for payments.
53.20 Application requirements.
53.30 Payments.
53.31 Annual report.
53.32 Recapture provisions.
53.40 Submissions of information and documents.
53.41 Notification of funding decision.

**Authority:** 38 U.S.C. 101, 501, 1744.

### § 53.1 Purpose and scope.

In accordance with the provisions of 38 U.S.C. 1744, this part sets forth the mechanism for a State to obtain payments to assist a State Veterans Home (SVH) in the hiring and retention of nurses for the purpose of reducing nursing shortages at that SVH.

(Authority: 38 U.S.C. 101, 501, 1744)

### § 53.2 Definitions.

For the purpose of this part:

*Nurse* means an individual who is a registered nurse, a licensed practical nurse, a licensed vocational nurse, or a nursing assistant certified in the State in which payment is made and who is a bedside caregiver at least a majority of the time (e.g., this would generally not include an individual acting in the capacity of an advance practice nurse, an administrative nurse, or a director of nursing) (the terms *nurses* and *nursing* shall be construed consistent with this definition).

*State* means each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

*State representative* means the official designated in accordance with State authority with responsibility for matters relating to payments under this part.

*State Veterans Home (SVH)* means a home approved by the Department of Veterans Affairs (VA) which a State established primarily for veterans disabled by age, disease, or otherwise, who by reason of such disability are incapable of earning a living. A SVH may provide domiciliary care, nursing home care, adult day health care, and hospital care. Hospital care may be provided only when the SVH also provides domiciliary and/or nursing home care.

(Authority: 38 U.S.C. 101, 501, 1744)

### § 53.10 Decision makers, notifications, and additional information.

The Chief Consultant, Geriatrics and Extended Care, will make all determinations regarding payments under this part, and will provide written notice to affected State representatives of approvals, denials, or requests for additional information under this part.

(Authority: 38 U.S.C. 101, 501, 1744)

### § 53.11 General requirements for payments.

(a) VA will make payment under this part to a State for an employee incentive program to reduce the shortage of nurses at the SVH, when the following conditions are met:

(1) The State representative applies for payment in accordance with the provisions of § 53.20;

(2) The SVH receives per diem payments from VA under the provisions of 38 U.S.C. 1741 for one or more of the following: Adult day health care, domiciliary care, hospital care, or nursing home care;

(3) The SVH has a nursing shortage that is documented by credible evidence, including but not limited to SVH records showing nursing vacancies, SVH records showing nurse overtime use, and reports documenting that nurses are difficult to hire in the local area and difficult to retain as employees at the SVH;

(4) The SVH does not use payments under this part to pay for all or part of a nurse's standard employee benefits, such as salary, health insurance, or retirement plan;

(5) The SVH provides to the Chief Consultant, Geriatrics and Extended Care, documentation establishing that it has an employee incentive program that:

(i) Is likely to be effective in promoting the hiring and retention of nurses for the purpose of reducing nursing shortages at that home, and

(ii) Is in operation or ready for immediate implementation if VA payments are made under this part;

(6) The payment amount applied for by the State is no more than 50 percent of the funding for the employee incentive program during the Federal fiscal year;

(7) The SVH employee incentive program includes a mechanism to ensure that an individual receiving benefits under the program works at the SVH as a nurse for a period commensurate with the benefits provided, and, insofar as possible, the program is designed to eliminate any nursing shortage at the SVH within a 3-year period from the initiation of VA payments;

(8) The SVH, if it received payments under this part during a previous Federal fiscal year, has met the reporting requirements of § 53.31(a) regarding such payments;

(9) The SVH credits to its employee incentive program any funds refunded to the SVH by an employee because the employee was in breach of an agreement for employee assistance funded with payments made under this part and the SVH credits the amount returned as a non-Federal funding source; and

(10) The project does not involve the construction, acquisition, expansion, remodeling or alteration of the SVH.

(b) VA intends to allow flexibility and innovation in determining the types of employee incentive programs at SVHs eligible for payments. Programs could include such things as the provision of short-term scholarships for continuing nursing education, sign-on bonuses for nurses, student loan forgiveness programs, and improvements to working conditions. In determining whether an employee incentive program is likely to be effective, VA will consider any information available, including past performance of the SVH's program funded by payments made under this part.

(Authority: 38 U.S.C. 101, 501, 1744)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0709.)

### § 53.20 Application requirements.

(a) To apply for payments during a Federal fiscal year, a State representative must submit to VA, in accordance with § 53.40, a completed VA Form 10–0430 and documentation specified by the form (VA Form 10–0430 is available at VA medical centers and on the Internet at *http://www1.va.gov/geriatricsshg/* or may be obtained by contacting the Geriatrics and Extended Care Office (114) at 202–461–6750, VHA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420). The submission for payments for a fiscal year must be received by VA during the last quarter (July 1–September 30) of the preceding fiscal year. The State must submit a new application for each fiscal year that the State seeks payments for an incentive program.

(b) As part of the application, the State representative must submit to VA evidence that the State has sufficient funding, when combined with the VA payments, to fully operate its employee incentive program through the end of the fiscal year. To meet this requirement, the State representative must provide to VA a letter from an

authorized State official certifying that, if VA were to approve payments under this part, the non-VA share of the funds for the program would be by a date or dates specified in the certification, available for the employee incentive program without further State action to make such funds available. If the certification is based on a State law authorizing funds for the employee incentive program, a copy of the State law must be submitted with the certification.

(c) If an application does not contain sufficient information for a determination under this part, the State representative will be notified in writing (electronically and by mail) of any additional submission required and that the State has 30 calendar days from the date of the notice to submit such additional information or no further action will be taken. If the State representative does not submit all of the required information or demonstrate that he or she has good cause for failing to provide the information within 30 calendar days of the notice (which may extend beyond the last quarter of the preceding Federal fiscal year), then the State applicant will be notified in writing that the application for VA assistance will be deemed withdrawn and no further action will be taken.

(Authority: 38 U.S.C. 101, 501, 1744)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0709.)

**§ 53.30 Payments.**

(a) The amount of payments awarded under this part during a Federal fiscal year will be the amount requested by the State and approved by VA in accordance with this part. Payments may not exceed 50 percent of the cost of the employee incentive program for that fiscal year and may not exceed 2 percent of the amount of the total per diem payments estimated by VA to be made under 38 U.S.C. 1741 to the State for that SVH during that fiscal year for adult day health care, domiciliary care, hospital care, and nursing home care.

(b) Payments will be made by lump sum or installment as deemed appropriate by the Chief Consultant, Geriatrics and Extended Care.

(c) Payments will be made to the State or, if designated by the State representative, the SVH conducting the employee incentive program.

(d) Payments made under this part for a specific employee incentive program shall be used solely for that purpose.

(Authority: 38 U.S.C. 101, 501, 1744)

**§ 53.31 Annual report.**

(a) A State receiving payment under this part shall provide to VA a report setting forth in detail the use of the funds, including a descriptive analysis of how effective the employee incentive program has been in improving nurse staffing in the SVH. The report shall be provided to VA within 60 days of the close of the Federal fiscal year (September 30) in which payment was made and shall be subject to audit by VA.

(b) A State receiving payment under this part shall also prepare audit reports as required by the Single Audit Act of 1984 (see 38 CFR part 41) and submit them to VA.

(Authority: 38 U.S.C. 101, 501, 1744)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0709.)

**§ 53.32 Recapture provisions.**

If a State fails to use the funds provided under this part for the purpose for which payment was made or receives more than is allowed under this part, the United States shall be entitled to recover from the State the amount not used for such purpose or the excess amount received.

(Authority: 38 U.S.C. 101, 501, 1744)

**§ 53.40 Submissions of information and documents.**

All submissions of information and documents required to be presented to VA must be made to the Chief Consultant, Geriatrics and Extended Care (114), VHA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 101, 501, 1744)

(The Office of Management and Budget has approved the information collection provisions in this section under control number 2900–0709.)

**§ 53.41 Notification of funding decision.**

If the Chief Consultant, Geriatrics and Extended Care, determines that a submission from a State fails to meet the requirements of this part for funding, the Chief Consultant shall provide written notice of the decision and the reasons for the decision.

(Authority: 38 U.S.C. 101, 501, 1744)

[FR Doc. E8–28542 Filed 12–2–08; 8:45 am]

**BILLING CODE 8320–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R06–OAR–2007–0523; FRL–8747–6]**

## Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Nitrogen Oxides ($NO_X$) From Stationary Sources

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The EPA is finalizing approval of rules for the control of $NO_X$ emissions into the Texas State Implementation Plan (SIP). Texas submitted this SIP revision to us on May 30, 2007 (May 30, 2007 SIP revision), and we proposed approval of the May 30, 2007 SIP revision on July 11, 2008. The May 30, 2007 SIP revision to the Texas SIP is a substantive and non-substantive recodification and reformatting of the $NO_X$ rules currently approved in the Texas SIP, and also includes a part of the Nitrogen Oxides ($NO_X$ ) reductions needed for the Dallas/Forth Worth (D/FW) area to attain the Federal 8-hour ozone National Ambient Air Quality Standard (NAAQS). Today's final rulemaking covers four separate actions. First, we are approving the repeal, from the Texas SIP, of the current Chapter 117 rules that correspond to the re-codified new rules and the revised and reformatted rules because the reformatted revision will better accommodate future additions/revisions to the rules. Second, we are approving revisions to the Texas SIP that add new controls for the D/FW major $NO_X$ point sources. We are not, however, taking action on the Texas rules for cement plants in this document. We proposed approval of the rules for cement plants in a separate **Federal Register** document. Third, we are approving revisions to the Texas SIP that add new controls for D/FW minor $NO_X$ sources. Fourth, we are approving revisions to the Texas SIP that add new controls for combustion sources in East Texas. These $NO_X$ reductions will assist the D/FW area to attain the 8-hour ozone NAAQS. We are approving all of these actions as meeting the requirements of section 110 and part D of the Federal Clean Air Act (the Act).

**DATES:** This rule will be effective on January 2, 2009.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2007–0523. All documents in the docket are listed on the *www.regulations.gov* Web site.

Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the 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 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.

**FOR FURTHER INFORMATION CONTACT:** Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, e-mail address *shar.alan@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Throughout this document ''we,'' ''us,'' and ''our'' refer to EPA.

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## I. Background

### *A. What actions are we approving?*

On May 30, 2007, TCEQ submitted rule revisions to 30 TAC, Chapter 117, ''Control of Air Pollution from Nitrogen Compounds,'' as a revision to the Texas SIP for point sources of $NO_X$ (May 30, 2007 SIP revision). The State of Texas submitted the May 30, 2007 SIP revision to us, to, among other things, provide a portion of the $NO_X$ reductions needed for the D/FW area to attain the Federal 8-hour ozone NAAQS.

On July 11, 2008 (73 FR 39900) we proposed approval of the May 30, 2007 SIP revision. The public comment period for our proposal expired on August 11, 2008.

We received relevant comments from TCEQ on our July 11, 2008 (73 FR 39900) publication, correcting or clarifying some of the citations used in our proposed approval document. We appreciate the State's input, and have accordingly corrected those citations in today's final document. See our Technical Support Document (TSD) prepared in conjunction with today's final action for more information.

We received no other comments on our proposed approval of the May 30, 2007 SIP revision. Therefore, we are finalizing our July 11, 2008 proposal (73 FR 39900), except section 117.9810, rulemaking action, today. We will act on section 117.9810 in a separate rulemaking action in future [1]. We are taking four separate actions in today's final action.

First, we are approving revisions which involve repealing the current Chapter 117 rules from Texas SIP, and simultaneously approving into the Texas SIP, a new reformatted Chapter 117. We are approving the repeal of the current Chapter 117, and the recodification and reformatting of Chapter 117 because the reformatted revision will better accommodate future additions/revisions to the rules and will maintain consistency between the State rules and Federal SIP. We are approving all of the non-substantive reformatted, restructured, renumbered, reorganized, and administrative revisions to the wording of Chapter 117 into Texas SIP. In our proposal, we clarified that the specifically identified rules do not make any changes to the substance of the rules that we previously approved into the Texas SIP, Chapter 117. By approving the repeal of the current Chapter 117 from the Texas SIP, and approving the new Chapter 117's rules into the Texas SIP, we are making it clear that the new rules replace the previous rules in their entirety. We are approving these non-substantive reformatted, restructured, renumbered, reorganized, and administrative revisions to the wording of Chapter 117 under section 110 and part D of the Act. For a full list of affected sections see section C of this document.

Second, we are approving revisions to the D/FW $NO_X$ major point source rules. Sections 117.410(a), 117.410(b) and 117.310(b) contain substantive changes in the reformatted Chapter 117 rules that result in additional $NO_X$ reductions. These reductions were not previously a part of EPA-approved Texas SIP, Chapter 117.

Third, we are approving revisions to the D/FW minor source rules for the control of $NO_X$. Section 117.2110(a) contains substantive changes in the reformatted Chapter 117 rules that result in additional $NO_X$ reductions which will help the D/FW area to attain the 1997 8-hour ozone standard. These reductions were not previously a part of EPA-approved Texas SIP, Chapter 117.

Fourth, we are proposing to approve revisions to the rules for the control of $NO_X$ emissions from combustion sources in East Texas. Section 117.3310(a) contains substantive changes in the reformatted Chapter 117 rules that result in significant $NO_X$ emissions reductions. These reductions were not previously a part of EPA-approved Texas SIP, Chapter 117.

Sections F through P of this document contain more information concerning each of these four actions.

[1] It came to our attention after publication of the proposal that we never took action on 30 TAC 117.571 that TCEQ repealed, and replaced with a new 30 TAC 117.9810. Therefore, there is no previously approved rule in the Texas SIP. We will need to evaluate the new rule 30 TAC 117.9810 for substance, and determine if it is approvable as a SIP revision. Our action will be taken in a separate **Federal Register** rulemaking.

*B. What is the relationship between the May 30, 2007 SIP revision and the ozone attainment demonstration plan for the D/FW area?*

The resulting emissions reductions of $NO_X$, an ozone precursor, from this SIP revision will assist in bringing the D/FW area into attainment with the 1997 8-hour ozone NAAQS, and help with the maintenance of the 1997 ozone NAAQS in the East and Central parts of the State. The D/FW 8-hour ozone nonattainment area (Collin, Dallas, Denton, Tarrant, Ellis, Johnson, Kaufman, Parker, and Rockwall Counties) is designated nonattainment, and classified as a moderate 8-hour non-attainment area for ozone. See 69 FR 23857 published on April 30, 2004. We proposed approval of the D/FW 8-hour ozone attainment demonstration plan in a separate rulemaking action, and will consider relevant written comments received on the D/FW 8-hour ozone attainment demonstration plan in a separate **Federal Register** publication.

*C. What sections of the May 30, 2007, SIP revision will become part of Texas SIP?*

Table 1 below contains a summary list of the sections of 30 TAC, Chapter 117 that we proposed for approval, in our July 11, 2008 (73 FR 39900) rulemaking action, for point sources of $NO_X$ to become part of the Texas SIP. Table 1 below includes both the sections with substantive changes and the nonsubstantive changes.

TABLE 1—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 BEING APPROVED INTO TEXAS SIP

| Section No. | Description |
|---|---|
| Section 117.10 | Definitions. |
| Section 117.100 | Applicability. |
| Section 117.103 | Exemptions. |
| Section 117.105 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.110 | Emission Specifications for Attainment Demonstration. |
| Section 117.115 | Alternative Plant-Wide Emission Specifications. |
| Section 117.123 | Source Cap. |
| Section 117.130 | Operating Requirements. |
| Section 117.135 | Initial Demonstration of Compliance. |
| Section 117.140 | Continuous Demonstration of Compliance. |
| Section 117.145 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.150 | Initial Control Plan Procedures. |
| Section 117.152 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.154 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.156 | Revision of Final Control Plan. |
| Section 117.200 | Applicability. |
| Section 117.203 | Exemptions. |
| Section 117.205 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.210 | Emission Specifications for Attainment Demonstration. |
| Section 117.215 | Alternative Plant-Wide Emission Specifications. |
| Section 117.223 | Source Cap. |
| Section 117.230 | Operating Requirements. |
| Section 117.235 | Initial Demonstration of Compliance. |
| Section 117.240 | Continuous Demonstration of Compliance. |
| Section 117.245 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.252 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.254 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.256 | Revision of Final Control Plan. |
| Section 117.300 | Applicability. |
| Section 117.303 | Exemptions. |
| Section 117.305 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.310 | Emission Specifications for Attainment Demonstration. |
| Section 117.315 | Alternative Plant-Wide Emission Specifications. |
| Section 117.320 | System Cap. |
| Section 117.323 | Source Cap. |
| Section 117.330 | Operating Requirements. |
| Section 117.335 | Initial Demonstration of Compliance. |
| Section 117.340 | Continuous Demonstration of Compliance. |
| Section 117.345 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.350 | Initial Control Plan Procedures. |
| Section 117.352 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.354 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.356 | Revision of Final Control Plan. |
| Section 117.400 | Applicability. |
| Section 117.403 | Exemptions. |
| Section 117.410 | Emission Specifications for Eight-Hour Attainment Demonstration. |
| Section 117.423 | Source Cap. |
| Section 117.430 | Operating Requirements. |
| Section 117.435 | Initial Demonstration of Compliance. |
| Section 117.440 | Continuous Demonstration of Compliance. |
| Section 117.445 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.450 | Initial Control Plan Procedures. |
| Section 117.454 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.456 | Revision of Final Control Plan. |
| Section 117.1000 | Applicability. |

TABLE 1—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 BEING APPROVED INTO TEXAS SIP—Continued

| Section No. | Description |
|---|---|
| Section 117.1003 | Exemptions. |
| Section 117.1005 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.1010 | Emission Specifications for Attainment Demonstration. |
| Section 117.1015 | Alternative System-Wide Emission Specifications. |
| Section 117.1020 | System Cap. |
| Section 117.1035 | Initial Demonstration of Compliance. |
| Section 117.1040 | Continuous Demonstration of Compliance. |
| Section 117.1045 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.1052 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.1054 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.1056 | Revision of Final Control Plan. |
| Section 117.1100 | Applicability. |
| Section 117.1103 | Exemptions. |
| Section 117.1105 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.1110 | Emission Specifications for Attainment Demonstration. |
| Section 117.1115 | Alternative System-Wide Emission Specifications. |
| Section 117.1120 | System Cap. |
| Section 117.1135 | Initial Demonstration of Compliance. |
| Section 117.1140 | Continuous Demonstration of Compliance. |
| Section 117.1145 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.1152 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.1154 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.1156 | Revision of Final Control Plan. |
| Section 117.1200 | Applicability. |
| Section 117.1203 | Exemptions. |
| Section 117.1205 | Emission Specifications for Reasonably Available Control Technology (RACT). |
| Section 117.1210 | Emission Specifications for Attainment Demonstration. |
| Section 117.1215 | Alternative System-Wide Emission Specifications. |
| Section 117.1220 | System Cap. |
| Section 117.1235 | Initial Demonstration of Compliance. |
| Section 117.1240 | Continuous Demonstration of Compliance. |
| Section 117.1245 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.1252 | Final Control Plan Procedures for Reasonably Available Control Technology. |
| Section 117.1254 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.1256 | Revision of Final Control Plan. |
| Section 117.1300 | Applicability. |
| Section 117.1303 | Exemptions. |
| Section 117.1310 | Emission Specifications for Eight-Hour Attainment Demonstration. |
| Section 117.1335 | Initial Demonstration of Compliance. |
| Section 117.1340 | Continuous Demonstration of Compliance. |
| Section 117.1345 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.1350 | Initial Control Plan Procedures. |
| Section 117.1354 | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. |
| Section 117.1356 | Revision of Final Control Plan. |
| Section 117.2000 | Applicability. |
| Section 117.2003 | Exemptions. |
| Section 117.2010 | Emission Specifications. |
| Section 117.2030 | Operating Requirements. |
| Section 117.2035 | Monitoring and Testing Requirements. |
| Section 117.2045 | Recordkeeping and Reporting Requirements. |
| Section 117.2100 | Applicability. |
| Section 117.2103 | Exemptions. |
| Section 117.2110 | Emission Specifications for Eight-Hour Attainment Demonstration. |
| Section 117.2130 | Operating Requirements. |
| Section 117.2135 | Monitoring, Notification, and Testing Requirements. |
| Section 117.2145 | Recordkeeping and Reporting Requirements. |
| Section 117.3000 | Applicability. |
| Section 117.3003 | Exemptions. |
| Section 117.3005 | Gas-Fired Steam Generation. |
| Section 117.3010 | Emission Specifications. |
| Section 117.3020 | System Cap. |
| Section 117.3035 | Initial Demonstration of Compliance. |
| Section 117.3040 | Continuous Demonstration of Compliance. |
| Section 117.3045 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.3054 | Final Control Plan Procedures. |
| Section 117.3056 | Revision of Final Control Plan. |
| Section 117.3200 | Applicability. |
| Section 117.3201 | Definitions. |
| Section 117.3203 | Exemptions. |
| Section 117.3205 | Emission Specifications. |
| Section 117.3210 | Certification Requirements. |

TABLE 1—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 BEING APPROVED INTO TEXAS SIP—Continued

| Section No. | Description |
|---|---|
| Section 117.3215 | Notification and Labeling Requirements. |
| Section 117.3300 | Applicability. |
| Section 117.3303 | Exemptions. |
| Section 117.3310 | Emission Specifications for Eight-Hour Attainment Demonstration. |
| Section 117.3330 | Operating Requirements. |
| Section 117.3335 | Monitoring, Notification, and Testing Requirements. |
| Section 117.3345 | Recordkeeping and Reporting Requirements. |
| Section 117.4000 | Applicability. |
| Section 117.4005 | Emission Specifications. |
| Section 117.4025 | Alternative Case Specific Specifications. |
| Section 117.4035 | Initial Demonstration of Compliance. |
| Section 117.4040 | Continuous Demonstration of Compliance. |
| Section 117.4045 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.4050 | Control Plan Procedures. |
| Section 117.4100 | Applicability. |
| Section 117.4105 | Emission Specifications. |
| Section 117.4125 | Alternative Case Specific Specifications. |
| Section 117.4135 | Initial Demonstration of Compliance. |
| Section 117.4140 | Continuous Demonstration of Compliance. |
| Section 117.4145 | Notification, Recordkeeping, and Reporting Requirements. |
| Section 117.4150 | Control Plan Procedures. |
| Section 117.4200 | Applicability. |
| Section 117.4205 | Emission Specifications. |
| Section 117.4210 | Applicability of Federal New Source Performance Standards. |
| Section 117.8000 | Stack Testing Requirements. |
| Section 117.8010 | Compliance Stack Test Reports. |
| Section 117.8100 | Emission Monitoring System Requirements for Industrial, Commercial, and Institutional Sources. |
| Section 117.8110 | Emission Monitoring System Requirements for Utility Electric Generation Sources. |
| Section 117.8120 | Carbon Monoxide (CO) Monitoring. |
| Section 117.8130 | Ammonia Monitoring. |
| Section 117.8140 | Emission Monitoring for Engines. |
| Section 117.9000 | Compliance Schedule for Beaumont-Port Arthur Ozone Nonattainment Area Major Sources. |
| Section 117.9010 | Compliance Schedule for Dallas-Fort Worth Ozone Nonattainment Area Major Sources. |
| Section 117.9020 | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Major Sources. |
| Section 117.9030 | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources. |
| Section 117.9100 | Compliance Schedule for Beaumont-Port Arthur Ozone Nonattainment Area Utility Electric Generation Sources. |
| Section 117.9110 | Compliance Schedule for Dallas-Fort Worth Ozone Nonattainment Area Utility Electric Generation Sources. |
| Section 117.9120 | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Utility Electric Generation Sources. |
| Section 117.9130 | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Utility Electric Generation Sources. |
| Section 117.9200 | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources. |
| Section 117.9210 | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources. |
| Section 117.9300 | Compliance Schedule for Utility Electric Generation in East and Central Texas. |
| Section 117.9340 | Compliance Schedule for East Texas Combustion. |
| Section 117.9500 | Compliance Schedule for Nitric Acid and Adipic Acid Manufacturing Sources. |
| Section 117.9800 | Use of Emission Credits for Compliance. |

Although we proposed approval of the new section 117.9810 concerning Use of Emission Reductions Generated from the Texas Emissions Reduction Plan (TERP) in our July 11, 2008 publication, we are taking no action upon 117.9810 today. We will take rulemaking action on 117.9810 in a separate publication in future.

Please keep in mind that the tables in this document are not intended to be exhaustive, but rather to provide a guide for readers to generally understand which affected sources are likely to be required to comply with the $NO_X$ control requirements in conjunction with today's rulemaking action. To determine whether or how your facility would be affected by this particular action, you should refer to the actual text of 30 TAC Chapter 117, and the June 8, 2007 issue of the Texas Register (32 TexReg 3206). You can find the entire TCEQ Chapter 117 rules at: *http://www.tceq.state.tx.us/rules/indxpdf.html#117.*

Our TSD prepared for the July 11, 2008 (73 FR 39900) proposal contained detailed discussion of each of the above changes, and why EPA believed they should be approved into Texas SIP. We are approving the above sections of Table 1 into Texas SIP.

*D. What sections of the May 30, 2007, SIP revision will not become part of Texas SIP?*

Per TCEQ's request the following sections, listed in Table 2 below, of the May 30, 2007, SIP revision will not become a part of the EPA-approved Texas SIP. As stated in our proposal these rules mainly pertain to the control of ammonia or carbon monoxide emissions which are not ozone precursors and therefore, these rules are not necessary components of the Texas SIP. The rules listed in Table 2 are not already in the current Texas SIP and EPA continues to agree with Texas that these rules can remain outside the SIP.

TABLE 2—SECTIONS OF CHAPTER 117 NOT IN EPA-APPROVED TEXAS SIP

| Section No. | Explanation |
|---|---|
| 117.110(c), 117.125, 117.210(c), 117.225, 117.310(c), 117.325, 117.410(d), 117.425, 117.1010(b), 117.1025, 117.1110(b), 117.1125, 117.1210(b), 117.1225, 117.1310(b), 117.1325, 117.2010(i), 117.2025, 117.2110(h), 117.2125, 117.3010(2), 117.3025, 117.3123(f), 117.3125, 117.3310(e), and 117.3325. | Not a part of EPA-approved Texas SIP, and TCEQ continues to ask that these rules remain outside the SIP. |

Although the above sections of 30 TAC Chapter 117 will not become a part of the Texas SIP, they will continue to remain enforceable at the State level. As stated elsewhere in this document, we are taking no action upon 117.9810 today. We will take rulemaking action on 117.9810 in a separate publication in future.

*E. What sections of the May 30, 2007, SIP revision are we reviewing in another* ***Federal Register*** *action?*

Table 3 below contains a listing of sections of the May 30, 2007, SIP revision that we are not finalizing in today's action. We will review and act upon the cement kiln related sections of the May 30, 2007 SIP revision in a separate rulemaking action.

TABLE 3—SECTIONS OF CHAPTER 117 NOT BEING EVALUATED IN THIS RULEMAKING

| Section No. | Explanation |
|---|---|
| 117.3100, 117.3101, 117.3103, 117.3110, 117.3120, 117.3123, 117.3125, 117.3140, 117.3142, and 117.3145. | Cement kiln related provisions, not finalized in this rulemaking action. |

*F. What Counties in the D/FW area will the May 30, 2007, SIP revision affect?*

Table 4 below lists the Counties in the D/FW 8-hour Ozne nonattainment area that will be affected by today's action.

TABLE 4—TEXAS COUNTIES IN THE D/FW 8-HOUR OZONE NONATTAINMENT AREA

| D/FW Counties | Explanation |
|---|---|
| Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant ..... | See section 117.10(2)(C). |

*G. What Counties in East and Central Texas will the May 30, 2007, SIP revision affect?*

Table 5 below lists the Counties in the East and Central Texas that will be affected by today's action.

TABLE 5—COUNTIES PART OF THE EAST AND CENTRAL TEXAS PROVISION OF CHAPTER 117

| East and central Texas counties | Explanation |
|---|---|
| Anderson, Brazos, Burleson, Camp, Cass, Cherokee, Franklin, Freestone, Gregg, Grimes, Harrison, Henderson, Hill, Hopkins, Hunt, Lee, Leon, Limestone, Madison, Marion, Morris, Nacogdoches, Navarro, Panola, Rains, Robertson, Rusk, Shelby, Smith, Titus, Upshur, Van Zandt, and Wood. | See section 117.3300. |

*H. What are $NO_X$?*

Nitrogen oxides belong to the group of criteria air pollutants. $NO_X$ are produced from burning fuels, including gasoline and coal. Nitrogen oxides react with volatile organic compounds (VOC) to form ozone or smog, and are also major components of acid rain. For more information on $NO_X$ see *http://www.epa.gov/air/urbanair/nox/.*

*I. What is Ozone and why do we regulate it?*

Ozone is a gas composed of three oxygen atoms. Ground level ozone is generally not emitted directly from a

vehicle's exhaust or an industrial smokestack, but is created by a chemical reaction between $NO_X$ and VOCs in the presence of sunlight and high ambient temperatures. Thus, ozone is known primarily as a summertime air pollutant. $NO_X$ and VOCs are precursors of ozone. Motor vehicle exhaust and industrial emissions, gasoline vapors, chemical solvents and natural sources emit $NO_X$ and VOCs. Urban areas tend to have high concentrations of ground-level ozone, but areas without significant industrial activity and with relatively low vehicular traffic are also subject to increased ozone levels because wind carries ozone and its precursors hundreds of miles from their sources.

Repeated exposure to ozone pollution may cause lung damage. Even at very low concentrations, ground-level ozone triggers a variety of health problems including aggravated asthma, reduced lung capacity, and increased susceptibility to respiratory illnesses like pneumonia and bronchitis. It can also have detrimental effects on plants and ecosystems.

*J. What is a SIP?*

The SIP is a set of air pollution regulations, control strategies, other means or techniques and technical analyses developed by the state, to ensure that the state meets the NAAQS. The SIP is required by section 110 and other provisions of the Act. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as emissions inventories, monitoring networks, and modeling demonstrations. Each state must submit these regulations and control strategies to EPA for approval and incorporation into the Federally-enforceable SIP. Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin.

*K. What are the $NO_X$ emissions requirements for point sources in the D/FW area that we are approving?*

We approved $NO_X$ emissions specifications for stationary sources in 66 FR 15195 published March 16, 2001. In addition to requiring $NO_X$ emissions control requirements for those sources, we are approving the following $NO_X$ emissions requirements for the following affected sources with emissions greater than 50 Tons Per Year (TPY) in the D/FW 8-hour ozone nonattainment area. We have included the Chapter 117 citation for each source category in the Table 6 below for convenience purposes.

TABLE 6—$NO_X$ EMISSIONS SPECIFICATIONS FOR THE D/FW 8-HOUR OZONE NONATTAINMENT AREA

| Source | $NO_X$ emission specification | Additional information | Citation |
|---|---|---|---|
| Reciprocating Internal Combustion Engines | 2.0 g/hp-hr | Natural gas, rich burn, capacity ≥300 hp, before January 1, 2000, also a 3.0 g/hp-hr limit of CO. | 117.410(a)(1)(B)(i). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Natural gas, rich burn, capacity ≥300 hp, on or after January 1, 2000, also a 3.0 g/hp-hr limit of CO. | 117.410(a)(9)(B)(ii). |
| Reciprocating Internal Combustion Engines | 0.60 g/hp-hr | Gas-fired, rich burn, landfill gas | 117.410(b)(4)(A)(i). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Gas-fired, rich burn, not using landfill gas | 117.410(b)(4)(A)(ii). |
| Reciprocating Internal Combustion Engines | 0.70 g/hp-hr | Gas-fired, lean burn, before June 1, 2007, not modified afterwards. | 117.410(b)(4)(B)(i). |
| Reciprocating Internal Combustion Engines | 0.60 g/hp-hr | Gas-fired, lean burn, landfill gas, on or after June 1, 2007. | 117.410(b)(4)(B)(ii)(I). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Gas-fired, lean burn, not using landfill gas, and on or after June 1, 2007. | 117.410(b)(4)(B)(ii)(I). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Dual-fuel | 117.410(b)(4)(B)(ii)(II). |
| Duct Burners | 0.032 lb/MMBtu | Used in turbine exhausts, rated ≥10 MW | 117.410(b)(6). |
| Duct Burners | 0.15 lb/MMBtu | Used in turbine exhausts, 1.0 rated <10 MW | 117.410(b)(6). |
| Duct Burners | 0.26 lb/MMBtu | Used in turbine exhausts, rated ≥1.0 MW | 117.410(b)(6). |
| Lime Kilns | 3.7 lb/ton of CaO | Individual kiln basis | 117.410(b)(7)(A)(i). |
| Lime Kilns | 3.7 lb/ton of CaO | Site-wide basis | 117.410(b)(7)(A)(ii). |
| Ceramic and Brick Kilns | 40% $NO_X$ reduction | Using daily 2000 calendar year EI | 117.410(b)(7)(B)(i). |
| Brick Kilns | 0.175 lb/ton of product. | As option | 117.410(b)(7)(B)(ii). |
| Ceramic Kilns | 0.27 lb/ton of product | As option | 117.410(b)(7)(B)(iii). |
| Metallurgical Furnaces | 0.087 lb/MMBtu | Heat Furnace, March 1–October 31 any year. | 117.410(b)(8)(A). |
| Metallurgical Furnaces | 0.10 lb/MMBtu | Reheat Furnace, March 1–October 31 any year. | 117.410(b)(8)(B). |
| Metallurgical Furnaces | 0.45 lb/MMBtu | Lead smelting blast cupola and reverberatory. | 117.410(b)(8)(C). |
| Incinerators | 80% $NO_X$ reduction | Using real emissions of 2000 EI | 117.410(b)(9)(A). |
| Incinerators | 0.030 lb/MMBtu | As option | 117.410(b)(9)(B). |
| Container Glass Furnaces | 4.0 lb/ton of glass pulled. | Melting furnace, within 25% of permitted production capacity, or MAER of permit issued before June 1, 2007. | 117.410(b)(10)(A)(i), or 117.410(b)(10)(A)(ii). |
| Fiberglass Furnaces | 4.0 lb/ton product pulled. | Mineral wool, cold-top electric | 117.410(b)(10)(B). |
| Fiberglass Furnaces | 1.45 lb/ton product pulled. | Mineral wool, regenerative | 117.410(b)(10)(C). |
| Fiberglass Furnaces | 3.1 lb/ton product pulled. | Mineral wool, non-regenerative | 117.410(b)(10)(D). |
| Curing Ovens | 0.036 lb/MMBtu | Gas fired, used in mineral wool-type or textile-type fiberglass. | 117.410(b)(11). |
| Ovens and Heaters | 0.036 lb/MMBtu | Natural gas-fired | 117.410(b)(12). |

TABLE 6—$NO_X$ EMISSIONS SPECIFICATIONS FOR THE D/FW 8-HOUR OZONE NONATTAINMENT AREA—Continued

| Source | $NO_X$ emission specification | Additional information | Citation |
|---|---|---|---|
| Dryers | 0.036 lb/MMBtu | Natural gas-fired, used in organic solvent, printing ink, clay, brick, ceramic tile, calcining, and vitrifying processes. | 117.410(b)(13)(A). |
| Spray Dryers | 0.15 lb/MMBtu | Natural gas-fired, used in ceramic tile manufacturing processes. | 117.410(b)(13)(B). |

We are approving these $NO_X$ emissions specifications under Part D of the Act because their resulting emissions reductions will assist Texas in demonstrating attainment of the 1997 8-hour ozone standard in the D/FW 8-hour ozone nonattainment area.

Therefore, we are approving these requirements into the Texas SIP.

*L. What are the $NO_X$ emission requirements for stationary diesel engines in the D/FW area that we are approving?*

This SIP revision requires reductions of $NO_X$ emissions from stationary diesel engines in the D/FW area. The following Table 7 contains a summary of the $NO_X$ emission specifications for stationary diesel engines in the D/FW area. We have included the Chapter 117 citation for each source category in the Table 7 below for convenience purposes.

TABLE 7—$NO_X$ EMISSION REQUIREMENTS STATIONARY DIESEL ENGINES FOR THE D/FW 8-HOUR OZONE NONATTAINMENT AREA

| Source | $NO_X$ Emission Specification | Citation |
|---|---|---|
| Diesel engines in service before March 1, 2009: not modified, reconstructed, or relocated on or after March 1, 2009. | 11.0 gram/hp-hr | 117.410(b)(4)(D). |
| Rated less than 50 hp: modified, installed reconstructed, or relocated on or after March 1, 2009. | 5.0 gram/hp-hr | 117.410(b)(4)(E)(i). |
| Rated 50 hp or more, but less than 100 hp: modified, installed, reconstructed, or relocated on or after March 1, 2009. | 3.3 gram/hp-hr | 117.410(b)(4)(E)(ii). |
| Rated 100 hp or more, but less than 750 hp: installed, modified, reconstructed, or relocated on or after March 1, 2009. | 2.8 gram/hp-hr | 117.410(b)(4)(E)(iii). |
| Rated 750 hp or more: installed, modified, reconstructed, or relocated on or after March 1, 2009. | 4.5 gram/hp-hr | 117.410(b)(4)(E)(iv). |

Also see section 117.2110(a)(3) concerning stationary diesel engines at minor sources within the D/FW 8-Hour Ozone Nonattainment Area.

As stated in our July 11, 2008 (73 FR 39900) proposal, we are approving the above-listed $NO_X$ emission requirements for diesel engines because they are in agreement with those found in 40 CFR 89.112, and EPA's Document Number 420–R–98–016 dated August 1998, titled ''Final Regulatory Impact Analysis: Control of Emissions from Nonroad Diesel Engines.'' In addition, the above-listed $NO_X$ emission requirements for diesel engines are consistent with those we approved for similar units at Table VI of 66 FR 57230 published on November 14, 2001. We are therefore approving these $NO_X$ emission requirements into the Texas SIP under Part D of the Act because their resulting emissions reductions will assist Texas in demonstrating attainment of the 8-hour ozone standard within the D/FW 8-hour ozone nonattainment area.

*M. What are the $NO_X$ emissions specifications for minor sources of $NO_X$ in the D/FW area that we are approving?*

These minor sources include stationary reciprocating internal combustion engines that are not a major source of $NO_X$ (emit, when uncontrolled, less than 50 Tons Per Year (TPY) of $NO_X$). See sections 117.2100 and 117.2103 for more information.

TABLE 8—$NO_X$ EMISSIONS REQUIREMENTS FOR MINOR SOURCES IN THE D/FW AREA

| Source | $NO_X$ emission specification | Additional information | Citation |
|---|---|---|---|
| Reciprocating Internal Combustion Engines | 0.60 g/hp-hr | Stationary, rich-burn, using landfill gas-fired | 117.2110(a)(1)(A)(i). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Stationary, rich-burn, not landfill gas-fired | 117.2110(a)(1)(A)(ii). |
| Reciprocating Internal Combustion Engines | 0.70 g/hp-hr | Stationary, lean-burn, in service before June 1, 2007. | 117.2010(a)(1)(B)(i). |
| Reciprocating Internal Combustion Engines | 0.60 g/hp-hr | Stationary, lean-burn, in service on or after June 1, 2007, using landfill gas. | 117.2010(a)(1)(B)(i)(I). |
| Reciprocating Internal Combustion Engines | 0.50 g/hp-hr | Stationary, lean-burn, in service on or after June 1, 2007, not using landfill gas. | 117.2010(a)(1)(B)(i)(II). |
| Reciprocating Internal Combustion Engines | 5.83 g/hp-hr | Stationary, dual-fuel | 117.2010(a)(2). |
| Reciprocating Internal Combustion Engines | The lower of 11.0 g/hp-hr or an established emission rate. | Stationary, diesel, in service before March 1, 2009; and not modified, reconstructed, or relocated on or after March 1, 2009. | 117.2110(a)(3)(A). |

TABLE 8—$NO_X$ EMISSIONS REQUIREMENTS FOR MINOR SOURCES IN THE D/FW AREA—Continued

| Source | $NO_X$ emission specification | Additional information | Citation |
|---|---|---|---|
| Reciprocating Internal Combustion Engines ... | 3.3 g/hp-hr ..... | Stationary, diesel, rated 50 hp or more but less than 100 hp; and installed, modified, reconstructed, or relocated on or after March 1, 2009. | 117.2110(a)(3)(B)(i). |
| Reciprocating Internal Combustion Engines ... | 2.8 g/hp-hr ..... | Stationary, diesel, rated 100 hp or more but less than 750 hp; and installed, modified, reconstructed, or relocated on or after March 1, 2009. | 117.2110(a)(3)(B)(ii). |
| Reciprocating Internal Combustion Engines ... | 4.5 g/hp-hr ..... | Stationary, diesel, rated 750 or more; and installed, modified, reconstructed, or relocated on or after March 1, 2009. | 117.2110(a)(3)(B)(iii). |

As an alternative, a minor source from the Table 8 above located within the D/FW area and having an annual capacity factor of 0.0383 or less may choose emissions specification of 0.060 lb/MMBtu, instead. See 117.2110(a)(4).

The $NO_X$ emissions requirements for the above-listed minor sources of $NO_X$ and their resulting emissions reductions will assist in demonstrating attainment of the 8-hour ozone NAAQS within the D/FW 8-hour ozone nonattainment area. Therefore, we are approving these requirements into the Texas SIP.

*N. What are the $NO_X$ emissions requirements for stationary reciprocating internal combustion engines (RICE) in East Texas that we are approving?*

The gas-fired stationary reciprocating internal combustion engines located in Anderson, Brazos, Burleson, Camp, Cass, Cherokee, Franklin, Freestone, Gregg, Grimes, Harrison, Henderson, Hill, Hopkins, Hunt, Lee, Leon, Limestone, Madison, Marion, Morris, Nacogdoches, Navarro, Panola, Rains, Robertson, Rusk, Shelby, Smith, Upshur, Van Zandt, or Wood Texas Counties are subject to these requirements. See section 117.3300 for more information. The following Table 9 contains $NO_X$ emissions requirements and related information for these affected units.

On July 19, 2007 TCEQ announced implementation of Texas Senate Bill 2000, passed in 2007 by the 80th Texas Legislative Session. The Bill directs the TCEQ to develop an incentive grant program for the partial reimbursement of capital costs for installing nonselective catalytic reduction (NSCR) systems to reduce emissions of $NO_X$ from existing stationary gas-fired rich-burn compressor engines. For more information see *http://www.tceq.state.tx.us/implementation/air/rules/sb2003.html* (URL dating July 20, 2007).

TABLE 9—$NO_X$ EMISSIONS REQUIREMENTS FOR STATIONARY RECIPROCATING INTERNAL COMBUSTION ENGINES IN EAST TEXAS

| Source | $NO_X$ emission specification | Additional information | Citation |
|---|---|---|---|
| Reciprocating Internal Combustion Engines ... | 1.00 g/hp-hr ..... | Rich burn, gas-fired, capacity < 500 hp ..... | 117.3310(a)(1). |
| Reciprocating Internal Combustion Engines ... | 0.60 g/hp-hr ..... | Rich burn, landfill gas-fired, capacity ≥ 500 hp. | 117.3310(a)(2)(A). |
| Reciprocating Internal Combustion Engines ... | 0.50 g/hp-hr ..... | Rich burn, not landfill gas-fired, capacity ≥ 500 hp. | 117.3310(a)(2)(B). |

The $NO_X$ emissions requirements for the stationary reciprocating internal combustion engines in East and Central Texas and their resulting emissions reductions will assist in demonstrating attainment of the 8-hour ozone NAAQS within the Houston-Galveston-Brazoria, D/FW, and Beaumont/Port Arthur areas. Furthermore, these reductions will contribute to the continued maintenance of the standard in the eastern half of the State of Texas, and they enhance the Texas SIP. Therefore, we are approving these requirements into the Texas SIP under part D, and sections 110 and 116 of the Act, respectively.

*O. What are the $NO_X$ emissions requirements for state-wide water heaters, small boilers, and process heaters that we are approving?*

The water heaters, small boilers, and process heaters that use natural gas and have a rated capacity of 2 million Btu per hour or less are subject to these requirements. See 117.3200 and 117.3203 for more information. The following Tables 10 and 11 contain type and size categories, and $NO_X$ emissions requirements for these affected units.

TABLE 10—WATER HEATER SIZE CLASSIFICATIONS

| Maximum rated capacity (Btu/Hr) | Type |
|---|---|
| Capacity [ 75,000 ..... | 0 |
| 400,000 [ Capacity > 75,000 ..... | 1 |
| 2,000,000 < Capacity > 400,000 ..... | 2 |

TABLE 11—CHAPTER 117 STATE-WIDE $NO_X$ REQUIREMENTS FOR WATER HEATERS, SMALL BOILERS, AND PROCESS HEATERS

| Type | Date | $NO_X$ emission specification | Citation |
|---|---|---|---|
| 0 | Manufactured on or after July 1, 2002, but no later than December 31, 2004. | 40 ng/joule of heat output | 117.3205(a)(1)(A). |
| 0 | Manufactured on or after July 1, 2002, but no later than December 31, 2004. | 55 ppmv at 3% oxygen dry basis | 117.3205(a)(1)(B). |
| 0 | Manufactured on or after January 1, 2005 | 10 ng/joule of heat output | 117.3205(a)(2)(A). |
| 0 | Manufactured on or after January 1, 2005 | 15 ppmv at 3% oxygen dry basis | 117.3205(a)(2)(B). |
| 1 | Manufactured on or after July 1, 2002 | 40 ng/joule of heat output | 117.3205(a)(3)(A). |
| 1 | Manufactured on or after July 1, 2002 | 55 ppmv at 3% oxygen dry basis | 117.3205(a)(3)(B). |
| 2 | Manufactured on or after July 1, 2002 | 30 ppmv at 3% oxygen dry basis | 117.3205(a)(4)(A). |
| 2 | Manufactured on or after July 1, 2002 | 0.037 lb/MMBtu/hr of heat input | 117.3205(a)(4)(B). |
| 0 | Manufactured on or after July 1, 2002 | 40 ng/joule of heat output | 117.3205(b)(1)(A). |
| 0 | Manufactured on or after July 1, 2002 | 55 ppmv at 3% oxygen dry basis | 117.3205(b)(1)(B). |
| 1 | Manufactured on or after July 1, 2002 | 40 ng/joule of heat output | 117.3205(b)(2)(A). |
| 1 | Manufactured on or after July 1, 2002 | 55 ppmv at 3% oxygen dry basis | 117.3205(b)(2)(B). |
| 2 | Manufactured on or after July 1, 2002 | 30 ppmv at 3% oxygen dry basis | 117.3205(b)(3)(A). |
| 2 | Manufactured on or after July 1, 2002 | 0.037 lb/MMBtu/hr of heat input | 117.3205(b)(3)(B). |

The size categories and $NO_X$ emissions requirements for these affected units are similar to those in place in other parts of the country. In our proposal and the corresponding TSD we explained how the revised state-wide residential water heater $NO_X$ emission requirements meet the requirements of section 110(l) of the Act. Therefore, we are finding that the revised state-wide residential water heater $NO_X$ emission requirements meet section 110(l) of the Act. Thus, we are approving the state-wide $NO_X$ emission requirements for water heaters, small boilers, and process heaters into the Texas SIP.

*P. What are the compliance schedules for $NO_X$ emissions sources that we are approving?*

The following Table 12 contains a summary of the $NO_X$-related compliance schedules for major sources, utility generating units, and minor sources affected by the May 30, 2007 SIP revision. See sections 117.9000 through 117.9500 for more information.

TABLE 12—$NO_X$ COMPLIANCE SCHEDULES FOR POINT SOURCES UNDER CHAPTER 117

| Source | Compliance date | Additional information | Citation |
|---|---|---|---|
| Major, D/FW | Install all $NO_X$ abatement equipment by no later than May 30, 2007. | Increment of Progress (IOP) requirement | 117.9030(a)(1). |
| Major, D/FW | Submit initial control plan per 117.450 by no later than June 1, 2008.<br>Comply with emissions requirements by no later than March 1, 2009 when source subject to 117.410(b)(1), (2), (4), (5), (6), (7)(A), (10), and (14)..<br>Diesel and dual-fuel engines comply with testing and hours of operation for testing and maintenance by no later than March 1, 2009.<br>Gas turbines or IC engines claiming run time exemption comply with the run time requirements by no later than March 1, 2009. | 8-hour attainment demonstration requirement | 117.9030(b). |
| D/FW | Submit initial control plan per 117.1350 by no later than June 1, 2008.<br>Comply with all other requirements by no later than March 1, 2009. | Utility electric generation sources | 117.9130(a)(1) and (2). |
| Minor, D/FW | Rich-burn, gas-fired stationary RICE comply with $NO_X$ requirements by no later than March 1, 2009.<br>Lean-burn, gas-fired stationary RICE comply with $NO_X$ requirements by no later than March 1, 2010.<br>Diesel-fired and dual-fuel stationary RICE comply with $NO_X$ requirements by no later than March 1, 2009. | RICE fired with different fuel types | 117.9210 |
| East Texas | Stationary RICE comply with $NO_X$ requirements by no later than March 1, 2010. | East Texas combustion sources | 117.9340(a). |

Including these compliance dates, summarized in Table 12 above, in the rule provides for enforceability and practicability of the $NO_X$ rule, and enhances the Texas SIP; therefore, we are approving them into the Texas SIP.

**II. Final Action**

Today, we are finalizing approval of revisions to the 30 TAC Chapter 117 into the Texas SIP. This rulemaking covers four separate actions. First, we are approving the repeal of all non-substantive changes to the SIP's Chapter 117 rules and the reformatting of current Chapter 117 because the reformatted revision will better accommodate future additions/revisions to the rules. Second, we are approving substantive revisions to the current $NO_X$ SIP's Chapter 117 rules for D/FW $NO_X$ major point sources. Third, we are approving substantive revisions to the current Texas SIP's Chapter 117 rules for D/FW minor sources of $NO_X$ . Fourth, we are approving substantive revisions to the current Texas SIP's Chapter 117 rules for combustion sources in East Texas. These $NO_X$ reductions will assist the D/FW area in attaining the 1997 8-hour ozone NAAQS. Today, we are not taking action on the cement kiln related provisions of Chapter 117, see sections E and D of this document. We are also not taking action on new section 117.9810, see section C of this document.

**III. 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;
- 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); and
- 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 February 2, 2009. 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, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen oxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: November 25, 2008.

**Richard E. Greene,**

*Regional Administrator, Region 6.*

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

**PART 52—[AMENDED]**

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

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

**Subpart SS—Texas**

■ 2. In § 52.2270 the entry for Chapter 117 (Reg 7)—Control of Air Pollution from Nitrogen Compounds in the table in paragraph (c) is revised to read as follows:

**§ 52.2270 Identification of plan.**

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE TEXAS SIP

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| * | * | * | * | * |
| **Chapter 117—Control of Air Pollution From Nitrogen Compounds** | | | | |
| **Subchapter A—Definitions** | | | | |
| Section 117.10 ..... | Definitions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter B—Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas** | | | | |
| **Division 1—Beaumont-Port Arthur Ozone Nonattainment Area Major Sources** | | | | |
| Section 117.100 ..... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.103 ..... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.105 ..... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.110 ..... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.110(c) not in SIP. |
| Section 117.115 ..... | Alternative Plant-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.123 ..... | Source Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.130 ..... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.135 ..... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.140 ..... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.145 ..... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.150 ..... | Initial Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.152 ..... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.154 ..... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.156 ..... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Dallas-Fort Worth Ozone Nonattainment Area Major Sources** | | | | |
| Section 117.200 ..... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.203 ..... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.205 ..... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.210 ..... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.210(c) not in SIP. |
| Section 117.215 ..... | Alternative Plant-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.223 ..... | Source Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.230 ..... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.235 ..... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.240 ..... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.245 ..... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.252 ..... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.254 ..... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.256 ..... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 3—Houston-Galveston-Brazoria Ozone Nonattainment Area Major Sources** | | | | |
| Section 117.300 ..... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.303 ..... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.305 ..... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.310 ..... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.310(c) not in SIP. |
| Section 117.315 ..... | Alternative Plant-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.320 ..... | System Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.223 ..... | Source Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.330 ..... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.335 ..... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.340 ..... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.345 ..... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.350 ..... | Initial Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.352 ..... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.354 ..... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.356 ..... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 4—Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources** | | | | |
| Section 117.400 ..... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.403 ..... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.410 ..... | Emission Specifications for Eight-Hour Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.410(d) not in SIP. |
| Section 117.423 ..... | Source Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.430 ..... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.435 ..... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.440 ..... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.445 ..... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.450 ..... | Initial Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.454 ..... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.456 ..... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter C—Combustion Control at Major Utility Electric Generation Sources in Ozone Nonattainment Areas** | | | | |
| **Division 1—Beaumont-Port Arthur Ozone Nonattainment Area Utility Electric Generation Sources** | | | | |
| Section 117.1000 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1003 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1005 ... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1010 ... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.1010(b) not in SIP. |
| Section 117.1015 ... | Alternative System-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1020 ... | System Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1035 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1040 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1045 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1052 ... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1054 ... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1056 ... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Dallas-Fort Worth Ozone Nonattainment Area Utility Electric Generation Sources** | | | | |
| Section 117.1100 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1103 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1105 ... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1110 ... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1115 ... | Alternative System-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1120 ... | System Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1135 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1140 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1145 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1152 ... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1154 ... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1156 ... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 3—Houston-Galveston-Brazoria Ozone Nonattainment Area Utility Electric Generation Sources** | | | | |
| Section 117.1200 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

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| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.1203 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1205 ... | Emission Specifications for Reasonably Available Control Technology (RACT). | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.1210(b) not in SIP. |
| Section 117.1210 ... | Emission Specifications for Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1215 ... | Alternative System-Wide Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1220 ... | System Cap ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1235 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1240 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1245 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1252 ... | Final Control Plan Procedures for Reasonably Available Control Technology. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1254 ... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1256 ... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 4—Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Utility Electric Generation Sources** | | | | |
| Section 117.1300 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1303 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1310 ... | Emission Specifications for Eight-Hour Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.1310(b) not in SIP. |
| Section 117.1335 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1340 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1345 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1350 ... | Initial Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1354 ... | Final Control Plan Procedures for Attainment Demonstration Emission Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.1356 ... | Revision of Final Control Plan ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter D—Combustion Control at Minor Sources in Ozone Nonattainment Areas** | | | | |
| **Division 1—Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources** | | | | |
| Section 117.2000 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2003 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2010 ... | Emission Specification ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.2010(i) not in SIP. |
| Section 117.2030 ... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2035 ... | Monitoring and Testing Requirements | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2045 ... | Recordkeeping and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources** | | | | |
| Section 117.2100 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

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| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.2103 ... | Exemptions | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2110 ... | Emission Specifications for Eight-Hour Attainment Demonstrations. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.2110(h) not in SIP. |
| Section 117.2130 ... | Operating Requirements | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2135 ... | Monitoring and Testing Requirements | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.2145 ... | Recordkeeping and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter E—Multi-Region Combustion Control** | | | | |
| **Division 1—Utility Electric Generation in East and Central Texas** | | | | |
| Section 117.3000 ... | Applicability | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3003 ... | Exemptions | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3005 ... | Gas-Fired Steam Generation | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3010 ... | Emission Specifications | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.3010(2) not in SIP. |
| Section 117.3020 ... | System Cap | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3035 ... | Initial Demonstration of Compliance | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3040 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3045 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3054 ... | Final Control Plan Procedures | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3056 ... | Revision of Final Control Plan | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Cement Kilns** | | | | |
| Section 117.260 ..... | Cement Kiln Definitions | 04/19/00, 03/05/03 | 03/26/04, 69 FR 15686 | Also finalizes 65 FR 64914. |
| Section 117.261 ..... | Applicability | 04/19/00 | 03/26/04, 69 FR 15686. | |
| Section 117.265 ..... | Emission Specifications | 04/19/00, 03/05/03 | 03/26/04, 69 FR 15686 | Also finalizes 65 FR 64914. |
| Section 117.273 ..... | Continuous Demonstration of Compliance. | 04/19/00 | 03/26/04, 69 FR 15686. | |
| Section 117.279 ..... | Notification, Recordkeeping, and Reporting Requirements. | 04/19/00, 03/05/03 | 03/26/04, 69 FR 15686. | |
| Section 117.283 ..... | Source Cap | 04/19/00, 03/05/03 | 03/26/04, 69 FR 15686. | |
| Section 117.524 ..... | Compliance Schedule for Cement Kilns | 04/19/00, 03/05/03 | 03/26/04, 69 FR 15686. | |
| **Division 3—Water Heaters, Small Boilers, and Process Heaters** | | | | |
| Section 117.3200 ... | Applicability | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3201 ... | Definitions | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3203 ... | Exemptions | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3205 ... | Emission Specifications | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3210 ... | Certification requirements | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3215 ... | Notification and Labeling Requirements | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 4—East Texas Combustion** | | | | |
| Section 117.3300 ... | Applicability | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

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| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.3303 ... | Exemptions ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3310 ... | Emission Specifications for Eight-Hour Attainment Demonstration. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | 117.3310(e) not in SIP. |
| Section 117.3330 ... | Operating Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3335 ... | Monitoring, Notification, and Testing Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.3345 ... | Recordkeeping and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter F—Acid Manufacturing** | | | | |
| **Division 1—Adipic Acid Manufacturing** | | | | |
| Section 117.4000 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4005 ... | Emission Specifications ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4025 ... | Alternative Case Specific Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4035 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4040 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4045 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4050 ... | Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Nitric Acid Manufacturing—Ozone Nonattainment Areas** | | | | |
| Section 117.4100 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4105 ... | Emission Specifications ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4125 ... | Alternative Case Specific Specifications. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4135 ... | Initial Demonstration of Compliance .... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4140 ... | Continuous Demonstration of Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4145 ... | Notification, Recordkeeping, and Reporting Requirements. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4150 ... | Control Plan Procedures ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Nitric Acid Manufacturing—Ozone Nonattainment Areas** | | | | |
| Section 117.4200 ... | Applicability ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4205 ... | Emission Specifications ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.4210 ... | Applicability of Federal New Source Performance Standards. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter G—General Monitoring and Testing Requirements** | | | | |
| **Division 1—Compliance Stack Testing and Report Requirements** | | | | |
| Section 117.8000 ... | Stack Testing Requirements ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.8010 ... | Compliance Stack Test Reports ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Division 2—Emission Monitoring** | | | | |
| Section 117.8100 ... | Emission Monitoring System Requirements for Industrial, Commercial, and Institutional Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |

EPA-APPROVED REGULATIONS IN THE TEXAS SIP—Continued

| State citation | Title/subject | State approval/ submittal date | EPA approval date | Explanation |
|---|---|---|---|---|
| Section 117.8110 ... | Emission Monitoring System Requirements for Utility Electric Generation Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.8120 ... | Carbon Monoxide (CO) Monitoring ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.8130 ... | Ammonia Monitoring ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.8140 ... | Emission Monitoring for Engines ..... | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter H—Administrative Provisions** | | | | |
| **Division 1—Compliance Schedules** | | | | |
| Section 117.9000 ... | Compliance Schedule for Beaumont-Port Arthur Ozone Nonattainment Area Major Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9010 ... | Compliance Schedule for Dallas-Fort Worth Ozone Nonattainment Area Major Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9020 ... | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Major Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9030 ... | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Major Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9100 ... | Compliance Schedule for Beaumont-Port Arthur Ozone Nonattainment Area Utility Electric Generation Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9110 ... | Compliance Schedule for Dallas-Fort Worth Ozone Nonattainment Area Utility Electric Generation Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9120 ... | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Utility Electric Generation Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9130 ... | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Utility Electric Generation Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9200 ... | Compliance Schedule for Houston-Galveston-Brazoria Ozone Nonattainment Area Minor Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9210 ... | Compliance Schedule for Dallas-Fort Worth Eight-Hour Ozone Nonattainment Area Minor Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9300 ... | Compliance Schedule for Utility Electric Generation in East and Central Texas. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9340 ... | Compliance Schedule for East Texas Combustion. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| Section 117.9500 ... | Compliance Schedule for Nitric Acid and Adipic Acid Manufacturing Sources. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
| **Subchapter H—Administrative Provisions** | | | | |
| **Division 2—Compliance Flexibility** | | | | |
| Section 117.9800 ... | Use of Emission Credits for Compliance. | 5/30/2007 | 12/3/2008 [Insert *FR* page number where document begins]. | |
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[FR Doc. E8–28681 Filed 12–2–08; 8:45 am]
**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 180

**[EPA–HQ–OPP–2007–1106; FRL–8387–9]**

### Chlorothalonil; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes tolerances for combined residues of chlorothalonil and its 4-hydroxy metabolite in or on *Brassica*, head and stem, subgroup 5A; ginseng; horseradish; lentil; okra; rhubarb; vegetable, cucurbit, group 9; vegetable, fruiting, group 8, except tomato; and yam, true. It also establishes a tolerance with regional registration for combined residues of chlorothalonil and its metabolite on persimmon and removes existing tolerances for combined residues of chlorothalonil and its metabolite on broccoli, brussels sprouts, cabbage, cauliflower, cucumber, melon, non-bell pepper, pumpkin, summer squash, and winter squash; as well as the time-limited tolerance on ginseng. These tolerances are no longer needed, since they are superseded by the new tolerances on *Brassica*, cucurbit and fruiting vegetables and the permanent tolerance on ginseng. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective December 3, 2008. Objections and requests for hearings must be received on or before February 2, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–1106. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

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

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

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

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

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

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

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

### *C. Can I File an Objection or Hearing Request?*

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–1106 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 2, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–1106, by one of the following methods:

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

## II. Petition for Tolerance

In the **Federal Register** of January 23, 2008 (73 FR 3964) (FRL–8345–7), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 7E7270) by Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.275 be amended by establishing tolerances for combined residues of the fungicide chlorothalonil, tetrachloroisophthalonitrile, and its

metabolite, 4-hydroxy-2,5,6-trichloroisophthalonitrile, in or on vegetables, fruiting, group 8 at 5.0 parts per million (ppm); okra at 5.0 ppm; persimmon at 1.9 ppm; horseradish at 4.0 ppm; rhubarb at 5.0 ppm; ginseng at 3.0 ppm; yam at 5.0 ppm; lupine at 0.1 ppm; lentil at 0.1 ppm; vegetable, cucurbit, group 9 at 5.0 ppm; and *Brassica*, head and stem, subgroup 5A at 5.0 ppm. That notice referenced a summary of the petition prepared by GB Biosciences Corporation, the registrant, on behalf of IR-4, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the tolerance levels for ginseng, okra, persimmon, rhubarb, and yam. EPA has also determined that a tolerance is not needed for lupine and that the proposed tolerance for vegetable, fruiting, group 8 should exclude tomato and be set slightly higher than proposed. The reasons for these changes are explained in Unit IV.C.

## III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for combined residues of chlorothalonil and its 4-hydroxy metabolite on *Brassica*, head and stem, subgroup 5A at 5.0 ppm; ginseng at 4.0 ppm; horseradish at 4.0 ppm; lentil at 0.10 ppm; okra at 6.0 ppm; persimmon at 1.5 ppm; rhubarb at 4.0 ppm; vegetable, cucurbit, group 9 at 5.0 ppm; vegetable, fruiting, group 8, except tomato at 6.0 ppm; and yam, true at 0.10 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

### *A. Toxicological Profile*

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

Chlorothalonil has low-acute toxicity by the oral and dermal routes of exposure and is moderately toxic by the inhalation route. It is severely irritating to the eye and moderately irritating to the skin but is not a skin sensitizer.

Chlorothalonil causes gastric irritation upon ingestion. In a subchronic dog study, both males and females exhibited decreased body weights, body-weight gains and food consumption. In a chronic dog study, there was one death (female), decreased body-weight gain and food consumption, macroscopic and microscopic pathological findings in the stomach (including thickened appearance of the stomach and intra-epithelial nuclear pyknosis in the mucosal epithelium of the antrum of the stomach) and a very slight hypertrophy of the cells in the zona fasciculata of the adrenal glands. In a second chronic dog study, vacuolated epithelium of the kidney was observed. In a subchronic mouse study, chlorothalonil produced hyperplasia and hyperkeratosis of the squamous epithelium of the stomach. In a subchronic rat study, chlorothalonil increased relative kidney weights and produced dilated renal medullary tubules as well as hyperplasia and hyperkeratosis of the non-glandular area of the stomach. In rodent chronic toxicity studies, there was an increased incidence of epithelial hyperplasia of the limiting ridge and non-glandular region of the stomach in rats and mice.

There are two toxicology data sets, submitted by different basic registrants, available for chlorothalonil. There was no indication of a carcinogenic response in the rat chronic toxicity/carcinogenicity study from the newer data set; however, an increased incidence of renal adenomas and carcinomas and an increased incidence of papillomas and/or carcinomas of the forestomach were observed in both sexes of rats and mice with the older data set. The new carcinogenicity study in mice also demonstrates that chlorothalonil produces similar papillomas of the forestomach. Based on the increased incidence of renal adenomas and carcinomas observed in both sexes of rats and mice, the rarity of the tumor response in the kidney, and the increased incidence of papillomas and/or carcinomas of the forestomach in rats and mice, EPA classified chlorothalonil as a ''likely'' human carcinogen by all routes of exposure.

Several studies are available that address the mechanism of carcinogenicity of chlorothalonil. Based on the mechanistic data submitted for the kidney tumor response demonstrating a toxic response of the kidney and forestomach to repeated dietary administration of chlorothalonil, the mode of action for tumor induction of chlorothalonil is likely to be non-linear. With regard to the forestomach tumors, data submitted by the registrant showing cell proliferation and non-neoplastic pathology at doses near those producing a tumorigenic response also support a non-linear mode of action for chlorothalonil. Based on the weight of the evidence presented to the Agency, EPA has concluded that a non-linear risk assessment using a Margin of Exposure (MOE) approach is appropriate for chlorothalonil.

No developmental toxicity was observed in two rat developmental toxicity studies or in one of the two rabbit developmental toxicity studies available for chlorothalonil. In the other rabbit study, there was an increased incidence of thirteen ribs and reduced sternebrae in the absence of maternal toxicity. There was no evidence of reproductive toxicity in either rat reproduction study available for chlorothalonil.

There is no evidence that chlorothalonil causes neurotoxicity. There was no evidence of neuropathology, and there were no central nervous system (CNS) malformations, effects on brain weights, abnormal behavior or effects on offspring sexual maturation observed in the toxicity studies available for chlorothalonil, including a subchronic neurotoxicity study in rats.

In a 90–day oral toxicity study in rats, a slight decrease in thymus weight was observed at the highest dose tested, a possible indication of immunotoxicity. However, since there were no histopathological findings noted in the thymus and no effects on the thymus observed in other subchronic or chronic/carcinogenicity studies in rats,

EPA has concluded that the slight effect on thymus weight seen in this study is a spurious effect and not indicative of immunotoxicity.

4-hydroxy-2,5,6-trichloroisophthalonitrile is a major metabolite of chlorothalonil in plants and the predominant residue in animals. Toxicology data available for this metabolite include acute oral and subchronic toxicity studies in rats, developmental toxicity studies in rats and rabbits, a reproduction toxicity study in rats, a chronic toxicity study in dogs and chronic/carcinogenicity studies in rats and mice. The results of these studies indicate that the toxicity of the 4-hydroxy metabolite is similar to that of parent chlorothalonil. Based on this determination, EPA has concluded that the chlorothalonil risk assessment adequately accounts for potential toxicity resulting from exposure to 4-hydroxy chlorothalonil, and a separate risk assessment is not needed.

Specific information on the studies received and the nature of the adverse effects caused by chlorothalonil and 4-hydroxy chlorothalonil, as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document *Chlorothalonil. Petition For Tolerances on Brassica Head and Stem Subgroup 5A, Cucurbit Vegetable Group 9, Fruiting Vegetable Group 8, Ginseng, Horseradish, Lentil, Lupin, Okra, Persimmon, Rhubarb, Yam, Lychee, and Starfruit. Human-Health Risk Assessment* at page 15 in docket ID number EPA–HQ–OPP–2007–1106.

*B. Toxicological Endpoints*

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

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

The endpoint used to establish the cPAD for chlorothalonil has changed since EPA conducted its previous risk assessment, described in the **Federal Register** of July 27, 2007 (72 FR 41224) (FRL–8127–9). Previously, the cPAD was based on forestomach lesions observed in the mouse carcinogenicity study. EPA has reconsidered this endpoint and concluded that it is not appropriate for use in human risk assessment because of differences in the physiological characteristics of the forestomach in rodents compared to other species, including humans. Therefore, EPA has selected another endpoint (kidney lesions observed in the rat chronic toxicity/carcinogenicity study) as the basis for the cPAD.

The dose used to assess risk from short-term and intermediate-term incidental oral exposure to chlorothalonil has also changed. Previously, EPA assessed incidental oral exposures based on forestomach and kidney effects observed in the 2–generation reproduction study (LOAEL = 30.8 milligrams/kilograms/day (mg/kg/day)). EPA is now assessing incidental oral exposures to chlorothalonil based on kidney effects observed in a different study, the 90–day rat feeding study (LOAEL = 10 mg/kg/day). This study provides the lowest NOAEL (3.0 mg/kg/day) and LOAEL in the database for short-term/intermediate-term exposures, and the study length is the most appropriate to assess exposures of these durations.

A summary of the toxicological endpoints for chlorothalonil used for human risk assessment can be found at *http://www.regulations.gov* in the document *Chlorothalonil. Petition For Tolerances on Brassica Head and Stem Subgroup 5A, Cucurbit Vegetable Group 9, Fruiting Vegetable Group 8, Ginseng, Horseradish, Lentil, Lupin, Okra, Persimmon, Rhubarb, Yam, Lychee, and Starfruit. Human-Health Risk Assessment* at page 36 in docket ID number EPA–HQ–OPP–2007–1106.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to chlorothalonil and its 4-hydroxy metabolite, EPA considered exposure under the petitioned-for tolerances as well as all existing chlorothalonil tolerances in 40 CFR 180.275. EPA assessed dietary exposures from chlorothalonil and its metabolite in food as follows:

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

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the United States Department of Agriculutre (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intakes by Individuals (CSFII). As to residue levels in food, EPA assumed 100% crop treated (CT), tolerance-level residues and default processing factors for all foods except tomatoes (average field-trial residues and empirical processing factors used), peppers (average field-trial residues used), and snap beans (average field-trial residues used).

iii. *Cancer*. Because chlorothalonil's cancer effects are the result of chronic exposure, EPA is using the chronic exposure assessment to assess chlorothalonil's cancer risk.

iv. *Anticipated residue information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be

required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water*. The residues of concern in drinking water include parent chlorothalonil and its 4-hydroxy metabolite. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for chlorothalonil and 4-hydroxy chlorothalonil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of chlorothalonil and 4-hydroxy chlorothalonil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of chlorothalonil and its 4-hydroxy metabolite for chronic exposures are estimated to be 68.2 parts per billion (ppb) for surface water and 3.2 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 68.2 ppb was used to assess the contribution from drinking water.

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

Chlorothalonil is currently registered for the following uses that could result in residential exposures: As a fungicide on golf courses and as a preservative in paints. EPA assessed residential exposure using the following assumptions: There is potential for short-term or intermediate-term dermal exposure of adults and children on golf courses that have been treated with chlorothalonil. There is also potential for short-term/intermediate-term dermal and inhalation exposure of handlers of paints containing chlorothalonil and potential for short-term/intermediate-term postapplication dermal exposure of adults, as well as short-term/intermediate-term postapplication dermal and episodic incidental oral exposures of children from the use of chlorothalonil-treated paints in residential buildings. Postapplication inhalation exposures to chlorothalonil on treated golf courses and in buildings from treated paint are expected to be negligible, and the Agency has not identified a hazard of concern for short-term or intermediate-term dermal exposures; therefore, EPA assessed only short-term and intermediate-term inhalation exposures of handlers using chlorothalonil-treated paints and episodic postapplication incidental oral exposures of children from the use of chlorothalonil-treated paints in residential buildings.

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

Chlorothalonil is a polychlorinated fungicide. Other members of this class include hexachlorobenzene (HCB), pentachlorophenol (PCP), and pentachloronitrobenzene (PCNB). This is a very loose classification of compounds related only in being polychlorinated and acting as fungicides. Available data do not support a finding for a common mechanism of toxicity for chlorothalonil and the other pesticides in the polychlorinated fungicide class. Chlorothalonil produces renal (kidney) tubular adenomas and carcinomas and papillomas of the stomach in rats. Chlorothalonil also produces gastric lesions and kidney toxicity due to perturbation of mitochondrial respiration. The other pesticides in the class do not have the same toxic effects and do not have the same mode of action. For the purposes of this tolerance action, therefore, EPA has assumed that chlorothalonil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

*D. Safety Factor for Infants and Children*

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

2. *Prenatal and postnatal sensitivity*. The pre- and postnatal toxicity database for chlorothalonil includes rat and rabbit developmental toxicity studies (two of each) and two reproduction toxicity studies in rats, as well as a subchronic neurotoxicity study in rats. In addition, there are developmental toxicity studies in rats and rabbits and reproduction toxicity studies in rats available for the 4-hydroxy metabolite as well as the major soil degradate, SDS–46851.

There was no evidence of increased qualitative or quantitative susceptibility of fetuses or offspring in any of the submitted developmental or reproduction studies for chlorothalonil or its metabolites, except in one of the chlorothalonil developmental toxicity studies in rabbits. In the newer of the two rabbit studies, there was a slight increase in the incidence of two variations (13$^{th}$ rib and reduced sternebrae) in fetuses in the high-dose group. No maternal effects occurred at any dose in this study. EPA's concern for this equivocal evidence of quantitative susceptibility is low, and there are no residual uncertainties with regard to prenatal and postnatal susceptability, for the following reasons: The variations were only observed in one of the two developmental toxicity studies conducted in the same strain of rabbit at the same dose levels; these variations are known to occur spontaneously within this strain (New Zealand White) of rabbit, as evidenced by the fact that the concurrent controls had high incidences of both variations; and there is a well-defined NOAEL for the study that is protective of these effects.

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

i. The toxicity database for chlorothalonil is complete, except for acute neurotoxicity and immunotoxicity studies, and EPA has determined that an additional uncertainty factor (UF) is not required to account for potential neurotoxicity or immunotoxicity. The reasons for this determination are explained below:

a. EPA began requiring functional immunotoxicity testing of all food and non-food use pesticides on December 26, 2007. Since this requirement went into effect after the tolerance petition was submitted, these studies are not yet available for chlorothalonil. In the absence of specific immunotoxicity studies, EPA has evaluated the available chlorothalonil toxicity data to determine whether an additional database UF is needed to account for potential immunotoxicity. In a 90–day oral toxicity study in rats, a slight decrease in thymus weight was observed at the highest dose tested, a possible indication of immunotoxicity. However, since there were no histopathological findings noted in the thymus and no effects on the thymus observed in other subchronic or chronic/carcinogenicity studies in rats, EPA has concluded that the slight effect on thymus weight seen in this study is a spurious effect and not indicative of immunotoxicity. Due to the lack of evidence of immunotoxicity for chlorothalonil, EPA does not believe that conducting immunotoxicity testing will result in a NOAEL less than the NOAEL of 2 mg/kg/day already established for chlorothalonil, and an additional factor (UFDB) for database uncertainties is not needed to account for potential immunotoxicity.

b. Acute neurotoxicity testing is also required as a result of changes made to the pesticide data requirements in December of 2007. Although an acute study has not yet been submitted, there is no evidence of neurotoxicity in any study in the toxicity database for chlorothalonil, including a subchronic neurotoxicity study. Therefore, EPA has concluded that an additional UF is not needed to account for the lack of these data.

ii. Although there was equivocal evidence of increased quantitative susceptibility of fetuses to chlorothalonil exposure in one of two rabbit developmental toxicity studies, the Agency did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment.

iii. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments utilized tolerances or anticipated residues that are based on reliable field trial data. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to chlorothalonil in drinking water. EPA used similarly conservative assumptions to assess postapplication incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by chlorothalonil.

*E. Aggregate Risks and Determination of Safety*

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

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

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to chlorothalonil from food and water will utilize 94% of the cPAD for children, 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of chlorothalonil is not expected.

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

Chlorothalonil is currently registered for uses that could result in short-term and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term and intermediate-term residential exposures to chlorothalonil. Since the doses and endpoints selected for chlorothalonil to assess short-term and intermediate-term exposure are identical, the short-term and intermediate-term risk estimates for chlorothalonil are the same.

Using the exposure assumptions described in this unit for short-term/intermediate-term exposures, EPA has concluded the combined short-term/intermediate-term food, water, and residential exposures aggregated result in an aggregate MOE of 270 for adults. The MOE for adults includes food, drinking water, and short-term/intermediate-term inhalation exposure of individuals mixing, loading, and applying chlorothalonil-treated paint with an airless sprayer, the handler exposure scenario resulting in the highest estimated exposure to chlorothalonil.

As discussed in this unit, EPA also assessed incidental oral exposure of children from ingestion of paint chips containing chlorothalonil. The estimated incidental oral MOE for children is 1,200. Ingestion of paint chips is considered to be an episodic, rather than a routine behavior; therefore, EPA has determined that it is not appropriate to aggregate incidental oral exposures with chronic exposures from food and drinking water.

4. *Aggregate cancer risk for U.S. population*. As discussed in unit III.A., EPA classified chlorothalonil as a ''likely'' human carcinogen by all routes of exposure, based on the increased incidence of renal adenomas and carcinomas observed in both sexes of rats and mice, the rarity of the tumor response in the kidney, and the increased incidence of papillomas and/or carcinomas of the forestomach in rats and mice. EPA has determined that the mechanism of carcinogenicity of chlorothalonil is non-linear (i.e., not a non-threshold effect) and that the point of departure used in calculating the cPAD is protective of the cancer effects. Since there are no uses of chlorothalonil expected to result in chronic residential exposure, and since chronic dietary exposure for the overall U.S. population is less than the cPAD (43% of the cPAD), EPA concludes that aggregate cancer risk from exposure to chlorothalonil is below the LOC.

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

## IV. Other Considerations

*A. Analytical Enforcement Methodology*

Adequate enforcement methodology (gas chromatography (GC) method with electron-capture detection (ECD)) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental

Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

*B. International Residue Limits*

The Codex Alimentarius Commission has established maximum residue limits (MRLs) for chlorothalonil *per se* on several commodities associated with this petition: 7 ppm for sweet pepper; 5 ppm each for broccoli, brussels sprouts, cucumber, and squash (summer and winter); 2 ppm for melons (except watermelon); and 1 ppm each for cabbage, heads and cauliflower. Some of these MRLs are set at the same nominal value as the U.S. tolerances (broccoli and brussels sprouts from the *Brassica* group; cucumber and squash from the cucurbit group). However, since the U.S. tolerance definition includes the 4-hydroxy metabolite, harmonization with CODEX is not possible at this time.

*C. Revisions to Petitioned-For Tolerances*

Based upon review of the data supporting the petition, EPA has revised the tolerance levels for ginseng, okra, persimmon, rhubarb, and yam. EPA has also determined that a tolerance is not needed for lupine and that the proposed tolerance for fruiting vegetable group 8 should exclude tomato and be set slightly higher than proposed. EPA revised the tolerance levels for ginseng from 3.0 to 4.0 ppm, rhubarb from 5.0 to 4.0 ppm, persimmon from 1.9 to 1.5 ppm, and vegetable, fruiting, group 8 and okra from 5.0 to 6.0 ppm, based on analyses of the residue field trial data using the Agency's Tolerance Spreadsheet in accordance with the Agency's *Guidance for Setting Pesticide Tolerances Based on Field Trial Data*. The Agency determined that a tolerance is not needed for lupine, since residues on lupine are covered by the existing tolerance on dry bean seed. Tomato was excluded from fruiting vegetable group 8 based on differences in the use pattern for tomatoes and the other members of this group. The tolerance for yam was reduced from 5.0 to 0.1 ppm, based on data translated from potato. The 5.0 ppm level proposed by the petitioner appears to have been a typographical error in the petition, since the 0.1 ppm level was discussed elsewhere in the text of the petition.

## V. Conclusion

Therefore, tolerances are established for combined residues of chlorothalonil, tetrachloroisophthalonitrile, and its metabolite, 4-hydroxy-2,5,6-trichloroisophthalonitrile, in or on *Brassica*, head and stem, subgroup 5A at 5.0 ppm; ginseng at 4.0 ppm; horseradish at 4.0 ppm; lentil at 0.10 ppm; okra at 6.0 ppm; persimmon at 1.5 ppm; rhubarb at 4.0 ppm; vegetable, cucurbit, group 9 at 5.0 ppm; vegetable, fruiting, group 8, except tomato at 6.0 ppm; and yam, true at 0.10 ppm.

## VI. Statutory and Executive Order Reviews

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

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

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

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

## VII. Congressional Review Act

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

## List of Subjects in 40 CFR Part 180

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

Dated: November 13, 2008.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

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

## PART 180—[AMENDED]

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

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

■ 2. Section 180.275 is amended by:

■ i. Removing the entries for Broccoli; Brussels sprouts; Cabbage; Cauliflower; Cucumber; Melon; Pepper, nonbell (and its associated footnote); Pumpkin; Squash, summer; and Squash, winter from the table in paragraph (a)(1).

■ ii. Alphabetically adding commodities to the table in paragraph (a)(1).

■ iii. Revising paragraph (b).

■ iv. Alphabetically adding commodities to the table in paragraph (c) to read as follows:

**§ 180.275 Chlorothalonil; tolerances for residues.**

(a) * * *

(1) * * *

| Commodity | Parts per million |
|---|---|
| * * * | * * |
| Brassica, head and stem, subgroup 5A | 5.0 |
| * * * | * * |
| Ginseng | 4.0 |
| Horseradish | 4.0 |
| Lentil | 0.10 |
| * * * | * * |
| Okra | 6.0 |
| * * * | * * |
| Rhubarb | 4.0 |
| * * * | * * |
| Vegetable, cucurbit, group 9 | 5.0 |
| Vegetable, fruiting, group 8, except tomato | 6.0 |
| Yam, true | 0.10 |

* * * * *

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

(c) * * *

| Commodity | Parts per million |
|---|---|
| * * * | * * |
| Persimmon | 1.5 |

* * * * *

[FR Doc. E8–28597 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2007–0147; FRL–8385–7]**

## Glyphosate; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation establishes new tolerances for certain plant commodities and all animal commodities, and revises other tolerances for glyphosate and its metabolite *N*-acetyl-glyphosate (expressed as glyphosate). These changes are detailed in Unit II of this document. E.I. DuPont de Nemours and Company requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective December 3, 2008. Objections and requests for hearings must be received on or before February 2, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

**ADDRESSES:** EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0147. All documents in the docket are listed in the docket index available at http://*www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at http:/ /*www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Vickie Walters, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 703–305–5704; e-mail address: *walters.vickie@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

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

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

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

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

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

*C. Can I File an Objection or Hearing Request?*

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0147 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before February 2, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2007–0147, by one of the following methods:

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

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

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

## II. Petition for Tolerance

In the **Federal Register** of May 9, 2007 (72 FR 26372) (FRL–8121– 5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 6F7146) by E.I. DuPont de Nemours and Company, DuPont Crop Protection, Laurel Run Plaza, P.O. Box 80, Newark, DE 19714–0030. The petition requested that 40 CFR 180.364 be amended by establishing tolerances for combined residues of the herbicide glyphosate, *N*-(phosphonomethyl)glycine and its metabolite *N*-acetyl-glyphosate, *N*-acetyl-*N*-(phosphonomethyl)glycine resulting from the application of glyphosate, the isopropylamine salt of glyphosate, the ethanolamine salt of glyphosate, the ammonium salt of glyphosate, and the potassium salt of glyphosate to Optimum™GAT™ soybeans in or on the food commodities: Cattle, kidney; cattle, liver; egg, goat, kidney; goat, liver; hog, kidney; hog, liver; horse, kidney; horse, liver; poultry, meat; poultry, meat byproducts; sheep, kidney; sheep, liver; soybean, forage; soybean, hay; soybean, hulls; and soybean, aspirated grain fractions at levels already established for glyphosate alone. That notice referenced a summary of the petition prepared by E.I. DuPont de Nemours and Company, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. Comments were received on the notice of filing. EPA's response to these comments is discussed in Unit IV.C.

DuPont has requested a Section 3 registration under the Federal Insecticide, Fungicide, and Rodenticide Act (''FIFRA'') for the preplant application of the herbicides glyphosate and pyrithiobac sodium to glyphosate–tolerant soybean. The petitioner is also working to commercialize a genetically modified soybean designated as Optimum™GAT™ soybeans. *N*-acetyl-glyphosate is produced when glyphosate is applied to Optimum™GAT™ soybeans. As a result the petitioner is requesting that the glyphosate tolerance expression be modified from glyphosate per se to the combined residues of glyphosate and *N*-acetyl-glyphosate. This petition was filed in conjunction with Dupont's this requested change to its FIFRA registration.

Based upon review of the data submitted in support of the petition, EPA has determined that the residues of concern in these commodities are glyphosate and *N*-acetyl-glyphosate. The current tolerance expression specifies residues of glyphosate (*N*(phosphonomethyl)glycine). To address that *N*-acetyl-glyphosate was the major residue in mature Optimum™GAT™ soybean forage, hay, and seed, the Agency concluded that it is necessary to include this compound in the tolerance expression. EPA is splitting current § 180.364(a) into paragraphs (a)(1) and (a)(2). Paragraph (a)(1) will include all of the commodities currently in paragraph (a), except for the animal commodities and the commodities grain, aspirated fractions; soybean, forage; soybean, hay; soybean, hulls; and soybean, seed, which EPA is transferring to new paragraph (a)(2). The tolerances in paragraph (a)(2) will cover application of glyphosate to non-genetically modified soybeans, genetically-modified soybeans currently in use, and Optimum™GAT™ soybeans. Note that based on the submitted residue data on application of glyphosate to Optimum™GAT™ soybeans, the numerical value of the current soybean and livestock tolerances do not need to be changed (only the tolerance expression is changing). Combined residues of glyphosate and *N*-acetyl-glyphosate in soybean commodities derived from glyphosate-treated Optimum™GAT™ soybeans and livestock commodities from animals which consume only glyphosate-treated Optimum™GAT™ soybeans will not exceed the existing tolerance level. Additionally, the change in tolerance expression will not affect the application of the tolerance to soybean commodities derived from glyphosate-treated non-genetically modified soybean and livestock commodities from animals which consumed only glyphosate-treated non-genetically modified soybean because these commodities will have only glyphosate per se residues, and not *N*-acetyl-glyphosate residues.

In the **Federal Register** of May 2, 2007 (72 FR 24188)(FRL–8122–8), the Agency published a final rule revising the tolerance expression for glyphosate to include the dimethylamine salt of glyphosate. Because there is a potential for soybeans to be treated with product containing the dimethylamine salt of glyphosate the Agency has determined that the dimethylamine salt of glyphosate should be added to the tolerance expression for paragraph (a)(2).

Based upon review of the soybean processing studies submitted supporting the petition, EPA has determined that the currently established tolerances for the commodities grain, aspirated fractions and soybean, hulls need to be increased to 310 ppm and 120 ppm, respectively. Currently established tolerance levels for all other commodities in this rule are supported by available data.

## III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for the combined residues of glyphosate, *N*-(phosphonomethyl)glycine and its metabolite *N*-acetyl-glyphosate (expressed as glyphosate) resulting from the application of glyphosate, the isopropylamine salt of glyphosate, the ethanolamine salt of glyphosate, the dimethylamine salt of glyphosate, the ammonium salt of glyphosate, and the potassium salt of glyphosate on the food commodities cattle, meat byproducts at 5.0 ppm; egg at 0.05 ppm; goat, meat byproducts at 5.0 ppm; grain, aspirated fractions at 310 ppm; hog, meat byproducts at 5.0 ppm; horse, meat byproducts at 5.0 ppm; poultry, meat, at 4.0 ppm; poultry, meat byproducts at 1.0 ppm; sheep, meat byproducts at 5.0 ppm; soybean, seed at 20.0 ppm; soybean, forage at 100.0 ppm; soybean, hay at 200.0 ppm, and soybean, hulls at 120 ppm and soybean, seed at 20.0 ppm. EPA's assessment of exposures and risk associated with establishing tolerances follows.

*A. Toxicological Profile*

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by glyphosate and its metabolite *N*-acetyl-glyphosate as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document entitled Petition: 6F7146. Glyphosate-Isopropylammonium and Pyrithiobac Sodium. Human Health Risk Assessment for Application to Glyphosate Tolerant Soybean; pages 7–10 in docket ID number EPA– HQ–OPP–2007–0147 and identified as document EPA–HQ–OPP–2007– 0147–0007.

The toxicological profile of glyphosate is discussed in the risk assessment referenced earlier in this section and in the risk assessment referenced in the final rule published in the **Federal Register** of December 20, 2006 (71 FR 76180) (FRL–8105–9) which establishes tolerances for residues of glyphosate in or on noni at 0.20 ppm; pea, dry at 8.0 ppm; safflower at 85 ppm; sunflower at 85 ppm; and vegetable, legume group 6 except soybean and pea, dry at 5.0 ppm.

Toxicological endpoints and current risk assessments for glyphosate are discussed in the risk assessment referred to in the final rule published in the **Federal Register** of December 20, 2006 (71 FR 76180) (FRL–8105–9) which establishes tolerances for residues of glyphosate in or on noni at 0.20 ppm; pea, dry at 8.0 ppm; safflower at 85 ppm; sunflower at 85 ppm; and vegetable, legume group 6 except soybean and pea, dry at 5.0 ppm.

1. A summary of the data submitted in support of the metabolite *N*-acetyl-glyphosate is listed below. Refer to the risk assessment available in the public docket for this rule and identified above as document EPA–HQ–OPP–2007–0147–0007 for more information.

i. An acute oral toxicity study in rats with an Acute Oral $LD_{50}$ greater than 5,000 milligrams/kilogram (mg/kg).

ii. A 90–day subchronic oral (feeding) study, in which no systemic toxicity was observed in male and female rats at doses up to 18,000 ppm (equal to 1157/1461 mg/kg/day in males/females, respectively).

iii. *N*-acetyl-glyphosate was negative for mutagenicity in a bacterial reverse mutation assay (Ames test), an *in vitro* chromosomal aberration assay in Chinese Hamster Ovary (CHO) cells, an *in vitro* Mammalian Cell Gene Mutation Assay in CHO cells and an *in vivo* cytogenetics (bone marrow) in mice, and a metabolism and pharmacokinetics study.

2. *N*-acetyl aminomethylphosphonic acid (*N*-acetyl-AMPA) was detected as one of the metabolites formed following oral administration of *N*-acetyl-glyphosate. It is not expected to be absorbed quickly from the gastrointestinal tract since it is a charged molecule at the physiological pH. *N*-acetyl-AMPA is expected to be less toxic than *N*-acetyl-glyphosate. Data submitted in support of this metabolite included the following:

i. An acute oral toxicity study with an $LD_{50}$ of greater than 8,300 mg/kg.

ii. A bacterial reverse mutation assay (Ames test), in which *N*-acetyl-AMPA was not mutagenic when tested up to 5,000 microgram (µg)/plate in presence and absence of activation in *S. typhimurium* strains of TA98, TA 100, TA1535, TA1537, and in *Escheria coli* strain WP2uvrA.

iii. An *in vitro* Mammalian Chromosome Aberration Test in Human Perpherral Blood Lymphocytes, in which *N*-acetyl-AMPA was negative for the induction of structural and numerical chromosome aberrations in both the non-activated and the S9-activated test systems when tested up to 15.30 milligrams/milliliter (mg/ml).

iv. An *in vitro* Mammalian Cell Gene Mutation Test (CHO/HPRT) Test, in which *N*-acetyl-AMPA was not mutagenic at the HGPRT locus in Chinese hamster ovary cells tested up to 1,531 µg/ml in the presence and absence of metabolic activation.

v. An *in vivo* Mouse Bone Marrow Micronucleus Test, in which *N*-acetyl-AMPA resulted in no detections of chromosomal aberrations were detected in male and female mice at doses up to 2,000 mg/kg.

3. For the purpose of assessing the aggregate risk from glyphosate tolerances, EPA has assumed that *N*-acetyl-glyphosate is equally toxic to glyphosate. This conservative assumption is based on the structural similarity of *N*-acetyl-glyphosate with glyphosate; a structure activity relationships (SAR) analysis of *N*-acetyl-glyphosate with a lack or structural alerts for carcinogenicity, mutagenicity and endocrine effects; and toxicity data for *N*-acetyl-glyphosate showing low acute toxicity, low subchronic toxicity and lack of mutagenicity, In all probability, *N*-acetyl-glyphosate is of lower toxicity than glyphosate. For example, subchronic toxicity testing with glyphosate showed no systemic toxicity in male and female rats at doses up to 400 mg/kg/day in males and females. Subchronic testing with *N*-acetyl-glyphosate showed no systemic toxicity in male and female rats at doses up to 1157/1446 mg/kg/day in males/females, respectively.

The toxicity of *N*-acetyl-AMPA is considered low and of limited concern based on the available data described above, and lack of any structural alerts.

Amendment of the glyphosate soybean and meat and milk tolerances to include *N*-acetyl-glyphosate in the tolerance expression does not result in changes in the exposure or risk estimates reported in the previous risk assessments for the reasons listed below and fully discussed in the risk assessment referenced earlier in this section.

i. The Agency has determined that *N*-acetyl-glyphosate has no greater toxicity than glyphosate and probably is of lower toxicity.

ii. The numerical value of all but two food tolerances will remain the same.

iii. The most recent dietary analysis assumed tolerance level residues and, 100% crop treated.

iv. The estimate of glyphosate levels in drinking water is based on a glyphosate use involving direct application to water at 3.75 pounds active ingredient per acre. Use of glyphosate on glyphosate-resistant soybeans will not result in higher levels in drinking water.

v. Previously calculated dietary burdens to poultry were based on alfalfa meal (400 ppm tolerance) and soybeans hulls (100 ppm tolerance) as significant contributors to the diet. Based on the latest guidance, although soybean seed, meal, and hulls are feed to poultry, soybean hulls are is no longer considered a significant contributor to poultry diets. The previously calculated dietary burdens to hog were based on alfalfa meal and barley grain (20 ppm tolerance) being significant contributors to the diet. Soybean seed and meal are fed to hogs; however, the current action does not require an increase in tolerance for soybean seed or meal. Based on these complications, the Agency concludes that the application of glyphosate to Optimum™GAT™ soybean will not result in combined residues of glyphosate and *N*-acetyl-glyphosate (expressed as glyphosate) in poultry or hog commodities greater than the residues of glyphosate that result under the currently established glyphosate per se tolerances.

vi. Previously calculated dietary burdens to dairy or beef cattle were based on alfalfa hay (400 ppm tolerance) being the significant contributor to the diet. The Agency concludes that the consumption of glyphosate Optimum™GAT™ soybean will not result in combined residues of glyphosate and *N*-acetyl-glyphosate (expressed as glyphosate) in or on beef/dairy cattle commodities greater than the currently established glyphosate per se tolerances for the reasons below.

a. The high tolerance value for alfalfa hay (400 ppm) and alfalfa hay occupies 40% of the total beef/dairy cattle diet.

b. The soybean hull tolerance is only increasing from 100 to 120 ppm and soybean hulls will occupy at most 20% of the beef/dairy cattle dietary burdens.

c. Aspirated grain fractions occupy at most 5% of the beef cattle dietary burden and are not feed to dairy cattle.

Accordingly, based on the risk assessments discussed in the notice referenced above, EPA concludes that no harm will result to the general population and to infants and children from aggregate exposure to the combined residues of glyphosate and its metabolite *N*-acetyl-glyphosate (expressed as glyphosate).

## IV. Other Considerations

### *A. Analytical Enforcement Methodology*

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

### *B. International Residue Limits*

There are Codex Maximum Residue Levels (MRL) established for glyphosate (sum of glyphosate and AMPA, expressed as glyphosate) on soybean, dry at 20 ppm; edible offal (mammalian) at 5 ppm; eggs at 0.05 ppm; poultry meat at 0.05 ppm and poultry, edible offal of at 0.5 ppm. Canadian MRLs are established for glyphosate including the metabolite aminomethylphosphonic acid (AMPA) on soybean seed at 20 ppm, kidney of cattle, goats, hogs, poultry and sheep at 2.0 ppm; and liver of cattle, goats, hogs, poultry, and sheep at 0.2 ppm. A Mexican MRL of 6 ppm is established for glyphosate. The glyphosate tolerances EPA is establishing in this action differ from the tolerance expression for the CODEX, Canadian or Mexican MRLs, due to the inclusion of *N*-acetyl-glyphosate in the expression. Additionally, the EPA tolerances differ from the CODEX and Canadian MRLs in that the EPA tolerances do not include AMPA in tolerance expression. At this time, harmonization between the U.S. tolerances and the CODEX, Canadian or Mexican MRLs can not be achieved because of the inclusion of *N*-acetyl-glyphosate in the EPA tolerances is necessary to support use patterns in the United States and EPA has concluded that AMPA should not be included in the tolerance expression because it is not toxicologically significant. The petitioner is seeking registration and amendment of the tolerance expressionin other countries. This may lead to harmonization between the U.S. tolerances and the CODEX, Canadian or Mexican MRLs.

### *C. Response to Comments*

Three commenters submitted comments in response to the notice of filing. A summary of the comments and EPA's response follows.

1. *Comment*. One commenter does not believe that DuPont has submitted sufficient toxicological data to demonstrate that *N*-acetyl-glyphosate is not of toxicological concern and that submitted data did not support the claim of equivalent toxicity between glyphosate and *N*-acetyl-glyphosate. The commenter argued that the single acute toxicity EPA relied on actually suggests that *N*-acetyl-glyphosate is more toxic than glyphosate. This commenter also believes that reproductive, developmental, and chronic and carcinogenicity data on *N*-acetyl-glyphosate should be generated and analyzed.

Another commenter expressed concern that sufficient data may not have been submitted on the metabolite *N*-acetyl-glyphosate to satisfy the requirements for EPA to establish tolerances or to support the establishment of MRLs by other countries. The first commenter expressed a similar concern that submitted data failed to meet requirements of international authorities such as Joint FAO/WHO Meeting in Pesticide Residues (JMPR), particularly when compared to the extensive data bases required for other metabolites such as AMPA and *N*-acetyl-glufosinate.

*Response*. EPA does not agree with the contention that *N*-acetyl-glyphosate is more toxic than glyphosate. The Agency concluded that *N*-acetyl-glyphosate is not likely to be more toxic than glyphosate based on the available toxicity studies and Structure Activity Relationship (SAR). The available acute toxicity study with *N*-acetyl-glyphosate and glyphosate indicate low toxicity (Acute Oral $LD_{50}$ was greater than 5,000 mg/kg bw). Both *N*-acetyl-glyphosate and glyphosate are placed in acute Tox Category IV. There was evidence of some mortality in an acute oral study with *N*-acetyl-glyphosate but not with glyphosate. However, the evidence from very high doses in this acute oral $LD_{50}$ test suggesting that *N*-acetyl-glyphosate might be more toxic than glyphosate is outweighed by the results of subchronic tests with the two compounds. There was no evidence of systemic toxicity in 90–day dietary toxicity studying rats with *N*-acetyl-glyphosate conducted at well above the limit dose (18,000 PPM equal to 1,157/1,461 mg/kg/day in males and females, respectively). In a 90–day dietary toxicity study in rats with glyphosate at 0, 1,000, 5,000 or 20,000 ppm (equivalent to 0, 63, 317, or 1,267 mg/kg/day in males and 0, 84, 404, or 1,623 mg/kg/day in females), glyphosate caused increased serum phosphorus and potassium at all doses treated in both sexes and occurrence of high dose pancreatic lesions in males (effect was not evaluated at lower doses). Based on these findings systemic toxicity NOAEL for glyphosate can be considered as less than 1,000 ppm (equivalent to <63 mg/kg/day). Thus the subchronic study with *N*-acetyl glyphosate clearly indicates that it is less toxic than glyphosate. The available adequate battery of mutagenicity studies with *N*-acetyl glyphosate and glyphosate indicate that they are not mutagenic. The metabolism of *N*-acetyl glyphosate and glyphosate is well studied in rats. These studies indicate that both compounds are rapidly absorbed and excreted from the body and are not biosequestered. In fact, nearly all of the orally administered *N*-acetyl-glyphosate was excreted unchanged in the urine and feces. There is extensive database available on glyphosate, which indicate that glyphosate is not mutagenic, not a carcinogen, and not a developmental or reproductive toxicant. Based on its structural similarities with glyphosate and available data, it is reasonable to conclude that the *N*-acetyl-glyphosate is not likely to be more toxic than the parent. The Agency evaluated available information and data and concluded that additional data on *N*-acetyl-glyphosate was not needed based on the weight of evidence described above. In addition, Agency has accepted bridging data where evidence is clear in order to reduce the animal usage.

EPA also disagrees with the claim that EPA has insufficient data on *N*-acetyl-

glyphosate. EPA did review larger data sets on the metabolites AMPA and *N*-acetyl-glufosinate but these larger data sets were submitted voluntarily by pesticide registrants; EPA did not require these data to be submitted. EPA's decision to review all data that was submitted whether required or not (which is something the Agency does routinely) can not be converted into an EPA determination that such data would be required to make a safety finding for a similar pesticide metabolite. For the reasons expressed above, EPA concludes it has sufficient data on *N*-acetyl-glyphosate. For similar reasons, EPA also disagrees with the commenter's suggestion that because the Joint FAO/WHO Meeting in Pesticide Residues (JMPR) reviewed larger data sets on AMPA and *N*-acetyl-glufosinate, EPA's data set on *N*-acetyl-glyphosate must be deficient. The JMPR does not have any regulatory authority to require data and the commenters do not claim that JMPR defined the toxicological data needed to make the toxicity determinations with regard to AMPA and *N*-acetyl-glufosinate. The JMPR reviewed the data voluntarily submitted; it did not make a recommendation on the data necessary to make the needed toxicity evaluation.

2. *Comment.* One commenter argues that the higher residues of *N*-acetyl-glyphosate may be absorbed at a higher rate than glyphosate. Taking into consideration the increased absorption for *N*-acetyl-glyphosate compared to glyphosate are likely in meat, milk, poultry, and eggs due to the high values of *N*-acetyl-glyphosate that are likely in plants and the higher absorption in animals of *N*-acetyl-glyphosate (when compared to glyphosate). The commenter notes that Optimum™GAT™ soybeans were specifically engineered to convert *N*-acetyl-glyphosate and thus is likely to result in significant amounts of *N*-acetyl-glyphosate in soybeans. As to the higher absorption in animals, the commenter references a rat metabolism study and argues that indicates that higher absorption would occur in poultry and livestock that ingest residues of *N*-acetyl-glyphosate in feed and that the higher absorption would likely result in higher residues in meat, milk, and eggs when compared with glyphosate.

*Response.* As the commenter stated, the rat metabolism studies indicate that *N*-acetyl-glyphosate may be absorbed at a higher rate than glyphosate. Taking into consideration the increased absorption for *N*-acetyl-glyphosate, the previously calculated livestock diets (driven by 400 ppm alfalfa hay/meal tolerances), and the previously revised guidance concerning the construction of livestock diets (changes to the percent each food feedstuff contributes to a livestock diet, livestock diets are now constructed taking in to consideration nutritional requirements), it was concluded that higher livestock tolerances are not necessary. Note that the dietary analysis assumed tolerance level residue for the livestock commodities (i.e. assumes all of the commodities feed to livestock have tolerance level residues and all livestock commodities consumed by humans have tolerance level residues).

3. *Comment.* One commenter expressed concern that the petitioner had stated its intent to increase glyphosate spray rates or change spray timing and that residue data had not be submitted to reflect levels of *N*-acetyl-glyphosate under actual use conditions.

*Response.* The petitioner submitted several Optimum™GAT™ soybean magnitude-of-the-residue studies which monitored for residues of glyphosate and *N*-acetyl-glyphosate in forage and hay and soybean seed. (See document cited earlier in this unit for detailed discussion of these data). The Agency concluded that this data was acceptable and supported the proposed use pattern. The Agency also concluded that additional field trial data were not necessary and that the proposed tolerance levels discussed in Unit II of this document were acceptable. The Agency has not received an application requesting increased application rates or changes in application timing at this time. The Agency will reevaluate the need for additional magnitude-of-the-residue data if and when an application of this type is received.

4. *Comment.* A concern expressed by two of the three commenters was the possible amendment of FIFRA registration to allow higher application rates on soybeans of ALS inhibitor herbicides such as sulfonylureas already registered on soybeans or new uses of ALS inhibitor herbicides on soybeans. Such amended uses or new uses, the commenter urged, should be conditioned on the submission of additional residue data or consideration of possible effects to non-target plants and endangered species.

*Response.* The Agency has not received requests for increased use or new uses of ALS inhibitor pesticides on Optimum™GAT™ soybean seed to additional herbicides at this time. The pre-plant use of pyrithiobac sodium in soybeans remained unchanged for this action. However, as discussed on page 3 of the risk assessment referenced in Section III of this document, since ALS tolerance is conferred via modification of the endogenous ALS gene such that the plant is no longer sensitive (i.e. the tolerance is not conveyed via metabolism of the herbicide), the Agency's current view is that the nature/magnitude of residues submitted in support of registration of ALS-inhibiting herbicides to nontransgenic soybean are applicable for application of these compounds to Optimum™GAT™ soybean.

5. *Comment.* One commenter expressed a concern that the analytical method submitted may not enable simultaneous quantification of the combination of glyphosate, *N*-acetyl-glyphosate and aminomethylphosphonic acid (AMPA), all of which could be present in exported soybeans.

*Response.* Available information including Agency method trial confirms that proposed analytical method (high performance liquid chromatography (HPLC) with tandem mass spectrometry (MS/MS)) quantifies residues of glyphosate, *N*-acetyl-glyphosate, and AMPA in crops and animal commodities.

6. *Comment.* One commenter opposed the way the tolerance expression was written in the notice of filing and the fact that a new paragraph was being added to the tolerance expression allowing for duplicate listings of the same commodities dependent on genetic makeup.

*Response.* Based on the submitted comments and the available information the Agency has decided that 40 CFR 180.364(a) will be redesignated as paragraph (a)(1) and that the current listings from newly redesignated paragraph (a)(1) for soybean and animal commodities will be transferred to new paragraph (a)(2). The revised tolerance expression deletes any reference to genetic make up. See Unit II of this document for discussion.

7. *Comment.* One commenter expressed a concern that current EPA label policy allowing the use of general terminology such as ''glyphosate tolerant soybeans'' would permit use of any soybean seed that satisfies the general ''glyphosate tolerant'' criteria if crop seed such as Optimum™GAT™ soybean seed were commercially available, even if appropriate data have not been reviewed and tolerances granted.

*Response.* The EPA label policy is intended to allow the use of glyphosate on any approved glyphosate tolerant seed. The Agency does not regulate or approve the glyphosate tolerant seed, only the use of glyphosate on the crops grown from the glyphosate tolerant

seed. The approval of the seed itself is handled by the United States Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS). Information on approval of the Optimum™GAT™ soybean seed is available in a notice published in the **Federal Register** of July 24, 2008 (73 FR 43203) which advised the public of their determination that a soybean line developed by Pioneer HI-Bred International, Inc., designated as transformation event 356043, which has been genetically engineered for tolerance to glyphosate and acetolactate synthase-inhibiting herbicides, is no longer considered a regulated article under their regulations governing the introduction of certain genetically engineered organisms, and the public docket established for that action by USDA/APHIS, which is available at *http://www.regulations.gov* and is identified as docket identification number APHIS–2007–019.

8. *Comment*. One commenter expressed a concern that Optimum™GAT™ soybeans are plants that have high levels of a new abnormal enzyme that creates new untested metabolites. The commenter referenced an article (Science, 21 May 2004, vol. 34 pp 1151–1154) which shows that the new ''shuffled enzyme'' (*N*-acetylate) can react with common amino acids L-aspartate, L-serine, phosphor-L-serine, L-threonine, L-glutamate, L-aspargine, and L-cysteine to form new *N*-acetylated versions of these common amino acids. The commenter stated that toxicology data may be necessary to address the safety of these *N*-acetylated metabolites.

*Response*. This issue concerns componets of the Optimum™GAT™ soybean and not residues of the pesticide glyphosate and is not relevant to EPA's determination of safety under section 408 of the FFDCA. However, similar comments were received and addressed by APHIS during the course of their review of the Optimum™GAT™ soybean seed which is fully discussed in the **Federal Register** notice of July 24, 2008 and the APHIS public docket referenced earlier in this unit. In summary APHIS reviewed available information toxicity data available for both the 356043 soybean seed and *N*-acetyl-L-aspartic acid (NAA) and determine that additional toxicological assessment was unwarranted. APHIS determined that quantification of other acetylated amino acids did not need to be measured based on the fact that the GAT4601 enzyme has different kinetic and specificity properties than the native enzymes from Bacillus licheniformis which have the ability to use additional amino acids as substrates under specific *in vitro* conditions. The study conducted with GAT4601 demonstrated the kinetic parameters could only be established for aspartate and glutamate. Additional information concerning this conclusion can be found in the APHIS public docket referenced earlier in this unit.

9. *Comment*. One commenter expressed concern that sufficient data may not have been submitted on the metabolite *N*-acetyl-glyphosate to satisfy the requirements for EPA to establish tolerances or to support the establishment of MRLs by other countries and Agencies. A second commenter expressed a similar concern that submitted data failed to meet requirements of international authorities such as Joint FAO/WHO Meeting in Pesticide Residues (JMPR), particularity when compared to the extensive databases required for other metabolites such as AMPA and *N*-acetyl-glufosinate.

*Response*. The Agency has determined that the submitted data discussed above and in the referenced risk assessments provided sufficient information for the Agency to make the required human safety determination required in the FFDCA and satisfy data requirements for establishment of tolerances and registration in the United States.

10. *Comment*. One commenter expressed concern that the proposed unilateral change to the glyphosate residue definition to include the new metabolite *N*-acetyl-glyphosate has significant potential to disrupt the international trade of soybeans for U.S. growers until the glyphosate residue definition is implemented globally. The commenter further noted that the data submitted to EPA may not be sufficient for other countries to modify their tolerance expressions.

*Response*. The petitioner submitted a summary of a metabolism study conducted with Optimum™GAT™ soybean. This study indicated that both glyphosate and *N*-acetyl-glyphosate were significant residues in/on Optimum™GAT™ soybean forage and straw. For mature Optimum™GAT™ soybean seed, only *N*-acetyl-glyphosate was a significant residue (glyphosate represented a minor component of the total residue). Since *N*-acetyl-glyphosate was the major residue in mature Optimum™GAT™ soybean forage, hay, and seed, EPA concluded that it is necessary to include this compound in the tolerance expression.

EPA believes that the new metabolite *N*-acetyl glyphosate is not likely to disrupt international trade of soybean for U.S. growers. DuPont is seeking registration in various countries. The Agency expects that the various countries will come to similar conclusion as the United States for Optimum™GAT™ soybean and amend their tolerance expressions which will alleviate the potential trade issue. The current analytical method would detect glyphosate, AMPA and *N*-acetyl glyphosate allowing enforcement of the tolerances in other countries. Growers in the United States have the option of growing conventional soybeans or other varieties of glyphosate tolerant seed until any trade issues in other countries with Optimum™GAT™ soybeans are resolved.

11. *Comment*. Several comments were received from a private citizen objecting to establishment of tolerances.

*Response*. The Agency has received similar comments from this commenter on numerous previous occasions. Refer to the **Federal Register** of March 14, 2007 (72 FR 11784; FRL–8117–2) for the Agency's response to these objections. In addition the commenter noted that bees and turkey vultures are dying. These comments are not relevant to human safety determination which is the sole focus of tolerance actions under section 408 of the FFDCA. For informational purposes, EPA would note that pesticide effects on wildlife are addressed in the FIFRA registration process. In a honey bee contact test with glyphosate, mortality was low in all treatment levels. The results indicate that glyphosate is classified as practically nontoxic to honeybees. Although the Agency does not require testing on turkey buzzards specifically, the potential for avian mortality to glyphosate has been assessed using bobwhite quail acute oral $LD_{50}$ study and bobwhite quail and mallard duck 8–day dietary $LC_{50}$ studies. These data indicate that glyphosate is practically nontoxic to avian species on an acute oral basis and no more than slightly toxic on a subacute dietary basis. The potential effects to avian growth and reproduction from glyphosate have been assessed using avian reproduction studies with mallard duck and bobwhite quail. These data indicate that glyphosate is not expected to cause reproductive impairment. The commenter did not submit any information to support a revision of Agency conclusions.

## V. Conclusion

Therefore, tolerances are established for combined residues of glyphosate, *N*-(phosphonomethyl)glycine and its metabolite *N*-acetyl-glyphosate (expressed as glyphosate) resulting from the application of glyphosate, the

isopropylamine salt of glyphosate, the ethanolamine salt of glyphosate, the dimethylamine salt of glyphosate, the ammonium salt of glyphosate, and the potassium salt of glyphosate on the food commodities cattle, meat byproducts at 5.0 ppm; egg at 0.05 ppm; goat, meat byproducts at 5.0 ppm; grain, aspirated fractions at 310 ppm; hog, meat byproducts at 5.0 ppm; horse, meat byproducts at 5.0 ppm; poultry, meat, at 4.0 ppm; poultry, meat byproducts at 1.0 ppm; sheep, meat byproducts at 5.0 ppm; soybean, seed at 20.0 ppm; soybean, forage at 100.0 ppm; soybean, hay at 200.0 ppm, and soybean, hulls at 120 ppm as discussed in Unit II of this document.

### VI. Statutory and Executive Order Reviews

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

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

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

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

### VII. Congressional Review Act

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

### List of Subjects in 40 CFR Part 180

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

Dated: November 19, 2008.

**Donald R. Stubbs,**

*Director, Registration Division, Office of Pesticide Programs.*

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

## PART 180—[AMENDED]

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

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

■ 2. Section 180.364 is amended as follows:

■ a. By removing the entries cattle, meat byproducts; egg; goat, meat byproducts; grain, aspirated fractions; hog, meat byproducts; horse, meat byproducts; poultry, meat; poultry, meat byproducts; sheep, meat byproducts; soybean, forage; soybean, hay; soybean, hulls; and soybean, seed from the table in paragraph (a).

■ b. By redesignating paragraph (a) introductory text and the remainder of the table as paragraph (a)(1) and by adding paragraph (a)(2) to read as follows:

**§ 180.364 Glyphosate, Tolerance for residue.**

(a) * * * (1) * * *

(2) Tolerances are established for combined residues of glyphosate, *N*-(phosphonomethyl)glycine and its metabolite *N*-acetyl-glyphosate (expressed as glyphosate) resulting from the application of glyphosate, the isopropylamine salt of glyphosate, the ethanolamine salt of glyphosate, the dimethylamine salt of glyphosate, the ammonium salt of glyphosate, and the potassium salt of glyphosate on the food commodities:

| Commodity | Parts per Million |
|---|---|
| Cattle, meat byproducts | 5.0 |
| Egg | 0.05 |
| Goat, meat byproducts | 5.0 |
| Grain aspirated fractions | 310.0 |
| Hog, meat byproducts | 5.0 |
| Horse, meat byproducts | 5.0 |
| Poultry, meat | 4.0 |
| Poultry, meat byproducts | 1.0 |
| Sheep, meat byproducts | 5.0 |
| Soybean, forage | 100.0 |
| Soybean, hay | 200.0 |
| Soybean, hulls | 120.0 |
| Soybean, seed | 20.0 |

* * * * *

[FR Doc. E8–28571 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 404

**[Docket No. 080227317–81455–02]**

**RIN 0648–AW44**

## Papahanaumokuakea Marine National Monument Proclamation Provisions

**AGENCIES:** National Oceanic and Atmospheric Administration (NOAA),

Department of Commerce (DOC); United States Fish and Wildlife Service (USFWS), Department of the Interior (DOI).

**ACTION:** Final rule.

**SUMMARY:** NOAA and the USFWS are publishing final regulations to establish a ship reporting system for the Papahanaumokuakea Marine National Monument. This action implements measures adopted by the International Maritime Organization requiring notification by ships passing through the Monument without interruption.

**DATES:** This rule is effective January 2, 2009.

**ADDRESSES:** For copies of the environmental assessment or other related documents, please write to: T. Aulani Wilhelm, Monument Superintendent (NOAA); 6600 Kalanianaole Highway, 300, Honolulu, HI 96825. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to (enter office name) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Copies of the final environmental assessment may be viewed and downloaded at *http://hawaiireef.noaa.gov/*.

**FOR FURTHER INFORMATION CONTACT:** T. Aulani Wilhelm, Monument Superintendent (NOAA); 6600 Kalanianaole Highway, 300, Honolulu, HI 96825; (808) 397–2657.

**SUPPLEMENTARY INFORMATION:**

## I. Statutory and Regulatory Background

On June 15, 2006, President Bush established the Northwestern Hawaiian Islands Marine National Monument (Monument) by issuing Presidential Proclamation 8031 (Proclamation); (71 FR 36443, June 26, 2006) under the authority of the Antiquities Act (Act) (16 U.S.C. 431). The Proclamation reserves all lands and interests in lands owned or controlled by the Government of the United States in the Northwestern Hawaiian Islands (NWHI), including emergent and submerged lands and waters, out to a distance of approximately 50 nautical miles (nmi) from the islands. The outer boundary of the Monument is approximately 100 nmi wide and extends approximately 1200 nmi around coral islands, seamounts, banks, and shoals. The area includes the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve, the Midway Atoll National Wildlife Refuge/Battle of Midway National Memorial, and the Hawaiian Islands National Wildlife Refuge. The Monument was renamed the Papahanaumokuakea Marine National Monument by Proclamation 8112 (72 FR 10029, February 28, 2007).

The Proclamation provides that the Secretary of Commerce, through NOAA, has primary responsibility regarding the management of the marine areas of the Monument, in consultation with the Secretary of the Interior. The Secretary of the Interior, through the USFWS, has sole responsibility for management of the areas of the Monument that overlay the Midway Atoll National Wildlife Refuge, the Battle of Midway National Memorial, and the Hawaiian Islands National Wildlife Refuge, in consultation with the Secretary of Commerce. Further, the Proclamation provides that nothing in the Proclamation diminishes or enlarges the jurisdiction of the State of Hawaii. The Monument includes state waters, including the Northwestern Hawaiian Islands State Marine Refuge and State Seabird Sanctuary at Kure Atoll. The State currently holds the submerged and ceded lands of the NWHI in trust. This public trust is overseen by the Office of Hawaiian Affairs through an amendment to the Constitution of the State of Hawaii. The State of Hawaii has primary responsibility for managing the State waters of the Monument.

In 2006 NOAA and USFWS published joint regulations codifying the provisions of the Proclamation (71 FR 51134, August 29, 2006). With certain exceptions, the Proclamation and the joint regulations restrict access to the Monument to persons who have been issued Monument permits. Vessels that do not have permits cannot enter the Monument except for uninterrupted passage through the Monument and notice must be provided to NOAA by telephone, fax, or e-mail not less than 72 hours and not more than one month prior to passing through the Monument. Notice must also be provided not more than twelve hours after the vessel has exited the Monument. All of the terms of the Proclamation and the regulations are applied in accordance with international law.

The Proclamation directed the Secretary of State, in consultation with the Secretaries of Commerce and the Interior, to take appropriate action to enter into negotiations with other governments to make necessary arrangements for the protection of the Monument and to promote the purposes for which it was established. The proclamation further directed the Secretary of State to seek the cooperation of other governments and international organizations in furtherance of the purposes of the Proclamation and consistent with applicable regional and multilateral arrangements for the protection and management of special marine areas.

In April 2007 and in accordance with the Proclamation, the United States proposed to the International Maritime Organization (IMO), a specialized agency of the United Nations, that the Monument be designated as a Particularly Sensitive Sea Area (PSSA) to protect the attributes of the fragile and integrated coral reef ecosystem from potential hazards associated with international shipping activities. The U.S. noted in its proposal that the burden on international shipping by the proposed PSSA and its associated protective measures would be minimal while its objectives—increased maritime safety, protection of the fragile environment, preservation of cultural resources and areas of cultural importance significant to Native Hawaiians, as well as facilitation of the ability to respond to developing maritime emergencies—would be significantly furthered. PSSA designation had been granted previously to only ten marine areas globally, including the marine areas around the Florida Keys, the Great Barrier Reef, and the Galapagos.

On April 3, 2008, the IMO designated the Monument as a PSSA. As part of the PSSA designation process, the IMO adopted U.S. proposals for associated protective measures consisting of (1) expanding and consolidating the six existing recommendatory Areas To Be Avoided (ATBAs) in the Monument into four larger areas and enlarging the class of vessels to which they apply; and (2) establishing a ship reporting system for vessels transiting the Monument, which is mandatory for ships 300 gross tons or greater that are entering or departing a U.S. port or place and recommended for other ships. The system requires that ships notify the U.S. shore-based authority (i.e., the U.S. Coast Guard; NOAA will be receiving all messages associated with this program on behalf of the Coast Guard) at the time they begin transiting the reporting area and again when they exit. Notification is made by e-mail through the Inmarsat-C system or other satellite communication system. It is estimated that almost all commercial vessel traffic will be able to report via Inmarsat-C.

The PSSA and associated protective measures were adopted to provide additional protection to the exceptional natural, cultural and historic resources in the Monument. Requiring vessels to notify NOAA upon entering the reporting area will help make the

operators of these vessels aware that they are traveling through a fragile area with potential navigational hazards such as the extensive coral reefs found in many shallow areas of the Monument. The PSSA is now in effect, and the IMO has provided for an effective date for the associated protective measures of May 1, 2008.

NOAA and USFWS are establishing the infrastructure that will be required to maintain an international ship reporting system and to ensure that information regarding PSSA designation will be incorporated into nautical charts and other information sources. This rule implements the mandatory ship reporting system as adopted by IMO, establishes the reporting area using the IMO boundary coordinates, and publishes the coordinates of the four ATBAs.

**II. Vessel Reporting Requirements**

These regulations apply to vessels that do not have permits to enter the Monument and that pass through the Monument without interruption. These regulations do not change the exemptions at 50 CFR 404.8 (activities necessary to respond to emergencies or necessary for law enforcement purposes) and 404.9 (activities and exercises of the Armed Forces, including those of the United States Coast Guard) and, therefore, do not apply to vessels covered by those exemptions. As explained further, below, these regulations also do not apply to sovereign immune vessels.

The regulations accomplish the following actions:

(1) Modify the current notification requirements (at 50 CFR 404.4) for passing through the Monument without interruption and add several new associated terms and definitions (at Sec. 404.3);

(2) Establish a reporting area around the Monument, extending outward ten nautical miles from the Monument boundary but excluding the ATBAs within the Monument;

(3) Describe the categories of vessels that are subject to the reporting requirement;

(4) Specify the type of information regarding the vessel, its location, etc. that is required in the e-mail to NOAA and that is to be sent in a reporting format that is consistent with the reporting system adopted by IMO;

(5) Allow for vessels that do not have e-mail capability to continue to comply with the current prior notification requirements;

(6) Recommend voluntary participation in the reporting system for all other vessels that are not required to notify NOAA; and

(7) Publish the revised boundaries of the four voluntary ATBAs.

Each of these elements is described below.

*A. Modification of Existing Notification Requirements*

Monument regulations at 50 CFR 404.4 prohibit entry into the Monument except in certain situations. One of the exceptions is for vessels passing through the Monument without interruption. Those vessels, however, are currently required to provide notice prior to entering and after leaving the Monument. Notification of entry must be provided at least 72 hours, but no longer than 1 month, prior to the entry date. Notification of departure from the Monument must be provided within 12 hours of leaving. Notification may be made by e-mail, telephone, or fax and must include the following information: Position when making the report; vessel name and IMO identification number; name, address, and telephone number of owner and operator; United States Coast Guard documentation, state license, or registration number; home port; intended and actual route through the Monument; general categories of any hazardous cargo on board; and length of vessel and propulsion type (e.g., motor or sail).

These changes to the regulations replace the current notification requirements for vessels that have e-mail capability. Vessels without e-mail capability will continue to provide notification in advance and upon exiting the Monument as described previously but the type of information to be provided is modified by these regulations as indicated below.

The following terms are being added to the definitions at 50 CFR 404.3 to facilitate implementation of the proposed ship reporting requirements: ''Areas to be avoided''; ''Categories of hazardous cargoes''; ''IMO''; and ''Reporting area.'' The definitions to these terms are contained in the text of the regulations.

*B. Reporting Area*

The regulations create a reporting area extending ten miles out and entirely around the Monument boundary. The coordinates of the area are set forth in Appendix D of the regulations and are the same as the coordinates that were adopted by IMO when it accepted the PSSA in principle and adopted the associated protective measures for the PSSA in 2007. Certain categories of vessels (described below) that intend to pass through the Monument without interruption are required to e-mail certain information at the time they cross the reporting area boundary and again when they exit the reporting area after having passed through the Monument.

The reporting area does not include the ATBAs within the Monument. As such, vessels that pass through an ATBA while passing through the Monument must notify NOAA at the time they exit the reporting area and enter the ATBA, and again when they exit the ATBA and re-enter the reporting area.

There are three large areas of the Monument (within the reporting area) that are not within the IMO-designated ATBAs. These breaks between the four ATBAs allow for primarily north-south passage through the Monument. From west to east, these areas are in the following locations and are shown in Figure 1: Between the ATBAs extending around Pearl and Hermes Atoll and Lisianski Island; between the ATBAs around Maro Reef and Gardner Pinnacles; and between the ATBAs around Mokumanamana (Necker Island) and Nihoa Island. It is anticipated that vessels will navigate through the Monument via these areas. Vessels passing through the Monument in these areas are only required to send e-mail notification upon entering the reporting area and again upon leaving it.

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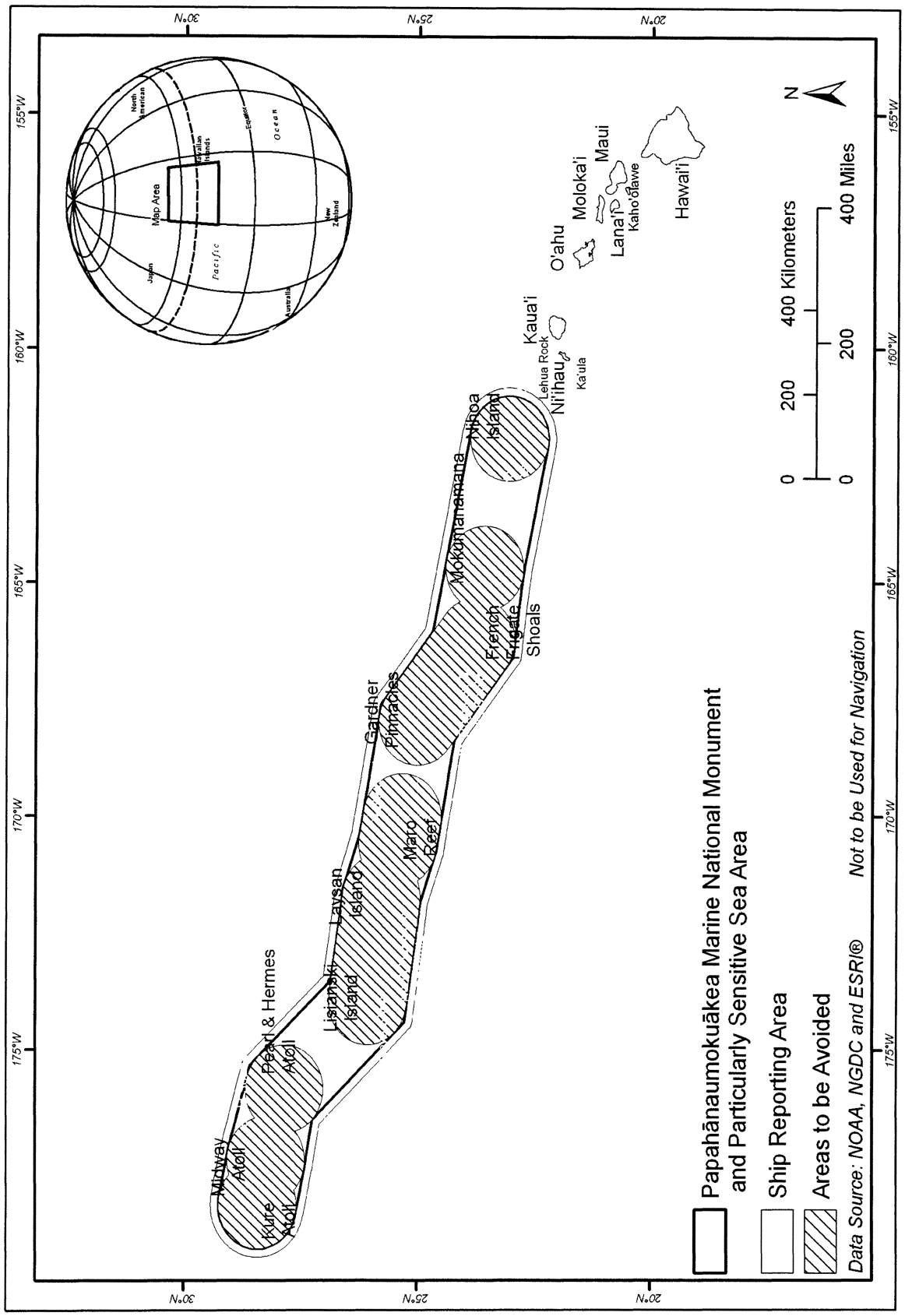
Figure 1. Papahanaumokuakea Marine National Monument Particularly Sensitive Sea Areas, Ship Reporting Areas, and Areas to be Avoided

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*C. Vessels That Are Required To Provide Notification*

All vessels of the United States—regardless of size—are subject to the proposed reporting requirements. All foreign vessels greater than 300 gross tons and that are either going to or coming from a U.S. port or place are required to participate in the ship reporting system. Foreign vessels of any size that are heading to or coming from a U.S. port or place are also required to provide e-mail notification if they experience an emergency while crossing through the reporting area. Although e-mail capability is now routine on vessels greater than 300 gross tons and is also widely used by many smaller vessels, vessels of the United States less than 300 gross tons that do not have e-mail capability remain subject to the advanced notice reporting requirements currently in effect. These vessels will continue to be required to follow the current reporting process: Provide notice by telephone, fax, or e-mail not less than 72 hours but not more than one month prior to entering the Monument for uninterrupted passage and to provide notification of departing the Monument within 12 hours of leaving.

Vessels are not required to provide notification if they operate in the reporting area but remain outside of the Monument, such as fishing vessels fishing outside the Monument boundary. However, if the operator of a vessel within the reporting area decides to cross uninterrupted through the Monument all of the notification requirements will then apply. In no case may the vessel lawfully pass through the Monument until notification had been provided, consistent with these regulations.

The reporting requirements do not apply to vessels of the Armed Forces and the United States Coast Guard because the prohibitions in the Proclamation and the regulations do not apply to their activities and exercises (50 CFR 404.9(a)). In addition, the ship reporting system adopted by the IMO specifically exempts all sovereign immune vessels from the reporting requirement and, therefore, the regulations published today do not apply to these vessels. Vessel sovereign immunity is interpreted in light of relevant provisions of international instruments, such as the IMO-adopted ship reporting system, Article 36 of the United Nations Convention on the Law of the Sea, and Chapter 5, Regulation 1 of the International Convention for the Safety of Life at Sea. This is consistent with provisions of the Proclamation and the regulations that state the Proclamation shall be applied in accordance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law.

*D. Specific Information and Reporting Format Required for Entry and Exit Notifications by Vessels With E-mail Capability*

The information that each vessel must submit and the format in which it must be submitted are shown in Appendix E to the regulations. The information to be provided upon entering the reporting area and the reporting format are based on and consistent with the reporting requirements adopted by IMO and include: Vessel identification information (i.e., name, call sign, flag, IMO identification number); date and time of entry; position; true course; speed in knots and tenths; destination and estimated time of arrival; intended route through the reporting area; vessel draft; categories of hazardous cargoes on board; any vessel defects or deficiencies that restrict maneuverability or impair normal navigation; any pollution incident or goods lost overboard within the Monument, reporting area, or the U.S. EEZ; contact information for the vessel's agent or owner; vessel size (length overall, gross tonnage) and type; and total number of persons on board. Information required when the vessel leaves the reporting area includes: Vessel identification information (i.e., name, call sign, flag, IMO identification number); date and time of exit; position; and any pollution incident or goods lost overboard within the Monument, reporting area, or the U.S. EEZ.

The system that is being established to receive the notifications is based on Inmarsat-C and NOAA will assume the cost associated with Inmarsat-C transmissions to the e-mail address provided under this program. This rule does not require a vessel to install or use Inmarsat-C, but NOAA will not assume costs associated with e-mail transmissions sent through other satellite communications systems. Vessel owners who receive an Inmarsat-C charge for any e-mail sent to NOAA pursuant to these regulations will be reimbursed upon invoicing NOAA with a copy of the charges.

*E. Specific Information and Reporting Format Required for Entry and Exit Notifications by Vessels Without Onboard E-mail Capability*

Vessels of the United States less than 300 gross tons that do not have onboard e-mail capability are required to submit the following information not less than 72 hours but not more than one month prior to entering the Monument for uninterrupted passage: Vessel identification information (e.g., name, call sign, flag, IMO identification number); date and time of entry; position (as applicable); destination and estimated time of arrival; intended route through the Monument and the reporting area; vessel draft; categories of hazardous cargoes on board (as applicable); any vessel defects or deficiencies that restrict maneuverability or impair normal navigation; contact information for the vessel's agent or owner; vessel size (length overall, gross tonnage) and type; and total number of persons on board. Upon exiting the Monument these vessels must provide the following information within 12 hours of leaving: Vessel identification information (e.g., name, call sign, flag, IMO identification number); date and time of exit; position; and any pollution incident or goods lost overboard within the Monument, reporting area, or the U.S. EEZ. This information may be submitted by nonvessel-based e-mail (e.g., from home or office), fax, or telephone. Once a vessel is equipped with an onboard e-mail system, however, it must comply with the requirements for vessels with that capability, including the reporting format shown in Appendix E to the regulations.

*F. Voluntary Participation in the Ship Reporting System by All Other Vessels*

Vessels that are not required to participate in the ship reporting system are nevertheless strongly urged to participate on a voluntary basis. Participation will help make the operators of these vessels aware that they are traveling through a fragile area with potential navigational hazards such as the extensive coral reefs found in many shallow areas of the Monument. Voluntary participation will increase maritime safety, protection of the fragile environment, preservation of cultural resources and areas of cultural importance significant to Native Hawaiians. Participation will also facilitate the ability to respond to developing maritime emergencies.

*G. Modification of the Areas To Be Avoided (ATBAs)*

An ATBA is an area within which either navigation is particularly hazardous or it is exceptionally important to avoid casualties. As such, ATBAs should be avoided by all ships, or certain classes of ships. While ATBAs can be mandatory (i.e., vessels are required by applicable law to avoid and operate outside of the area) most are voluntary and vessels may travel through them. The IMO adopted six voluntary ATBAs in the Northwestern Hawaiian Islands in 1980. Part of the action taken in 2008 by the IMO was to enlarge the six original ATBAs so that they now connect in certain places resulting in four larger ATBAs. This rule publishes the coordinates of these four ATBAs. The coordinates are attached to the regulations as Appendix C. The ATBAs are not part of the reporting area and vessels that enter any ATBA while passing through the Monument without interruption must provide an exit notification upon entering the ATBA, an entry notification again upon reentering the reporting area, and a second exit notification when the vessel departed the reporting area and the Monument on the other side. Thus, transiting through the Monument via an ATBA requires four reports as compared with the two reports required for transiting the Monument between the ATBAs.

**III. Response to Comments**

Comments on the proposed rule and the draft environmental assessment were received from the following: The Department of the Navy; the United States Coast Guard; the Missile Defense Agency; and the Marine Mammal Commission. The comments did not result in any changes to the proposed regulations but additional discussion has been added to the preamble of this final rule to clarify that the reporting requirements do not apply to activities and exercises of the Armed Forces (including those carried out by the United States Coast Guard) or to sovereign immune vessels of foreign nations. The comments are summarized below together with responses from NOAA and FWS.

*Comment 1:* It should be clear that the Armed Forces exception in 50 CFR 404.9 applies to the new ship reporting regulations.

*Response:* The reporting regulations do not affect the Armed Forces exception to the prohibitions set forth in the Proclamation and in the regulations at 50 CFR 404.9. The reporting regulations do not apply to activities and exercises of the Armed Forces, (including those carried out by the United States Coast Guard) that are consistent with applicable laws. The Armed Forces exemptions in the Proclamation and at 50 CFR 404.9 are not affected by these regulations.

*Comment 2:* Clarify that the regulations do not affect international legal principles governing freedom of navigation for sovereign immune vessels in international waters, such as foreign warships, and law-enforcement craft.

*Response:* Language has been added to section 404.4(c) to clarify that the regulations do not apply to sovereign immune vessels in international waters. The ship reporting system adopted by the IMO specifically exempts all sovereign immune vessels from the reporting requirement and, therefore, the regulations published today do not apply to these vessels. This is consistent with provisions of the Proclamation and the regulations that state the Proclamation shall be applied in accordance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law.

*Comment 3:* The ATBAs are recommendatory and ships should not be required to report their entry into or exit from Monument ATBAs.

*Response:* The regulations do not require vessels to report when they enter or exit ATBAs. They do, however, require vessels to notify the U.S. shore-based authority (NOAA, on behalf of the U.S. Coast Guard) whenever they enter or exit the Reporting Area. As adopted by the IMO and implemented by these regulations, the ATBAs are outside of the Reporting Area. A vessel entering an ATBA is required to notify NOAA because it is exiting the Reporting Area and it must send another e-mail when it reenters the Reporting Area from an ATBA or anywhere else that is outside of the Reporting Area.

*Comment 4:* Modify the reporting requirements to: (a) Ensure that all vessels in the reporting area or Monument immediately report any emergencies; (b) clarify that emergencies include any accidents, pollution incidents, or losses of cargo that could pose a risk to natural and cultural resources; and (c) identify the types of information to be reported in cases of emergencies.

*Response:* At this time, NOAA and FWS are maintaining the regulations as proposed to implement the measures recommended by the IMO, but will consider a separate rule making to address whether and how to require the reporting of emergencies in the Monument. The scope of such a rule could apply to a broader category of vessels than those simply passing through the Monument without interruption and could include vessels entering the Monument pursuant to permits. Such a rule would also be applied in accordance with international law.

*Comment 5:* Include in the ship reporting system a return message describing why special precautions are needed in the area, the Areas To Be Avoided, other relevant protection measures and appropriate information (e.g., permit requirements for any activity other than uninterrupted passage through the Monument).

*Response:* A return message will be sent back to vessels that provide e-mail notification and will include relevant information such as precautions while in the Monument and other matters.

**IV. Classification**

*A. National Environmental Policy Act*

An environmental assessment has been prepared to evaluate the proposed revisions to the reporting requirements and resulted in a Finding of No Significant Impact (FONSI). Copies are available at the address and Web site listed in the **ADDRESSES** section of this rule.

*B. Executive Order 12866: Regulatory Impact*

This rule has been determined to be not significant within the meaning of Executive Order 12866.

*C. Executive Order 13132: Federalism Assessment*

NOAA has concluded this regulatory action does not have federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 13132. The State of Hawaii was consulted during the promulgation of this rule.

*D. Paperwork Reduction Act*

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0548. Public reporting burden for entry and exit notification is expected to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. In the proposed rule, NOAA and FWS requested public comment regarding this collection of information and

burden estimate. No comments were received.

*E. Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this rule would not have a significant economic impact on a substantial number of small entities.

The factual basis for this certification is as follows:

The regulations establish a ship reporting system for the Monument. When transiting the Monument, all U.S. vessels, all foreign-flag vessels 300 gross tons or greater that are going to or coming from a U.S. port or place, and all foreign-flag vessels of any size coming from a U.S. port or place and experiencing an emergency while crossing through the reporting area are required to participate in the reporting system. Specific information is required to be transmitted via e-mail to NOAA upon entry into and exit from the reporting area. Vessels without onboard e-mail capability will continue to provide notification as originally required by the Monument regulations at 50 CFR part 404, and the information provided is essentially the same as required previously.

The SBA establishes size standards for determining whether a U.S. entity is a small business. The size standards relevant to this proposed rulemaking are: finfish fishing (NAICS Code 114111): Average annual receipts of $4.0 million or less; and deep sea freight transport (NAICS Code 483111): average employment of 500 employees or less. Approximately 120 U.S. fishing vessels are expected to be impacted by this rulemaking, and all are considered to be small entities. U.S. freight transport vessels are expected to be affected by this rulemaking, though none are considered to be small entities. All vessels without e-mail capability are considered to be small entities.

The cost of the regulation is not expected to be significant. It is expected that vessels transiting the Monument will remain outside of the designated ATBA's to avoid navigational hazards in the ATBA's. For these vessels, two e-mails will be required for compliance with the proposed rule: One upon entering the reporting area and one upon exiting the reporting area. For those vessels that cross into the ATBA's, four e-mails will be necessary. Because the ATBA's are not part of the reporting system, the vessel will enter and exit the reporting area twice. The cost of sending an e-mail varies depending on the type of service, the provider rates and the length of the message but is estimated to be approximately $1.75 per entry report e-mail sent via Inmarsat-C. The exit report should cost approximately $0.50. It will take approximately 15 minutes or less to send each e-mail.

Because NOAA is paying for the monetary cost of e-mail transmissions using the Inmarsat-C system, this cost will not be accrued by any small entities. Entities using other e-mail systems, however, will bear the monetary cost of e-mail transmission in addition to the time cost. For those vessels without on-board e-mail capability, cost of compliance for notification prior to entry is expected to be the cost of a standard fax or e-mail charge, or will be free if the information is provided by telephone using the 1–800 number listed in the regulations. An exit notification made within 12 hours will require the use of a satellite telephone, the cost of which will be subject to rate variables. However, the content to be conveyed is relatively brief and can be provided in approximately one minute.

Given the minimal cost of compliance with this rulemaking, the impact of this rule is not expected to be significant. As a result, a regulatory flexibility analysis is not required and none has been prepared.

**List of Subjects in 50 CFR Part 404**

Administrative practice and procedure, Coastal zone, Fish, Fisheries, Historic preservation, Intergovernmental relations, Marine resources, Monuments and memorials, Natural resources, Reporting and recordkeeping requirements, Wildlife, Wildlife refuges.

Dated: November 21, 2008.

**Jane C. Luxton,**

*General Counsel, National Oceanic and Atmospheric Administration.*

Dated: November 20, 2008.

**Lyle Laverty,**

*Assistant Secretary for Fish and Wildlife and Parks.*

■ Accordingly, for the reasons set forth in the preamble, NOAA and USFWS amend part 404, title 50 of the Code of Federal Regulations as follows:

## PART 404—[AMENDED]

■ 1. The authority citation for part 404 continues to read as follows:

**Authority:** 16 U.S.C. 431 *et seq.*; 16 U.S.C. 460k–3; 16 U.S.C. 1801 *et seq.*; 16 U.S.C. 742f, 16 U.S.C. 742l, and 16 U.S.C. 668dd–ee; 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 1531 *et seq.*, Public Law 106–513, Sec. 6(g) (2000).

■ 2. In § 404.3, definitions for ''Areas to be avoided,'' ''Categories of Hazardous cargoes,'' ''IMO,'' and ''Reporting area'' are added alphabetically as follows:

**§ 404.3 Definitions.**

* * * * *

*Areas to be avoided* means the four designated areas that should be avoided by vessels that are conducting passage through the Monument without interruption. Appendix C sets forth the coordinates of these areas.

* * * * *

*Categories of hazardous cargoes* means goods classified in the International Maritime Dangerous Goods (IMDG) Code; substances classified in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) and chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code); oils as defined in MARPOL Annex I; noxious liquid substances as defined in MARPOL Annex II; harmful substances as defined in MARPOL Annex III; and radioactive materials specified in the Code for the Safe Carriage of the Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code).

* * * * *

*IMO* means the International Maritime Organization.

* * * * *

*Reporting area* means the area within the coordinates set forth in Appendix D.

* * * * *

■ 3. Revise § 404.4 to read as follows:

**§ 404.4 Access to Monument.**

(a) Entering the Monument is prohibited and thus unlawful except:

(1) As provided in §§ 404.8 and 404.9;

(2) Pursuant to a permit issued under §§ 404.10 or 404.11; or

(3) When conducting passage without interruption in accordance with paragraphs (b) through (f) of this section.

(b) Any person passing through the Monument without interruption is subject to the prohibitions in §§ 404.5, 404.6, and 404.7.

(c) The following vessels, except vessels entitled to sovereign immunity under international law, passing through the Monument without interruption must participate in the ship reporting system as provided in paragraphs (d) and (e) of this section:

(1) Vessels of the United States, except as provided in paragraph (f) of this section;

(2) All other ships 300 gross tonnage or greater, entering or departing a United States port or place; and

(3) All other ships in the event of an emergency, entering or departing a United States port or place.

(d) Immediately upon entering the reporting area, the vessels described in paragraph (c) of this section must provide the following information by e-mail sent to *nwhi.notifications@noaa.gov* in the IMO standard reporting format and data syntax shown in Appendix E:

(1) Vessel name, call sign or ship station identity, flag, and IMO identification number if applicable, and either Federal documentation or State registration number if applicable.

(2) Date, time (UTC) and month of entry.

(3) Position.

(4) True course.

(5) Speed in knots and tenths.

(6) Destination and estimated time of arrival.

(7) Intended route through the Monument and the reporting area.

(8) Vessel draft (in meters).

(9) Categories of hazardous cargoes on board.

(10) Any vessel defects or deficiencies that restrict maneuverability or impair normal navigation.

(11) Any pollution incident or goods lost overboard within the Monument, the reporting area, or the U.S. EEZ.

(12) Contact information for the vessel's agent or owner.

(13) Vessel size (length overall, gross tonnage) and type.

(14) Total number of persons on board.

(e) Immediately upon leaving the reporting area, the vessels described in paragraph (c) must provide the following information by e-mail sent to *nwhi.notifications@noaa.gov* in the IMO standard reporting format and data syntax shown in Appendix E:

(1) Vessel name, call sign or ship station identity, flag, and IMO identification number if applicable, and either Federal documentation or State registration number if applicable.

(2) Date, time (UTC) and month of exit.

(3) Position.

(4) Any pollution incident or goods lost overboard within the Monument, the reporting area, or the U.S. EEZ.

(f)(1) Vessels of the United States less than 300 gross tonnage that are not equipped with onboard e-mail capability must provide notification of entry and the information described in paragraphs (d)(1), (2), (3) as applicable, (6), (7), (8), (9) as applicable, (10), (12), (13), and (14) of this section at least 72 hours, but no longer than 1 month, prior to the entry date. Notification of departure from the Monument and the information described in paragraph (e) of this section must be provided within 12 hours of leaving. Notification under this paragraph may be made by e-mail, telephone, or fax, by contacting: (i) *E-mail: nwhi.notifications@noaa.gov*;

(ii) *Telephone:* 1–866–478–NWHI (6944);

(iii) *Fax:* 1–808–397–2662.

(2) The information must be provided in the IMO standard reporting format and data syntax shown in Appendix E.

(g) All vessels passing through the Monument without interruption other than those described in paragraphs (c)(1) through (3) of this section should participate in the ship reporting system set forth in paragraphs (d) and (e) of this section.

■ 4. Add Appendix C to Part 404 to read as follows:

## Appendix C to Part 404—Boundary Coordinated for Papahānaumokuākea Marine National Monument Areas To Be Avoided

## Appendix C—Geographical Coordinates

*Areas To Be Avoided*

*Papahanaumokuakea Marine National Monument*

Reference chart: United States 540, 2008 edition; 19016, 2008 edition; 19019, 2008 edition; 19022, 2008 edition.

These charts are based on World Geodetic System 1984 Datum (WGS–84) and astronomic datum.

TABLE C–1—KURE ATOLL, MIDWAY ATOLL, AND PEARL AND HERMES ATOLL

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 27°14′.76 | 176°29′.87 |
| 2 | 27°24′.95 | 177°33′.31 |
| 3 | 27°35′.87 | 178°29′.90 |
| 4 | 27°36′.64 | 178°33′.93 |
| 5 | 27°37′.53 | 178°37′.32 |
| 6 | 27°38′.60 | 178°40′.65 |
| 7 | 27°39′.85 | 178°43′.90 |
| 8 | 27°41′.28 | 178°47′.05 |
| 9 | 27°42′.89 | 178°50′.10 |
| 10 | 27°44′.66 | 178°53′.03 |
| 11 | 27°46′.59 | 178°55′.83 |
| 12 | 27°48′.67 | 178°58′.49 |
| 13 | 27°50′.89 | 179°01′.00 |
| 14 | 27°53′.22 | 179°03′.39 |
| 15 | 27°55′.69 | 179°05′.61 |
| 16 | 27°58′.29 | 179°07′.61 |
| 17 | 28°01′.01 | 179°09′.47 |
| 18 | 28°03′.81 | 179°11′.10 |
| 19 | 28°06′.71 | 179°12′.53 |
| 20 | 28°09′.67 | 179°13′.75 |
| 21 | 28°12′.70 | 179°14′.75 |
| 22 | 28°15′.78 | 179°15′.54 |
| 23 | 28°18′.91 | 179°16′.11 |
| 24 | 28°22′.04 | 179°16′.45 |
| 25 | 28°24′.72 | 179°16′.56 |
| 26 | 28°25′.20 | 179°16′.57 |

TABLE C–1—KURE ATOLL, MIDWAY ATOLL, AND PEARL AND HERMES ATOLL—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 27 | 28°25′.81 | 179°16′.56 |
| 28 | 28°28′.35 | 179°16′.44 |
| 29 | 28°31′.49 | 179°16′.10 |
| 30 | 28°34′.61 | 179°15′.54 |
| 31 | 28°37′.69 | 179°14′.75 |
| 32 | 28°40′.71 | 179°13′.74 |
| 33 | 28°43′.68 | 179°12′.54 |
| 34 | 28°46′.58 | 179°11′.13 |
| 35 | 28°49′.39 | 179°09′.52 |
| 36 | 28°52′.11 | 179°07′.70 |
| 37 | 28°54′.72 | 179°05′.70 |
| 38 | 28°57′.21 | 179°03′.51 |
| 39 | 28°59′.58 | 179°01′.15 |
| 40 | 29°01′.81 | 178°58′.62 |
| 41 | 29°03′.90 | 178°55′.93 |
| 42 | 29°05′.83 | 178°53′.10 |
| 43 | 29°07′.60 | 178°50′.13 |
| 44 | 29°09′.21 | 178°47′.04 |
| 45 | 29°10′.64 | 178°43′.84 |
| 46 | 29°11′.89 | 178°40′.54 |
| 47 | 29°12′.95 | 178°37′.16 |
| 48 | 29°13′.82 | 178°33′.71 |
| 49 | 29°14′.50 | 178°30′.21 |
| 50 | 29°14′.99 | 178°26′.66 |
| 51 | 29°15′.28 | 178°23′.08 |
| 52 | 29°15′.36 | 178°19′.49 |
| 53 | 29°15′.25 | 178°15′.90 |
| 54 | 29°14′.94 | 178°12′.32 |
| 55 | 29°14′.43 | 178°08′.78 |
| 56 | 29°03′.47 | 177°12′.07 |
| 57 | 29°02′.55 | 177°07′.29 |
| 58 | 28°38′.96 | 175°35′.47 |
| 59 | 28°38′.67 | 175°34′.35 |
| 60 | 28°34′.91 | 175°19′.74 |
| 61 | 28°26′.24 | 175°10′.65 |
| 62 | 28°24′.61 | 175°08′.95 |
| 63 | 28°24′.53 | 175°09′.04 |
| 64 | 28°20′.09 | 175°04′.91 |
| 65 | 28°16′.05 | 175°01′.92 |
| 66 | 28°11′.78 | 174°59′.33 |
| 67 | 28°07′.29 | 174°57′.23 |
| 68 | 28°02′.63 | 174°55′.68 |
| 69 | 27°57′.84 | 174°54′.62 |
| 70 | 27°53′.01 | 174°54′.05 |
| 71 | 27°48′.12 | 174°54′.05 |
| 72 | 27°43′.28 | 174°54′.62 |
| 73 | 27°38′.48 | 174°55′.71 |
| 74 | 27°33′.81 | 174°57′.32 |
| 75 | 27°29′.30 | 174°59′.43 |
| 76 | 27°25′.00 | 175°02′.03 |
| 77 | 27°20′.93 | 175°05′.07 |
| 78 | 27°17′.18 | 175°08′.59 |
| 79 | 27°13′.73 | 175°12′.47 |
| 80 | 27°10′.59 | 175°16′.67 |
| 81 | 27°07′.88 | 175°21′.25 |
| 82 | 27°05′.57 | 175°26′.09 |
| 83 | 27°03′.66 | 175°31′.15 |
| 84 | 27°02′.22 | 175°36′.40 |
| 85 | 27°01′.29 | 175°41′.78 |
| 86 | 27°00′.73 | 175°47′.22 |
| 87 | 27°00′.68 | 175°52′.74 |
| 88 | 27°01′.09 | 175°58′.16 |
| 89 | 27°01′.99 | 176°03′.53 |
| 90 | 27°03′.34 | 176°08′.81 |
| 91 | 27°05′.12 | 176°13′.91 |
| 92 | 27°07′.37 | 176°18′.79 |
| 93 | 27°09′.98 | 176°23′.40 |
| 94 | 27°13′.02 | 176°27′.74 |
| 95 | 27°13′.77 | 176°28′.70 |

TABLE C–2—LISIANSKI ISLAND, LAYSAN ISLAND, MARO REEF, AND RAITA BANK

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 26°50′.89 | 173°30′.79 |
| 2 | 26°36′.00 | 171°37′.70 |
| 3 | 26°35′.49 | 171°33′.84 |
| 4 | 26°35′.10 | 171°30′.84 |
| 5 | 26°34′.07 | 171°27′.50 |
| 6 | 26°33′.35 | 171°25′.16 |
| 7 | 26°14′.26 | 170°23′.04 |
| 8 | 26°08′.69 | 169°48′.96 |
| 9 | 26°08′.36 | 169°49′.03 |
| 10 | 26°07′.62 | 169°45′.83 |
| 11 | 26°06′.03 | 169°40′.57 |
| 12 | 26°03′.97 | 169°35′.64 |
| 13 | 26°01′.51 | 169°30′.91 |
| 14 | 25°58′.65 | 169°26′.45 |
| 15 | 25°55′.32 | 169°22′.34 |
| 16 | 25°51′.67 | 169°18′.60 |
| 17 | 25°47′.78 | 169°15′.19 |
| 18 | 25°43′.54 | 169°12′.34 |
| 19 | 25°39′.05 | 169°09′.93 |
| 20 | 25°34′.37 | 169°08′.08 |
| 21 | 25°29′.54 | 169°06′.76 |
| 22 | 25°24′.61 | 169°05′.93 |
| 23 | 25°19′.63 | 169°05′.64 |
| 24 | 25°14′.65 | 169°05′.93 |
| 25 | 25°09′.69 | 169°06′.66 |
| 26 | 25°04′.85 | 169°08′.02 |
| 27 | 25°00′.17 | 169°09′.96 |
| 28 | 24°55′.66 | 169°12′.35 |
| 29 | 24°51′.35 | 169°15′.14 |
| 30 | 24°47′.37 | 169°18′.48 |
| 31 | 24°43′.69 | 169°22′.22 |
| 32 | 24°40′.34 | 169°26′.31 |
| 33 | 24°37′.42 | 169°30′.78 |
| 34 | 24°35′.00 | 169°35′.64 |
| 35 | 24°33′.02 | 169°40′.66 |
| 36 | 24°31′.34 | 169°45′.88 |
| 37 | 24°30′.31 | 169°51′.08 |
| 38 | 24°29′.68 | 169°56′.53 |
| 39 | 24°29′.56 | 170°01′.81 |
| 40 | 24°29′.61 | 170°04′.57 |
| 41 | 24°35′.77 | 170°44′.39 |
| 42 | 24°36′.29 | 170°47′.58 |
| 43 | 24°37′.18 | 170°50′.37 |
| 44 | 24°37′.76 | 170°52′.17 |
| 45 | 24°56′.23 | 171°50′.19 |
| 46 | 25°16′.61 | 174°24′.84 |
| 47 | 25°29′.56 | 174°38′.45 |
| 48 | 25°33′.28 | 174°42′.03 |
| 49 | 25°37′.33 | 174°45′.20 |
| 50 | 25°41′.68 | 174°47′.84 |
| 51 | 25°46′.23 | 174°50′.05 |
| 52 | 25°50′.93 | 174°51′.77 |
| 53 | 25°55′.80 | 174°52′.91 |
| 54 | 26°00′.71 | 174°53′.47 |
| 55 | 26°05′.67 | 174°53′.61 |
| 56 | 26°10′.59 | 174°53′.07 |
| 57 | 26°15′.46 | 174°52′.08 |
| 58 | 26°20′.20 | 174°50′.57 |
| 59 | 26°24′.75 | 174°48′.44 |
| 60 | 26°29′.15 | 174°45′.94 |
| 61 | 26°33′.26 | 174°42′.96 |
| 62 | 26°37′.11 | 174°39′.49 |
| 63 | 26°40′.60 | 174°35′.63 |
| 64 | 26°43′.75 | 174°31′.43 |
| 65 | 26°46′.49 | 174°26′.87 |
| 66 | 26°48′.90 | 174°22′.09 |
| 67 | 26°50′.79 | 174°17′.03 |
| 68 | 26°52′.20 | 174°11′.79 |
| 69 | 26°53′.21 | 174°06′.43 |
| 70 | 26°53′.74 | 174°00′.98 |
| 71 | 26°53′.74 | 173°55′.48 |
| 72 | 26°53′.29 | 173°50′.02 |
| 73 | 26°52′.56 | 173°44′.58 |
| 74 | 26°51′.85 | 173°39′.14 |
| 75 | 26°51′.13 | 173°33′.69 |
| 76 | 26°50′.75 | 173°30′.87 |

TABLE C–3—GARDNER PINNACLES, FRENCH FRIGATE SHOALS, AND NECKER ISLAND

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 25°49′.64 | 167°52′.66 |
| 2 | 25°49′.70 | 167°52′.65 |
| 3 | 25°48′.99 | 167°48′.35 |
| 4 | 25°47′.09 | 167°36′.72 |
| 5 | 25°39′.84 | 167°26′.48 |
| 6 | 25°35′.10 | 167°19′.79 |
| 7 | 25°10′.43 | 166°45′.00 |
| 8 | 24°40′.91 | 166°03′.36 |
| 9 | 24°35′.64 | 165°34′.99 |
| 10 | 24°23′.78 | 164°31′.12 |
| 11 | 24°23′.59 | 164°31′.14 |
| 12 | 24°23′.31 | 164°29′.74 |
| 13 | 24°21′.85 | 164°24′.52 |
| 14 | 24°20′.10 | 164°19′.39 |
| 15 | 24°17′.75 | 164°14′.56 |
| 16 | 24°14′.99 | 164°09′.97 |
| 17 | 24°11′.86 | 164°05′.69 |
| 18 | 24°08′.30 | 164°01′.80 |
| 19 | 24°04′.48 | 163°58′.23 |
| 20 | 24°00′.27 | 163°55′.22 |
| 21 | 23°55′.85 | 163°52′.59 |
| 22 | 23°51′.17 | 163°50′.56 |
| 23 | 23°46′.33 | 163°48′.98 |
| 24 | 23°41′.37 | 163°47′.99 |
| 25 | 23°36′.34 | 163°47′.56 |
| 26 | 23°31′.27 | 163°47′.60 |
| 27 | 23°26′.27 | 163°48′.28 |
| 28 | 23°21′.34 | 163°49′.50 |
| 29 | 23°16′.53 | 163°51′.14 |
| 30 | 23°11′.96 | 163°53′.47 |
| 31 | 23°07′.54 | 163°56′.15 |
| 32 | 23°03′.46 | 163°59′.38 |
| 33 | 22°59′.65 | 164°03′.01 |
| 34 | 22°56′.27 | 164°07′.10 |
| 35 | 22°53′.22 | 164°11′.49 |
| 36 | 22°50′.60 | 164°16′.18 |
| 37 | 22°48′.48 | 164°21′.16 |
| 38 | 22°46′.73 | 164°26′.28 |
| 39 | 22°45′.49 | 164°31′.60 |
| 40 | 22°44′.83 | 164°37′.03 |
| 41 | 22°44′.65 | 164°42′.51 |
| 42 | 22°44′.92 | 164°47′.99 |
| 43 | 22°45′.11 | 164°49′.52 |
| 44 | 22°45′.39 | 164°51′.48 |
| 45 | 22°45′.17 | 164°51′.53 |
| 46 | 22°50′.26 | 165°34′.99 |
| 47 | 22°55′.50 | 166°19′.63 |
| 48 | 22°55′.93 | 166°23′.32 |
| 49 | 22°57′.41 | 166°36′.00 |
| 50 | 23°03′.75 | 166°45′.00 |
| 51 | 23°05′.48 | 166°47′.45 |
| 52 | 24°12′.70 | 168°22′.86 |
| 53 | 24°12′.88 | 168°22′.78 |
| 54 | 24°16′.05 | 168°27′.28 |
| 55 | 24°19′.15 | 168°31′.66 |
| 56 | 24°22′.27 | 168°35′.95 |
| 57 | 24°25′.71 | 168°39′.94 |
| 58 | 24°29′.51 | 168°43′.55 |
| 59 | 24°33′.67 | 168°46′.63 |
| 60 | 24°38′.06 | 168°49′.29 |
| 61 | 24°42′.68 | 168°51′.46 |
| 62 | 24°47′.45 | 168°53′.12 |
| 63 | 24°52′.34 | 168°54′.28 |
| 64 | 24°57′.32 | 168°54′.82 |
| 65 | 25°02′.32 | 168°54′.95 |
| 66 | 25°07′.30 | 168°54′.43 |
| 67 | 25°12′.19 | 168°53′.32 |
| 68 | 25°16′.99 | 168°51′.76 |
| 69 | 25°21′.57 | 168°49′.60 |
| 70 | 25°25′.94 | 168°46′.93 |
| 71 | 25°30′.09 | 168°43′.86 |
| 72 | 25°33′.89 | 168°40′.42 |
| 73 | 25°37′.37 | 168°36′.52 |
| 74 | 25°40′.49 | 168°32′.24 |
| 75 | 25°43′.24 | 168°27′.68 |
| 76 | 25°45′.57 | 168°22′.82 |
| 77 | 25°47′.43 | 168°17′.76 |
| 78 | 25°48′.79 | 168°12′.47 |
| 79 | 25°49′.72 | 168°07′.09 |
| 80 | 25°50′.11 | 168°01′.62 |
| 81 | 25°50′.18 | 168°00′.09 |

TABLE C–4—NIHOA ISLAND

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 23°52′.82 | 161°44′.54 |
| 2 | 23°52′.10 | 161°41′.20 |
| 3 | 23°51′.18 | 161°37′.92 |
| 4 | 23°50′.08 | 161°34′.71 |
| 5 | 23°48′.79 | 161°31′.58 |
| 6 | 23°47′.33 | 161°28′.55 |
| 7 | 23°45′.69 | 161°25′.62 |
| 8 | 23°43′.88 | 161°22′.81 |
| 9 | 23°41′.92 | 161°20′.13 |
| 10 | 23°39′.80 | 161°17′.60 |
| 11 | 23°37′.54 | 161°15′.21 |
| 12 | 23°35′.14 | 161°12′.99 |
| 13 | 23°32′.62 | 161°10′.93 |
| 14 | 23°29′.99 | 161°09′.05 |
| 15 | 23°27′.25 | 161°07′.35 |
| 16 | 23°24′.42 | 161°05′.85 |
| 17 | 23°21′.51 | 161°04′.54 |
| 18 | 23°18′.52 | 161°03′.43 |
| 19 | 23°15′.48 | 161°02′.53 |
| 20 | 23°12′.39 | 161°01′.84 |
| 21 | 23°09′.27 | 161°01′.35 |
| 22 | 23°06′.13 | 161°01′.09 |
| 23 | 23°02′.97 | 161°01′.03 |
| 24 | 22°59′.82 | 161°01′.19 |
| 25 | 22°56′.69 | 161°01′.57 |
| 26 | 22°53′.58 | 161°02′.15 |
| 27 | 22°50′.51 | 161°02′.95 |
| 28 | 22°47′.50 | 161°03′.95 |
| 29 | 22°44′.55 | 161°05′.15 |
| 30 | 22°41′.67 | 161°06′.54 |
| 31 | 22°38′.88 | 161°08′.13 |
| 32 | 22°36′.19 | 161°09′.90 |
| 33 | 22°33′.61 | 161°11′.85 |

TABLE C–4—NIHOA ISLAND—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 34 | 22°31′.14 | 161°13′.97 |
| 35 | 22°28′.81 | 161°16′.25 |
| 36 | 22°26′.61 | 161°18′.69 |
| 37 | 22°24′.56 | 161°21′.26 |
| 38 | 22°22′.66 | 161°23′.97 |
| 39 | 22°20′.92 | 161°26′.80 |
| 40 | 22°19′.35 | 161°29′.74 |
| 41 | 22°17′.95 | 161°32′.78 |
| 42 | 22°16′.73 | 161°35′.90 |
| 43 | 22°15′.70 | 161°39′.10 |
| 44 | 22°14′.85 | 161°42′.37 |
| 45 | 22°14′.20 | 161°45′.68 |
| 46 | 22°13′.73 | 161°49′.03 |
| 47 | 22°13′.47 | 161°52′.41 |
| 48 | 22°13′.40 | 161°55′.80 |
| 49 | 22°13′.53 | 161°59′.18 |
| 50 | 22°13′.85 | 162°02′.55 |
| 51 | 22°14′.31 | 162°05′.45 |
| 52 | 22°14′.37 | 162°05′.89 |
| 53 | 22°14′.59 | 162°06′.88 |
| 54 | 22°15′.87 | 162°12′.18 |
| 55 | 22°17′.70 | 162°17′.31 |
| 56 | 22°19′.97 | 162°22′.20 |
| 57 | 22°22′.73 | 162°26′.84 |
| 58 | 22°25′.88 | 162°31′.15 |
| 59 | 22°29′.41 | 162°35′.09 |
| 60 | 22°33′.28 | 162°38′.61 |
| 61 | 22°37′.47 | 162°41′.72 |
| 62 | 22°41′.93 | 162°44′.34 |
| 63 | 22°46′.63 | 162°46′.47 |
| 64 | 22°51′.48 | 162°48′.05 |
| 65 | 22°56′.46 | 162°49′.09 |
| 66 | 23°01′.50 | 162°49′.58 |
| 67 | 23°06′.58 | 162°49′.49 |
| 68 | 23°11′.61 | 162°48′.89 |
| 69 | 23°16′.57 | 162°47′.70 |
| 70 | 23°21′.36 | 162°45′.98 |
| 71 | 23°26′.02 | 162°43′.75 |
| 72 | 23°30′.40 | 162°41′.01 |
| 73 | 23°34′.51 | 162°37′.83 |
| 74 | 23°38′.26 | 162°34′.18 |
| 75 | 23°41′.69 | 162°30′.18 |
| 76 | 23°44′.72 | 162°25′.79 |
| 77 | 23°47′.36 | 162°21′.11 |
| 78 | 23°49′.55 | 162°16′.16 |
| 79 | 23°51′.24 | 162°10′.99 |
| 80 | 23°52′.44 | 162°05′.63 |
| 81 | 23°53′.14 | 162°00′.25 |
| 82 | 23°53′.36 | 161°54′.75 |
| 83 | 23°53′.09 | 161°49′.28 |
| 84 | 23°52′.82 | 161°47′.09 |
| 85 | 23°52′.39 | 161°44′.67 |

■ 5. Add Appendix D to Part 404 to read as follows:

## Appendix D to Part 404—Boundary Coordinates for Papahānaumokuākea Marine National Monument Ship Reporting Area

## Appendix D—Geographical Coordinates

*Ship Reporting Area*

*Papahānaumokuākea Marine National Monument*

Reference chart: United States 540, 2008 edition; 19016, 2008 edition; 19019, 2008 edition; 19022, 2008 edition.

These charts are based on World Geodetic System 1984 Datum (WGS–84) and astronomic datum.

TABLE D–1—OUTER BOUNDARY

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 29°25′.47 | 178°16′.97 |
| 2 | 28°43′.73 | 175°13′.84 |
| 3 | 27°00′.77 | 173°25′.78 |
| 4 | 26°44′.91 | 171°28′.07 |
| 5 | 26°24′.23 | 170°20′.59 |
| 6 | 25°56′.43 | 167°32′.10 |
| 7 | 24°50′.20 | 165°58′.69 |
| 8 | 24°05′.52 | 161°56′.86 |
| 9 | 24°05′.29 | 161°56′.62 |
| 10 | 24°04′.37 | 161°51′.53 |
| 11 | 24°03′.44 | 161°46′.45 |
| 12 | 24°02′.41 | 161°41′.39 |
| 13 | 24°01′.31 | 161°36′.35 |
| 14 | 23°59′.68 | 161°31′.55 |
| 15 | 23°57′.85 | 161°26′.85 |
| 16 | 23°55′.54 | 161°22′.31 |
| 17 | 23°52′.96 | 161°17′.92 |
| 18 | 23°50′.12 | 161°13′.72 |
| 19 | 23°46′.94 | 161°10′.08 |
| 20 | 23°43′.49 | 161°06′.47 |
| 21 | 23°39′.71 | 161°03′.09 |
| 22 | 23°35′.72 | 161°00′.14 |
| 23 | 23°31′.59 | 160°57′.46 |
| 24 | 23°27′.32 | 160°55′.23 |
| 25 | 23°22′.74 | 160°53′.71 |
| 26 | 23°18′.29 | 160°52′.17 |
| 27 | 23°13′.57 | 160°51′.04 |
| 28 | 23°08′.68 | 160°50′.46 |
| 29 | 23°03′.70 | 160°50′.17 |
| 30 | 22°58′.67 | 160°50′.35 |
| 31 | 22°53′.84 | 160°51′.04 |
| 32 | 22°49′.11 | 160°52′.20 |
| 33 | 22°44′.46 | 160°53′.56 |
| 34 | 22°40′.03 | 160°55′.52 |
| 35 | 22°35′.73 | 160°57′.68 |
| 36 | 22°31′.54 | 161°00′.25 |
| 37 | 22°27′.57 | 161°03′.23 |
| 38 | 22°23′.76 | 161°06′.64 |
| 39 | 22°20′.24 | 161°10′.23 |
| 40 | 22°17′.02 | 161°14′.13 |
| 41 | 22°14′.04 | 161°18′.34 |
| 42 | 22°11′.35 | 161°22′.80 |
| 43 | 22°09′.19 | 161°27′.45 |
| 44 | 22°07′.29 | 161°32′.11 |
| 45 | 22°05′.87 | 161°36′.94 |
| 46 | 22°04′.62 | 161°41′.89 |
| 47 | 22°03′.94 | 161°47′.09 |
| 48 | 22°03′.41 | 161°52′.36 |
| 49 | 22°03′.41 | 161°57′.51 |
| 50 | 22°03′.82 | 162°02′.83 |
| 51 | 22°04′.49 | 162°08′.04 |
| 52 | 22°05′.43 | 162°13′.12 |
| 53 | 22°05′.97 | 162°16′.41 |
| 54 | 22°06′.29 | 162°16′.85 |
| 55 | 22°34′.57 | 164°47′.27 |
| 56 | 22°47′.60 | 166°38′.23 |
| 57 | 24°03′.82 | 168°27′.91 |
| 58 | 24°25′.76 | 170°45′.39 |
| 59 | 24°46′.54 | 171°53′.03 |
| 60 | 25°07′.60 | 174°28′.71 |
| 61 | 27°05′.82 | 176°35′.51 |
| 62 | 27°27′.32 | 178°38′.66 |
| 63 | 27°28′.93 | 178°43′.56 |
| 64 | 27°30′.64 | 178°48′.40 |
| 65 | 27°32′.74 | 178°52′.96 |
| 66 | 27°35′.06 | 178°57′.30 |
| 67 | 27°37′.89 | 179°01′.49 |

TABLE D–1—OUTER BOUNDARY—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 68 | 27°40′.90 | 179°05′.60 |
| 69 | 27°44′.17 | 179°09′.41 |
| 70 | 27°47′.74 | 179°12′.85 |
| 71 | 27°51′.45 | 179°16′.00 |
| 72 | 27°55′.32 | 179°18′.82 |
| 73 | 27°59′.33 | 179°21′.13 |
| 74 | 28°03′.49 | 179°23′.15 |
| 75 | 28°07′.82 | 179°24′.76 |
| 76 | 28°12′.31 | 179°26′.18 |
| 77 | 28°16′.95 | 179°27′.05 |
| 78 | 28°21′.61 | 179°27′.63 |
| 79 | 28°26′.18 | 179°27′.77 |
| 80 | 28°30′.87 | 179°27′.48 |
| 81 | 28°35′.61 | 179°26′.95 |
| 82 | 28°40′.09 | 179°25′.75 |
| 83 | 28°44′.46 | 179°24′.31 |
| 84 | 28°48′.70 | 179°22′.50 |
| 85 | 28°52′.81 | 179°20′.43 |
| 86 | 28°56′.71 | 179°17′.77 |
| 87 | 29°00′.58 | 179°14′.92 |
| 88 | 29°04′.18 | 179°11′.69 |
| 89 | 29°07′.62 | 179°08′.20 |
| 90 | 29°10′.86 | 179°04′.37 |
| 91 | 29°13′.76 | 179°00′.21 |
| 92 | 29°16′.24 | 178°55′.78 |
| 93 | 29°18′.51 | 178°51′.26 |
| 94 | 29°20′.45 | 178°46′.50 |
| 95 | 29°22′.26 | 178°41′.67 |
| 96 | 29°23′.52 | 178°36′.64 |
| 97 | 29°24′.53 | 178°31′.54 |
| 98 | 29°25′.16 | 178°26′.31 |
| 99 | 29°25′.42 | 178°20′.92 |
| 100 | 29°25′.29 | 178°16′.70 |

TABLE D–2—INNER BOUNDARY AROUND KURE ATOLL, MIDWAY ATOLL, AND PEARL AND HERMES ATOLL

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 27°14′.76 | 176°29′.87 |
| 2 | 27°24′.95 | 177°33′.31 |
| 3 | 27°35′.87 | 178°29′.90 |
| 4 | 27°36′.64 | 178°33′.93 |
| 5 | 27°37′.53 | 178°37′.32 |
| 6 | 27°38′.60 | 178°40′.65 |
| 7 | 27°39′.85 | 178°43′.90 |
| 8 | 27°41′.28 | 178°47′.05 |
| 9 | 27°42′.89 | 178°50′.10 |
| 10 | 27°44′.66 | 178°53′.03 |
| 11 | 27°46′.59 | 178°55′.83 |
| 12 | 27°48′.67 | 178°58′.49 |
| 13 | 27°50′.89 | 179°01′.00 |
| 14 | 27°53′.22 | 179°03′.39 |
| 15 | 27°55′.69 | 179°05′.61 |
| 16 | 27°58′.29 | 179°07′.61 |
| 17 | 28°01′.01 | 179°09′.47 |
| 18 | 28°03′.81 | 179°11′.10 |
| 19 | 28°06′.71 | 179°12′.53 |
| 20 | 28°09′.67 | 179°13′.75 |
| 21 | 28°12′.70 | 179°14′.75 |
| 22 | 28°15′.78 | 179°15′.54 |
| 23 | 28°18′.91 | 179°16′.11 |
| 24 | 28°22′.04 | 179°16′.45 |
| 25 | 28°24′.72 | 179°16′.56 |
| 26 | 28°25′.20 | 179°16′.57 |

TABLE D–2—INNER BOUNDARY AROUND KURE ATOLL, MIDWAY ATOLL, AND PEARL AND HERMES ATOLL—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 27 | 28°25′.81 | 179°16′.56 |
| 28 | 28°28′.35 | 179°16′.44 |
| 29 | 28°31′.49 | 179°16′.10 |
| 30 | 28°34′.61 | 179°15′.54 |
| 31 | 28°37′.69 | 179°14′.75 |
| 32 | 28°40′.71 | 179°13′.74 |
| 33 | 28°43′.68 | 179°12′.54 |
| 34 | 28°46′.58 | 179°11′.13 |
| 35 | 28°49′.39 | 179°09′.52 |
| 36 | 28°52′.11 | 179°07′.70 |
| 37 | 28°54′.72 | 179°05′.70 |
| 38 | 28°57′.21 | 179°03′.51 |
| 39 | 28°59′.58 | 179°01′.15 |
| 40 | 29°01′.81 | 178°58′.62 |
| 41 | 29°03′.90 | 178°55′.93 |
| 42 | 29°05′.83 | 178°53′.10 |
| 43 | 29°07′.60 | 178°50′.13 |
| 44 | 29°09′.21 | 178°47′.04 |
| 45 | 29°10′.64 | 178°43′.84 |
| 46 | 29°11′.89 | 178°40′.54 |
| 47 | 29°12′.95 | 178°37′.16 |
| 48 | 29°13′.82 | 178°33′.71 |
| 49 | 29°14′.50 | 178°30′.21 |
| 50 | 29°14′.99 | 178°26′.66 |
| 51 | 29°15′.28 | 178°23′.08 |
| 52 | 29°15′.36 | 178°19′.49 |
| 53 | 29°15′.25 | 178°15′.90 |
| 54 | 29°14′.94 | 178°12′.32 |
| 55 | 29°14′.43 | 178°08′.78 |
| 56 | 29°03′.47 | 177°12′.07 |
| 57 | 29°02′.55 | 177°07′.29 |
| 58 | 28°38′.96 | 175°35′.47 |
| 59 | 28°38′.67 | 175°34′.35 |
| 60 | 28°34′.91 | 175°19′.74 |
| 61 | 28°26′.24 | 175°10′.65 |
| 62 | 28°24′.61 | 175°08′.95 |
| 63 | 28°24′.53 | 175°09′.04 |
| 64 | 28°20′.09 | 175°04′.91 |
| 65 | 28°16′.05 | 175°01′.92 |
| 66 | 28°11′.78 | 174°59′.33 |
| 67 | 28°07′.29 | 174°57′.23 |
| 68 | 28°02′.63 | 174°55′.68 |
| 69 | 27°57′.84 | 174°54′.62 |
| 70 | 27°53′.01 | 174°54′.05 |
| 71 | 27°48′.12 | 174°54′.05 |
| 72 | 27°43′.28 | 174°54′.62 |
| 73 | 27°38′.48 | 174°55′.71 |
| 74 | 27°33′.81 | 174°57′.32 |
| 75 | 27°29′.30 | 174°59′.43 |
| 76 | 27°25′.00 | 175°02′.03 |
| 77 | 27°20′.93 | 175°05′.07 |
| 78 | 27°17′.18 | 175°08′.59 |
| 79 | 27°13′.73 | 175°12′.47 |
| 80 | 27°10′.59 | 175°16′.67 |
| 81 | 27°07′.88 | 175°21′.25 |
| 82 | 27°05′.57 | 175°26′.09 |
| 83 | 27°03′.66 | 175°31′.15 |
| 84 | 27°02′.22 | 175°36′.40 |
| 85 | 27°01′.29 | 175°41′.78 |
| 86 | 27°00′.73 | 175°47′.22 |
| 87 | 27°00′.68 | 175°52′.74 |
| 88 | 27°01′.09 | 175°58′.16 |
| 89 | 27°01′.99 | 176°03′.53 |
| 90 | 27°03′.34 | 176°08′.81 |
| 91 | 27°05′.12 | 176°13′.91 |
| 92 | 27°07′.37 | 176°18′.79 |
| 93 | 27°09′.98 | 176°23′.40 |
| 94 | 27°13′.02 | 176°27′.74 |
| 95 | 27°13′.77 | 176°28′.70 |

TABLE D–3—INNER BOUNDARY AROUND LISIANSKI ISLAND, LAYSAN ISLAND, MARO REEF, AND RAITA BANK

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 26°50′.89 | 173°30′.79 |
| 2 | 26°36′.00 | 171°37′.70 |
| 3 | 26°35′.49 | 171°33′.84 |
| 4 | 26°35′.10 | 171°30′.84 |
| 5 | 26°34′.07 | 171°27′.50 |
| 6 | 26°33′.35 | 171°25′.16 |
| 7 | 26°14′.26 | 170°23′.04 |
| 8 | 26°08′.69 | 169°48′.96 |
| 9 | 26°08′.36 | 169°49′.03 |
| 10 | 26°07′.62 | 169°45′.83 |
| 11 | 26°06′.03 | 169°40′.57 |
| 12 | 26°03′.97 | 169°35′.64 |
| 13 | 26°01′.51 | 169°30′.91 |
| 14 | 25°58′.65 | 169°26′.45 |
| 15 | 25°55′.32 | 169°22′.34 |
| 16 | 25°51′.67 | 169°18′.60 |
| 17 | 25°47′.78 | 169°15′.19 |
| 18 | 25°43′.54 | 169°12′.34 |
| 19 | 25°39′.05 | 169°09′.93 |
| 20 | 25°34′.37 | 169°08′.08 |
| 21 | 25°29′.54 | 169°06′.76 |
| 22 | 25°24′.61 | 169°05′.93 |
| 23 | 25°19′.63 | 169°05′.64 |
| 24 | 25°14′.65 | 169°05′.93 |
| 25 | 25°09′.69 | 169°06′.66 |
| 26 | 25°04′.85 | 169°08′.02 |
| 27 | 25°00′.17 | 169°09′.96 |
| 28 | 24°55′.66 | 169°12′.35 |
| 29 | 24°51′.35 | 169°15′.14 |
| 30 | 24°47′.37 | 169°18′.48 |
| 31 | 24°43′.69 | 169°22′.22 |
| 32 | 24°40′.34 | 169°26′.31 |
| 33 | 24°37′.42 | 169°30′.78 |
| 34 | 24°35′.00 | 169°35′.64 |
| 35 | 24°33′.02 | 169°40′.66 |
| 36 | 24°31′.34 | 169°45′.88 |
| 37 | 24°30′.31 | 169°51′.08 |
| 38 | 24°29′.68 | 169°56′.53 |
| 39 | 24°29′.56 | 170°01′.81 |
| 40 | 24°29′.61 | 170°04′.57 |
| 41 | 24°35′.77 | 170°44′.39 |
| 42 | 24°36′.29 | 170°47′.58 |
| 43 | 24°37′.18 | 170°50′.37 |
| 44 | 24°37′.76 | 170°52′.17 |
| 45 | 24°56′.23 | 171°50′.19 |
| 46 | 25°16′.61 | 174°24′.84 |
| 47 | 25°29′.56 | 174°38′.45 |
| 48 | 25°33′.28 | 174°42′.03 |
| 49 | 25°37′.33 | 174°45′.20 |
| 50 | 25°41′.68 | 174°47′.84 |
| 51 | 25°46′.23 | 174°50′.05 |
| 52 | 25°50′.93 | 174°51′.77 |
| 53 | 25°55′.80 | 174°52′.91 |
| 54 | 26°00′.71 | 174°53′.47 |
| 55 | 26°05′.67 | 174°53′.61 |
| 56 | 26°10′.59 | 174°53′.07 |
| 57 | 26°15′.46 | 174°52′.08 |
| 58 | 26°20′.20 | 174°50′.57 |
| 59 | 26°24′.75 | 174°48′.44 |
| 60 | 26°29′.15 | 174°45′.94 |
| 61 | 26°33′.26 | 174°42′.96 |
| 62 | 26°37′.11 | 174°39′.49 |
| 63 | 26°40′.60 | 174°35′.63 |
| 64 | 26°43′.75 | 174°31′.43 |
| 65 | 26°46′.49 | 174°26′.87 |
| 66 | 26°48′.90 | 174°22′.09 |
| 67 | 26°50′.79 | 174°17′.03 |
| 68 | 26°52′.20 | 174°11′.79 |
| 69 | 26°53′.21 | 174°06′.43 |
| 70 | 26°53′.74 | 174°00′.98 |
| 71 | 26°53′.74 | 173°55′.48 |
| 72 | 26°53′.29 | 173°50′.02 |
| 73 | 26°52′.56 | 173°44′.58 |
| 74 | 26°51′.85 | 173°39′.14 |
| 75 | 26°51′.13 | 173°33′.69 |
| 76 | 26°50′.75 | 173°30′.87 |

TABLE D–4—INNER BOUNDARY AROUND GARDNER PINNACLES, FRENCH FRIGATE SHOALS, AND NECKER ISLAND

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 25°49′.64 | 167°52′.66 |
| 2 | 25°49′.70 | 167°52′.65 |
| 3 | 25°48′.99 | 167°48′.35 |
| 4 | 25°47′.09 | 167°36′.72 |
| 5 | 25°39′.84 | 167°26′.48 |
| 6 | 25°35′.10 | 167°19′.79 |
| 7 | 25°10′.43 | 166°45′.00 |
| 8 | 24°40′.91 | 166°03′.36 |
| 9 | 24°35′.64 | 165°34′.99 |
| 10 | 24°23′.78 | 164°31′.12 |
| 11 | 24°23′.59 | 164°31′.14 |
| 12 | 24°23′.31 | 164°29′.74 |
| 13 | 24°21′.85 | 164°24′.52 |
| 14 | 24°20′.10 | 164°19′.39 |
| 15 | 24°17′.75 | 164°14′.56 |
| 16 | 24°14′.99 | 164°09′.97 |
| 17 | 24°11′.86 | 164°05′.69 |
| 18 | 24°08′.30 | 164°01′.80 |
| 19 | 24°04′.48 | 163°58′.23 |
| 20 | 24°00′.27 | 163°55′.22 |
| 21 | 23°55′.85 | 163°52′.59 |
| 22 | 23°51′.17 | 163°50′.56 |
| 23 | 23°46′.33 | 163°48′.98 |
| 24 | 23°41′.37 | 163°47′.99 |
| 25 | 23°36′.34 | 163°47′.56 |
| 26 | 23°31′.27 | 163°47′.60 |
| 27 | 23°26′.27 | 163°48′.28 |
| 28 | 23°21′.34 | 163°49′.50 |
| 29 | 23°16′.53 | 163°51′.14 |
| 30 | 23°11′.96 | 163°53′.47 |
| 31 | 23°07′.54 | 163°56′.15 |
| 32 | 23°03′.46 | 163°59′.38 |
| 33 | 22°59′.65 | 164°03′.01 |
| 34 | 22°56′.27 | 164°07′.10 |
| 35 | 22°53′.22 | 164°11′.49 |
| 36 | 22°50′.60 | 164°16′.18 |

TABLE D–4—INNER BOUNDARY AROUND GARDNER PINNACLES, FRENCH FRIGATE SHOALS, AND NECKER ISLAND—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 37 | 22°48′.48 | 164°21′.16 |
| 38 | 22°46′.73 | 164°26′.28 |
| 39 | 22°45′.49 | 164°31′.60 |
| 40 | 22°44′.83 | 164°37′.03 |
| 41 | 22°44′.65 | 164°42′.51 |
| 42 | 22°44′.92 | 164°47′.99 |
| 43 | 22°45′.11 | 164°49′.52 |
| 44 | 22°45′.39 | 164°51′.48 |
| 45 | 22°45′.17 | 164°51′.53 |
| 46 | 22°50′.26 | 165°34′.99 |
| 47 | 22°55′.50 | 166°19′.63 |
| 48 | 22°55′.93 | 166°23′.32 |
| 49 | 22°57′.41 | 166°36′.00 |
| 50 | 23°03′.75 | 166°45′.00 |
| 51 | 23°05′.48 | 166°47′.45 |
| 52 | 24°12′.70 | 168°22′.86 |
| 53 | 24°12′.88 | 168°22′.78 |
| 54 | 24°16′.05 | 168°27′.28 |
| 55 | 24°19′.15 | 168°31′.66 |
| 56 | 24°22′.27 | 168°35′.95 |
| 57 | 24°25′.71 | 168°39′.94 |
| 58 | 24°29′.51 | 168°43′.55 |
| 59 | 24°33′.67 | 168°46′.63 |
| 60 | 24°38′.06 | 168°49′.29 |
| 61 | 24°42′.68 | 168°51′.46 |
| 62 | 24°47′.45 | 168°53′.12 |
| 63 | 24°52′.34 | 168°54′.28 |
| 64 | 24°57′.32 | 168°54′.82 |
| 65 | 25°02′.32 | 168°54′.95 |
| 66 | 25°07′.30 | 168°54′.43 |
| 67 | 25°12′.19 | 168°53′.32 |
| 68 | 25°16′.99 | 168°51′.76 |
| 69 | 25°21′.57 | 168°49′.60 |
| 70 | 25°25′.94 | 168°46′.93 |
| 71 | 25°30′.09 | 168°43′.86 |
| 72 | 25°33′.89 | 168°40′.42 |
| 73 | 25°37′.37 | 168°36′.52 |
| 74 | 25°40′.49 | 168°32′.24 |
| 75 | 25°43′.24 | 168°27′.68 |
| 76 | 25°45′.57 | 168°22′.82 |
| 77 | 25°47′.43 | 168°17′.76 |
| 78 | 25°48′.79 | 168°12′.47 |
| 79 | 25°49′.72 | 168°07′.09 |
| 80 | 25°50′.11 | 168°01′.62 |
| 81 | 25°50′.18 | 168°00′.09 |

TABLE D–5—INNER BOUNDARY AROUND NIHOA ISLAND

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 1 | 23°52′.82 | 161°44′.54 |
| 2 | 23°52′.10 | 161°41′.20 |
| 3 | 23°51′.18 | 161°37′.92 |
| 4 | 23°50′.08 | 161°34′.71 |
| 5 | 23°48′.79 | 161°31′.58 |
| 6 | 23°47′.33 | 161°28′.55 |
| 7 | 23°45′.69 | 161°25′.62 |
| 8 | 23°43′.88 | 161°22′.81 |
| 9 | 23°41′.92 | 161°20′.13 |
| 10 | 23°39′.80 | 161°17′.60 |
| 11 | 23°37′.54 | 161°15′.21 |
| 12 | 23°35′.14 | 161°12′.99 |
| 13 | 23°32′.62 | 161°10′.93 |
| 14 | 23°29′.99 | 161°09′.05 |
| 15 | 23°27′.25 | 161°07′.35 |
| 16 | 23°24′.42 | 161°05′.85 |
| 17 | 23°21′.51 | 161°04′.54 |
| 18 | 23°18′.52 | 161°03′.43 |
| 19 | 23°15′.48 | 161°02′.53 |
| 20 | 23°12′.39 | 161°01′.84 |
| 21 | 23°09′.27 | 161°01′.35 |
| 22 | 23°06′.13 | 161°01′.09 |
| 23 | 23°02′.97 | 161°01′.03 |
| 24 | 22°59′.82 | 161°01′.19 |
| 25 | 22°56′.69 | 161°01′.57 |
| 26 | 22°53′.58 | 161°02′.15 |
| 27 | 22°50′.51 | 161°02′.95 |
| 28 | 22°47′.50 | 161°03′.95 |
| 29 | 22°44′.55 | 161°05′.15 |
| 30 | 22°41′.67 | 161°06′.54 |
| 31 | 22°38′.88 | 161°08′.13 |
| 32 | 22°36′.19 | 161°09′.90 |
| 33 | 22°33′.61 | 161°11′.85 |
| 34 | 22°31′.14 | 161°13′.97 |
| 35 | 22°28′.81 | 161°16′.25 |
| 36 | 22°26′.61 | 161°18′.69 |
| 37 | 22°24′.56 | 161°21′.26 |
| 38 | 22°22′.66 | 161°23′.97 |
| 39 | 22°20′.92 | 161°26′.80 |
| 40 | 22°19′.35 | 161°29′.74 |
| 41 | 22°17′.95 | 161°32′.78 |
| 42 | 22°16′.73 | 161°35′.90 |
| 43 | 22°15′.70 | 161°39′.10 |
| 44 | 22°14′.85 | 161°42′.37 |
| 45 | 22°14′.20 | 161°45′.68 |
| 46 | 22°13′.73 | 161°49′.03 |
| 47 | 22°13′.47 | 161°52′.41 |
| 48 | 22°13′.40 | 161°55′.80 |
| 49 | 22°13′.53 | 161°59′.18 |
| 50 | 22°13′.85 | 162°02′.55 |
| 51 | 22°14′.31 | 162°05′.45 |
| 52 | 22°14′.37 | 162°05′.89 |
| 53 | 22°14′.59 | 162°06′.88 |
| 54 | 22°15′.87 | 162°12′.18 |
| 55 | 22°17′.70 | 162°17′.31 |
| 56 | 22°19′.97 | 162°22′.20 |

TABLE D–5—INNER BOUNDARY AROUND NIHOA ISLAND—Continued

| Point | Latitude (N) | Longitude (W) |
|---|---|---|
| 57 | 22°22′.73 | 162°26′.84 |
| 58 | 22°25′.88 | 162°31′.15 |
| 59 | 22°29′.41 | 162°35′.09 |
| 60 | 22°33′.28 | 162°38′.61 |
| 61 | 22°37′.47 | 162°41′.72 |
| 62 | 22°41′.93 | 162°44′.34 |
| 63 | 22°46′.63 | 162°46′.47 |
| 64 | 22°51′.48 | 162°48′.05 |
| 65 | 22°56′.46 | 162°49′.09 |
| 66 | 23°01′.50 | 162°49′.58 |
| 67 | 23°06′.58 | 162°49′.49 |
| 68 | 23°11′.61 | 162°48′.89 |
| 69 | 23°16′.57 | 162°47′.70 |
| 70 | 23°21′.36 | 162°45′.98 |
| 71 | 23°26′.02 | 162°43′.75 |
| 72 | 23°30′.40 | 162°41′.01 |
| 73 | 23°34′.51 | 162°37′.83 |
| 74 | 23°38′.26 | 162°34′.18 |
| 75 | 23°41′.69 | 162°30′.18 |
| 76 | 23°44′.72 | 162°25′.79 |
| 77 | 23°47′.36 | 162°21′.11 |
| 78 | 23°49′.55 | 162°16′.16 |
| 79 | 23°51′.24 | 162°10′.99 |
| 80 | 23°52′.44 | 162°05′.63 |
| 81 | 23°53′.14 | 162°00′.25 |
| 82 | 23°53′.36 | 161°54′.75 |
| 83 | 23°53′.09 | 161°49′.28 |
| 84 | 23°52′.82 | 161°47′.09 |
| 85 | 23°52′.39 | 161°44′.67 |

■ 6. Add Appendix E to Part 404 to read as follows:

## Appendix E to Part 404—Content and Syntax for Papahānaumokuākea Ship Reporting System

Immediately upon crossing the reporting area boundary, notification should be sent as a direct e-mail to *nwhi.notifications@noaa.gov* in the prescribed format and data syntax shown. Use of batch message routing services which may delay receipt of a report should not be used. Failure to follow the exact format (*e.g.*, extra information, extraneous characters, or double spacing) may cause the automated computer system to reject your report. **Note**: Report transmission costs via INMARSAT–C will be assumed by NOAA.

### E.1 Entry Notification Format

Immediately upon entering the Reporting Area, vessels required to participate must provide the following information.

TABLE E.1—INFORMATION REQUIRED FOR ENTRY NOTIFICATION

| Telegraphy | Function | Information required | Example field text |
|---|---|---|---|
| | System identifier | CORAL SHIPREP // | CORAL SHIPREP // |
| A | Ship | Vessel name/call sign/flag/IMO number/Federal documentation or State registration number if applicable //. | A/OCEAN VOYAGER/C5FU8/BAHAMAS/IMO 9359165// |
| B | Date, time (UTC), and month of entry. | A 6-digit group giving day of month (first two digits), hours and minutes (last four digits) in coordinated universal time, suffixed by the letter Z (indicating time in UTC), and three letters indicating month //. | B/271107Z DEC// |

TABLE E.1—INFORMATION REQUIRED FOR ENTRY NOTIFICATION—Continued

| Telegraphy | Function | Information required | Example field text |
|---|---|---|---|
| | System identifier | CORAL SHIPREP // | CORAL SHIPREP // |
| C ..... | Position ..... | A 4-digit group giving latitude in degrees and minutes, suffixed with the letter N (indicating north), followed by a single /, and a five-digit group giving longitude in degrees and minutes, suffixed with the letter W (indicating west) // [Report in the World Geodetic System 1984 Datum (WGS–84)]. | C/2728N/17356W// |
| E ..... | True course ..... | 3-digit number indicating true course // ..... | E/180// |
| F ..... | Speed in knots and tenths. | 3-digit group indicating knots decimal tenths // ..... | F/20.5// |
| I ..... | Destination and estimated time of arrival. | Name of port city/country/estimated arrival date and time group expressed as in (B) //. | I/SEATTLE/USA/311230Z DEC// |
| L ..... | Intended route through the reporting area. | Route information should be reported as a direct rhumbline (RL) course through the reporting area and intended speed (expressed as in E and F) or a series of waypoints (WP). Each waypoint entry should be reported as latitude and longitude, expressed as in (C), and intended speed between waypoints (as in F) // (Note: As many "L" lines as needed may be used to describe the vessel's intended route.). | L/RL/215/20.5//<br>-OR-<br>L/WP/2734N/17352W/20.5//<br>L/WP/2641N/17413W/20.5//<br>L/WP/2605N/17530W/20.5// |
| O ..... | Vessel draft in meters. | Maximum present static draft reported in meters decimal centimeters //. | O/11.50// |
| P ..... | Categories of Hazardous Cargoes*. | Classification Code (e.g. IMDG, IBC, IGC, INF) / and all corresponding Categories of Hazardous Cargoes (delimited by commas) // Note: If necessary, use a separate "P" line for each type of Classification Code. | P/IMDG/1.4G,2.1,2.2,2.3,3,4.1,6.1,8,9// |
| Q ..... | Defects or deficiencies**. | Brief details of defects, damage, deficiencies or limitations that restrict maneuverability or impair normal navigation // (If none, enter the number zero.). | Q/Include details as required// |
| R ..... | Pollution incident or goods lost overboard**. | Description of pollution incident or goods lost overboard within the Monument, the Reporting Area, or the U.S. Exclusive Economic Zone//(If none, enter the number zero.). | R/0// |
| T ..... | Contact information of ship's agent or owner. | Name/address/and phone number of ship's agent or owner // | T/JOHN DOE/GENERIC SHIPPING COMPANY INC, 6101 ACME ROAD, ROOM 123, CITY, STATE, COUNTRY 12345/123–123–1234// |
| U ..... | Ship size (length overall and gross tonnage) and type. | Length overall reported in meters decimal centimeters/number of gross tons/type of ship (e.g. bulk carrier, chemical tanker, oil tanker, gas tanker, container, general cargo, fishing vessel, research, passenger, OBO, RORO) //. | U/294.14/54592/CONTAINER SHIP// |
| W ..... | Persons ..... | Total number of persons on board // ..... | W/15// |

TABLE E.1 NOTES

*Categories of hazardous cargoes means goods classified in the International Maritime Dangerous Goods (IMDG) Code; substances classified in chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code) and chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code); oils as defined in MARPOL Annex I; noxious liquid substances as defined in MARPOL Annex II; harmful substances as defined in MARPOL Annex III; and radioactive materials specified in the Code for the Safe Carriage of the Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes in Flasks on Board Ships (INF Code).

**In accordance with the provisions of the MARPOL Convention, ships must report information relating to defects, damage, deficiencies or other limitations as well as, if necessary, information relating to pollution incidents or loss of cargo. Safety related reports must be provided to CORAL SHIPREP without delay should a ship suffer damage, failure or breakdown affecting the safety of the ship (Item Q), or if a ship makes a marked deviation from a route, course or speed previously advised (Item L). Pollution or cargo lost overboard must be reported without delay (Item R).

### E.2 Prior Notification of Entry Format

Vessels of the United States less than 300 gross tonnage that are not equipped with onboard e-mail capability must provide the following notification of entry at least 72 hrs, but no longer than 1 month, prior to entry date, utilizing the data syntax described above. Notification may be made via the following communication methods, listed in order of preference: E-mail [*nwhi.notifications@noaa.gov*]; fax [1–808–397–2662]; telephone [1–866–478–NWHI (6944), 1–808–395–NWHI (6944)].

TABLE E.2—INFORMATION REQUIRED FOR PRIOR NOTIFICATION

| | |
|---|---|
| System identifier. | PRIOR NOTICE //. |
| Items ..... | A, B, C (as applicable), I, L, O, P (as applicable), Q, T, U, W. |

### E.3 Exit Notification Format

Immediately upon leaving the Reporting Area, vessels required to participate must provide the following information. Vessels of the United States less than 300 gross tonnage that are not equipped with onboard e-mail capability must provide the following Exit Notification information within 12 hrs of leaving the Reporting Area. Notification may be made via the following communication methods, listed in order of preference: E-mail [*nwhi.notifications@noaa.gov*]; fax [1–808–397–2662]; telephone [1–866–478–NWHI (6944), 1–808–395–NWHI (6944)].

TABLE E.3—INFORMATION REQUIRED FOR EXIT NOTIFICATION

| Telegraphy | Function | Information required | Example field text |
|---|---|---|---|
| | System identifier | CORAL SHIPREP // | CORAL SHIPREP// |
| A | Ship | Vessel name / call sign / flag / IMO number / Federal documentation or State registration number if applicable //. | A/OCEAN VOYAGER/C5FU8/BAHAMAS/IMO9359165// |
| B | Date, time (UTC), and month of exit. | A 6-digit group giving day of month (first two digits), hours and minutes (last four digits), suffixed by the letter Z indicating time in UTC, and three letters indicating month//. | B/271657Z DEC// |
| C | Position | A 4-digit group giving latitude in degrees and minutes, suffixed with the letter N (indicating north), followed by a single //, and a five digit group giving longitude in degrees and minutes, suffixed with the letter W (indicating west) // [Report in the World Geodetic System 1984 Datum (WGS–84)]. | C/2605N/17530W// |
| R | Pollution incident or goods lost overboard. | Description of pollution incident or goods lost overboard within the Monument, the Reporting Area, or the U.S. Exclusive Economic Zone // (If none, enter the number zero). | R/0// |

**E.4 Example Entry Report**

CORAL SHIPREP//
A/SEA ROVER/WFSU/USA/IMO 8674208/DOC 602011//
B/010915Z JUN//
C/2636N/17600W//
E/050//
F/20.0//
I/LOS ANGELES/USA/081215Z JUN//
L/RL/050/20.0//
O/10.90//
P/IMDG/3,4.1,6.1,8,9//
Q/0//
R/0//
T/JOHN DOE/CONTAINER SHIPPERS INC, 500 PORT ROAD, ROOM 123, LOS ANGELES, CA, USA 90050/213–123–1234//
U/199.90/27227/CONTAINER SHIP//
W/15//

**E.5 Example Exit Report**

CORAL SHIPREP//
A/SEA ROVER/WFSU/USA/IMO 8674208/DOC 602011//
B/011515Z JUN//
C/2747N/17416W//
R/0//

[FR Doc. E8–28245 Filed 12–2–08; 8:45 am]
BILLING CODE 3510–22–P

# Proposed Rules

Federal Register
Vol. 73, No. 233
Wednesday, December 3, 2008

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

**DEPARTMENT OF DEFENSE**

**OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR Part 9901**

**RIN 3206–AL75**

## National Security Personnel System

**AGENCY:** Department of Defense; Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Defense (DoD) and the Office of Personnel Management (OPM) are issuing a proposed regulation adding Subpart E, Staffing and Employment, to the National Security Personnel System (NSPS) regulation published in the **Federal Register** on September 26, 2008. NSPS is a human resources management system for DoD, originally authorized by the National Defense Authorization Act for Fiscal Year 2004, amended by the National Defense Authorization Act for Fiscal Year 2008, and the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. The proposed regulation governs staffing and employment under NSPS.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** You may submit comments identified by docket number NSPS–OPM–2008–0139 and/or Regulatory Information Number (RIN) 3206–AL75. Please arrange and identify your comments on the regulatory text by section number; if your comments relate to the supplementary information, please refer to the heading and page number. There are two methods for submitting comments. Please submit only one set of comments via one of the methods described.

- *Preferred Method for Comments:* The preferred method for submitting comments is through the Federal Rulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Alternative Method for Comments:* If unable to access the Federal Rulemaking Portal, comments may be mailed to the following address: DOD/OPM/NSPS Public Comments, PO Box 14474, Washington, DC 20044.

*Instructions:* All submissions must include the agency name and docket number or RIN for this rulemaking. Mailed comments must be in paper form. No mailed comments in electronic form (CDs, floppy disk, or other media) will be accepted. The Federal Rulemaking Portal, *http://www.regulations.gov*, will contain any public comments as received, without change, unless the comment contains security-sensitive material, confidential business information, or other information for which public disclosure is restricted by statute. If such material is received, we will provide a reference to that material in the version of the comment that is placed in the docket. The docket system is an ''anonymous access'' system, which means that DoD and OPM will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment. Unless a comment is submitted anonymously, the names of all commenters will be public information.

Please ensure your comments are submitted within the specified open comment period. Comments received after the close of the comment period will be marked ''late,'' and DoD and OPM are not required to consider them in formulating a final decision.

Before acting on this proposal, DoD and OPM will consider all comments we receive on or before the closing date for comments. Comments filed late will be considered only if it is possible to do so without incurring expense or delay. Changes to this proposal may be made in light of the comments we receive.

**FOR FURTHER INFORMATION CONTACT:** For DoD, Bradley B. Bunn, (703) 696–5604; for OPM, Charles D. Grimes III, (202) 606–8079

**SUPPLEMENTARY INFORMATION:** The Department of Defense (DoD or ''the Department'') and the Office of Personnel Management (OPM) are proposing to add staffing and employment provisions to the regulation published in the **Federal Register** on September 26, 2008 (Volume 73, Number 188) [Rules and Regulations] [Pages 56344–56420] pertaining to the National Security Personnel System (NSPS or ''the System''), a human resources (HR) management system for DoD under 5 U.S.C. 9902, as enacted by section 1101 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136, November 24, 2003), amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181, January 28, 2008), and by section 1106 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417, October 14, 2008). The following information is intended to provide interested parties with relevant background material about, and a description of the staffing and employment subpart of the regulation.

### Significant Changes to the Original Law

The original NSPS statute was enacted on November 24, 2003, and provided the Secretary of Defense, in regulations jointly prescribed with the Director of OPM, the authority to establish a flexible and contemporary civilian personnel system called the National Security Personnel System. NSPS provided DoD with authority to deviate from Governmentwide regulations in the areas of labor relations, adverse actions and appeals, reduction in force, classification, compensation, staffing, and performance management. This new civilian personnel system was intended to cover most of the approximately 700,000 DoD civilian employees.

The original statute provided authority to the Secretary of Defense, notwithstanding 5 U.S.C. chapters 31, 33 and 35, to establish qualifications requirements for, recruit for and make appointments to NSPS positions; to establish methods of assigning, reassigning, detailing, transferring, or promoting employees; and to establish workforce shaping procedures that reduce disruption and place greater emphasis on performance as a factor in retention. These authorities enabled flexible processes to assign new or different work and to streamline hiring processes.

Public Law 110–181 amended title 5, United States Code, retaining authority for performance-based pay and classification and compensation flexibilities, but substantially modifying

other NSPS authorities. The law, among other things—

- Brings NSPS under Governmentwide rules for labor-management relations, disciplinary actions and employee appeals of adverse actions, and workforce shaping (reduction in force, furlough, and transfer of function).
- Requires that this rule be considered a major rule for the purposes of section 801 of title 5, United States Code, with advance Congressional notification for OPM/DoD jointly-prescribed NSPS regulations.
- Gives these rules the status of Governmentwide rules for the purpose of collective bargaining under chapter 71 when these rules are uniformly applicable to all organizational or functional units included in NSPS.
- Revised the staffing and employment authorities authorized by NDAA 2004.

On October 14, 2008, section 1106 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 was enacted, which addressed staffing and employment authorities. Pursuant to this law, the following NSPS staffing and employment authorities have been retained under NSPS: Authority for the Secretary of Defense to waive 5 U.S.C. chapter 33 for the purpose of regulating methods of establishing qualification requirements for, recruitment for, and appointments to NSPS positions, as well as the methods of assigning, reassigning, detailing, transferring, or promoting employees. In so doing, the Secretary must comply with the provisions of 5 U.S.C. 2302(b)(11), regarding veterans' preference requirements and 5 U.S.C. chapter 71.

**Staffing and Employment—5 CFR 9901 Subpart E**

This subpart provides DoD with authority, pursuant to 5 U.S.C. 9902(i), to modify and replace certain provisions of title 5 pertaining to methods for recruitment for, and appointments to, NSPS positions and the methods for the assignment, reassignment, detail, transfer, and promotion of employees into and within NSPS. This subpart has been revised to (1) Reflect changes in the NSPS as a result of the amendments to 5 U.S.C. 9902 by the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) as further amended by the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009; (2) provide specificity to the regulation based on existing implementation; (3) reflect changes in subparts A through D of the regulation as published on September 26, 2008, and (4) make technical changes and improvements.

In order to meet its critical mission requirements worldwide and respond to a dynamic national security environment, the Department needs greater flexibility to attract, recruit, assign and retain a high quality workforce. Although the current General Schedule personnel management system is based on important core principles, the General Schedule does not embody the flexibility needed by DoD to meet mission requirements. While preserving merit principles and veterans' preference requirements, subpart E of the proposed regulations helps to streamline hiring and placement processes and provides DoD with an expanded set of flexible hiring tools to respond effectively to continuing mission changes and priorities. Under the proposed regulations, DoD managers will have greater flexibility in acquiring, advancing, and assigning a workforce tailored to the Department's needs. The new staffing flexibilities, in conjunction with the NSPS compensation and classification flexibilities, provide DoD managers with a greater range of options to adapt their recruitment and hiring strategies to meet changing mission and organizational needs, including consideration of the nature and duration of work. The proposed regulations also address the need to compete for the best talent available by providing the Department with the ability to streamline and accelerate the recruitment process.

*Definitions*

The proposed regulations adopt, for staffing and employment purposes, the definitions for the terms ''promotion'' and ''reassignment'' defined in regulations published in the **Federal Register** on September 26, 2008 (Volume 73, Number 188) [Rules and Regulations] [pages 56391—56392], to fit the NSPS pay banding environment. In addition, the regulations adopt the term ''reduction in band'' as defined in the above referenced regulations. This term replaces ''change to lower grade'' which does not reflect the current NSPS classification architecture. Under pay banding, the GS grade structure is collapsed into fewer, broader salary ranges. Employees progress through those ranges based primarily on performance and job duties. Under NSPS, employees can also receive increased pay as a result of a reassignment within or to a comparable pay band, reduction to a lower pay band, or promotion to a higher pay band, as provided in subpart C of the regulations published on September 26, 2008.

*Appointing Authorities*

*Governmentwide Appointing Authorities.* Under the proposed regulations, the Department will continue to use excepted and competitive appointing authorities under chapters 31 and 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes. Individuals hired under those authorities will be designated as career, career conditional, term, temporary, or time-limited employees, as appropriate.

*Additional NSPS Appointing Authorities.* Under the proposed regulations, the Secretary and the Director may additionally establish new excepted and competitive appointing authorities for positions covered by NSPS. For any appointing authority that may result in entry into the competitive service, including excepted service appointments that may lead to a subsequent noncompetitive appointment to the competitive service, DoD and OPM will jointly publish advance notice, and request comment, in the **Federal Register** whenever it establishes such an authority. In addition, DoD and OPM may establish excepted appointing authorities for positions that are not in the competitive service without specific notice in the **Federal Register**. The proposed authority to establish new appointing authorities provides flexibility to tailor appointments to the many unique DoD missions and employment requirements. The proposed regulations require DoD to publish annually a list of appointing authorities created under this authority which remain in effect. DoD will prescribe appropriate implementing issuances to administer a new authority.

*Direct Hire Authority.* The proposed regulations authorize DoD to exercise direct hire authority, subject to existing legal and regulatory standards without approval by OPM. The removal of this additional time consuming step enables DoD to streamline this hiring process while retaining the same legal and regulatory standards that exist under the General Schedule.

*Non-permanent Appointing Authorities.* DoD may continue to use existing temporary, term, and time-limited appointing authorities; however, the proposed regulations provide for modified duration of such appointments as well as modified advertising requirements, examining procedures, and the appropriate uses of time-limited employees. Most significantly, non-permanent appointments under NSPS may be extended for longer time periods providing flexibility and tools to

respond to a larger variety of DoD missions requirements and environments. The use of non-permanent employees in DoD assures continuity of operations in response to temporary surges in workload, extended absences due to military or civilian deployment, Base Realignment and Closure (BRAC) actions, and the mission-driven activities at Defense installations worldwide. The continuing dynamic employment and national security environment within DoD requires that DoD meet mission requirements using DoD civilian employees when an active duty service member or contractor is not the best fit by providing more agile non-permanent hiring authority. These proposed regulations further streamline hiring practices and enhance flexibility by establishing criteria under which term and temporary employees who were hired via the competitive examining process may be converted without further competition to a career or career conditional appointment in the competitive service.

*Recruitment and Competitive Examining*. In order to increase the efficiency of the recruiting and hiring process without compromising merit principles, the proposed regulations allow DoD to target its recruiting strategy. DoD will provide public notice for all vacancies in the competitive service and accept applications from all sources; however, if there are sufficient qualified candidates in the local commuting area and other targeted sources, consideration may be limited to those applicants. If there are insufficient qualified candidates in the local commuting area, DoD may consider applicants from outside that area. Permitting limited consideration under competitive examining to qualified applicants in a commuting area instead of considering potentially hundreds or thousands of applications from across the country, facilitates mission accomplishment by streamlining the hiring process and significantly reducing the amount of time a position remains vacant. The proposed regulations further streamlines hiring processes by extending examining authority to DoD, to be exercised in accordance with chapters 31 and 33 of title 5, U.S. Code. To exercise this authority, DoD will develop and coordinate examining procedures which will remain subject to OPM oversight. Examining procedures will adhere to the core values of merit system principles in 5 U.S.C. 2301 and veterans' preference requirements set forth in 5 U.S.C. 3309 through 3320, as applicable, and will be available in writing for applicants to review.

*Altenative Promotion Procedures*

The proposed regulations establish and provide authority to use several alternative forms of competition for merit promotion purposes. These alternative promotion procedures continue to require an analysis of the job to be filled to identify knowledges, skills, abilities, and/or competencies required. The alternative promotion procedures also require notification to potential candidates; an evaluation to determine highly qualified candidates; and consideration of registrants in the DoD Priority Placement Program or Reemployment Priority List. However, these promotion procedures do not require advertisement via the standard vacancy announcement procedures. These alternative forms of competition include the use of assessment boards, alternate certification procedures, and selection for promotion from among qualified employees with exceptional (i.e., role model) performance ratings. The alternative promotion procedures help to streamline internal recruitment processes thereby reducing the time period a position remains vacant.

Additional key changes to this subpart include (1) Adding detailed rules regarding non-permanent appointing authorities for competitive and excepted service positions (including periods of time for which appointments may be made or extended and other conditions); (2) establishment of time limits on initial and supervisory probationary periods to align with time periods governing application of Governmentwide adverse action procedures; (3) establishment of specific rules on initial and supervisory probationary periods, crediting service and termination processes; (4) establishment of specific rules describing the competitive examining process; (5) establishment of specific rules for internal placement (including the NSPS Merit Promotion Program); and, (6) establishment of a career conditional appointment and redefinition of career appointments under NSPS to reflect coverage of NSPS employees under Governmentwide workforce shaping rules as a result of Public Law 110–181.

Modifications to this subpart reflect changes in law and regulation while continuing to reflect the Department's commitment to provide constructive and effective ways to attract, recruit, and retain employees; enhance management's flexibilities to respond more competitively to changing labor markets; facilitate movement into and within NSPS; and provide the flexibility the Department needs to streamline the hiring process and adapt quickly to critical and changing mission needs and priorities while preserving merit system principles and veterans' preference in every aspect of the system's design. DoD managers will have greater flexibility in acquiring and advancing a workforce tailored to the Department's needs. The flexibilities provide DoD managers with a greater range of options to adapt their recruitment and hiring strategies to meet changing mission and organizational needs including consideration of the nature and duration of work. Finally, the proposed regulations also address the need to compete for the best talent available and reduce the period of time a position remains vacant by providing the Department with the ability to streamline and accelerate the recruitment process.

The following table lists, by specific regulatory section, a brief description of each significant change to subpart E of section 9901 of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203].

| | Description of proposed change |
|---|---|
| § 9901.502 | *Scope of authority*. This section specifies the provisions of Federal statute waived under the staffing and employment rules for NSPS. This section has been modified to reflect coverage of 5 U.S.C. 3321(a)(2) with respect to this subpart and to delete reference to waiver of 5 U.S.C. 5112(a) pertaining to the general authority of the Office of Personnel Management concerning position classification and the development of qualification requirements for a position. This latter provision has already been waived via waiver of 5 U.S.C. chapter 51 under § 9901.203 and provisions for identification and establishment of qualification requirements are outlined in § 9901.212(d). |

| | Description of proposed change |
|---|---|
| § 9901.504 | *Definitions*. This section provides definitions of terms specific to subpart E. This revision adds definitions for the terms *detail, initial probationary period, local commuting area, and supervisory probationary period*. The definition for a career employee is modified and a definition for a career conditional employee is added. Also added is the term *competencies* with a cross reference to § 9901.103 where the term is defined. The revised regulation slightly modifies the definition of *temporary employee* to clarify application to both the competitive and excepted service and to add a cross reference. Additionally, the definition of *term employee* is revised to pertain to an employee in the competitive service and the definition of *time-limited employee* is also revised to pertain to an employee in the excepted service. |
| § 9901.511(c) | *Paragraph (c), Severe shortage/critical need hiring authority* of this section of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] is modified. Specifically, paragraph (c)(1) is modified to provide that the Secretary must make the determination that a severe shortage/critical hiring need exists and may make this determination on his/her own or in response to a written request from the Head of a DoD Component.<br>Adds a new paragraph (c)(3) to this section authorizing the Secretary to extend a direct hire authority which is due to expire when he/she determines that there is or will continue to be severe shortage/critical hiring need.<br>Renumbers paragraphs (c)(3) and (c)(4) as (c)(4) and (c)(5), respectively. |
| § 9901.511(d)(1) | *Non-permanent appointing authorities*. This paragraph retains the Secretary's authority to prescribe a duration of appointment for temporary, term, and time-limited appointments that is different than that prescribed in Governmentwide rules. However, this paragraph of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] is modified to specify the procedures for appointing employees under temporary, term, and time-limited appointments in the competitive and excepted service. |
| § 9901.511(d)(1)(i) | *Temporary appointments*. A new paragraph is added describing the purpose of temporary appointments, establishing specific time limits for temporary appointments, and providing for reassigning employees on temporary appointments to another temporary position provided the total combined service does not exceed the maximum 3-year limitation.<br>New paragraphs (d)(1)(i)(A) and (d)(1)(i)(B) are added to this section to clarify that temporary appointments may be made to both competitive and excepted service positions using applicable appointment procedures. |
| § 9901.511(d)(1)(ii) | *Term appointments in the competitive service*. A new paragraph (d)(1)(ii)(A) is added to specify procedures for the use of term appointments. These procedures describe the purpose of term appointments, establish time limits for term appointments, and provide for the ability to promote, reassign, or reduce in band employees on term appointments. These procedures preclude the use of employees on term appointments in positions that should be filled on a permanent basis except when necessary to accomplish permanent work in circumstances where the position cannot be filled permanently.<br>A new paragraph (d)(1)(ii)(B) is added to specify that these appointments may be made competitively or noncompetitively using applicable procedures. |
| § 9901.511(d)(1)(iii) | *Time-limited appointments in the excepted service*. A new paragraph is added to authorize non-permanent appointments in the excepted service for more than 1 year, but does not place a limit on the duration of the appointment, consistent with these types of appointments under OPM regulations. The new paragraph specifies that these appointments may be made using procedures at 5 CFR part 302 and provides for reassigning these employees to other time-limited positions in the excepted service as long as the employee meets the qualification requirements for the position. |
| § 9901.511(d)(2)(iv) | *Conversion to career conditional or career appointment*. Adds a new paragraph to specify a non-permanent employee may be noncompetitively converted to a career conditional or career appointment provided that the position he or she is converted to is in the same pay schedule and band for which hired on the non-permanent appointment. |
| § 9901.511(e) | *Tenure group*. Adds new paragraph specifying that assignment of tenure group codes for reduction in force purposes is based on tenure group definitions in 5 CFR 351.501(b) for competitive service and 5 CFR 351.502(b) for excepted service. |
| § 9901.512 | *Probationary periods*. Revises language formerly found in § 9901.512 of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to prescribe conditions of probationary periods to include types of probationary periods, creditable service, failure to complete a probationary period, conditions for termination of probationers, appeal rights, and relationship of probationary periods to other actions. |
| § 9901.512(a)(1)–(a)(3) | *Initial probationary period*. Revises paragraph (a) of this section in the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to state employment situations that require an initial probationary period and identifies applicable time limits. |
| § 9901.512(a)(4) | *Crediting service*. Adds new paragraph to describe how time served under an appointment is credited toward completion of the initial probationary period. |
| § 9901.512(a)(5) | *Termination of probationers for unsatisfactory performance and/or conduct*. Adds new paragraph to require termination of employees during an initial probationary period for performance and/or conduct to follow Governmentwide regulations at 5 CFR 315.804. |
| § 9901.512(a)(6) | *Termination of probationers for conditions arising before appointment*. Adds a new paragraph to require termination of employees during an initial probationary period for reasons based in whole or in part on conditions arising before the employee's appointment to follow Governmentwide regulations at 5 CFR 315.805. |

| | Description of proposed change |
|---|---|
| § 9901.512(a)(7) | *Appeals*. Adds a new paragraph to afford competitive service employees who are terminated during the initial probationary period limited appeal rights to the Merit Systems Protection Board in accordance with 5 CFR 315.806. |
| § 9901.512(b) and (b)(1) | *Supervisory probationary period*. Revises paragraph (b) of this section of the rule published in the **Federal Register** dated November 1, 2005 (Volume 70, Number 210) [Pages 66201–66203] to establish a supervisory probationary period and limits such periods to 1 year.<br>Adds paragraph (b)(1) to this section describing how service is credited toward completion of the supervisory probationary period. |
| § 9901.512(b)(2) | *Failure to complete the supervisory probationary period*. Adds new paragraph to include and expand language at § 9901.512(b) to explain placement options for employees who fail the supervisory probationary period.<br>Adds paragraph (b)(iii) requiring that an employee be notified in writing when reassigned for failure to complete the supervisory probationary period. |
| § 9901.512(b)(2)(iv) | *Appeals*. Adds new paragraph (A) to state that an employee who is placed in a non-supervisory position for failure to successfully complete a supervisory probationary period has no appeal right.<br>Adds new paragraph (B) to permit employee alleging partisan political affiliation or marital status as the reason for failure of the supervisory probationary period to appeal to the Merit Systems Protection Board under 5 CFR 315.908(b). |
| § 9901.512(b)(2)(v) | *Relationship to other actions*. Adds two new paragraphs. Paragraph (A) requires that when an initial probationary period and a supervisory probationary period are served concurrently, the former takes precedence.<br>Paragraph (B) requires application of 5 CFR 752 when an employee is demoted to a lower pay band than the one he/she left to accept the supervisory position if demoted for other than supervisory performance. |
| § 9901.513 | Removes material formerly found in this section addressing Qualification standards. Authority for establishing NSPS-unique qualification standards or modifying OPM qualification standards for NSPS positions is found at §§ 9901.211 and 9901.212. |
| § 9901.514 | *Non-citizen hiring*. Revises paragraph to specify that non-citizens may be hired to permanent, temporary, or time-limited appointments in the excepted service when an absence of qualified U.S. citizens is demonstrated. New language also prevents movement to other positions unless a qualified U.S. citizen is unavailable. |
| § 9901.515(a)(1) | *Competitive examining procedures*. Revises paragraph (a) and (a)(1) to state that competitive examining procedures may be used to make career, career conditional, term, and temporary appointments in the competitive service. Includes language authorizing the use of numerical rating and ranking or category ranking and selection procedures, but specifies that the decision on which method to use must be made prior to issuing a vacancy announcement. |
| § 9901.515(a)(2) | New language provides that the Secretary will issue uniform policies, procedures, and guidance for competitive examining consistent with Governmentwide procedures prescribed in 5 CFR part 332 and provides that the authority to conduct competitive examining for NSPS positions may be delegated in writing. |
| § 9901.515(b) | *Public notice*. Replaces material in paragraph (b) with information previously found in § 9901.515(a)(1), (2), (3), and (4). This new language specifies area of consideration and public announcement for positions filled using competitive examining procedures. |
| § 9901.515(c) | *Numerical rating and ranking procedures*. Revises paragraph to specify procedures to be used when filling positions using numerical rating and ranking approach and to clarify that preference eligible applicants may not be passed over to select a non-preference eligible, unless procedures for passing over a preference eligible are followed. |
| § 9901.515(d) | *Alternative rating and selection procedures (category rating)*. Replaces material at paragraph (c) to specify procedures to be used when filling positions using the category rating and selection method of competitive examining. |
| § 9901.515(e) | *Passing over preference eligibles*. Adds new paragraph confirming OPM retains authority to grant or deny a request to pass over a preference eligible with a compensable service-connected disability of 30% or more and to make medical qualifications determinations pertaining to preference eligibles. |
| § 9901.516 | *Internal placement*. This section is revised to codify current application of NSPS regulations with regard to internal placement. |
| § 9901.516(a) | *Determining levels of work and movement within and across career groups*. Adds paragraph to state that the definitions found in § 9901.103 for the terms promotion, reassignment, and reduction in band must be applied when determining whether an action does or does not require competition and in applying pay administration procedures. |
| § 9901.516(b) | *Eligibility for promotion to full performance band*. Adds paragraph to require rating of record at Level 3 or above (or determination by authorized management official that performance meets this level) before an employee in a career ladder position may be promoted to the full performance band. |
| § 9901.516(c) | *Time after competitive appointment restriction*. Adds paragraph that indicates that the restrictions on movement of an employee immediately after initial appointment are not applicable to NSPS positions. |
| § 9901.516(d) | *Details*. Adds paragraph to prescribe that details may be made without a time limit and that an official personnel action is only required in certain situations. |

| | Description of proposed change |
|---|---|
| § 9901.516(e) | *NSPS Merit Promotion Program*. Adds paragraphs (e)(1) through (e)(5) that, in conjunction with requirements at 5 CFR part 335, establish the NSPS Merit Promotion Program. Prescribes that all actions must be taken in accordance with merit system principles. Requires employees who are absent for legitimate reasons to receive consideration for vacancies. Requires applicants to meet minimum qualification standards. Requires a job analysis to identify the basic duties and responsibilities of the position to be filled and the knowledge, skills, and abilities and/or competencies necessary to successfully perform the work of the position. Prescribes management's right to select or not select from among any group of highly qualified candidates and from appropriate sources of candidates. Requires maintenance of records for a specified period documenting how each competitive service position is filled through internal competitive procedures to allow reconstruction of the placement action if necessary. |
| § 9901.516(e)(6) | *Competitive actions*. Adds paragraph to specify which promotion actions require the application of competitive procedures (e.g., promotion to a higher pay band, temporary promotion or temporary detail to a higher pay band for more than 180 days, *et al.*). |
| § 9901.516(e)(7) | *Exceptions to competition*. Adds paragraph to specify which promotion actions do not require competitive procedures (*e.g.*, promotion to a full performance band when competition previously occurred, promotion when position is reclassified as a result of the issuance of a new classification standard, promotion when position is reclassified because of additional duties and responsibilities, *et al.*). |
| § 9901.516(e)(8) | *Alternative promotion procedures*. Adds new paragraph describing alternative forms of competition that do not require a vacancy announcement, to include assessment boards, alternative certification, and exceptional performance promotion. Employees must be made aware that these flexibilities may be used; notice may be given via newsletters, bulletin boards, Web sites, or other common methods of employee communication. |
| § 9901.516(e)(9) | *Grievances*. Adds new paragraph providing for employee right to file a complaint relating to a promotion action via appropriate grievance procedures. Although there is no right of appeal to OPM, OPM may conduct investigations of substantial violations of OPM requirements. |

**Next Steps**

The National Defense Authorization Act for Fiscal Year 2008 requires that this rule be considered a major rule for the purpose of section 801 of title 5, United States Code. As such, before it can take effect, the Department will submit to each House of the Congress and to the Comptroller General a report containing the rule, a general statement relating to the rule, and the proposed effective date of the rule. The rule may not be effective until the date occurring 60 days after the later of (1) Congressional receipt of the report, or (2) the date the rule is published in the **Federal Register**. Congress has the opportunity to delay implementation of the rule based on the procedures set forth in 5 U.S.C. 801–808.

**E.O. 12866, Regulatory Review**

DoD and OPM have determined that this action is a significant regulatory action within the meaning of Executive Order 12866 because there is significant public interest in the National Security Personnel System. DoD and OPM have analyzed the expected costs and benefits of the revised HR system, and that analysis was presented in the supplementary information published with the rule on September 26, 2008 (Volume 73, Number 188) on page 56389.

The primary benefit to the public of NSPS resides in the HR flexibilities that will enable DoD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment. A performance-based pay system that rewards excellent performance will result in a more qualified and proficient workforce and will generate a greater return on investment in terms of productivity and effectiveness. Taken as a whole, the changes included in these proposed regulations will improve upon the original NSPS regulations and result in a contemporary, merit-based HR system that focuses on performance, generates respect and trust, and supports the primary mission of DoD.

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

**Regulatory Flexibility Act**

DoD and OPM have determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

**Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)**

This proposed regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

**E.O. 12988, Civil Justice Reform**

This proposed regulation is consistent with the requirements of E.O. 12988. The regulation clearly specifies the effects on existing Federal law or regulation; provides clear legal standards; has no retroactive effects; specifies procedures for administrative and court actions; defines key terms; and is drafted clearly.

**E.O. 13132, Federalism**

DoD and OPM have determined these proposed regulations would not have Federalism implications because they would apply only to Federal agencies and employees. The proposed regulations would not have financial or other effects on States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

**Unfunded Mandates**

These proposed regulations would not result in the expenditure by State, local, or tribal governments of more than $100 million annually. Thus, no written assessment of unfunded mandates is required.

**List of Subjects in 5 CFR Part 9901**

Administrative practice and procedure, Government employees, Labor management relations, Labor unions, Reporting and recordkeeping requirements, Wages.

Office of Personnel Management.

**Michael W. Hager,**

*Acting Director, Office of Personnel Management.*

Department of Defense.

**Gordon England,**

*Deputy Secretary of Defense.*

Accordingly, under the authority of section 9902 of title 5, United States Code, the Department of Defense and the Office of Personnel Management are proposing to add subpart E to part 9901 of title 5, Code of Federal Regulations to read as follows:

## PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)

## Subpart E—Staffing and Employment

Sec.

**General**

9901.501 Purpose.
9901.502 Scope of authority.
9901.503 Coverage.
9901.504 Definitions.

**External Recruitment and Internal Placement**

9901.511 Appointing authorities.
9901.512 Probationary periods.
9901.513 [Reserved]
9901.514 Non-citizen hiring.
9901.515 Competitive examining procedures.
9901.516 Internal placement.

**Authority:** 5 U.S.C. 9902.

## Subpart E—Staffing and Employment

### General

#### § 9901.501 Purpose.

(a) This subpart sets forth policies and procedures for the recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (i).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(i).

#### § 9901.502 Scope of authority.

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C. 3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321 (except 3321(a)(2)), 3324, 3325, 3327, 3330, and 3341 are modified or waived and replaced with respect to that category except as otherwise specified in this subpart. In accordance with § 9901.101, the Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

#### § 9901.503 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b).

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as authorized under 5 U.S.C. 9902.

#### § 9901.504 Definitions.

In this subpart—

*Career conditional employee* means an individual appointed without time limit to a competitive service position in NSPS who does not meet the definition of a career employee.

*Career employee* means an individual appointed without time limit to a competitive service position in NSPS who has served 3 years of substantially continuous service as described in 5 CFR 315.201(b).

*Competencies* has the meaning given that term in § 9901.103.

*Detail* means the temporary assignment, other than temporary reassignment or temporary promotion, of an employee to another position with the expectation that the employee will return to the permanent position of record upon expiration of the assignment. For pay and benefit purposes, an employee continues to encumber the position from which the employee was detailed.

*Initial probationary period* means the initial period of service immediately following an employee's appointment to the competitive or excepted service, as specified in § 9901.512, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Local commuting area* is the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual place of employment.

*Promotion* has the meaning given that term in § 9901.103.

*Reassignment* has the meaning given that term in § 9901.103. For the purpose of part 351 of this title, an official position does not include a position to which an employee is reassigned on a temporary or time-limited basis.

*Reduction in band* has the meaning given that term in § 9901.103.

*Supervisory probationary period* means the first year of service immediately following an employee's initial appointment or placement in a supervisory position, as provided in 5 U.S.C. 3321(a)(2), during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

*Temporary employee* means an individual in the competitive or excepted service who is employed for a limited period of time not to exceed 1 year. The individual's appointment may be extended, up to a maximum established under § 9901.511(d), to perform the work of a position that does not require an additional permanent employee.

*Term employee* means an individual in the competitive service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

*Time-limited employee* means an individual in the excepted service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

### External Recruitment and Internal Placement

#### § 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities under chapter 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals appointed under these authorities will be given career, career conditional, term or temporary appointments in the competitive service or permanent, time-limited, or temporary appointments in the excepted service, as appropriate. The competitive appointing authorities under this paragraph are subject to the procedures in part 330 of this title, except for 5 CFR 330.208 and 330.501.

(b) *Additional appointing authorities.* (1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and

excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2) DoD and OPM will jointly publish a notice, and request comments, in the **Federal Register** when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive service position.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the **Federal Register**.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary will determine when a severe shortage of candidates or a critical hiring need exists, as defined in 5 CFR part 337, subpart B, for particular occupations, pay bands, career groups, and/or geographic locations. The Secretary may decide that such a shortage or critical need exists, or may make this decision in response to a written request from the Head of a DoD Component. These authorities may be used without regard to competitive examination requirements described in § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary may extend a direct hire authority if the Secretary determines there is or will continue to be a severe shortage of candidates or a critical hiring need for a particular position(s) as of the date the authority is due to expire.

(4) The Secretary will terminate or modify a specific authority to make appointments under this section when it is determined that the severe shortage or critical need upon which the authority was based no longer exists.

(5) The Secretary will notify OPM of determinations made under this paragraph (c).

(d) *Non-permanent appointing authorities.* (1) The Secretary may authorize appointments with time limits in the competitive or excepted service, as appropriate, when the need for an employee's services is not permanent. These appointments will be either temporary, term, or time-limited as defined below:

(i) *Temporary appointments.* Temporary appointments are for a specified period not to exceed 1 year and may be made in either the competitive or the excepted service. A temporary appointment may be extended for 2 additional years, in increments not to exceed 1 year, to a maximum of 3 years. Temporary appointments may be made and extended to positions involving intermittent or seasonal work without regard to the maximum time limits. The circumstances under which a temporary appointment is appropriate include, but are not limited to: Filling a position to address a temporary workload peak or to complete a project; meeting a staffing need that is anticipated not to exceed a one-year timeframe for reasons such as abolishment, reorganization, or contracting out of a function; anticipated reduction in funding; filling positions temporarily because the positions are expected to be needed for placement of permanent employees who would otherwise be displaced; or when the incumbent will be out of the position for a temporary period of time, but is expected to return. A temporary employee may be reassigned to another temporary position provided the total combined service under the temporary appointment does not exceed the maximum three-year time limitation, the employee meets the qualification requirements of the position, and provided the conditions specific to the employee's appointing authority are met. Temporary appointments are made as follows:

(A) *Competitive service.* Temporary appointments to positions in the competitive service may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337, as appropriate. Temporary appointments to positions in the competitive service also may be made noncompetitively consistent with 5 CFR part 316, or by any noncompetitive appointing authorities granted to or by the Secretary.

(B) *Excepted service.* Temporary appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302.

(ii) *Term appointments in the competitive service.* (A) Term appointments are in the competitive service and will be for a period of more than 1 year, but not to exceed 5 years. The term appointment may be extended by an authorized management official for 1 additional year to a maximum of 6 years. The circumstances under which a term appointment is appropriate include, but are not limited to, project work, extraordinary workload, uncertainty of future funding, scheduled contracting out or abolishment of a function, the need to maintain permanent positions for placement of potential surplus employees, or when the incumbent will be out of the position for a significant period of time, but is expected to return. A term employee may be promoted, reassigned or reduced in band to another term position provided the total combined service under the term appointment does not exceed the maximum six-year time limitation and the employee meets the qualification requirements of the position.

(B) Term appointments may be made using competitive procedures under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337, as appropriate. Term appointments also may be made noncompetitively consistent with 5 CFR part 316 or by any noncompetitive appointing authorities granted to or by the Secretary.

(iii) *Time-limited appointments in the excepted service.* Time-limited appointments are in the excepted service and will be for a period of more than 1 year. Time-limited appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302. A time-limited employee may be reassigned to another time-limited position in the excepted service provided the employee meets the qualification requirements of the position and the conditions specific to the appointing authority applicable to the employee.

(2) *Conversion to career conditional or career appointment.* A non-permanent employee serving in a competitive service position may be converted without further competition to a permanent position (i.e., career or career-conditional) if—

(i) The vacancy announcement met the requirements of § 9901.515(a) and included the possibility of noncompetitive conversion to a permanent position (i.e., career or career-conditional) at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in § 9901.515(b) and (c);

(iii) The employee completed at least 2 years of continuous service at Level 3 (Valued Performer) or better; and

(iv) The employee is converted to a career conditional or career position in

the same pay schedule and band for which hired.

(e) *Tenure group*. For reduction in force purposes, NSPS employees appointed to the competitive service are placed in one of the tenure groups defined in 5 CFR 351.501(b) or, if appointed to the excepted service, one of the tenure groups defined in 5 CFR 351.502(b).

**§ 9901.512 Probationary periods.**

(a) *Initial probationary period*. (1) An employee who is given a career, career conditional, or term appointment in the competitive service or a permanent or time-limited appointment in the excepted service under this part is required to complete a probationary period when the employee:

(i) Is appointed from a competitive list of eligibles established under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire procedures under 5 CFR part 337; or

(ii) Is appointed to the competitive service either by special authority or by conversion under subparts F or G of 5 CFR part 315, unless specifically exempt from probation by the authority itself; or

(iii) Is reinstated, unless, during any period of service which affords a current basis for reinstatement, the employee completed an initial probationary period; or

(iv) Is appointed to a position in the excepted service under the procedures prescribed in part 302 of this title.

(2) An employee serving an initial probationary period at the time his or her permanent position is converted into NSPS, or at the time he or she is assigned from a non-NSPS position to an NSPS position, or at the time he or she is reappointed through the DoD Priority Placement Program or Reemployment Priority List established under part 330 of this title after being involuntarily separated through no fault of the employee, will continue the probationary period, i.e., the probationary period does not start over.

(3) The probationary period required by § 9901.512(a) is as follows:

(i) Competitive service—1 year.

(ii) Excepted service—2 years, except for preference eligibles who have appeal rights after 1 year under 5 CFR part 752.

(4) *Crediting Service*. (i) Time spent in a non-pay status in excess of one workday during the initial probationary period will extend the probationary period by an equal amount of time.

(ii) Service during an initial probationary period from which an employee is separated for performance or conduct does not count toward completion of probation required under a subsequent NSPS appointment.

(iii) The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, i.e., those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as one day of credit toward the 260 days (actual ''work days'' in a year, excluding weekends) needed to complete the 1-year probationary period. The probationary period may not be completed in less than 1 year calendar time.

(iv) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration under part 353 of this title to Federal service. An employee serving a probationary period who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Services serves the remainder of the probationary period upon reinstatement provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

(5) *Termination of probationers for unsatisfactory performance and/or conduct*. When an authorized management official proposes to terminate an employee during his or her initial probationary period because his or her performance and/or conduct during this period fails to demonstrate his or her fitness or qualifications for continued employment, the official will follow procedures at 5 CFR 315.804.

(6) *Termination of probationers for conditions arising before appointment*. When an authorized management official proposes to terminate an employee during his or her initial probationary or trial period for reasons based in whole or in part on conditions arising before the employee's appointment, the official will follow procedures at 5 CFR 315.805.

(7) *Appeals*. Under NSPS, a competitive service employee who is terminated during the initial probationary period will have limited appeal rights to the Merit Systems Protection Board (MSPB) under 5 CFR 315.806.

(b) *Supervisory probationary period*. Under NSPS, an employee is required to serve a probationary period upon initial appointment to a supervisory position. The supervisory probationary period is 1 year. An employee serving a supervisory probationary period at the time his or her permanent position is converted into NSPS will continue the probationary period in the new position; i.e., the supervisory probationary period does not start over.

(1) *Crediting service toward completion of the supervisory probationary period*. (i) An employee who is reassigned, transferred, promoted or reduced in band from one supervisory position to another while serving a supervisory probationary period is subject to the probationary period prescribed for the new position. Service in the former position is credited toward completion of the probationary period in the new position.

(ii) Temporary service in a supervisory position prior to the supervisory probation when there is no break in service is creditable toward completion of a supervisory probationary period. This includes service on temporary promotion or reassignment to another supervisory position while serving a supervisory probation. Service in a nonsupervisory position is not creditable.

(iii) Time spent in a non-pay status in excess of one workday during the supervisory probationary period will extend the probationary period by an equal amount of time.

(iv) Service during a supervisory probationary period from which an employee was separated or demoted for performance and/or conduct does not count toward completion of a supervisory probationary period required under a subsequent appointment.

(v) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full toward completion of a supervisory probationary period upon restoration to Federal service under part 353 of this title.

(2) *Failure to complete the supervisory probationary period*. (i) Except as described in paragraph (b)(2)(ii) of this section, an employee who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be assigned to a position at a grade or pay band and pay no lower than that held before assignment to the supervisory position.

(ii) A nonsupervisory employee who is reduced in band into a position which requires a supervisory probationary period and who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be reassigned to a grade or pay band no lower than that held when serving the supervisory probation. The employee is eligible for repromotion in accordance with NSPS promotion rules under § 9901.516.

(iii) The agency must notify the employee in writing that he or she is being assigned for failure to complete the supervisory probationary period.

(iv) *Appeals.* (A) An employee, who, in accordance with the provisions of this section, is assigned to a nonsupervisory position, has no appeal right, except as provided in paragraph (b)(2)(iv)(B) of this section.

(B) An employee who alleges that a Component action under this section was based on partisan political affiliation or marital status may appeal to the MSPB under 5 CFR 315.908(b).

(v) *Relationship to other actions.* (A) If an employee is required to concurrently serve both a supervisory and an initial probationary period, the latter takes precedence.

(B) An action that demotes an employee to a pay band lower than the one the employee left to accept the supervisory position, for reasons other than supervisory performance, is governed by part 752 of this title.

**§ 9901.513 [Reserved]**

**§ 9901.514 Non-citizen hiring.**

The Secretary may establish procedures for appointing non-citizens to permanent, temporary, or time-limited positions in the excepted service, provided there is a demonstrated absence of qualified U.S. citizens and applicable immigration and security requirements are met. Non-citizens may not be promoted, reassigned, or reduced in band, except in situations where a qualified U.S. citizen is once again unavailable.

**§ 9901.515 Competitive examining procedures.**

(a)(1) Under NSPS, competitive examining is authorized to appoint applicants to career, career conditional, term, and temporary appointments in the competitive service. In recruiting applicants from outside the civil service for competitive appointments to competitive service positions in NSPS, Components with examining authority may use either numerical rating and ranking or alternative ranking and selection procedures (i.e., category rating). Components must decide which procedures to use prior to issuing a vacancy announcement and include this information in the vacancy announcement.

(2) The Secretary will issue uniform policies, procedures, and guidance concerning competitive examining for NSPS within the Department and may delegate in writing authority for competitive examining for NSPS positions. These policies, procedures, and guidance will be consistent with part 332, subparts A and C, of this title.

(b) *Public notice.* (1) Components will accept applications from all U.S. citizens, to include current Federal employees, and at a minimum, will consider applicants from the local commuting area. Components may concurrently consider applicants from other targeted recruitment sources, as specified in the vacancy announcement. If there are insufficient qualified candidates in both the local commuting area and targeted recruitment sources, Components may consider applicants from outside that area.

(2) When limiting consideration, the vacancy announcement will clearly state that consideration will be limited if sufficient qualified candidates are received from the local commuting area and other targeted recruitment sources. If sufficient candidates are not received from the local commuting area and other targeted recruitment sources, consideration will be expanded to all applicants; i.e., the area of consideration will not be expanded incrementally.

(3) No minimum announcement opening period is required. The open period will be based on the type of position being filled and the availability of qualified candidates in the labor market.

(c) *Numerical rating and ranking procedures.* When filling positions using numerical rating and ranking, the procedures issued by the Secretary will be followed. All qualified applicants may be referred and selection may be made from among any referred applicants except that a preference eligible will not be passed over to select a non-preference eligible, unless procedures under 5 U.S.C. 3318 for passing over a preference eligible are followed.

(d) *Alternative ranking and selection procedures (category rating).* When filling positions using category rating, procedures issued by the Secretary will be followed in lieu of the procedures in part 337, subpart C, except for § 337.304, of this title.

(e) *Passing over preference eligibles.* OPM retains the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more and to make medical qualifications determinations pertaining to preference eligibles. The Secretary has the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of less than 30 percent.

**§ 9901.516 Internal placement.**

(a) *Determining levels of work and movement within and across career groups.* The determination of when an action is a promotion, reassignment, or reduction in band for competitive or noncompetitive movement and related pay administration purposes, either between NSPS positions or to an NSPS position from a non-NSPS position, must be made by applying the definitions of those terms at § 9901.103.

(b) *Eligibility for promotion to full performance band.* An employee with a rating of record of Level 1 or Level 2 is not eligible for promotion to the full performance band of the position until such time as the employee attains a rating of record of Level 3 or above. An employee who does not have an NSPS rating of record may be promoted to the full performance band of the position if an authorized management official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or above.

(c) *Time after competitive appointment restriction.* Restrictions on the movement of an employee immediately after the employee's initial appointment to Federal service as described in 5 CFR part 330, subpart E, are not applicable to NSPS positions.

(d) *Details.* There is no time limit on details or any requirement to extend them incrementally. An official personnel action is not required to document a detail unless the detail exceeds one year, crosses Component and/or Agency lines or assigns an employee from NSPS to another pay system within the Component, e.g., NSPS to General Schedule, or documents developmental rotational assignments or deployment.

(e) *NSPS Merit Promotion Program.* In accordance with the Secretary's authority to prescribe regulations for the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS, the procedures below, in conjunction with the merit promotion requirements in part 335 of this title constitute the NSPS Merit Promotion Program. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures.

(1) All actions taken under the NSPS Merit Promotion Program, whether involving the identification, qualification, evaluation, or selection of candidates, will be made without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status or other prohibited criteria

and will be based solely on job-related factors.

(2) Vacancy announcements will identify areas of consideration that are sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Employees within the area of consideration who are absent for legitimate reason, e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments, must receive appropriate consideration for promotion if they apply for a vacant position; i.e., they cannot be excluded from consideration because they are absent. Employees who are unable to apply for vacant positions while they are away may also make other appropriate arrangements for consideration.

(3) To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by either OPM or the Department, as appropriate. Prior to the recruitment process, authorized management officials will identify through job analysis the job-related criteria that will be used to evaluate and determine the best qualified candidates for referral. The job analysis will identify the basic duties and responsibilities of the position being filled; the knowledge, skills, abilities, and/or competencies required to perform the duties and responsibilities; and the factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics. Candidate evaluation will give due weight to performance appraisals and incentive awards. When evaluating a candidate's performance appraisals, consideration may be given to the differences in performance appraisal systems. Job analysis requirements will conform to the Uniform Guidelines on Employee Selection Procedures in 29 CFR part 1607, and 5 CFR part 300, subpart A.

(4) Management has the right to select or not select from among a group of highly qualified candidates and to select from appropriate sources of candidates.

(5) Components will maintain a temporary record of each promotion to a competitive service position filled through internal competitive procedures to allow reconstruction of the placement action, including documentation on how candidates were rated, ranked, and referred. These records may be destroyed after 2 years or after the program has been formally evaluated by OPM (whichever occurs first) if the time limit for grievance has lapsed and destruction would otherwise be consistent with the Department's Priority Placement Program requirements.

(6) *Competitive actions.* (i) Except as provided in paragraph (e)(7) of this section, competitive procedures apply to promotion of an employee to a higher pay band (i.e., a higher level of work) and to the following actions:

(A) Temporary promotion or detail to a higher pay band for more than 180 days. Prior service during the preceding 12 months under noncompetitive temporary promotions or details to higher pay-banded positions counts toward the 180-day total. A temporary promotion may be made permanent without further competition, provided the temporary promotion was originally made under competitive procedures and the fact that the temporary promotion might lead to a permanent promotion was made known to all potential candidates;

(B) Reassignment or reduction in band to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction in force regulations at 5 CFR part 351);

(C) Transfer to a position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

(D) Reinstatement to a permanent, term, or temporary position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(7) *Exceptions to competition.* (i) Competitive procedures do not apply to:

(A) Promotion resulting from the upgrading of a position to a higher pay band level without significant change in the duties and responsibilities due to the issuance of a new NSPS classification standard or the correction of an initial classification error;

(B) Promotion resulting from an employee's position being classified at a higher pay band level because of additional duties and responsibilities;

(C) Promotion resulting from previous competitive selection for a position with documented potential to a higher pay band;

(D) Temporary promotion or detail to a higher pay band or a position with known promotion potential for 180 days or less;

(E) Promotion to a higher pay band previously held on a permanent or term basis in the competitive service from which an employee was separated or demoted for other than performance or conduct reasons;

(F) Promotion, reassignment, reduction in band, transfer, or reinstatement to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an approved interchange agreement) and did not lose because of performance or conduct reasons;

(G) Consideration of a candidate not given proper consideration in a competitive promotion action;

(H) Placement resulting from reduction in force procedures under 5 CFR part 351; and

(I) The appointment of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any salary level, consistent with 5 CFR part 317, subpart G.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(8) *Alternative promotion procedures.* The Secretary may authorize the use of the following alternative procedures to fill NSPS positions. Use of these alternative procedures does not require the posting of vacancy announcements; however, employees must be made aware that these processes may be utilized via newsletters, bulletin boards, Web sites, or other common methods of employee communication. Use of these alternative procedures is subject to the requirements of the DoD Priority Placement Program and the Reemployment Priority List.

(i) *Assessment boards.* (A) Boards may convene to assess internal candidates for current and future advancement opportunities based on pre-established criteria. Pre-established criteria may include experience, training, awards, education, performance evaluation scores (ratings of record) or other appropriate

information consistent with merit system principles and the ''Uniformed Guidelines on Employee Selection Procedures.''

(B) Boards will categorize employees into specific levels of candidates to generate referral lists of ranked candidates for occupational groups. These referral lists are valid for one year from the date generated. Selection from the referral list should be further justified based on specific job-related factors unique to the actual vacancy.

(C) Boards, which should be comprised of senior level managers (subject matter experts for each particular occupational group), may be convened on an ad hoc basis or may be held annually in conjunction with the performance evaluation process.

(ii) *Alternate certification.* A selecting official may make a by-name request for an individual from any appropriate source of Department or Component employees. The employee may be selected if ranked within the highest quality group as determined by rating factors established for the position.

(iii) *Exceptional performance promotion.* (A) An employee whose most recent rating of record is a Level 5 performance rating may be promoted to a vacant position in a higher pay band when the vacant position has the same occupational series (or related interdisciplinary/interoccupational series) and similar function as the position the employee held at the time he or she received the Level 5 rating.

(B) Selecting officials must determine and document the area of consideration, and must consider all employees in the area of consideration whose current Level 5 rating was based on performance in the same occupational series and similar function as the vacancy being filled.

(9) *Grievances.* Employees have the right to file a complaint relating to a promotion action. Such complaints will be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in 5 CFR part 300, subpart A. There is no right of appeal to OPM, but OPM may conduct investigations of substantial violations of OPM requirements.

[FR Doc. E8–28672 Filed 12–2–08; 8:45 am]

BILLING CODE 6325–39–P

## DEPARTMENT OF AGRICULTURE

### Commodity Credit Corporation

### 7 CFR Part 1487

**RIN 0551–AA71**

### Technical Assistance for Specialty Crops

**AGENCY:** Foreign Agricultural Service and Commodity Credit Corporation, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would amend the regulations used to administer the Technical Assistance for Specialty Crops (TASC) program by increasing the amount of funding per proposal to $500,000 in a given year, extending the allowable length of an activity to 5 years; and by allowing up to five approved projects for any one TASC participant at any given time.

**DATES:** Comments concerning this proposed rule must be received by January 2, 2009 to be assured consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *E-Mail: ppsadmin@fas.usda.gov*.
- *Fax:* (202) 720–9361.
- *Hand Delivery or Courier:* U.S. Department of Agriculture, Foreign Agricultural Service, Program Policy Staff, Portals Office Building, Suite 400, 1250 Maryland Ave., SW., Washington, DC 20024.
- *U.S. Postal Delivery:* U.S. Department of Agriculture, Foreign Agricultural Service, Program Policy Staff, Stop 1023, 1400 Independence Ave., SW., Washington, DC 20250–1042.

Comments may be inspected in Suite 400, Portals Building, 1250 Maryland Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. A copy of this proposed rule is available through the FAS home page at *http://www.fas.usda.gov/mos/programs/TASC.asp*.

**FOR FURTHER INFORMATION CONTACT:** Mark Slupek at (202) 720–4327, fax at (202) 720–9361, or by e-mail at: *ppsadmin@fas.usda.gov*.

**SUPPLEMENTARY INFORMATION:**

#### Background

This proposed rule changes three existing TASC limitations. First, it increases the funding cap on individual proposals from $250,000 to $500,000 per year. Second, it increases the maximum duration of an activity from 3 years to 5 years. Finally, it increases the number of approved projects from three to five that a TASC participant can have underway at any given time. These changes are consistent with the Administration's position regarding the TASC program.

#### Executive Order 12866

This proposed rule is issued in conformance with Executive Order 12866. It has been determined to be not significant for the purposes of Executive Order 12866 and was reviewed by the Office of Management and Budget (OMB). A cost-benefit assessment of this rule was not completed.

#### Executive Order 12988

This rule has been reviewed in accordance with Executive Order 12988. This rule would preempt State laws to the extent such laws are inconsistent with it. This rule would not be retroactive.

#### Executive Order 12372

This program is not subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

#### Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because FAS is not required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

#### Environmental Assessment

FAS has determined that this proposed rule does not constitute a major State or Federal action that would significantly affect the human or natural environment consistent with the National Environmental Policy Act (NEPA), 40 CFR part 1502.4, Major Federal actions requiring the preparation of Environmental Impact Statements, and Compliance with NEPA implementing the regulations of the Council on Environmental Quality, 40 CFR parts 1500–1508. Therefore, no environmental assessment or environmental impact statement will be prepared.

#### Unfunded Mandates

Although CCC is publishing this as a proposed rule, Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) does not apply to this rule. CCC is not

required by 5 U.S.C. 553 or any other law to publish a notice of proposed rulemaking for the subject of this rule. Further, this rule contains no unfunded mandates as defined in sections 202 and 205 of UMRA. Nor does this rule potentially affect small governments or contain significant Federal intergovernmental mandates.

**Paperwork Reduction Act of 1995**

In accordance with the Paperwork Reduction Act of 1995, FAS has previously received approval from the Office of Management and Budget (OMB) with respect to the information collection required to support this program. The information collection is described below:

*Title:* Technical Assistance for Specialty Crops.

*OMB Control Number:* 0551–0038.

**E-Government Act Compliance**

FAS 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. The forms, regulations, and other information collection activities required to be utilized by a person subject to this rule are available at *http://www.fas.usda.gov*.

**List of Subjects in 7 CFR Part 1487**

Agricultural commodities, Exports, Specialty crops.

For the reasons set out in the preamble, under the authority of 5 U.S.C. 553; 15 U.S.C. 714b and 714c, 7 CFR part 1487 is proposed to be amended as follows:

## PART 1487—TECHNICAL ASSISTANCE FOR SPECIALTY CROPS

1. The authority citation for part 1487 continues to read as follows:

**Authority:** Section 3205 of Public Law 107–171.

2. Revise § 1487.4 to read as follows:

**§ 1487.4 Are there any limits on the scope of proposals?**

(a) *Funding cap.* TASC proposals which request more than $500,000 of CCC funding in a given year will not be considered.

(b) *Length of activities.* Funding will not be provided for projects that have received TASC funding for five years. The five years do not need to be consecutive.

(c) *Target countries.* Proposals may target all export markets, including single countries or reasonable regional groupings of countries.

(d) *Multiple proposals.* Applicants may submit multiple proposals, but no TASC participant may have more than five approved projects underway at any given time.

3. Amend § 1487.6 by revising paragraph (b) to read as follows:

**§ 1487.6 What are the criteria for evaluating proposals?**

* * * * *

(b) *Evaluation process.* FAS will review all proposals for eligibility and completeness, and will evaluate each proposal against the factors described in paragraph (a) of this section. The purpose of this review is to identify meritorious proposals, recommend an appropriate funding level for each proposal, and submit the proposals and funding recommendations to appropriate officials within FAS for decision. FAS may, when appropriate to the subject matter of the proposal, request the assistance of other U.S. government experts in evaluating the merits of a proposal.

4. Amend § 1487.8 by revising paragraph (a)(4) to read as follows:

**§ 1487.8 How are payments made?**

(a) * * *

(4) Participants shall maintain all records and documents relating to TASC projects, including the original documentation which supports reimbursement claims, for a period of three calendar years following the expiration or termination date of the program agreement. Such records and documents will be subject to verification by FAS and shall be made available upon request to authorized officials of the U.S. Government. FAS may deny a claim for reimbursement if the claim is not supported by acceptable documentation.

* * * * *

Dated: November 19, 2008.

**Michael W. Yost,**

*Executive Vice President, Commodity Credit Corporation, and Administrator, Foreign Agricultural Service.*

[FR Doc. E8–28613 Filed 12–2–08; 8:45 am]

**BILLING CODE 3410–10–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2008–1267; Directorate Identifier 2008–CE–069–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Viking Air Limited Models DHC–6–1, DHC–6–100, DHC–6–200, and DHC–6–300 Airplanes

**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 that would supersede an existing AD. 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:

There have been reports of inter-rivet cracking on several wing front spar adapter assemblies (P/N C6WM1027–1) on the horizontal and vertical flanges. It was determined that the cracking was caused by stress corrosion in the short transverse grain initiated by local riveting induced stresses.

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 January 2, 2009.

**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:** Pong Lee, Aerospace Engineer, FAA, New York Aircraft Certification Office, ANE–171, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone: (516) 228–7324; fax: (516) 794–5531.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2008–1267; Directorate Identifier 2008–CE–069–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

**Discussion**

On May 15, 2008, we issued AD 2008–11–10, Amendment 39–15532 (73 FR 37353; July 1, 2008). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2008–11–10, a complete list of affected part numbers has been issued.

**Relevant Service Information**

Viking Air Limited has issued Viking DHC–6 Twin Otter Service Bulletins No. V6/540, dated October 1, 2007; No. V6/541, dated October 1, 2007; and No. V6/542, dated October 1, 2007; and R.W. Martin, Inc. Service Bulletin No. 00160/2, Revision A, dated November 15, 2007. 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 AD will affect 157 products of U.S. registry. We also estimate that it will take about 18 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour.

Based on these figures, we estimate the cost of this AD on U.S. operators to be $226,080 or $1,440 per product.

In addition, we estimate that any necessary follow-on actions will take about 200 work-hours and require parts costing $3,696 for a cost of $19,696 per product. We have no way of determining the number of products that may need these actions.

**Authority for This Rulemaking**

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

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

**Regulatory 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, Incorporation by reference, 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 removing Amendment 39–15532 (73 FR 37353; July 1, 2008), and adding the following new AD:

**Viking Air Limited:** Docket No. FAA–2008–1267; Directorate Identifier 2008–CE–069–AD.

**Comments Due Date**

(a) We must receive comments by January 2, 2009.

**Affected ADs**

(b) This AD supersedes AD 2008–11–10, Amendment 39–15532 (73 FR 37353; July 1, 2008).

**Applicability**

(c) This AD applies to the following Models DHC–6–1, DHC–6–100, DHC–6–200, and DHC–6–300 airplanes, all serial numbers, that are certificated in any category:

(1) Group 1: Equipped with wing boxes, part numbers (P/Ns) C6W1002–1, C6W1002–3, WR6–1002–59 or WR6–1002–61 that incorporate a P/N C6WM1027–1 front spar adapter assembly with 10 or more years of service; and

(2) Group 2: Equipped with wing boxes, P/Ns C6W1002–5, C6W1002–7, C6W1002–9, C6W1002–11, C6W1002–13, C6W1002–15, C6W1002–17, C6W1002–19, C6W1002–21, C6W1002–23, C6W1002–51, C6W1002–53, C6W1002–55, C6W1002–57 and C6W1002–61 that incorporate a P/N C6WM1027–1 front spar adapter assembly with 10 or more years of service.

**Subject**

(d) Air Transport Association of America (ATA) Code 57: Wings.

**Reason**

(e) The mandatory continuing airworthiness information (MCAI) states:

There have been reports of inter-rivet cracking on several wing front spar adapter assemblies (P/N C6WM1027–1) on the horizontal and vertical flanges. It was determined that the cracking was caused by stress corrosion in the short transverse grain initiated by local riveting induced stresses. This directive mandates modification and inspection of the wing front spar adapter fitting and replacement of cracked fittings.

**Actions and Compliance**

(f) Unless already done, do the following actions:

(1) *For Group 1 airplanes*, within the next 180 days after August 5, 2008 (the effective date of AD 2008–11–10), install inspection holes in the left-hand (LH) and right-hand (RH) lower wing skins following Viking DHC–6 Twin Otter Service Bulletin Number V6/541, dated October 1, 2007.

(2) *For Group 2 airplanes*, within the next 180 days after the effective date of this AD, install inspection holes in the LH and RH lower wing skins following Viking DHC–6 Twin Otter Service Bulletin Number V6/541, dated October 1, 2007.

(3) *For Group 1 and Group 2 airplanes*, before further flight after installing the inspection holes required in paragraph (f)(1) or (f)(2) of this AD, initially inspect the LH and RH front spar adapter assemblies for cracks, and repetitively thereafter inspect all affected wing box P/Ns at intervals not to exceed 1,200 hours time-in-service or 12 months, whichever occurs first, until the replacement required in paragraph (f)(4) of this AD is done.

(i) For wing box P/Ns C6W1002–1, C6W1002–3, C6W1002–5, C6W1002–7, C6W1002–9, C6W1002–11, C6W1002–13, C6W1002–15, C6W1002–17, C6W1002–19, C6W1002–21, C6W1002–23, C6W1002–51, C6W1002–53, C6W1002–55, C6W1002–57, C6W1002–59, and C6W1002–61, inspect following Viking DHC–6 Twin Otter Service Bulletin Number V6/540, dated October 1, 2007.

(ii) For wing box P/Ns WR6–1002–59 or WR6–1002–61, inspect following R.W. Martin, Inc. Service Bulletin No. 00160/2, Revision A, dated November 15, 2007.

(4) *For Group 1 and 2 airplanes*, before further flight after doing any inspection required in paragraph (f)(3) of this AD where cracks are found, replace the cracked front spar adapter assembly with a front spar adapter assembly, P/N C6WM1027–3. Do the replacement following Viking DHC–6 Twin Otter Service Bulletin Number V6/542, dated October 1, 2007. This replacement terminates the repetitive inspections required in paragraph (f)(3) of this AD for the replaced front spar adapter assembly.

(5) As a terminating action for the repetitive inspections required in paragraph (f)(3) of this AD, at any time after the initial inspection required in paragraph (f)(3) of this AD, you may replace P/N C6WM1027–1 with P/N C6WM1027–3, except it must be replaced prior to further flight as required by paragraph (f)(4) of this AD.

**FAA AD Differences**

**Note:** This AD differs from the MCAI and/or service information as follows: MCAI Transport Canada AD No. CF–2007–31, dated December 17, 2007, is applicable to airplane models with front spar adapter assembly P/N C6WM1027–3 that incorporate task C57–10–18 of the DHC–6 Corrosion Prevention and Control Manual (CPCM), PSM 1–6–5. The applicability of this proposed AD does not include airplane models with front spar adapter assembly P/N C6WM1027–3 that incorporate task C57–10–18 of the DHC–6 CPCM, PSM 1–6–5, which is required in the Transport Canada ADs No. CF–94–12R1, dated April 13, 1999, and AD No. CF–99–11, dated May 28, 1999. We have addressed the Corrosion Prevention and Control Program in AD 2008–13–11 (73 FR 37355, July 1, 2008), which identifies specific areas that must be inspected to ensure the structural integrity of the DHC–6 fleet.

**Other FAA AD Provisions**

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Pong Lee, Aerospace Engineer, FAA, New York Aircraft Certification Office, ANE–171, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone: (516) 228–7324; fax: (516) 794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (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 Transport Canada AD No. CF–2007–31, dated December 17, 2007; Viking DHC–6 Twin Otter Service Bulletins No. V6/540, dated October 1, 2007; No. V6/541, dated October 1, 2007; and No. V6/542, dated October 1, 2007; and R.W. Martin, Inc. Service Bulletin No. 00160/2, Revision A, dated November 15, 2007, for related information.

Issued in Kansas City, Missouri, on November 26, 2008.

**Kim Smith,**

*Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. E8–28645 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Chapter I

**[EPA–HQ–OPPT–2008–0627; FRL–8386–3]**

**RIN 2070–AJ44**

## Formaldehyde Emissions From Pressed Wood Products

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Advance notice of proposed rulemaking and notice of public meetings.

**SUMMARY:** On March 24, 2008, EPA received a Toxic Substances Control Act (TSCA) section 21 petition from numerous organizations and individuals concerned about risks to human health and the environment from exposure to formaldehyde in composite wood products, specifically hardwood plywood, particleboard, and medium density fiberboard. In response to that petition, EPA decided to initiate a proceeding to investigate whether and what type of regulatory or other action might be appropriate to protect against risks posed by formaldehyde emitted from these and other pressed wood products. This document commences that proceeding by describing EPA's initial steps in that investigation and requesting comment, information, and data relating to formaldehyde emissions from pressed wood products. This document also announces five public meetings that EPA has scheduled in order to obtain additional stakeholder input.

**DATES:** Comments must be received on or before February 2, 2009. For public meeting information, see Unit III.A.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2008–0627, by one of the following methods:

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

• *Mail*: Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Hand Delivery*: OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2008–0627. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPPT–2008–0627. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

**FOR FURTHER INFORMATION CONTACT:** *For general information contact*: Colby Linter, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

*For technical information contact*: Cindy Wheeler, National Program Chemicals Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 566–0484; e-mail address: *wheeler.cindy@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This document is directed to the public in general. However, this document may be of particular interest to the following entities:

• Veneer, plywood, and engineered wood product manufacturing (NAICS code 3212).

• Manufactured home (mobile home) manufacturing (NAICS code 321991).

• Prefabricated wood building manufacturing (NAICS code 321992).

• All other basic organic chemical manufacturing (NAICS code 325199), e.g., formaldehyde manufacturing.

• Furniture and related product manufacturing (NAICS code 337).

• Furniture merchant wholesalers (NAICS code 42321).

• Lumber, plywood, millwork, and wood panel merchant wholesalers (NAICS code 42331).

• Other construction material merchant wholesalers (NAICS code 423390), e.g., merchant wholesale distributors of manufactured homes (i.e., mobile homes) and/or prefabricated buildings.

• Furniture stores (NAICS code 4421).

• Building material and supplies dealers (NAICS code 4441).

• Manufactured (mobile) home dealers (NAICS code 45393).

• Motor home manufacturing (NAICS code 336213).

• Travel trailer and camper manufacturing (NAICS code 336214).

• Recreational vehicle (RV) dealers (NAICS code 441210).

• Recreational vehicle merchant wholesalers (NAICS code 423110).

• Plastics material and resin manufacturing (NAICS code 325211).

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

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the

public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

### *A. Basic Information*

Formaldehyde is a colorless, strong-smelling gas. Commonly used as a preservative in medical laboratories and mortuaries, formaldehyde is also found in other products such as chemicals, pressed wood products (e.g., particleboard, fiberboard, and plywood), household products, glues, permanent press fabrics, and paper product coatings. Formaldehyde is widely used as a fungicide, germicide, and disinfectant. It is also a by-product of combustion and certain other natural processes.

Although there may be many sources of formaldehyde in air inside homes, including various household products, cigarette smoke, and un-vented, fuel-burning appliances (gas stoves, kerosene space heaters), the most significant sources of formaldehyde are likely to be pressed wood products made using adhesives that contain urea-formaldehyde (UF) and other formaldehyde-based resins. Pressed wood products typically made with such resins for indoor use include, but are not limited to: Particleboard (used as sub-flooring and shelving and in cabinetry and furniture); hardwood plywood paneling (used for decorative wall covering and used in cabinets and furniture); and medium density fiberboard (used for drawer fronts, cabinets, and furniture tops). Medium density fiberboard contains a higher resin-to-wood ratio than any other UF pressed wood product and is generally recognized as being the highest formaldehyde-emitting pressed wood product. Other pressed wood products include waferboard, oriented strandboard, hardboard, laminated veneer lumber, and parallel strand lumber.

Formaldehyde is both an irritant and a probable human carcinogen. Depending on concentration, it is well recognized that formaldehyde can be an eye, nose, and throat irritant, even when exposure is of relatively short duration. In the indoor environment, sensory reactions and various symptoms as a result of mucous membrane irritation are potential effects, and, while there are large individual differences in the general population, the differences may be even greater when sensitive people are included in an analysis (Ref. 1). EPA acknowledges that there are uncertainties relating to irritation response levels in humans. As noted in Unit IV.C. of the June 27, 2008 **Federal Register** notice discussed in Unit II.B.2. of this document, EPA is currently conducting an irritation hazard characterization that could be used to evaluate possible regulatory and other actions to address formaldehyde emissions from pressed wood products (Ref. 2).

In 1991, EPA classified formaldehyde as a probable human carcinogen, ''based on limited evidence in humans, and sufficient evidence in animals,'' and derived an inhalation unit risk factor for assessing formaldehyde cancer risk (Ref. 3). As discussed in the June 27, 2008 **Federal Register** notice, the assessment and modeling procedure used to develop EPA's cancer risk assessment is not based on the most current information. EPA's Office of Research and Development (ORD) is currently engaged in a reassessment of the potential cancer and non-cancer risks of formaldehyde through the ORD Integrated Risk Information System (IRIS) program. As a result of the IRIS reassessment process, EPA may determine that the appropriate cancer unit risk is higher or lower than the 1991 value after considering the currently available scientific information, including human data.

ORD and OPPTS are collaborating on developing an EPA IRIS assessment for non-cancer effects, including an irritation hazard characterization, of formaldehyde. This assessment will be expedited and prepared separately from the formaldehyde IRIS cancer reassessment. If the jointly-developed non-cancer assessment is peer-reviewed and completed in a timely manner, OPPTS will use it to inform its decision-making as part of a rulemaking under TSCA. The Agency's assessment process will include the appropriate external peer review, which will offer opportunities for public comment on the underlying science.

EPA also intends to commission the National Academy of Sciences to conduct a comprehensive review of the available scientific data on formaldehyde. The Agency believes that this additional analysis and advice will further strengthen the scientific basis of its understanding of formaldehyde risks.

Formaldehyde is also one of 187 compounds listed under section 112(b)(1) of the Clean Air Act (CAA) as a hazardous air pollutant (HAP). The CAA requires EPA to regulate emissions of HAPs from a published list of industrial source categories. The EPA has developed lists of major and area source categories that must meet control technology requirements for HAPs and has developed (or is developing) standards for these source categories. The plywood and composite wood products (PCWP) National Emission Standards for Hazardous Air Pollutants (NESHAP) is one of these standards (Ref. 4). The PCWP NESHAP controls emissions of formaldehyde and other HAPs from various process units (e.g., dryers and presses) at PWCP facilities.

### *B. The Section 21 Petition*

On March 24, 2008, 25 organizations and approximately 5,000 individuals petitioned EPA under section 21 of TSCA to use section 6 of TSCA to adopt a recently-promulgated California regulation concerning emissions of formaldehyde from three types of products California described as composite wood products: Hardwood plywood, particleboard, and medium density fiberboard (Ref. 5). The petitioners asked EPA to assess and reduce the risks posed by formaldehyde emitted from these products by exercising its authority under TSCA section 6 to adopt and apply nationally the California formaldehyde emissions regulation for these composite wood products. In addition, petitioners requested EPA to extend this regulation to include composite wood products used in manufactured homes.

1. *The California Air Resource Board's Airborne Toxics Control Measure.* In 2007, the California Air Resource Board (CARB) approved an

Airborne Toxics Control Measure (ATCM) for formaldehyde emissions from hardwood plywood, particleboard, and medium density fiberboard (Ref. 6). The ATCM was approved on April 18, 2008 by the California Office of Administrative Law and the first emission standards will take effect on January 1, 2009. The ATCM requires manufacturers to meet formaldehyde emission standards for any of these products that are sold, offered for sale, supplied, or manufactured for use in California. The ATCM also requires that compliant products be used in finished goods sold, offered for sale, supplied or manufactured for sale in California. The ATCM does not apply to hardwood plywood and particleboard materials when installed in manufactured homes subject to regulations promulgated by the United States Department of Housing and Urban Development (HUD). Seventeen percent of new construction and eight percent of existing manufactured housing are built according to HUD's regulations (Ref. 7).

The ATCM's ''Phase 1'' emission standards for hardwood plywood, particleboard, and medium density fiberboard will take effect on January 1, 2009. More stringent ''Phase 2'' standards will be phased in between 2010 and 2012. The ATCM does not allow manufacturers to meet these emission standards using barrier methods. CARB anticipates that manufacturers will meet the ''Phase 1'' standards by using resin technologies that are similar to those commonly in use today. To meet the ''Phase 2'' standards, CARB believes that manufacturers will likely use modified current day urea-formaldehyde (UF), no-added formaldehyde (NAF), or ultra-low-emitting formaldehyde (ULEF) resin systems.

The ATCM requires manufacturers of covered products to demonstrate compliance with the emission standards by being certified by an independent party known as a ''third party certifier.'' Third party certifiers must be approved by CARB and must follow specified requirements to verify that a manufacturer's production meets applicable formaldehyde emission standards. Once their product has been approved by CARB, manufacturers who use NAF or some ULEF resin systems are exempt from ongoing testing requirements. Manufacturers who use other ULEF resin systems may be granted a reduction in frequency for ongoing testing. Manufacturers would also be required to label their covered products to identify them as meeting either the ''Phase 1'' or ''Phase 2'' emission standards, or as being made with either NAF or ULEF resins. The ATCM also imposes recordkeeping requirements on manufacturers to document compliance.

The ATCM requires distributors, importers, fabricators, and retailers to purchase and sell panels and finished goods that comply with applicable formaldehyde emission standards. They must take precautions, such as communicating with their suppliers, to ensure that the products they purchase are in compliance with applicable emission standards. Distributors and importers must maintain records documenting compliance and fabricators must also label their finished goods as compliant with the applicable standards.

2. *EPA's response to the petition.* Although a substantial amount of information was submitted by reference with the petition or otherwise available to the Agency, EPA determined that the available information was not sufficient to support an evaluation of whether formaldehyde emitted from hardwood plywood, particleboard, and medium density fiberboard presents or will present an unreasonable risk to human health (including cancer and non-cancer endpoints) under TSCA section 6. As discussed in detail in the **Federal Register** notice announcing EPA's response to the petition, EPA's evaluation of the data provided by the petitioners revealed significant information gaps that would need to be filled to support an evaluation of whether use of formaldehyde in these products presents or will present an unreasonable risk under TSCA section 6 (Ref. 2).

Nevertheless, after considering the information presented by the petitioners (including information in the California administrative record), information submitted by commenters, and other available information, EPA decided to initiate a proceeding to investigate whether and what type of regulatory or other action might be appropriate to protect against risks posed by formaldehyde emitted from the products covered by the CARB ATCM as well as other pressed wood products. At the conclusion of this investigation, EPA anticipates determining whether EPA should take action, which may include regulatory action under TSCA section 6(a), action under TSCA section 6(b), voluntary or regulatory (e.g., under TSCA section 6) application of a voluntary consensus standard, or other approaches. While evaluating options, EPA intends to engage the public in this process and coordinate efforts with other interested agencies. The purpose of this document is to outline the steps EPA plans to take as part of this investigation, including opportunities for public participation, and to request comment and data in particular areas where available information is lacking.

## III. Public Participation

With this document, EPA is announcing its plans to involve stakeholders in gathering information to inform EPA's determination of the scope of the problem and EPA's decision on the best ways to address risks that may be posed by formaldehyde emissions from pressed wood products. EPA is beginning the public participation process by soliciting stakeholder assistance in obtaining a better understanding of the available control technologies and approaches, current and future industry practices, and implementation of the CARB ATCM. This document contains numerous specific requests for comment, information, and data on topics of current interest to EPA. Stakeholders are encouraged to respond to these requests and to provide comment on any other matters pertaining to the content of this document.

In addition, EPA is planning to hold five half-day public meetings in January of 2009. The purpose of these meetings is to receive stakeholder comments on the issue of formaldehyde emissions from pressed wood products, including the questions described in this document, and on future opportunities for public participation on this issue.

### *A. Meeting Dates and Locations*

The meetings will be held as follows:

1. In Research Triangle Park, NC on January 8, 2009, from 1 p.m. to 5 p.m. The meeting will be held at the Environmental Protection Agency, Main Campus Auditorium (C111B/C), 109 TW Alexander Drive, Research Triangle Park, North Carolina 27711.

2. In Portland, OR on January 13, 2009, from 1 p.m. to 5 p.m. The meeting will be held at the State Public Health Building, 800 NE Oregon St., Room 1B, Portland, Oregon 97232.

3. In Chicago, IL on January 15, 2009, from 8:30 a.m. to 12:30 p.m. The meeting will be held at the Ralph Metcalfe Federal Building, Room 328, 77 West Jackson Blvd., Chicago, IL 60604.

4. In Dallas, TX on January 26, 2009, from 1 p.m. to 5 p.m. The meeting will be held at the Environmental Protection Agency, 1445 Ross Avenue, 12th Floor, Dallas,Texas 75202.

5. In Washington, DC on January 29, 2009, from 1 p.m. to 5 p.m. The meeting will be held at the Environmental Protection Agency, EPA East, Room

1153, 1201 Constitution Ave., Washington, DC 20460.

*B. Meeting Procedures*

For additional information on the scheduled meetings, contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**. The meetings will be open to the public. Oral presentations or statements by interested parties will be limited to 10 minutes. Interested parties are encouraged to contact the technical person at least 10 days prior to the meeting to schedule presentations. Since seating for outside observers may be limited, those wishing to attend the meetings as observers are also encouraged to contact the technical person at the earliest possible date, but no later than 10 days before the meeting, to ensure adequate seating arrangements.

To request accommodation of a disability, please contact the technical person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

## IV. Investigation Overview and Specific Requests for Comment, Information, and Data

The first part of this Unit describes the elements of EPA's investigation and includes specific requests for comments, information, and data that may pertain to each investigation element. The second part of this Unit describes each of the various tools that EPA may use to address risks that may be posed by formaldehyde emissions from pressed wood products, along with requests for comment on these and other regulatory and voluntary approaches.

*A. Investigation Elements and Associated Requests for Comment, Information, and Data*

1. *Industry profile*. EPA seeks to obtain a better understanding of the available technologies to control formaldehyde emissions from pressed wood products, industry practices, and implementation of the CARB ATCM. EPA is planning an industry survey to supplement the information that EPA is requesting in this document. EPA requests commenters on this notice to provide information or data they may have regarding the pressed wood product industry. To the extent that the requested information was already submitted in response to EPA's request for comment on the TSCA section 21 petition, or is already publicly available and summarized in prior reports, such as those prepared in the late 1990s to support development of the PCWP NESHAP (Refs. 8, 9, 10, 11), EPA requests that commenters note such reports and whether the reports remain accurate with respect to new developments or changes that have occurred over time. EPA is particularly interested in responses to the following questions:

a. *Pressed wood products*. EPA has identified the following categories of pressed wood products that may be manufactured using urea-formaldehyde (UF) resin and other formaldehyde-based resins: Particleboard, medium density fiberboard, hardwood and softwood plywood, waferboard, oriented strandboard, hardboard, parallel strand lumber, laminated veneer lumber, prefabricated I-joists, and glued laminated beams (Ref. 12).

i. Are there other pressed wood products that may contain formaldehyde-based resins? What are these products?

ii. The CARB ATCM covers only three types of pressed wood products: Particleboard, medium density fiberboard, and hardwood plywood. Are there other specific pressed wood products or categories of pressed wood products that have been demonstrated to result in comparable or higher formaldehyde emissions? What emission levels have been reported and what percentages of these products have or may have such emissions? What companies produce or import such products? What are the applications for these products?

iii. What are the end-uses and quantities for each type of pressed wood product? In particular, EPA would like to receive information on the production volume (expressed as square feet or some comparable value) for each type of pressed wood product that is used in each end-use market, such as the amount of hardwood plywood used in cabinetry, furniture, paneling, door panels/skins, etc.

iv. To what degree are domestic and imported products interchangeable?

b. *Resins used in manufacturing pressed wood products*. Formaldehyde-based resins may be used in the manufacture of pressed wood products. The resins may serve to bind together raw wood materials, such as wood shavings, flakes, wafers, chips, particles, veneers, fibers, strands, or sawdust, to form the pressed wood product. There are several types of formaldehyde-based resins. Additionally, there are alternative resins that are not formaldehyde-based. The types of resins commonly used in pressed wood products include the following: Urea-formaldehyde (UF) resin, phenol-formaldehyde (PF) resin, melamine-formaldehyde (MF) resin, melamine-urea-formaldehyde (MUF) resin, isocyanate resin, polydiphenylmethane diisocyanate (pMDI) resin, polyvinyl acetate (PVA), and soy-based resin. Less commonly-used resins include: Ammonia urea formaldehyde (AUF), phenol resorcinol formaldehyde (PRF), phenol urea formaldehyde (PUF), phenol urea formaldehyde tannin (PUFT), and resorcinol formaldehyde (RF).

i. What types of resins, whether formaldehyde-based or not, are or may be used in the manufacture of each type of pressed wood product listed in Unit IV.A.1.a?

ii. What are the typical concentrations of free formaldehyde in each formaldehyde-based resin type and in each type of pressed wood product? (The term ''free formaldehyde'' refers to unreacted formaldehyde and formaldehyde that may become available from depolymerization of the resin.) EPA is also interested in information on the total quantity and typical mole ratio of the components of each type of resin used for each type of pressed wood product.

c. *Evaluation of manufacturing processes*. EPA is seeking detailed information on the manufacturing processes for each type of pressed wood product, including the operating parameters and conditions, unit operations, and equipment.

i. EPA is interested in descriptions of all of the factors, including the composition of raw materials and unit operating parameters, at each step in the manufacturing process that may affect the formaldehyde content of finished pressed wood products. EPA requests descriptions of the methods, including unit operations and operating procedures, used for controlling the content of formaldehyde in pressed wood products.

ii. EPA requests any available information on the overall mass balance and the formaldehyde mass balance per unit operation.

iii. EPA is interested in any available information on optimization studies of the factors affecting the formaldehyde content of finished pressed wood products. In general, an optimization study is a study of the means to improve the economic, environmental, health or safety performance of a chemical process. Improvements in one or more specific performance areas may have adverse impacts on other performance areas. In this context, EPA is requesting information on studies on the means of altering the process used to manufacture pressed wood products for the purpose

of reducing emissions of formaldehyde from such products. EPA is interested in any such information, including the results from bench scale experimental studies and engineering design studies with pilot plant or commercial production test run data.

iv. What are the quality control measures for the control of formaldehyde emissions from pressed wood products undertaken at manufacturing facilities? How often, to what extent, and why do these measures fail?

d. *Product alternatives.* EPA requests comment, data, and information on the potential alternatives that would reduce formaldehyde emissions from pressed wood products. EPA is also interested in the performance characteristics of, and the costs associated with using, alternative chemicals and processes to manufacture products that meet the CARB ATCM standards.

i. What low- or no- formaldehyde emitting substitutes exist? What percentage of the pressed wood market uses them? What percentage of the national pressed wood market, exclusive of California, is expected to use them after 2012 (when the CARB ATCM's Phase 2 emission limits have become effective), and in which products are they expected to be used?

ii. If a pressed wood products manufacturer were interested in reducing formaldehyde emissions, would the manufacturer substitute another resin (or resins) or modify the resins currently used? Which resins? Why?

iii. Do control technologies exist to reduce the levels of free formaldehyde in existing resin types? If so, what is the estimated effectiveness of each control technology? What is the basis for the effectiveness estimate?

iv. EPA has begun evaluating various resin formulations that have been manufactured to improve or eliminate formaldehyde emissions. EPA seeks information, including resin formulation, human health hazard, process, product performance, and cost information, from manufacturers who use or intend to use resins identified in the following list, manufacturers who use or intend to use other resins, and manufacturers who use or intend to use other methods to meet the CARB ATCM's Phase 1 and Phase 2 standards:

- Ethenol homopolymer (CASRN: 9002-89-5)
- Isocyanic acid, polymethylenepolyphenylene ester (CASRN: 9016-87-9)
- Urea, polymer with formaldehyde and 1,3,5-triazine-2,4,6-triamine (CASRN: 25036-13-9)
- Urea, polymer with formaldehyde and phenol (CASRN: 25104-55-6)
- Hexanedioic acid, polymer with N1-(2-aminoethyl)-1,2-ethanediamine and 2-(chloromethyl)oxirane (CASRN: 25212-19-5)
- Urea, polymer with formaldehyde, phenol and 1,3,5-triazine-2,4,6-triamine (CASRN: 25212-25-3)
- Urea, polymer with formaldehyde and methanol (CASRN: 37999-54-5)
- Poly[oxy(methyl-1,2-ethanediyl)], a-hydro-ω-hydroxy-, ether with 2-ethyl-2-(hydroxymethyl)-1,3-propanediol (3:1), polymer with 1,1'-methylenebis[4-isocyanatobenzene] (CASRN: 57596-50-6)
- Tannins, polymers with formaldehyde and phenol (CASRN: 68910-49-6)
- PureBond (Identity has been claimed confidential, but it is known to be soy-based)

v. What testing has been done to determine the effectiveness of the different barrier technologies (e.g., melamine sheets, paper coatings, varnish or paint treatments, films, foils) at lowering formaldehyde emissions over the lifetime of the coated pressed wood product? What are the results of that testing? The Agency is aware that some barrier methods need additional treatment of the remaining uncoated surfaces of the pressed wood products (*i.e.*, edge treatments with scavenger coatings) to work effectively. Has the use of barrier treatment or combination treatment eliminated the potential for formaldehyde emissions or simply deferred the release of formaldehyde, perhaps until the end of the wood products' life cycle? Are data available to show that the efficient use of scavenger chemicals is effective in permanently reducing formaldehyde emissions?

vi. What product substitutes exist for the products covered by the CARB ATCM, and what product substitutes exist for other pressed wood products? For example, oriented strandboard might be used in place of particleboard, or solid lumber might be used in place of fiberboard. What are the performance characteristics of and the costs associated with using product substitutes?

e. *Reaction to the CARB ATCM.* For companies that manufacture, import, fabricate, wholesale, or retail hardwood plywood, particleboard, or medium density fiberboard for sale outside of California:

i. Do you intend on distributing two sets of products, one that is compliant with the CARB ATCM (for sale in California) and another that is not CARB-compliant (for sale outside of California)? Do you intend to sell a single set of products (inside and outside of California) that comply with the CARB ATCM's Phase 2 standards? What factors are influential in making this decision (e.g., where your company is located, where your clients are located or sell their products, how large your company is)?

ii. If you intend on manufacturing hardwood plywood, particleboard, or medium density fiberboard products that comply with the CARB ATCM's Phase 2 standards, what resin system(s), additives, process modifications, or post-treatment did you previously use and what do you anticipate using in order to comply with the CARB ATCM?

iii. If you do not intend on selling products that comply with the CARB ATCM's Phase 2 standards, why not? What factors influence your decision of whether or not to sell products that comply with the CARB ATCM's Phase 2 standards?

iv. If you do not intend on selling products that comply with the CARB ATCM's Phase 2 standards, what level of formaldehyde emissions do you anticipate that your products will have? For example, will they meet the CARB ATCM's Phase 1 standards?

v. What are the key factors in determining the cost of complying with the CARB ATCM, and how do these vary across plants? For example, key factors may include whether the forming line in a pressed wood plant uses cauls or is caulless, or whether the presses are single opening, multi-opening, or continuous.

vi. Are data available on whether or how formaldehyde emission rates or compliance with the CARB ATCM may differ between domestic and imported products?

2. *Exposure assessment.* EPA has also initiated development of an exposure assessment for formaldehyde emissions from pressed wood products. Exposure assessments identify the pathways by which toxic substances may reach individuals, estimate how much of a substance an individual is likely to be exposed to (including the frequency and duration of exposure), estimate time-activity patterns, and estimate the number of individuals likely to be exposed. While this exposure assessment will primarily focus on consumer exposures, including children's exposures, EPA also plans to evaluate occupational exposures and exposures to emissions from manufacturing operations to assess benefits of any action developed to reduce consumer exposures to formaldehyde emissions from pressed wood products. EPA is reviewing the

available data for this purpose, including the data submitted by reference with the TSCA section 21 petition. Commenters are requested to submit any available information or data they may have that pertains to formaldehyde exposures and pressed wood products. EPA is particularly interested in the following:

a. *Product emissions*. i. What are the emissions profiles (e.g., mass of formaldehyde emitted over time, decay rate over time, and measurement method and parameters) of pressed wood-products containing formaldehyde-based resins on a national level? To the extent such information is available, EPA is interested in emissions profiles for each of the various types of resins, pressed wood products, and consumer goods.

ii. What data are available on the emissions profiles of the pressed wood products that could be used as substitutes?

b. *Children's furniture*. i. What is the surface area (square feet) of pressed wood product per unit of furniture that is used by children, such as baby cribs, changing tables, and toddler beds? What type of pressed wood product is used (e.g., UF-bonded hardwood plywood, soy-bonded hardwood plywood, UF fiberboard, MDI fiberboard) in children's furniture? What part of the furniture unit contains the pressed wood product? On a national level, how many units of children's furniture containing pressed wood product are sold?

ii. Are there any studies that have measured the formaldehyde exposure of children sleeping on furniture containing pressed wood products? What are the results? Are there any models available to estimate exposures from such microenvironments? Are there any data available on time-activity pattern data or air exchange rates specific for this scenario?

c. *Other items*. i. What are the current pressed wood characterizations and emission profiles of other pressed wood items, such as kitchen cabinets, entertainment centers, office furniture, etc.?

ii. What amount of pressed wood product goes into the construction of these types of products? How much of it is pressed wood product made with UF or other formaldehyde-based resins? Do imported cabinets and other furniture contain more or less pressed wood than similar domestic products?

iii. What amount (square feet) of pressed wood product will be installed into a kitchen during both minor renovations (refacing kitchen countertops and cabinets) and extensive renovations (where all countertops and cabinets are replaced)? Are there other renovation projects that typically involve a significant amount of pressed wood product? Which ones?

iv. Are there any studies that have measured the formaldehyde exposure of occupants to furniture and/or cabinets containing pressed wood products? Are there any models available to estimate exposures from such microenvironments? Are there any data available on time-activity pattern data or air exchange rates specific for this scenario?

d. *Emissions from manufacturing operations*. The manufacture of pressed wood products may release formaldehyde into the environment. Formaldehyde points of release may include, but are not limited to, the following: Fugitive and point source air emissions from refining, preheating, humidifying and/or drying of the wood materials; pressing and/or cooling of the wood product after adhesive application; finishing operations (aging, trimming, sanding, sorting, and storing); container residue from containers used to transport resins and/or adhesives; equipment cleanup wastes; combustion of formaldehyde-containing wood scraps, such as for energy recovery; and other handling of process or product wastes that contain formaldehyde. EPA requests information or data that commenters may have on emissions from pressed wood product manufacturing operations. To the extent that the requested information is already publicly available and summarized in prior reports, such as those prepared in the late 1990s to support development of the PCWP NESHAP (Refs. 6, 7, 8, 9), EPA requests that commenters note such reports and comment on whether the reports remain accurate with respect to new developments or changes that have occurred over time. EPA plans to evaluate exposures to emissions from manufacturing operations to assess benefits of any action developed to reduce consumer exposures to formaldehyde emissions from pressed wood products.

i. EPA is requesting information and data on all points of formaldehyde releases, including the quantity of such releases and the media to which formaldehyde is released, during the manufacture of each type of pressed wood product.

ii. EPA is interested in information on any control technologies, such as on-site wastewater treatment, filtration systems, or air pollution control devices (e.g., regenerative thermal oxidizers, biofilters, steam separation, scrubbers, ionic liquid technology), used to mitigate the environmental release of formaldehyde associated with the manufacture of pressed wood products, including estimates of the effectiveness of each control technology and the basis for each effectiveness estimate.

e. *Occupational exposure*. During manufacturing of pressed wood products, occupational exposure to formaldehyde may occur to workers who are in contact with, or in proximity to, the manufacturing or fabricating process, raw materials, or pressed wood products. EPA plans to evaluate occupational exposures to assess benefits of any action developed to reduce consumer exposures to formaldehyde emissions from pressed wood products. EPA is particularly interested in the potential for alternative chemicals and processes to reduce occupational exposures to formaldehyde during pressed wood product manufacture, processing, and distribution. EPA requests information on all worker activities in pressed wood manufacturing and fabricating that may result in occupational exposure to formaldehyde.

i. For each worker activity, EPA is interested in the duration of exposure per day and the frequency of the activity in days per year. For example, in a particular company's manufacturing process, two workers may empty containers of formaldehyde-containing resin into an applicator. For this company, this activity may take two hours per day and occur 250 days per year.

ii. EPA requests any recent information (*i.e.*, from the past 5 years), including studies, on worker exposures to formaldehyde during pressed wood product manufacturing processes, as well as any information on control technologies and/or personal protective equipment (PPE) that are used to mitigate occupational exposures of formaldehyde.

iii. EPA also requests comparable information on exposure to chemicals (e.g., regulated by EPA or the Occupational Safety and Health Administration) that are used in alternative resins or that are present as unreacted monomers in alternative resins (such as methylene diisocyanate (MDI), vinyl acetate monomer (VAM), and epichlorohydrin)).

f. *Emissions measurement and modeling*. EPA is interested in information on measuring formaldehyde emissions from pressed wood products and modeling exposures to these emissions.

i. What are the state of the art methods for measuring formaldehyde releases from pressed wood products?

For each method, EPA requests information on method detection limits, sample preparation, and product representation. EPA is interested in the advantages and disadvantages of each method as compared to other available methods.

ii. Are there any air monitoring data, other measured results, calculations, or verified/validated models that can be used for real life (in-home) exposure analysis? EPA is also interested in details as to the methods and approaches used in such studies.

g. *Building-specific exposure information.* EPA is interested in exposure information that may be specific to formaldehyde emissions from pressed wood products installed in various types of buildings, especially manufactured buildings or structures not regulated by HUD, such as park homes or trailers, travel trailers, portable classrooms, and temporary office trailers.

i. What types and amounts of pressed wood products are used in each such type of building or structure?

ii. What are the occupancy rates (e.g., number of people, days per year of occupancy), exposed population, time-activity patterns, and air exchange rates of each such type of building or structure?

iii. What monitoring studies or other exposure information are available for formaldehyde emissions from pressed wood products installed in these types of buildings or structures?

3. *Economic analysis.* As discussed in Unit IV.B. of this document, EPA is considering whether regulatory and/or voluntary actions are necessary to address formaldehyde emissions from pressed wood products. One of the options EPA plans to consider is whether it is appropriate to promulgate a rule under TSCA section 6(a). In promulgating any rule under TSCA section 6(a) with respect to a chemical substance, TSCA section 6(c) requires the Administrator to consider (among other factors), the benefits of such substance or mixture for various uses and the availability of substitutes for such uses, and the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.

These considerations may be informative whether or not EPA proceeds under TSCA section 6(a). Therefore, EPA requests information that it can use in preparing an economic analysis. Such information includes the cost and performance characteristics of substitute technologies to control formaldehyde emissions from pressed wood products; the extent to which substitute technologies are drop-in technologies (*i.e.*, can be used with existing equipment in a plant or require modifications to existing equipment); the supply and demand elasticities for markets potentially affected by action on formaldehyde in pressed wood products, including the markets for pressed wood, fabricated goods made from pressed wood (such as furniture, doors, kitchen cabinets, etc.), and resins or adhesives used in pressed wood; and information needed to assess the benefits of controlling exposures to formaldehyde from pressed wood products (such as the magnitude of exposure, the dollar value of the health effects resulting from such exposures, and the dollar value of any benefits not related to health endpoints, such as reduced exposure to unwanted odors).

*B. Regulatory Authorities and Voluntary Options*

The previous Unit of this notice describes the assessments EPA is undertaking in order to make a determination whether regulatory and/or voluntary action is needed to address risks that may be posed by formaldehyde emissions from pressed wood products. While EPA has not yet made this determination, EPA recognizes that stakeholders are likely to have valuable insights into the tools available to address risks. EPA also believes that it is most useful to obtain these insights early in the investigation process. This Unit briefly describes two of the regulatory authorities that EPA could use and requests comment on each. This Unit also asks whether any other regulatory authorities should be considered and seeks input on the possible use of voluntary approaches alone and in connection with regulatory approaches. EPA is particularly interested in comment, information, and data on the strengths and limitations of all of the options available to EPA. Additional specific requests for comment on each approach are included in the description of each approach.

1. *TSCA section 6(a).* In order to promulgate a rule under TSCA section 6(a), the Administrator must find that ''there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture * * * presents or will present an unreasonable risk of injury to health or the environment.'' This finding cannot be made considering risk alone. In promulgating any rule under TSCA section 6(a), TSCA section 6(c) requires the Administrator to consider:

- The effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture.
- The effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture.
- The benefits of such substance or mixture for various uses and the availability of substitutes for such uses.
- The reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.

If EPA finds that there is a reasonable basis to conclude that one or more activities presents an unreasonable risk, TSCA section 6(a) provides EPA with the authority to:

- Prohibit or limit manufacture, processing, or distribution in commerce;
- Prohibit or limit the manufacture, processing, or distribution in commerce of the chemical above a specified concentration;
- Require adequate warnings and instructions with respect to use, distribution, or disposal;
- Require recordkeeping, monitoring, and testing to ensure compliance with regulations promulgated under this section;
- Prohibit or regulate any manner of commercial use;
- Prohibit or regulate any manner of disposal; or
- Require manufacturers or processors to give notice of the unreasonable risk of injury.

TSCA section 6(a) also provides that the control measure or measures adopted must be the ''least burdensome requirements'' that adequately protect against the unreasonable risk.

EPA requests comment on the use of TSCA section 6(a) to regulate the manufacture, processing, distribution in commerce, commercial use, or disposal of one or more pressed wood products that contain formaldehyde. EPA is particularly interested in comments on the strengths and weaknesses of the control measures that could be adopted under this section, such as emissions limits or warning labels on pressed wood products.

2. *TSCA section 6(b).* TSCA section 6(b) specifically addresses quality control issues. EPA believes that TSCA section 6(b) is an available option for addressing formaldehyde risks because the information available to EPA suggests that formaldehyde emissions

from some pressed wood products are highly dependent upon the process used to manufacture the products. If EPA has a reasonable basis to conclude that a particular manufacturer or processor is making or producing a chemical substance in such a way that it presents an unreasonable risk of injury to human health or the environment, EPA may order the manufacturer or processor to submit a description of its relevant quality control procedures. If EPA determines that those quality control procedures are inadequate to prevent an unreasonable risk, EPA may order the manufacturer or processor to modify its quality control procedures to the extent necessary to remedy the inadequacy. If EPA determines that a chemical which presents an unreasonable risk has been distributed, EPA may order the manufacturer or processor to notify its customers or the general public, or to replace or repurchase the chemical as necessary to protect health or the environment or any combination of these. Manufacturers and processors subject to a requirement to replace or repurchase must be offered the option to replace or repurchase, and EPA may prescribe the procedures for doing so in each case. Orders to revise procedures, to notify customers or the public, or replace or repurchase chemicals must be issued after an opportunity for a hearing in accordance with section 554 of the Administrative Procedures Act (APA), which provides procedural requirements in cases where an adjudication is required on the record after an opportunity for a hearing.

EPA will evaluate whether it is feasible to use TSCA section 6(b) to address risks that may be posed by formaldehyde emissions from one or more pressed wood products. TSCA section 6(b) is targeted towards controlling the manufacturing processes of individual manufacturers or processors. As such, if EPA determines that emissions from pressed wood products present or will present an unreasonable risk, it may not be feasible or possible to use TSCA section 6(b) to address all such risks. EPA requests comment on the use of TSCA section 6(b) in this manner. In addition, if EPA were to take action under TSCA section 6(b) with respect to domestic manufacturers of pressed wood products, what could EPA do to control formaldehyde emissions from imported pressed wood products or finished goods made from pressed wood products, such as furniture, cabinets, countertops, and flooring?

3. *Other regulatory authorities.* Based on a preliminary review of the available authorities, EPA believes that the most effective authorities available to address risks that may be presented by formaldehyde emissions from pressed wood products would be TSCA sections 6(a) and 6(b). A number of the commenters on the TSCA section 21 petition appeared to support a national emissions limit for pressed wood products, yet contended that an ''unreasonable risk'' finding under TSCA section 6 was unjustified. EPA requests comment on other authorities available to EPA that could be used to impose a national emissions limit on these products. EPA also requests comment on other authorities that could be used in other ways to address risks that may be presented by formaldehyde emissions from pressed wood products.

The TSCA section 21 petition contained a request for EPA to apply the CARB ATCM to pressed wood products used in manufactured housing. As discussed in the **Federal Register** notice responding to the petition, HUD has standards that apply to pressed wood products in manufactured housing. Many petition commenters recommended that HUD continue to exercise jurisdiction over manufactured housing. Some suggested that EPA refer the matter to HUD under TSCA section 9. HUD itself commented on the petition (Ref. 13), stating that it had received a proposal to lower formaldehyde emissions limits from certain products used in the construction of manufactured homes from the Manufactured Housing Consensus Committee (MHCC), a Congressionally-established Federal Advisory Committee. In addition, according to HUD, the MHCC recently received a new proposal from the public to adopt the CARB ATCM standards. HUD stated that it will work with the MHCC to review this new proposal. EPA plans to work collaboratively with HUD to address risks that may be presented from formaldehyde emissions from pressed wood products used in manufactured housing.

4. *Voluntary approaches.* The National Technology Transfer and Advancement Act (NTTAA) (Pub. L. 104–113, §12(d), 110 Stat. 775, 783 (1996)) directs federal agencies to use voluntary consensus standards in their regulatory activities unless to do so would be ''inconsistent with applicable law or otherwise impractical.'' Voluntary consensus standards are technical standards, which include materials specifications, test methods, sampling protocols, business practices, and management systems developed or adopted by voluntary consensus standards bodies, both domestic and international. These bodies plan, develop, establish, or coordinate voluntary consensus standards using agreed-upon procedures. The NTTAA also encourages agencies to consult with voluntary consensus standards bodies and participate in the development of such standards when compatible with agency missions, authorities, priorities and budget resources.

Many of the commenters on the TSCA section 21 petition suggested that EPA work cooperatively with the affected industries to develop national standards for formaldehyde emissions from pressed wood products. EPA believes that voluntary initiatives can be useful tools in addressing risks to human health and the environment, and voluntary initiatives may be important components of a strategy to address the formaldehyde emissions that are the subject of this document. Indeed, there already are voluntary consensus standards for formaldehyde emissions, such as the standards developed under the auspices of the American National Standards Institute (ANSI), and voluntary industry compliance programs, such as the Composite Panel Association's Grademark program, that address formaldehyde emissions from some pressed wood products. The Composite Panel Association (CPA), in comments on the petition, observed that the CPA is accredited by ANSI as a standards developer (Ref. 14). The CPA further stated that, on June 3, 2008, the CPA Board of Directors ''approved the insertion of the CARB Phase 1 and Phase 2 formaldehyde emission limits'' into the new versions of the ANSI standards for Particleboard (ANSI A208.1) and for Medium Density Fiberboard (ANSI A208.2). While a consensus committee must still approve these revised standards, the CPA notes that, when they are finalized, purveyors of these products would be able to reference these standards in their ''commercial dealings.'' The Hardwood Plywood and Veneer Association (HPVA) likewise noted that they were in the process of revising the ANSI-HPVA national consensus standards for hardwood plywood and engineered hardwood flooring and they were considering including the CARB ATCM emission requirements (Ref. 15).

EPA would be interested in hearing more details from affected industries as to how voluntary national standards could be developed and implemented. EPA is specifically interested in comments that address the following questions:

a. How could EPA encourage compliance with purely voluntary standards, whether currently-existing or newly-developed?

b. How successful are the existing programs at reducing formaldehyde exposures? How could the existing programs be modified to improve the results? Would a new voluntary program be more successful at reducing formaldehyde exposures?

c. How would voluntary programs address imported products?

d. What role could regulatory adoption (e.g., using TSCA section 6) of voluntary consensus standards for formaldehyde emissions play in EPA's oversight of this issue? How would this approach address imported products?

**V. References**

1. Agency for Toxic Substances and Disease Registry. Toxicological Profile for Formaldehyde. 1999. *http://www.atsdr.cdc.gov/toxprofiles/tp111.html*

2. EPA. Formaldehyde Emissions from Composite Wood Products; Disposition of TSCA Section 21 Petition; Notice. **Federal Register** (73 FR 36504, June 27, 2008).

3. EPA, Office of Research and Development. Formaldehyde. Integrated Risk Information System. 1991. *http://www.epa.gov/iris/links.htm*

4. EPA. National Emission Standards for Hazardous Air Pollutants: Plywood and Composite Wood Products; Final Rule. **Federal Register** (72 FR 61060, October 29, 2007). *http://www.epa.gov/ttn/atw/plypart/fr29oc07.pdf*

5. Sierra Club, 25 other organizations, and approximately 5,000 individuals. Letter from Tom Neltner, Sierra Club, to Stephen Johnson, Administrator, Environmental Protection Agency. Re: Citizen Petition to EPA Regarding Formaldehyde in Wood Products. March 2008.

6. California Environmental Protection Agency Air Resources Board. Airborne Toxic Control Measure to Reduce Formaldehyde Emissions from Composite Wood Products. Final Regulation Order. April 2008. *http://www.arb.ca.gov/regact/2007/compwood07/compwood07.htm*

7. Note to file. July 17, 2008.

8. EPA, Office of Air Quality Planning and Standards (OAQPS). Background Information Document for Proposed Plywood and Composite Wood Products NESHAP. September, 2000.

9. EPA, OAQPS. Memorandum from D. Bullock, K. Hanks, and B. Nicholson, MRI to M. Kissell, EPA/ESD. *Summary of Responses to the 1998 EPA Information Collection Request (MACT Survey) — General Survey*. April 28, 2000.

10. EPA, OAQPS. Memorandum from K. Hanks and B. Threatt, MRI to M. Kissell, EPA/ESD. *Summary of Responses to the 1998 EPA Information Collection Request (MACT Survey)—Engineered Wood Products*. January 20, 2000.

11. EPA, OAQPS. Memorandum from K. Hanks, B. Threatt, and B. Nicholson, MRI to M. Kissell, EPA/ESD. *Summary of Responses to the 1998 EPA Information Collection Request (MACT Survey)—Hardwood Plywood and Veneer*. May 19, 1999.

12. Department of Agriculture, Forest Service; Forest Products Laboratory. *Wood Handbook—Wood as an Engineering Material*. Gen. Tech. Rep. FPL–GTR–113 (1999). *http://www.fpl.fs.fed.us/documnts/fplgtr/fplgtr113/fplgtr113.pdf*

13. Department of Housing and Urban Development, Office of Regulatory Affairs and Manufactured Housing. (May 12, 2008).

14. Composite Panel Association. (May 12, 2008).

15. Hardwood Plywood and Veneer Association. (May 12, 2008).

**VI. Statutory and Executive Order Reviews**

Under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this action was submitted to the Office of Management and Budget (OMB) for review. Any changes to the document that were made in response to OMB comments received by EPA during that review have been documented in the docket as required by the Executive Order.

Since this document does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, the various other review requirements that apply when an agency imposes requirements do not apply to this action.

As part of your comments on this document, you may include any comments or information that you have regarding this action. In particular, any comments or information that would help the Agency to assess the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*); to consider voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note); to consider environmental health or safety effects on children pursuant to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997); or to consider human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994). The Agency will consider such comments during the development of any subsequent notice of proposed rulemaking as it takes appropriate steps to address any applicable requirements.

**List of Subjects**

Environmental protection, Housing, Toxic substances, Wood.

Dated: November 25, 2008.

**Stephen L. Johnson,**

*Administrator.*

[FR Doc. E8–28585 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 60, 61, and 63

**[EPA–HQ–OAR–2006–0640; FRL–8748–1]**

**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:** Notice of extension of comment period.

**SUMMARY:** EPA is announcing that the comment period on the proposed rule for 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'' published on October 9, 2008, is extended to February 5, 2009. This comment period extension also applies to the amendments proposed along with Performance Specification 17 and Procedure 4 for continuous parameter monitoring systems. EPA received requests for an extension to the comment period from the American Chemistry Council and the Coalition for Responsible Waste Incineration.

The reason given for the request for the extension was the need for additional time to review the proposed rules and assess their impact on subject sources. Since the additional time is expected to afford commenters the ability to prepare and submit more comprehensive and detailed comments, EPA finds the requests for an extension of the comment period reasonable.

One commenter also requested a 60-day extension to the deadline for requesting a public hearing on the proposed rule. No specific, compelling reason was provided for granting this request; therefore EPA finds the request for extending the deadline for requesting a public hearing on the proposal not reasonable.

**DATES:** *Comments:* Comments on the proposed rule must be received on or before February 5, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2006–0640, by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-Docket@epa.gov*, Attention Docket ID No. EPA–HQ–OAR–2006–0640.
- *Fax:* (202) 566–9744, Attention Docket ID No. EPA–HQ–OAR–2006–0640.
- *Mail:* Air and Radiation Docket and Information Center, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2006–0640. Please include a total of two copies.
- *Hand Delivery or Courier:* EPA Docket Center (6102T), 1301 Constitution Avenue, NW., Room 3334, Washington, DC 20460, Attention Docket ID No. EPA–HQ–OAR–2006–0640. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

*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 *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* 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 *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 *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 *www.regulations.gov* or in hard copy at the EPA Docket Center, Performance Specification 17 and Procedure 4 for Continuous Parameter Monitoring Systems Docket, 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:**

**A. Does this action apply to me?**

To determine whether your facility, company, business, organization, etc., is potentially affected by this action, you should examine the proposed rule published on October 9, 2008 (73 FR 59956). 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.

**B. What should I consider as I prepare my comments to EPA?**

Do not submit information containing CBI to EPA through *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), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711, Attention Docket ID No. 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 I get a copy of this document?**

In addition to being available in the docket, an electronic copy of this notice is available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control.

Dated: November 26, 2008.

**Robert J. Meyers,**

*Principal Deputy Assistant Administrator for Air and Radiation.*

[FR Doc. E8–28677 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

**[EPA–HQ–OAR–2002–0009; FRL–8747–9]**

**RIN 2060–AP07**

## National Emission Standards for Halogenated Solvent Cleaning

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Notice of extension of comment period.

**SUMMARY:** The EPA is announcing an extension of the public comment period on our proposed response to a Petition for Reconsideration regarding a final rule we issued under Section 112(f)(2) and 112(d)(6) of the Clean Air Act related to national emission standards for halogenated solvent cleaning. As published in the **Federal Register** on October 20, 2008, written comments on the proposed rule were to be submitted by December 4, 2008. On November 4, 2008, EPA received a timely request to extend the deadline for the public comment period on the proposed rule to February 4, 2009. In response to this request, EPA is extending the comment period that would end on December 4, 2008, to February 4, 2009.

**DATES:** *Comments.* Comments must be received on or before February 4, 2009.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2002–0009, 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) 566–1741.
- *Mail:* Air and Radiation Docket, EPA, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a duplicate copy, if possible. We request that a separate copy of each public comment also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).
- *Hand Delivery:* In person or by courier, deliver comments to: EPA Docket Center (2822T), EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information. We request that a separate copy of each public comment also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0009. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the EPA Docket Center, Docket ID No. EPA–HQ–OAR–2002–0009, EPA West Building, 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 and Radiation Docket is (202) 566–1742.

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact Mr. H. Lynn Dail, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–2363; fax number: (919) 541–3470; and e-mail address: *dail.lynn@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

A. This notice extends the public comment period on our proposed response to a Petition for Reconsideration (73 FR 62384, October 20, 2008) regarding a final rule we issued under Section 112(f)(2) and 112(d)(6) of the Clean Air Act related to national emission standards for halogenated solvent cleaning. As published in the **Federal Register** on October 20, 2008, written comments on the proposed rule were to be submitted by December 4, 2008. On November 4, 2008, we received a request to extend the deadline for the public comment period to February 4, 2009. In response to this request, we are extending the comment period that would end on December 4, 2008 to February 4, 2009.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit CBI information to EPA through *www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Mr. Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2002–0009.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow Directions—EPA may ask you to respond to specific questions or

organize comments by referencing the relevant part or section number.

- Explain why you agree or disagree: Suggest alternatives and substitute language.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

Dated: November 26, 2008.

**Robert J. Meyers,**

*Principal Deputy Assistant Administrator for Air and Radiation.*

[FR Doc. E8–28675 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 180

**[EPA–HQ–OPP–2007–1106; FRL–8390–1]**

## Chlorothalonil; Proposed Pesticide Tolerance

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to establish tolerances for combined residues of chlorothalonil and its 4-hydroxy metabolite in or on lychee and starfruit under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** Comments must be received on or before February 2, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–1106, by one of the following methods:

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

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2007–1106. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

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

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

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

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

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

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying

information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

EPA on its own initiative, under section 408(e) of FFDCA, 21 U.S.C. 346a(e), is proposing to establish tolerances for combined residues of the fungicide, chlorothalonil, tetrachloroisophthalonitrile, and its metabolite, 4-hydroxy-2,5,6-trichloroisophthalonitrile, in or on lychee at 15 parts per million (ppm) and starfruit at 3.0 ppm. The United States Department of Agriculture (USDA) requested that EPA establish these tolerances. Because USDA did not submit a petition in support of establishing these tolerances, EPA did not publish a Notice of Filing of a petition for these tolerances.

## III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for tolerances for combined residues of chlorothalonil and its 4-hydroxy metabolite on lychee at 15 ppm and starfruit at 3.0 ppm. EPA's assessment of exposures and risks associated with establishing these tolerances follows:

### *A. Toxicological Profile*

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

Chlorothalonil has low acute toxicity by the oral and dermal routes of exposure and is moderately toxic by the inhalation route. It is severely irritating to the eye and moderately irritating to the skin but is not a skin sensitizer.

Chlorothalonil causes gastric irritation upon ingestion. In a subchronic dog study, both males and females exhibited decreased body weights, body-weight gains and food consumption. In a chronic dog study, there was one death (female), decreased body-weight gain and food consumption, macroscopic and microscopic pathological findings in the stomach (including thickened appearance of the stomach and intra-epithelial nuclear pyknosis in the mucosal epithelium of the antrum of the stomach) and a very slight hypertrophy of the cells in the zona fasciculata of the adrenal glands. In a second chronic dog study, vacuolated epithelium of the kidney was observed. In a subchronic mouse study, chlorothalonil produced hyperplasia and hyperkeratosis of the squamous epithelium of the stomach. In a subchronic rat study, chlorothalonil increased relative kidney weights and produced dilated renal medullary tubules as well as hyperplasia and hyperkeratosis of the non-glandular area of the stomach. In rodent chronic toxicity studies, there was an increased incidence of epithelial hyperplasia of the limiting ridge and non-glandular region of the stomach in rats and mice.

There are two toxicology data sets, submitted by different basic registrants, available for chlorothalonil. There was no indication of a carcinogenic response in the rat chronic toxicity/carcinogenicity study from the newer data set; however, an increased incidence of renal adenomas and carcinomas and an increased incidence of papillomas and/or carcinomas of the forestomach were observed in both sexes of rats and mice with the older data set. The new carcinogenicity study in mice also demonstrates that chlorothalonil produces similar papillomas of the forestomach. Based on the increased incidence of renal adenomas and carcinomas observed in both sexes of rats and mice, the rarity of the tumor response in the kidney, and the increased incidence of papillomas and/or carcinomas of the forestomach in rats and mice, EPA classified chlorothalonil as a ''likely'' human carcinogen by all routes of exposure.

Several studies are available that address the mechanism of carcinogenicity of chlorothalonil. Based on the mechanistic data submitted for the kidney tumor response demonstrating a toxic response of the kidney and forestomach to repeated dietary administration of chlorothalonil, the mode of action for tumor induction of chlorothalonil is likely to be non-linear. With regard to the forestomach tumors, data submitted by the registrant showing cell proliferation and non-neoplastic pathology at doses near those producing a tumorigenic response also support a non-linear mode of action for chlorothalonil. Based on the weight of the evidence presented to the Agency, EPA has concluded that a non-linear risk assessment using a Margin of Exposure (MOE) approach is appropriate for chlorothalonil.

No developmental toxicity was observed in two rat developmental toxicity studies or in one of the two rabbit developmental toxicity studies available for chlorothalonil. In the other rabbit study, there was an increased incidence of thirteen ribs and reduced sternebrae in the absence of maternal toxicity. There was no evidence of reproductive toxicity in either rat reproduction study available for chlorothalonil.

There is no evidence that chlorothalonil causes neurotoxicity. There was no evidence of neuropathology, and there were no central nervous system (CNS) malformations, effects on brain weights, abnormal behavior or effects on offspring sexual maturation observed in the toxicity studies available for

chlorothalonil, including a subchronic neurotoxicity study in rats.

In a 90–day oral toxicity study in rats, a slight decrease in thymus weight was observed at the highest dose tested (HDT), a possible indication of immunotoxicity. However, since there were no histopathological findings noted in the thymus and no effects on the thymus observed in other subchronic or chronic/carcinogenicity studies in rats, EPA has concluded that the slight effect on thymus weight seen in this study is a spurious effect and not indicative of immunotoxicity.

4-hydroxy-2,5,6-trichloroisophthalonitrile is a major metabolite of chlorothalonil in plants and the predominant residue in animals. Toxicology data available for this metabolite include acute oral and subchronic toxicity studies in rats, developmental toxicity studies in rats and rabbits, a reproduction toxicity study in rats, a chronic toxicity study in dogs and chronic/carcinogenicity studies in rats and mice. The results of these studies indicate that the toxicity of the 4-hydroxy metabolite is similar to that of parent chlorothalonil. Based on this determination, EPA has concluded that the chlorothalonil risk assessment adequately accounts for potential toxicity resulting from exposure to 4-hydroxy chlorothalonil, and a separate risk assessment is not needed.

Specific information on the studies received and the nature of the adverse effects caused by chlorothalonil and 4-hydroxy chlorothalonil, as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document *Chlorothalonil. Petition For Tolerances on Brassica Head and Stem Subgroup 5A, Cucurbit Vegetable Group 9, Fruiting Vegetable Group 8, Ginseng, Horseradish, Lentil, Lupin, Okra, Persimmon, Rhubarb, Yam, Lychee, and Starfruit. Human-Health Risk Assessment*, page 15 in docket ID number EPA–HQ–OPP–2007–1106.

*B. Toxicological Endpoints*

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

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

A summary of the toxicological endpoints for chlorothalonil used for human risk assessment can be found at *http://www.regulations.gov* in the document *Chlorothalonil. Petition For Tolerances on Brassica Head and Stem Subgroup 5A, Cucurbit Vegetable Group 9, Fruiting Vegetable Group 8, Ginseng, Horseradish, Lentil, Lupin, Okra, Persimmon, Rhubarb, Yam, Lychee, and Starfruit. Human-Health Risk Assessment*, page 36 in docket ID number EPA–HQ–OPP–2007–1106.

*C. Exposure Assessment*

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to chlorothalonil and its 4-hydroxy metabolite, EPA considered exposure under the proposed tolerances as well as all existing chlorothalonil tolerances in 40 CFR 180.275. EPA assessed dietary exposures from chlorothalonil and its metabolite in food as follows:

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

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intakes by Individuals (CSFII). As to residue levels in food, EPA assumed 100% crop treated, tolerance-level residues and default processing factors for all foods except tomatoes (average field-trial residues and empirical processing factors used), peppers (average field-trial residues used) and snap beans (average field-trial residues used).

iii. *Cancer*. Because chlorothalonil's cancer effects are the result of chronic exposure, EPA is using the chronic exposure assessment to assess chlorothalonil's cancer risk.

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

2. *Dietary exposure from drinking water*. The residues of concern in drinking water include parent chlorothalonil and its 4-hydroxy metabolite. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for chlorothalonil and 4-hydroxy chlorothalonil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of chlorothalonil and 4-hydroxy chlorothalonil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of chlorothalonil and its 4-hydroxy

metabolite for chronic exposures are estimated to be 68.2 parts per billion (ppb) for surface water and 3.2 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 68.2 ppb was used to assess the contribution from drinking water.

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

Chlorothalonil is currently registered for the following uses that could result in residential exposures: As a fungicide on golf courses and as a preservative in paints. EPA assessed residential exposure using the following assumptions: There is potential for short-term or intermediate-term dermal exposure of adults and children on golf courses that have been treated with chlorothalonil. There is also potential for short-term/intermediate-term dermal and inhalation exposure of handlers of paints containing chlorothalonil and potential for short-term/intermediate-term postapplication dermal exposure of adults, as well as short-/intermediate-term postapplication dermal and episodic incidental oral exposures of children from the use of chlorothalonil-treated paints in residential buildings. Postapplication inhalation exposures to chlorothalonil on treated golf courses and in buildings from treated paint are expected to be negligible, and the Agency has not identified a hazard of concern for short-term or intermediate-term dermal exposures; therefore, EPA assessed only short-term and intermediate-term inhalation exposures of handlers using chlorothalonil-treated paints and episodic postapplication incidental oral exposures of children from the use of chlorothalonil-treated paints in residential buildings.

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

Chlorothalonil is a polychlorinated fungicide. Other members of this class include hexachlorobenzene (HCB), pentachlorophenol (PCP) and pentachloronitrobenzene (PCNB). This is a very loose classification of compounds related only in being polychlorinated and acting as fungicides. Available data do not support a finding for a common mechanism of toxicity for chlorothalonil and the other pesticides in the polychlorinated fungicide class. Chlorothalonil produces renal (kidney) tubular adenomas and carcinomas and papillomas of the stomach in rats. Chlorothalonil also produces gastric lesions and kidney toxicity due to perturbation of mitochondrial respiration. The other pesticides in the class do not have the same toxic effects and do not have the same mode of action. For the purposes of this tolerance action, therefore, EPA has assumed that chlorothalonil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

*D. Safety Factor for Infants and Children*

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

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicity database for chlorothalonil includes rat and rabbit developmental toxicity studies (two of each) and two reproduction toxicity studies in rats, as well as a subchronic neurotoxicity study in rats. In addition, there are developmental toxicity studies in rats and rabbits and reproduction toxicity studies in rats available for the 4-hydroxy metabolite as well as the major soil degradate, SDS–46851.

There was no evidence of increased qualitative or quantitative susceptibility of fetuses or offspring in any of the submitted developmental or reproduction studies for chlorothalonil or its metabolites, except in one of the chlorothalonil developmental toxicity studies in rabbits. In the newer of the two rabbit studies, there was a slight increase in the incidence of two variations (13th rib and reduced sternebrae) in fetuses in the high-dose group. No maternal effects occurred at any dose in this study. EPA's concern for this equivocal evidence of quantitative susceptibility is low, and there are no residual uncertainties with regard to prenatal and postnatal susceptability, for the following reasons: The variations were only observed in one of the two developmental toxicity studies conducted in the same strain of rabbit at the same dose levels; these variations are known to occur spontaneously within this strain (New Zealand White) of rabbit, as evidenced by the fact that the concurrent controls had high incidences of both variations; and there is a well-defined NOAEL for the study that is protective of these effects.

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

i. The toxicity database for chlorothalonil is complete, except for acute neurotoxicity and immunotoxicity studies, and EPA has determined that an additional uncertainty factor is not required to account for potential neurotoxicity or immunotoxicity. The reasons for this determination are explained as follows:

a. EPA began requiring functional immunotoxicity testing of all food and non-food use pesticides on December 26, 2007. Since this requirement went into effect after the tolerance petition was submitted, these studies are not yet available for chlorothalonil. In the absence of specific immunotoxicity studies, EPA has evaluated the available chlorothalonil toxicity data to determine whether an additional database uncertainty factor is needed to account for potential immunotoxicity. In a 90–day oral toxicity study in rats, a slight decrease in thymus weight was observed at the HDT, a possible indication of immunotoxicity. However, since there were no histopathological findings noted in the thymus and no effects on the thymus observed in other subchronic or chronic/carcinogenicity studies in rats, EPA has concluded that the slight effect on thymus weight seen in this study is a spurious effect and not indicative of immunotoxicity. Due to the lack of evidence of immunotoxicity for chlorothalonil, EPA does not believe that conducting immunotoxicity testing will result in a NOAEL less than the NOAEL of 2 milligrams/kilogram/day

(mg/kg/day) already established for chlorothalonil, and an additional factor (UFDB) for database uncertainties is not needed to account for potential immunotoxicity.

b. Acute neurotoxicity testing is also required as a result of changes made to the pesticide data requirements in December of 2007. Although an acute study has not yet been submitted, there is no evidence of neurotoxicity in any study in the toxicity database for chlorothalonil, including a subchronic neurotoxicity study. Therefore, EPA has concluded that an additional uncertainty factor is not needed to account for the lack of these data.

ii. Although there was equivocal evidence of increased quantitative susceptibility of fetuses to chlorothalonil exposure in one of two rabbit developmental toxicity studies, the Agency did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment.

iii. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments utilized tolerances or anticipated residues that are based on reliable field trial data. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to chlorothalonil in drinking water. EPA used similarly conservative assumptions to assess postapplication incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by chlorothalonil.

*E. Aggregate Risks and Determination of Safety*

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

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

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to chlorothalonil from food and water will utilize 94% of the cPAD for children, 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of chlorothalonil is not expected.

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

Chlorothalonil is currently registered for uses that could result in short-term and intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term and intermediate-term residential exposures to chlorothalonil. Since the doses and endpoints selected for chlorothalonil to assess short-term and intermediate-term exposure are identical, the short-term and intermediate-term risk estimates for chlorothalonil are the same.

Using the exposure assumptions described in this unit for short-term/intermediate-term exposures, EPA has concluded the combined short-term/intermediate-term food, water, and residential exposures aggregated result in an aggregate MOE of 270 for adults. The MOE for adults includes food, drinking water and short-/intermediate-term inhalation exposure of individuals mixing, loading and applying chlorothalonil-treated paint with an airless sprayer, the handler exposure scenario resulting in the highest estimated exposure to chlorothalonil.

As discussed in Unit III.C.3., there is potential for short and intermediate-term post-application dermal exposure of children on golf courses and in residential areas where chlorothalonil-treated paints have been used; however, EPA has not identified a toxicological endpoint of concern for short or intermediate-term dermal exposures. Therefore, for children, the short and intermediate-term aggregate risk is the sum of the risk from food and water, which does not exceed the Agency's level of concern.

EPA did assess incidental oral exposures of children from ingestion of paint chips containing chlorothalonil. The estimated incidental oral MOE for children is 1,200. Ingestion of paint chips is considered to be an episodic, rather than a routine behavior; therefore, EPA has determined that it is not appropriate to aggregate incidental oral exposures with chronic exposures from food and drinking water.

4. *Aggregate cancer risk for U.S. population*. As discussed in Unit III.A., EPA classified chlorothalonil as a ''likely'' human carcinogen by all routes of exposure, based on the increased incidence of renal adenomas and carcinomas observed in both sexes of rats and mice, the rarity of the tumor response in the kidney, and the increased incidence of papillomas and/or carcinomas of the forestomach in rats and mice. EPA has determined that the mechanism of carcinogenicity of chlorothalonil is non-linear (i.e. not a non-threshold effect) and that the Point of Departure used in calculating the cPAD is protective of the cancer effects. Since there are no uses of chlorothalonil expected to result in chronic residential exposure, and since chronic dietary exposure for the overall U.S. population is less than the cPAD (43% of the cPAD), EPA concludes that aggregate cancer risk from exposure to chlorothalonil is below the level of concern.

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

## IV. Other Considerations

*A. Analytical Enforcement Methodology*

Adequate enforcement methodology (gas chromatography (GC) method with electron-capture detection (ECD)) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

*B. International Residue Limits*

There are no established or proposed Codex MRLs for residues of chlorothalonil on lychee or starfruit.

## V. Conclusion

A tolerance is proposed for combined residues of chlorothalonil, tetrachloroisophthalonitrile, and its metabolite, 4-hydroxy-2,5,6-trichloroisophthalonitrile, in or on lychee at 15 ppm and starfruit at 3.0 ppm.

## VI. Statutory and Executive Order Reviews

This proposed rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). Nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), the Agency hereby certifies that this proposed action will not have significant negative economic impact on a substantial number of small entities. Establishing a pesticide tolerance or an exemption from the requirement of a pesticide tolerance is, in effect, the removal of a regulatory restriction on pesticide residues in food and thus such an action will not have any negative economic impact on any entities, including small entities. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This proposed rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of the FFDCA. For these same reasons, the Agency has determined that this proposed rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This proposed rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

### List of Subjects in 40 CFR Part 180

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

Dated: November 13, 2008.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

## PART 180—[AMENDED]

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

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

2. Section 180.275 is amended by alphabetically adding the following commodities to the table in paragraph (a)(1) to read as follows:

### § 180.275 Chlorothalonil; tolerances for residues.

(a) * * *

(1) * * *

| Commodity | Parts per million |
|---|---|
| * * * | * * |
| Lychee | 15 |
| * * * | * * |
| Starfruit | 3.0 |
| * * * | * * |

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[FR Doc. E8–28593 Filed 12–2–08; 8:45 am]

BILLING CODE 6560–50–S

# Notices

Federal Register

Vol. 73, No. 233

Wednesday, December 3, 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 COMMERCE

### International Trade Administration

**[A–570–831]**

### Fresh Garlic from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the New Shipper Reviews

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** December 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** Toni Page, Jun Jack Zhao, or Elfi Blum, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1398, (202) 482–1396, or (202) 482–0197, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On July 8, 2008, the Department of Commerce (Department) published a notice of initiation of new shipper reviews of fresh garlic from the PRC for six companies[1] covering the period November 1, 2007 through June 9, 2008. *See Fresh Garlic from the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 73 FR 38979 (July 8, 2008); *see also* Memorandum to File from Martha Douthit titled, ''Expansion of the Period of Review in the New Shipper Review of Fresh Garlic from the People's Republic of China,'' dated July 29, 2008. The preliminary results of these new shipper reviews are currently due no later than December 27, 2008.

[1] The companies are Jinxiang Hejia Co., Ltd., Juye Homestead Fruits and Vegetables Co., Ltd., Jinxiang Tianheng Trade Co., Ltd., Weifang Chenglong Import & Export Co., Ltd., Shandong Jinxiang Zhengyang Import & Export Co., Ltd., and Chengwu County Yuanxiang Industry & Commerce Co., Ltd.

#### Statutory Time Limits

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act), provides that the Department will issue the preliminary results of a new shipper review of an antidumping duty order within 180 days after the day on which the review was initiated. *See also* 19 CFR 351.214(i)(1). The Act further provides that the Department may extend that 180-day period to 300 days if it determines that the case is extraordinarily complicated. *See* 19 CFR 351.214 (i)(2).

#### Extension of Time Limit for Preliminary Results

The Department determines that these new shipper reviews involve extraordinarily complicated methodological issues, including the appropriate use of input methodology, potential affiliation issues, the examination of importer information, and the evaluation of the *bona fide* nature of each company's sales. Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.214(i)(2), the Department is extending the time limit for these preliminary results by 120 days, until no later than April 26, 2009. As April 26, 2009, falls on a Sunday, our preliminary results will be issued no later than April 27, 2009, the next business day. The final results continue to be due 90 days after the publication of the preliminary results.

We are issuing and publishing this notice in accordance with sections 751(a)(2)(B)(iv) and 777(i) of the Act.

Dated: November 24, 2008.

**Stephen J. Claeys,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. E8–28684 Filed 12–2–08; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### The Manufacturing Council: Meeting of The Manufacturing Council

**AGENCY:** International Trade Administration, U.S. Department of Commerce.

**ACTION:** Notice of an Open Meeting via Teleconference.

**SUMMARY:** The Manufacturing Council will hold a meeting via teleconference to deliberate for approval a proposed letter of recommendation regarding manufacturing priorities for the incoming Secretary.

**DATES:** December 12, 2008.

**TIME:** 12 p.m. (EST).

**FOR THE CONFERENCE CALL-IN NUMBER AND FURTHER INFORMATION, CONTACT:** The Manufacturing Council Executive Secretariat, Room 4043, Washington, DC, 20230 (Phone: 202–482–1369), or visit the Council's Web site at http://*www.manufacturing.gov/council.*

Dated: December 1, 2008.

**Kate W. Sigler,**

*Deputy Director, Office of Advisory Committees.*

[FR Doc. E8–28723 Filed 12–1–08; 4:15 pm]

**BILLING CODE 3510–DR–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0065]**

### Federal Acquisition Regulation; Submission for OMB Review; Overtime

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding a request for reinstatement of an OMB clearance and a 30-day notice for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of an information collection requirement concerning overtime.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of

information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before January 2, 2009.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Ernest Woodson, Contract Policy Division, GSA (202) 501–3775.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

Federal solicitations normally do not specify delivery schedules that will require overtime at the Government's expense. However, when overtime is required under a contract and it exceeds the dollar ceiling established during negotiations, the contractor must request approval from the contracting officer for overtime. With the request, the contractor must provide information regarding the need for overtime.

**B. Annual Reporting Burden**

*Respondents:* 1,270.

*Responses per Respondent:* 1.

*Total Responses:* 1,270.

*Hours per Response:* .25.

*Total Burden Hours:* 318.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0065, Overtime, in all correspondence.

Dated: November 25, 2008.

**Jeritta Parnell,**

*Acting Director, Office of Acquisition Policy.*

[FR Doc. E8–28639 Filed 12–2–08; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0064]**

### Federal Acquisition Regulation; Submission for OMB Review; Organization and Direction of Work

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding a request for reinstatement of an OMB clearance and a 30-day notice for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of an information collection requirement concerning organization and direction of work.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before January 2, 2009.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

When the Government awards a cost-reimbursement construction contract, the contractor must submit to the contracting officer and keep current a chart showing the general executive and administrative organization, the personnel to be employed in connection with the work under the contract, and their respective duties. The chart is used in administration of the contract and as an aid in determining cost. The chart is used by contract administration personnel to assure the work is being properly accomplished at reasonable prices.

**B. Annual Reporting Burden**

*Respondents:* 50.

*Responses per Respondent:* 1.

*Annual Responses:* 50.

*Hours per Response:* .75.

*Total Burden Hours:* 38.

*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0064, Organization and Direction of Work, in all correspondence.

Dated: November 25, 2008.

**Jeritta Parnell,**

*Acting Director, Office of Acquisition Policy.*

[FR Doc. E8–28640 Filed 12–2–08; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

## GENERAL SERVICES ADMINISTRATION

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[OMB Control No. 9000–0062]**

### Federal Acquisition Regulation; Submission for OMB Review; Material and Workmanship

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of request for public comments regarding a request for reinstatement of an OMB clearance and a 30-day notice for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a reinstatement of an information collection requirement concerning material and workmanship.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

**DATES:** Submit comments on or before January 2, 2009.

**ADDRESSES:** Submit comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Cecelia Davis, Contract Policy Division, GSA (202) 219–0202.

**SUPPLEMENTARY INFORMATION:**

**A. Purpose**

Under Federal contracts requiring that equipment (*e.g.*, pumps, fans, generators, chillers, etc.) be installed in a project, the Government must determine that the equipment meets the contract requirements. Therefore, the contractor must submit sufficient data on the particular equipment to allow the Government to analyze the item.

The Government uses the submitted data to determine whether or not the equipment meets the contract requirements in the categories of performance, construction, and durability. This data is placed in the contract file and used during the inspection of the equipment when it arrives on the project and when it is made operable.

**B. Annual Reporting Burden**

*Respondents:* 3,160.
*Responses per Respondent:* 1.5.
*Annual Responses:* 4,740.
*Hours per Response:* .25.
*Total Burden Hours:* 1,185.
*Obtaining Copies of Proposals:* Requesters may obtain a copy of the information collection documents from the General Services Administration, FAR Secretariat (VPR), Room 4041, 1800 F Street, NW., Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control No. 9000–0062, Material and Workmanship, in all correspondence.

Dated: November 25, 2008.

**Jeritta Parnell,**

*Acting Director, Office of Acquisition Policy.*

[FR Doc. E8–28641 Filed 12–2–08; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. ER09–311–000]**

### LANXESS Energy, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

November 26, 2008.

This is a supplemental notice in the above-referenced proceeding of LANXESS Energy, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is December 26, 2008.

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-referenced proceeding 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. E8–28685 Filed 12–2–08; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0046; FRL–8390–4]**

### Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

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

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

for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

*Instructions*: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

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

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

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

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. What Action is the Agency Taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

**New Tolerances**

1. *PP 8E7425*. (EPA–HQ–OPP–2008–0768). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540 and Makhteshim-Agan of North America, Inc., 4515 Falls of Neuse Road, Raleigh, NC 27609, proposes to establish a tolerance for residues of the insecticide novaluron, N-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide, in or on bushberry, subgroup 13-07B at 7 parts per million (ppm). Makhteshim-Agan of North America, Inc., is the manufacturer and basic registrant of novaluron. Makhteshim-Agan of North America, Inc., prepared and summarized the following information in support of the subject pesticide petition for novaluron. An adequate analytical method, gas chromatography/electron capture detector (GC/ECD), as published in the **Federal Register** of April 5, 2006 (71 FR 17009 )(FRL–7756–8) is available for enforcing tolerances of novaluron residues in or on stone fruit, bushberries, leafy Brassica and turnip greens. The method verification trial supports a limit of quantitation (LOQ) of 0.05 ppm, and the limit of detection (LOD) is 0.005 ppm for the different matrices. The limit of quantitation (LOQ = 0.05 ppm) was taken as the lowest level validated by this method. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

2. *PP 8E7426*. (EPA–HQ–OPP–2008–0769). Interregional Research Project No. 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540 and Makhteshim-Agan of North America, Inc., 4515 Falls of Neuse Road, Raleigh, NC 27609, proposes to establish a tolerance for residues of the insecticide novaluron, N-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide, in or on fruit, stone, group 12 at 8 parts per million (ppm); Brassica, leafy greens, subgroup 5B at 25 ppm; and turnip greens at 25 ppm. Makhteshim-Agan of North America, Inc., is the manufacturer and basic registrant of novaluron. Makhteshim-Agan of North America, Inc., prepared and summarized the following information in support of the subject pesticide petition for novaluron. An adequate analytical method, gas chromatography/electron capture detector (GC/ECD), as published in the **Federal Register** of April 5, 2006 (71 FR 17009) (FRL–7756–8), is available for enforcing tolerances of novaluron residues in or on stone fruit, bushberries, leafy Brassica and turnip greens. The method verification trial supports a limit of quantitation (LOQ) of 0.05 ppm, and the limit of detection (LOD) is 0.005 ppm for the different matrices. The limit of quantitation (LOQ = 0.05 ppm) was taken as the lowest level validated by this method. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

3. *PPs 8E7434 and 8E7436*. (EPA–HQ–OPP–2008–0773). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to establish tolerances for residues of the herbicide prometryn, 2,4-bis(isopropylamino)-6-methylthio-s-triazine (CAS Number 7287–19–6) in or on carrot at 0.7 parts per million (ppm); celeriac, roots at 0.05 ppm; celeriac, tops at 0.05 ppm; cilantro, fresh at 4.0 ppm; cilantro, dried at 15 ppm; okra at 0.05 ppm; parsley, leaves at 0.7 ppm (all the preceding in *PP 8E7434*); and leafy petiole, subgroup 4B at 0.5 ppm in (*PP 8E7436*). The Pesticide Analytical Manual (PAM) lists a gas chromatography (GC) method for determining residues in or on plants using a microcoulometric sulfur detection system that determines residues of prometryn. No tolerances are needed for prometryn residues in livestock commodities; therefore, no enforcement analytical methods are needed for these animal commodities. Contact: Susan Stanton, (703) 305–5218, *stanton.susan@epa.gov*.

4. *PP 8F7256*. (EPA–HQ–OPP–2008–0764). FMC Corporation, 1735 Market Street, Philadelphia, PA 19103, proposes to establish a tolerance for residues of the insecticide carbofuran in or on cotton by products including gin trash at 2.0 parts per million (ppm). A practical analytical methodology for detecting and measuring levels of carbofuran and 3-hydroxy-carbofuran in or on raw agricultural commodities has been submitted. The limit of detection (LOD) for each analyte using this method is 0.01 ppm, and the limit of quantitation (LOQ) is 0.05 ppm. The method is based on sample acid hydrolysis and residue determination using gas chromatography. Contact: John Hebert, (703) 308–7038, *hebert.john@epa.gov*.

5. *PP 8F7409*. (EPA–HQ–OPP–2008–0770). E. I. DuPont de Nemours and Company, DuPont Crop Protection, P.O. Box 30, Newark, DE 19714–0030, proposes to establish a tolerance for residues of the insecticide chlorantraniliprole, 3-bromo-N-4-chloro-2-methyl-6-(methylcarbamoyl)phenyl]-1-(3-chloro-2-pyridine-2-yl)-1H-pyrazole-5-carboxamide in or on nut, tree, group 14 at 0.07 parts per million (ppm); almond, hulls at 5 ppm; and pistachio at 0.07 ppm. Since chlorantraniliprole and its metabolic degradates are not of toxicological concern, analytical methods are not applicable. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

6. *PP 8F7413*. (EPA–HQ–OPP–2008–0771). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine and its metabolite, TMG, N-(2-chloro-5-thiazolylmethyl)-N-'-methylguanidine, in or on vegetable, root, except sugar beet, subgroup 01B at 0.6 parts per million (ppm); vegetable, tuberous and corm, subgroup 01C at 0.2 ppm; vegetable, bulb, group 03 at 0.2 ppm; vegetables, leafy greens, except brassica, subgroup 04A at 1.1 ppm; vegetable, Brassica, leafy, group 5 at 0.35 ppm; and residues of clothianidin, (E)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine in vegetables, fruiting, group 08 at 0.01 ppm; vegetable, cucurbit, group 09 at 0.01 ppm; grain, cereal, except rice, group 15 at 0.01 ppm, wheat, forage at 0.35 ppm, wheat, hay at 0.07 ppm and wheat, straw at 0.04 ppm. In plants and plant products, the residue of concern, parent clothianidin, can be determined using high performance liquid chromatography (HPLC) with electrospray tandem mass spectrometry (MS/MS) detection. In an extraction efficiency testing, the plant residues method has also demonstrated the ability to extract aged clothianidin residue. Although the plant residues liquid chromatography-tandem mass spectrometry (LC/MS/MS) method is highly suitable for enforcement method, an LC/UV (ultraviolet) method has also been developed which is suitable for

enforcement (monitoring) purposes in all relevant matrices. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

7. *PP 8F7414*. (EPA–HQ–OPP–2008–0772). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide imidacloprid, 1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine and its metabolites containing the 6-chloropyridinyl moiety, all expressed as the parent, in or on vegetable, bulb, group 3 at 2.5 parts per million (ppm). The analytical method is a common moiety method for imidacloprid and its metabolites containing the 6-chloropyridinyl moiety using a permanganate oxidation, silyl derivatization, and capillary gas chromatography/mass spectrometry (GC/MS) selective ion monitoring. This method has successfully passed a petition method validation in EPA labs. There is a confirmatory method specifically for imidacloprid and several metabolites utilizing GC/MS and high performance liquid chromatography/ ultraviolet (HPLC/UV) which has been validated by the EPA as well. Imidacloprid and its metabolites are stable for at least 24 months in the commodities when frozen. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

8. *PP 8F7415*. (EPA–HQ–OPP–2008–0772). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide imidacloprid, 1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine and its metabolites containing the 6-chloropyridinyl moiety, all expressed as the parent, in or on cereal, grain, group 15 at 0.05 parts per million (ppm). Bayer CropScience is also proposing use of the currently established tolerances for residues of imidacloprid, 1-[(6-chloro-3-pyridinyl)methyl]-N-nitro-2-imidazolidinimine and its metabolites containing the 6-chloropyridinyl moiety, all expressed as the parent, in or on the raw agricultural commodity vegetable, root, except sugar beet, subgroup 01B; vegetable, tuberous and corm, subgroup 01C; vegetable, leafy greens, except Brassica, subgroup 04A; vegetable, Brassica, leafy, group 05; vegetable, fruiting, group 08; and vegetable, cucurbit, group 09 to support the use of imidacloprid as a seed treatment on these crops. All required analytical methods have previously been submitted to the Agency and validated. Therefore, no additional methods are needed. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

9. *PP 8F7417*. (EPA–HQ–OPP–2008–0262). EPA has requested a notice of filing identified as a deficiency in the submitted petition from Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, to support the 30–day plant back interval for soybeans planted after a potato seed piece treatment with clothianidin at a rate of 420 g ai/ha. Soybean rotational residue data showed no residues greater than the level of quantitation (LOQ) of 0.01 parts per million (ppm) for soybeans planted 30 days after treatment of bare soil with Poncho 600 FS at a rate of 420 g ai/ha. This supports a 30–day plant back interval for soybeans after potato seed piece treatment at the above rate. No rotational crop tolerances are required. Therefore, no further data is required in this notice of filing. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

10. *PP 8F7437*. (EPA–HQ–OPP–2008–0704). Arysta LifeScience North America Corporation, 15401 Weston Parkway, Suite 150, Cary, NC 27513, proposes to establish a tolerance for residues of the fungicide fluoxastrobin (1E)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimydinyl]oxy]phenyl](5,6-dihydro-1,4,2-dioxazin-3-yl)methanone O-methyloxime, and its Z isomer, (1Z)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimydinyl]oxy]phenyl](5,6-dihydro-1,4,2-dioxazin-3-yl)methanone O-methyloxime in or on corn, field, grain at 0.02 parts per million (ppm); corn, field, aspirated grain fractions at 0.50 ppm; corn, field, forage at 3.0 ppm; corn, field, fodder/stover at 4.5 ppm; soybean, seed at 0.05 ppm; soybean, aspirated grain fractions at 0.40 ppm; soybean, forage at 9.0 ppm; soybean, hay at 1.2 ppm; and soybean, hulls at 0.40 ppm. Adequate analytical methodology using high performance liquid chromatography/tandem mass spectrometry (HPLC/MS/MS) detection is available for enforcement purposes. Contact: John Bazuin, (703) 305–7381, *bazuin.john@epa.gov*.

11. *PP 8F7438*. (EPA–HQ–OPP–2008–0781). Valent U.S.A. Corporation, 1600 Riviera Avenue, Suite 200, Walnut Creek, CA 94596, proposes to establish a tolerance for residues of the herbicide flumioxazin, 2-[7-fluoro-3,4-dihydro-3-oxo-4-(2-propynyl)-2H-1,4-benzoxazin-6-yl]-4,5,6,7-tetrahydro-1H-isoindole-1,3(2H)-dione and its metabolites APF (3-oxo-4-prop-2-ynyl-6-amino-7-fluoro-3,4-dihydro-1,4-benzoxazin) and 482-HA (N-(7-fluoro-3,4-dihydro-3-oxo-4-prop-2-ynyl-2H-1,4-benzoxazin-6-yl)cyclohex-1-ene-1-carboxamide-2-carboxylic acid) in or on freshwater fish at 1.5 parts per million (ppm). An analytical method for detecting flumioxazin and its metabolites in fish tissue has been submitted with this petition. The level of quantitation (LOQ) of flumioxazin and its metabolites in the analytical method for fish tissue is 0.01 ppm, which will allow monitoring for residues at the levels proposed for the tolerance. Contact: James M. Stone, (703) 305–7391, *stone.james@epa.gov*.

12. *PP 8F7444*. (EPA–HQ–OPP–2008–0262). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide spiromesifen; butanoic acid, 3,3-dimethyl-, 2-oxo-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-4-yl ester, and its enol metabolite; 4-hydroxy-3-(2,4,6-trimethylphenyl)-1-oxaspiro[4.4]non-3-en-2-one, calculated as parent compound equivalents in or on tomato, paste at 0.8 parts per million (ppm). Adequate analytical methodology using liquid chromatography/ tandem mass spectrometry (LC/MS/MS) detection is available for enforcement purposes. Contact: Kable Davis, (703) 306–0415, *davis.kable@epa.gov*.

**Amendment to Existing Tolerances**

1. *PP 8E7426*. (EPA–HQ–OPP–2008–0769). Interregional Research Project No. 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540 and Makhteshim–Agan of North America, Inc., 4515 Falls of Neuse Road, Raleigh, NC 27609, proposes to amend the tolerance in 40 CFR 180.598 by increasing the tolerance for residues of the insecticide novaluron, N-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide in or on egg from 0.05 parts per million (ppm) to 0.07 ppm. Makhteshim-Agan of North America, Inc., is the manufacturer and basic registrant of novaluron. Makhteshim-Agan of North America, Inc., prepared and summarized the following information in support of the subject pesticide petition for novaluron. An adequate analytical method, gas chromatography/electron capture detector (GC/ECD), as published in the **Federal Register** of April 5, 2006 (71 FR 17009) (FRL–7756–8), is available for enforcing tolerances of novaluron residues in or on stone fruit, bushberries, leafy Brassica and turnip greens. The method verification trial supports a limit of quantitation (LOQ) of 0.05 ppm, and the limit of detection (LOD) is 0.005 ppm for the different

matrices. The limit of quantitation (LOQ = 0.05 ppm) was taken as the lowest level validated by this method. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

2. *PP 7E7428*. (EPA–HQ–OPP–2005–0097). Interregional Research Project No. 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to amend the tolerance in 40 CFR 180.474 by raising the existing tolerance for residues of the fungicide tebuconazole (alpha-[2-(4-chlorophenyl)-ethyl]-alpha-(1,1-dimethylethyl)-1H-1,2,4-triazole-1-ethanol) tebuconazole (alpha-[2-(4-chlorophenyl)-ethyl]-alpha-(1,1-dimethylethyl)-1H-1,2,4-triazole-1-ethanol) in or on cherry from 4.0 to 5.0 parts per million (ppm). An enforcement method for plant commodities has been validated on various commodities. It has undergone successful EPA validation and has been submitted for inclusion in the (Pesticide Analytical Manual II (PAM II). The animal method has also been approved as an adequate enforcement method. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

**New Exemptions from an Inert Tolerance**

1. *PP 5E7003*. (EPA–HQ–OPP–2005-0310). Stepan Company, 951 Bankhead Hwy., Winder, GA 30680, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of the Alkyl (C10-C18) Dimethyl Amine Oxides (ADAOs) pre-harvest (including CAS Numbers 1643–20–5, 2571–88–2, 2605–79–0, 3332–27–2, 61788–90–7, 68955–55–5, 70592–80–2, 7128–91–8, 85408–48–6, and 85408–49–7) when used as a pesticide inert ingredient in pesticide formulations in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

2. *PP 8E7336*. (EPA–HQ–OPP–2008–0666). Goldschmidt Chemical Corporation, Degussa, 710 South Sixth Avenue, Hopewell, VA 23860, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.960 for residues of Castor oil, ethoxylated, oleate, minimum average molecular weight (in amu) 2,000 (CAS No. 220037–02–05) when used as a pesticide inert ingredient in pesticide formulations in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Deirdre Sunderland, (703) 603–0851, *sunderland.deirdre@epa.gov*.

3. *PP 8E7374*. (EPA–HQ–OPP–2008–0710). The Joint Inerts Task Force, Cluster Support Team 19, EPA Company Number 84949, c/o CropLife America, 1156 15th Street, NW., Suite 400, Washington, DC 20005, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.910 and 180.930 for residues of the Ethylene oxide adducts of 2,4,7,9-tetramethyl-5-decynediol, the ethylene oxide content averages 3.5, 10, or 30 moles (CAS No. 9014–85–1) when used as a pesticide inert ingredient in pesticide formulations in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

4. *PP 8E7423*. (EPA–HQ–OPP–2008–0739). The Joint Inerts Task Force, Cluster Support Team 13, EPA Company Number 84949, c/o CropLife America, 1156 15th Street, NW., Suite 400, Washington, DC 20005, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of Sodium 1,4-dialkyl sulfosuccinates pre-harvest including: Sodium 1,4-dihexyl sulfosuccinate (Butanedioic acid, sulfo, 1,4-bis dihexyl ester, sodium salt) (CAS No. 3006–15–3); Sodium 1,4-diisobutyl sulfosuccinate (Butanedioic acid, sulfo, 1,4-bis diisobutyl ester sodium salt) (CAS No. 127–39–9); and Sodium 1,4-dipentyl sulfosuccinate (Butanedioic acid, sulfo, 1,4-bis dipentyl ester sodium salt) (CAS No. 922–80–5) when used as a pesticide inert ingredient in pesticide formulations in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 25, 2008.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. E8–28666 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0046; FRL–8386–9]**

## Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the Agency's receipt of several initial filing of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

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

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

*Instructions*: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity

or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** A contact person is listed at the end of each pesticide petition summary and may be contacted by telephone or e-mail. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

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

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

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

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. What Action is the Agency Taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

*New Tolerances*

1. *PP 8E7394*. (EPA–HQ–OPP–2008–0713). BASF Corporation, PO Box 13528, Research Triangle Park, NC 27709, proposes to establish an import tolerance for residues of the fungicide pyraclostrobin, carbamic acid, [2-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its metabolite methyl-N-[[[1-(4-chlorophenyl) pyrazol-3-yl]oxy]o-tolyl] carbamate (BF 500-3); expressed as parent compound] in or on coffee, bean, green at 0.5 parts per million (ppm). The method of analysis in plants is aqueous organic solvent extraction, column clean up and quantitation by liquid chromatography/mass spectrometry/ mass spectrometry (LC/MS/MS). In animals the method of analysis involves base hydrolysis, organic extraction, column clean up and quantitation by LC/MS/MS or derivatization (methylation) followed by quantitation by gas chromatography/ mass spectrometry (GC/MS). Contact: John Bazuin, 703-305-7381, *bazuin.john@epa.gov*.

2. *PP 8E7419*. (EPA–HQ–OPP–2008–0730). Interregional Research Project No. 4 (IR-4), 500 College Rd. East, Suite 201 W, Princeton, NJ 08540 proposes to establish a tolerance for the combined residues of the herbicide, endothall, 7-oxabicylo[2,2,1]heptane-2,3-dicarboxylic acid and its monomethyl ester in or on vegetable root, and tuber group 1 at 2 parts per million (ppm); vegetable, leaves of root and tuber, group 2 at 3.5 ppm; vegetable, bulb, group 3-07 at 2 ppm; vegetable, leafy, except brassica, group 4 at 3.5 ppm; vegetable, brassica, leafy, group 5 at 0.1 ppm; turnip, greens at 0.1 ppm; vegetable, legume, group 6 at 3 ppm; vegetable, fruiting, group 8 at 0.05 ppm; okra at 0.05 ppm; vegetable, cucurbit, group 9 at 1.1 ppm; cilanto at 3.5ppm; fruit, citrus, group 10 at 0.05 ppm; fruit, pome, group 11 at 0.05 ppm; fruit, stone, group 12 at 0.25 ppm; berry and small fruit group 13-07 at 0.6 ppm; small fruit vine climing subgroup, except fuzzy kiwifruit, 13-07F at 0.9 ppm; nut, tree, group 14, at 0.05 ppm; pistachio at 0.05 ppm; almond, hulls at 10 ppm; grain, cereal, group 15 at 2.5 ppm; grain, cereal, forage, fodder and hay, group 16, forage at 3.5 ppm; grain, cereal, forage, fodder and hay, group 16, hay at 5 ppm; grain, cereal, forage, fodder and hay, group 16, stover at 11 ppm; grain, cereal, forage, fodder and hay, group 16, straw at 6 ppm; grain, aspirated fractions at 24 ppm; grass, forage, fodder, and hay, group 17, forage at 3 ppm; grass, forage, fodder and hay, group 17, hay at 19 ppm; nongrass animal feed, group 18, forage at 3.5 ppm; nongrass animal feed, group 18, hay at 8 ppm; peppermint, tops at 7 ppm; spearmint, tops at 7 ppm; and rice, grain at 1.7 ppm; and rice, straw at 4.5 ppm. An adequate method for purposes of enforcement of the proposed endothall tolerances is available. The method uses a high performance liquid chromatography/mass spectrometry/ mass spectrometry (HPLC/MS/MS) system. Separation is achieved using a reversed phase column. The molecular ions formed in negative ion mode were fragmented by collision with neutral gas. The method is capable of analyzing for residues of endothall on different crop matrices. Contact: Sidney Jackson, (703) 305–7610, *jackson.sidney@epa.gov*.

3. *PP 8E7427*. (EPA–HQ–OPP–2008–0731). IR-4, 500 College Rd. East, Suite 201W, Princeton, NJ, 08540, proposes to establish a tolerance for the combined residues of the fungicide cyazofamid, 4-chloro-2-cyano-N,N-dimethyl-5-(4-methylphenyl)-1H-imidazole-1-sulfonamide (CA) and its metabolite CCIM, 4-chloro-5-(4-methylphenyl)-1H-imidazole-2-carbonitrile (CA), in or on fruiting vegetables group 8 and okra at 0.8 ppm; and establish a tolerance with regional registration, as defined in §180.1(n), for grapes - East of the Rocky Mountains at 1.5 ppm. The grape tolerance will change from the current import tolerance to a regional tolerance. Residues of cyazofamid and CCIM were extracted from 20 grams of pepper with acetonitrile. After filtration, the extract was evaporated to near dryness and reconstituted with 2% sodium sulfate. The analytes were removed by partitioning with methylene chloride. After reconstitution in 50:50 acetonitrile: water, quantitation was achieved by LC/MS/MS. The method for grapes and tomatoes was discussed in a previous **Federal Register** notice on May 7, 2003. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

4. *PP 8F7352*. (EPA–HQ–OPP–2008–0733). Syngenta Crop Protection, Regulatory Affairs, P.O. Box 18300, Greensboro, NC 27419-8300, proposes to establish a tolerance for residues of the fungicide Acibenzolar S-methyl, in or on vegetable, cucurbit, group 9) at 1.0 ppm. Syngenta Analytical Method AG-671A is a practical and valid method for the determination and confirmation of acibenzolar S-methyl (CGA245704) in raw agricultural commodities (RAC) and processing substrates from the tobacco, leafy (including brassica) and fruiting vegetable crop groups at a LOQ of 0.02 ppm. Based on recoveries of dry bulb onion samples fortified at the lower limit of method validation, the limit of detection (LOD) and limit of quantitation (LOQ) were calculated as 0.013 and 0.040 ppm, respectively. The method involves extraction, solid phase cleanup of samples with analysis by high performance liquid chromatography (HPLC) with ultraviolet (UV) detection or confirmatory liquid chromatography/mass spectrometry (LC/)MS). The validity is demonstrated by the acceptable accuracy and precision obtained on numerous procedural recovery samples (radiovalidation and field trial sample sets), and by the extractability and accountability obtained by the analysis of weathered radioactive substrates using Analytical Method AG-671A. Contact: Tawanda Maignan, (703) 308–8050, *maignan.tawanda@epa.gov*.

5. *PP 8F7385*. (EPA–HQ–OPP–2008–0713). BASF Corporation, PO Box 13528, Research Triangle Park, NC 27709, proposes to establish tolerances for residues of the fungicide, pyraclostrobin, carbamic acid, [2-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its metabolite methyl-N-[[[1-(4-chlorophenyl) pyrazol-3-yl]oxy]o-tolyl] carbamate (BF 500-3); expressed as parent compound in or on Sorghum, forage at 5.0 ppm; Sorghum, grain at 0.5 ppm; and sorghum, stover at 0.8 ppm. The method of analysis in plants is aqueous organic solvent extraction, column clean up and quantitation by LC/MS/MS. In animals the method of analysis involves base hydrolysis, organic extraction, column clean up and quantitation by LC/MS/MS or derivatization (methylation) followed by quantitation by gas chromatography/ mass spectrometry (GC/MS). Contact: John Bazuin, (703) 305–7381, *bazuin.john@epa.gov*.

6. *PP 8F7406*. (EPA–HQ–OPP–2008–0704). Arysta LifeScience North America, LLC, 15401 Weston Parkway, Suite 150, Cary, NC 27513, proposes to establish a tolerance for residues of the fungicide fluoxastrobin, (1E)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimydinyl]oxy]phenyl](5,6-dihydro-1,4,2-dioxazin-3-yl)methanone O-methyloxime, and its Z isomer, (1Z)-[2-[[6-(2-chlorophenoxy)-5-fluoro-4-pyrimydinyl]oxy]phenyl](5,6-dihydro-1,4,2-dioxazin-3-yl)methanone O-methyloxime] in or on berry, low growing, subgroup 13-07G at 1.9 ppm. Adequate analytical methodology using LC/MS/MS detection is available for enforcement purposes. Contact: John Bazuin, (703) 305–7381, *bazuin.john@epa.gov*.

7. *PP 8F7410*. (EPA–HQ–OPP–2006-0848). Bayer CropScience, 2 T.W. Alexander Dr., Research Triangle Park,

NC 27709, proposes to establish a tolerance for the indirect or inadvertent residues of the fungicide fenamidone (4H-imidazol-4-one,3,5-dihydro-5-methyl-2-(methylthio)-5-phenyl-3-(phenylamino)-,(S)-) and its metabolite RPA 717879 (2,4-imidazolidinedione, 5-methyl-5-phenyl), in or on corn, field, forage at 0.50 ppm; corn, field, grain at 0.02 ppm; corn, stover at 0.35 ppm; corn, sweet, forage at 0.15 ppm; corn, sweet, kernel plus cob with husks removed at 0.20 ppm; soybean, forage at 0.20 ppm; soybean, hay at 0.20 ppm; and soybean, seed at 0.02 ppm. Although residue levels approaching the proposed tolerances are unlikely, independently validated enforcement methods are available for determining residues of fenamidone and relevant metabolites. Residues are quantified by HPLC with tandem mass spectrometric detection. The method LOQ are 0.02 ppm or lower for fenamidone, and its metabolites, RPA 412636, RPA 412708, and RPA 410193 in test raw agricultural commodities and processed fractions. Contact: Rosemary Kearns, (703) 305–5611, *kearns.rosemary@epa.gov*.

*Amendment to Existing Tolerances*

1. *PP 8E7427*. (EPA–HQ–OPP–2008–0731). IR-4, 500 College Rd. East, Suite 201W, Princeton, NJ, 08540, proposes to delete the existing tolerance in 40 CFR 180.601 for the combined residues of the fungicide cyazofamid, 4-chloro-2-cyano-N,N-dimethyl-5-(4-methylphenyl)-1H-imidazole-1-sulfonamide (CA) and its metabolite CCIM, 4-chloro-5-(4-methylphenyl)-1H-imidazole-2-carbonitrile (CA), in or on tomato at 0.2 ppm since the proposed fruiting vegetable crop group tolerance will replace the current tomato tolerance under ''New Tolerance'' No. 2. In addition, the grape tolerance will change from the existing import tolerance to a regional tolerance under ''New Tolerance'' No. 2. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

2. *PP 8F7390*. (EPA–HQ–OPP–2008–0713). BASF Corporation, PO Box 13528, Research Triangle Park, NC 27709, proposes to increase the tolerance in 40 CFR 180.582 for residues of the fungicide pyraclostrobin, carbamic acid, [2-[[[1-(4-chlorophenyl)-1H-pyrazol-3-yl]oxy]methyl]phenyl]methoxy-, methyl ester and its metabolite methyl-N-[[[1-(4-chlorophenyl) pyrazol-3-yl]oxy]o-tolyl] carbamate (BF 500-3); expressed as parent compound] in or on fruit, stone, group 12 from 0.9 to 2.5 ppm. The method of analysis in plants is aqueous organic solvent extraction, column clean up and quantitation by LC/MS/MS. In animals the method of analysis involves base hydrolysis, organic extraction, column clean up and quantitation by LC/MS/MS or derivatization (methylation) followed by quantitation by GC/MS. Contact: John Bazuin, (703) 305–7381, *bazuin.john@epa.gov*.

*New Exemption from Tolerance*

*PP 8F7401*. (EPA–HQ–OPP–2006-0993). Dow AgroSciences LLC, 9330 Zionsville Rd., Indianapolis, IN 46268, proposes to establish an exemption from the requirement of a tolerance for residues of the herbicide florasulam, in or on turfgrass. Adequate enforcement method for the combined residues of florasulam is available to enforce the tolerance expression in or on food. The analytical method uses capillary gas chromatography and mass selective detection (GC-MSD). The LOQ of the method is 0.01 ug/g for grain and 0.05 ug/g for forage, hay and straw. A suitable GC/MSD analytical method is available for measuring florasulam in small grain commodities for enforcing the above tolerances. Contact: Dianne L. Morgan, (703) 305–6217, *morgan.dianne@epa.gov*.

*New Exemption from an Inert Tolerance*

1. *PP 8E7422*. (EPA–HQ–OPP–2008–0725). The Joint Inerts Task Force, Cluster Support Team 24, 1156 15th St., N.W., Suite 400, Washington, DC 20005, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.910 and in 40 CFR 180.930 ii for residues of Sodium N-oleoyl-N-methyl taurine (CAS No. 137–20–2) when used as a pesticide inert ingredient in pesticide formulations in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

2. *PP 8E7382*. (EPA–HQ–OPP–2008–0738). The Joint Inerts Task Force (JITF), Cluster Support Team Number 4 (CST 4), EPA Company Number 84940, c/o CropLife America, 1156 15th Street, N.W., Suite 400, Washington, DC 20005, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of Alkyl Amine Polyalkoxylates (hereafter referred to as AAP) in or on all raw agricultural commodities when used as a pesticide inert ingredient in pesticide formulations. This tolerance expression includes the following:

Section 180.920: N, N-Bis-[[alpha]-ethyl-[omega]-hydroxypoly(oxy-1,2-ethanediyl)] C8-C18 saturated and unsaturated alkylamines; the poly(oxy-1,2-ethanediyl) content is 2-60 moles. Concentration in formulated pesticide end-use products not to exceed 25% by weight in herbicide products and 10% by weight in all other pesticide products.

TABLE—CAS REGISTRY NO. OF ALKYL AMINE POLYETHOXYLATES AAP (POE)

| CAS RN | Chemical Abstract Nomenclature |
|---|---|
| 61790-82-7 | Amines, hydrogenated tallow alkyl, ethoxylated |
| 61791-14-8 | Amines, coco alkyl, ethoxylated |
| 61791-24-0 | Amines, soya alkyl, ethoxylated |
| 61791-26-2 | Amines, tallow alkyl, ethoxylated |
| 68155-39-5 | Amines, C14-18 and C16-18-unsaturated alkyl, ethoxylated |
| 68155-33-9 | Amines, C14-18-alkyl, ethoxylated |
| 68155-40-8 | Amines, C16-18 and C18-unsaturated alkyl, ethoxylated |
| 288259-52-9 | Amines, C16-18-alkyl, ethoxylated |
| 58253-49-9 | Amines, oleyl derivatives, alkyl, ethoxylated |
| 61791-31-9 | Amines, coco derivatives alkyl, ethoxylated |
| 61791-44-4 | Amines, tallow derivatives alkyl, ethoxylated |
| 25307-17-9 | Amines, C18 oleyl derivatives alkyl, ethoxylated |
| 73246-96-5 | Amines, soya derivatives alkyl, ethoxylated |
| 70955-14-5 | Amines, C13-C15-derivatives alkyl, ethoxylated |
| 26635-93-8 | Amines, oleyl (9Z) oleyl derivatives alkyl, ethoxylated |
| 26635-92-7 | Amines, C18 derivatives alkyl, ethoxylated |
| 10213-78-2 | Amines, C18 derivatives alkyl, ethoxylated |

Section 180.920: N,N-Bis-[[alpha]-ethyl/methylethyl-[omega]-hydroxypoly(oxy-1,2-ethanediyl/oxy(methyl-1,2-ethanediyl))] C8-C18 saturated and unsaturated alkylamines; the poly(oxy-1,2-ethanediyl/oxy(methyl-1,2-ethanediyl)) content is 2-60 moles. Concentration in formulated pesticide end-use products not to exceed 25% by weight in herbicide products and 10% by weight in all other pesticide products.

TABLE—CAS REGISTRY NO. OF ALKYL AMINE POLYETHOXYLATE/POLYPROPROXYLATES AAP (POE/POP)

| CAS RN | Chemical Abstract Nomenclature |
|---|---|
| CAS RN | Chemical Abstract Nomenclature |
| 68153-97-9 | Amines, soya alkyl, ethoxylated propoxylated |
| 68213-26-3 | Amines, tallow alkyl, ethoxylated propoxylated |
| 75601-76-2 | Amines, hydrogenated tallow alkyl, ethoxylated propoxylated |

Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, 703-347-8825, *samek.karen@epa.gov*.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 25, 2008.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. E8–28667 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0046; FRL–8391–3]**

## Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

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

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

*Instructions*: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

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

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to

certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

*B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

## II. What Action is the Agency Taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this document contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

### New Tolerances

1. *PP 8E7445*. (EPA–HQ–OPP–2008–0810). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to establish a tolerance for residues of the insecticide spinosad, a fermentation product of Saccharopolyspora spinosa which consists of two related active ingredients: Spinosyn A (Factor A: CAS No. 131929–60–7) or 2-[(6-deoxy-2,3,4-tri-O-methyl-α-L-manno-pyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione; and Spinosyn D (Factor D; CAS No. 131929–63–0) or 2-[(6-deoxy-2,3,4-tri-O-methyl-α-L-manno-pyranosyl)oxy]-13-[[5-(dimethyl-amino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-4,14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione in or on pomegranate at 0.3 parts per million (ppm) and date at 0.1 ppm. EPA has determined adequate analytical methods are available for enforcement purposes for spinosad in plant and animal matrices. Methods include an immunoassay particle-based method 97.05 and a high performance liquid chromatography/ultraviolet (HPLC/UV) method GRM 03.15 and a suite of specific crop methods: GRM 94.02 (cottonseed and related commodities), GRM 95.17 (leafy vegetables), GRM 96.09 (citrus), GRM 96.14 (tree nuts), GRM 95.04 (fruiting vegetables), GRM 94.02.S1 (cotton gin byproducts). GRM 94.02 has a successful independent lab validation and was submitted for inclusion in the Pesticide Analytical Manual II (PAM II) as Method I. EPA recently concluded that for water, residues should be estimated using total spinosad residue method (EPA, DP # 316077, August 2, 2006). The Agency has concluded that spinosad are considered toxicologically identical to another pesticide, spinetoram. This conclusion is based on the following:

i. Spinetoram and spinosad are large molecules with nearly identical structures; and

ii. The toxicological profiles for each are similar (generalized systemic toxicity) with similar doses and endpoints chosen for human-health risk assessment. Spinosad and spinetoram should be considered toxicologically identical in the same manner that metabolites are generally considered toxicologically identical to the parent. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

2. *PP 8E7450*. (EPA–HQ–OPP–2008–0805). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to establish a tolerance for residues of the insecticide spinetoram, expressed as a combination of XDE-175-J: 1-H-as-indaceno[3,2-d]oxacyclododecin-7,15-dione, 2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-a-L-mannopyranosyl)oxy]-13-[[(2R,5S,6R)-5-(dimethylamino)tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,4,5,5a,5b,6,9,10,11,12, 13,14,16a,16b-hexadecahydro1 14-methyl-(2R,3aR,5aR,5bS,9S,13S,14R, 16aS,16bR);X XDE-175-L: 1H-as-

indaceno[3,2-d]oxacyclododecin-7,15-dione, 2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-a-L-mannopyranosyl)oxy]-13-[[(2R,5S,6R)-5-(dimethylamino) tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a, 5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-4,14-dimethyl-, (2S,3aR,5aS,5bS,9S,13S,14R, 16aS,16bS); ND-J:(2R,3aR,5aR,5bS, 9S,13S,14R,16aS,16bR)-9-ethyl-14-methyl-13-[[(2S,5S,6R)-6-methyl-5-(methylamino)tetrahydro-2H-pyran-2-yl]oxy]-7,15-dioxo-2,3,3a,4,5,5a,5b, 6,7,9,10,11,12,13,14,15,16a,16b-octadecahydro-1H-as-indaceno[3,2-d]oxacyclododecin-2-yl 6-deoxy-3-O-ethyl-2,4-di-O-methyl-alpha-L-mannopyranoside; and NF-J: (2R,3S,6S)-6-([(2R,3aR,5aR,5bS,9S,13S,14R,16aS, 16bR)-2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-alpha-L-mannopyranosyl) oxy]-9-ethyl-14-methyl-7,15-dioxo-2,3,3a,4,5,5a,5b,6,7,9,10,11,12,13,14,15, 16a,16b-octadecahydro-1H-as-indaceno[3,2-d]oxacyclododecin-13-yl]oxy)-2-methyltetrahydro-2H-pyran-3-yl(methyl)formamide in or on pineapple at 0.02 ppm; pomegranate at 0.3 ppm; date at 0.1 ppm; spice, subgroup 19B, except black pepper at 1.7 ppm; hop, dry cones at 22 ppm; and pineapple, process residue at 0.08 ppm. Per the **Federal Register** of October 10, 2007 (72 FR 57492) (FRL–8149–9) supported by DP # 325387, August 9, 2008, EPA has determined adequate analytical methods are available for enforcement purposes for spinetoram in plant and animal matrices. The methods were noted as efficient and well-documented. The independent laboratory validation data were acceptable. Spinetoram and its metabolites are determined using liquid chromatography with positive-ion atmospheric pressure chemical ionization tandem mass spectrometry (LC/MS/MS). The limit of detection (LOD) and limit of quantitation (LOQ) in crop and animal matrices are typically 0.003 g/g and 0.01 g/g, respectively. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

3. *PP 8F7456*. (EPA–HQ–OPP–2008–0811). Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419, proposes to establish a tolerance for residues of the herbicide mesotrione, in or on soybeans at 0.01 ppm. Practical and specific analytical method RAM 366/01 is available for detecting and measuring the level of mesotrione in or on various crop commodities. Contact: James M. Stone, (703) 305–7391, *stone.james@epa.gov*.

**Amendment to Existing Tolerances**

1. *PP 8E7445*. (EPA–HQ–OPP–2008–0810). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to amend the tolerances in 40 CFR 180.495 (a) to increase the levels of existing tolerances for residues of the insecticide spinosad, a fermentation product of Saccharopolyspora spinosa which consists of two related active ingredients: Spinosyn A (Factor A: CAS No. 131929–60–7) or 2-[(6-deoxy-2,3,4-tri-O-methyl-α-L-manno-pyranosyl)oxy]-13-[[5-(dimethylamino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione; and Spinosyn D (Factor D; CAS No. 131929–63–0) or 2-[(6-deoxy-2,3,4-tri-O-methyl-α-L-manno-pyranosyl)oxy]-13-[[5-(dimethyl-amino)-tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9,10,11,12,13,14,16a,16b-tetradecahydro-4,14-methyl-1H-as-Indaceno[3,2-d]oxacyclododecin-7,15-dione in or on nut, tree, group 14 and pistachio from 0.02 to 0.08 ppm; and almond, hulls from 2.0 ppm to 9.0 ppm. A reduction to a 1–day pre-harvest interval (PHI) is supported with new MOR data for the increased tolerances in tree nuts. EPA has determined adequate analytical methods are available for enforcement purposes for spinosad in plant and animal matrices. Methods include an immunoassay particle-based method 97.05 and a high performance liquid chromatography/ultraviolet (HPLC/UV) method GRM 03.15 and a suite of specific crop methods: GRM 94.02 (cottonseed and related commodities), GRM 95.17 (leafy vegetables), GRM 96.09 (citrus), GRM 96.14 (tree nuts), GRM 95.04 (fruiting vegetables), GRM 94.02.S1 (cotton gin byproducts). GRM 94.02 has a successful independent lab validation and was submitted for inclusion in the Pesticide Analytical Manual II (PAM II) as Method I. EPA recently concluded that for water, residues should be estimated using total spinosad residue method. The Agency has concluded that spinosad are considered toxicologically identical to another pesticide, spinetoram. This conclusion is based on the following:

i. Spinetoram and spinosad are large molecules with nearly identical structures; and

ii. The toxicological profiles for each are similar (generalized systemic toxicity) with similar doses and endpoints chosen for human-health risk assessment. Spinosad and spinetoram should be considered toxicologically identical in the same manner that metabolites are generally considered toxicologically identical to the parent. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

2. *PP 8E7450*. (EPA–HQ–OPP–2008–0805). Interregional Research Project No. 4 (IR-4), 500 College Road East, Suite 201 W, Princeton, NJ 08540, proposes to amend the tolerances in 40 CFR 180.635 to increase the levels of existing tolerances for residues of the insecticide spinetoram, expressed as a combination of XDE-175-J: 1-H-as-indaceno[3,2-d]oxacyclododecin-7,15-dione, 2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-a-L-mannopyranosyl)oxy]-13-[[(2R,5S,6R)-5-(dimethylamino)tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,4,5,5a,5b, 6,9,10,11,12,13,14,16a,16b-hexadecahydro 14-methyl-(2R,3aR,5aR,5bS,9S,13S,14R, 16aS,16bR); XDE-175-L: 1H-as-indaceno [3,2-d]oxacyclododecin-7,15-dione, 2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-a-L-mannopyranosyl)oxy]-13-[[(2R,5S,6R)-5-(dimethylamino)tetrahydro-6-methyl-2H-pyran-2-yl]oxy]-9-ethyl-2,3,3a,5a,5b,6,9, 10,11,12,13,14,16a,16b-tetradecahydro-4,14-dimethyl-, (2S,3aR,5aS,5bS,9S,13S,14R, 16aS,16bS); ND-J: (2R,3aR,5aR,5bS,9S,13S,14R,16aS,16bR) -9-ethyl-14-methyl-13-[[(2S,5S,6R)-6-methyl-5-(methylamino)tetrahydro-2H-pyran-2-yl]oxy]-7,15-dioxo-2,3,3a,4,5,5a,5b,6,7,9,10,11,12,13,14,15, 16a,16b-octadecahydro-1H-as-indaceno[3,2-d]oxacyclododecin-2-yl 6-deoxy-3-O-ethyl-2,4-di-O-methyl-alpha-L-mannopyranoside; and NF-J: (2R,3S,6S)-6-([(2R,3aR,5aR,5bS,9S,13S,14R,16aS, 16bR)-2-[(6-deoxy-3-O-ethyl-2,4-di-O-methyl-alpha-L-mannopyranosyl) oxy]-9-ethyl-14-methyl-7,15-dioxo-2,3,3a,4,5,5a,5b,6, 7,9,10,11,12,13,14,15,16a,16b-octadecahydro-1H-as-indaceno[3,2-d]oxacyclododecin-13-yl]oxy)-2-methyltetrahydro-2H-pyran-3-yl(methyl)formamide in or on nut, tree, group 14 and pistachio from 0.04 to 0.08 ppm; and almond, hulls from 2.0 ppm to 9.0 ppm. A reduction to a 1–day pre-harvest interval (PHI) is supported with new MOR data for the increased tolerances in tree nuts. EPA has determined adequate analytical methods are available for enforcement purposes for spinosad in plant and animal matrices. Methods include an immunoassay particle-based method 97.05 and a high performance liquid chromatography/ultraviolet (HPLC/UV) method GRM 03.15 and a suite of specific crop methods: GRM 94.02 (cottonseed and related commodities),

GRM 95.17 (leafy vegetables), GRM 96.09 (citrus), GRM 96.14 (tree nuts), GRM 95.04 (fruiting vegetables), GRM 94.02.S1 (cotton gin byproducts). GRM 94.02 has a successful independent lab validation and was submitted for inclusion in the Pesticide Analytical Manual II (PAM II) as Method I. EPA recently concluded that for water, residues should be estimated using total spinosad residue method (EPA, DP # 316077, August 2, 2006). The Agency has concluded that spinosad are considered toxicologically identical to another pesticide, spinetoram. This conclusion is based on the following:

i. Spinetoram and spinosad are large molecules with nearly identical structures; and

ii. The toxicological profiles for each are similar (generalized systemic toxicity) with similar doses and endpoints chosen for human-health risk assessment. Spinosad and spinetoram should be considered toxicologically identical in the same manner that metabolites are generally considered toxicologically identical to the parent. Contact: Laura Nollen, (703) 305–7390, *nollen.laura@epa.gov*.

3. *PP 8F7454*. (EPA–HQ–OPP–2008–0806). Y-TEX Corporation, 1825 Big Horn Avenue, P.O. Box 1450, Cody, WY 82414, proposes to amend the tolerances in 40 CFR 180.449 by increasing the combined residues of the insecticide avermectin $B_1$ (a mixture of avermectins containing greater than or equal to 80% avermectin $B_{1a}$(5-O-demethyl avermectin $A_1$) and less than or equal to 20% avermectin $B_{1b}$(5-O-demethyl-25-de(1-methylpropyl)-25-(1-methylethyl) avermectin $A_1$)) and its delta-8,9-isomer in or on cattle, fat from 0.015 ppm to 0.03 ppm and cattle, meat byproducts from 0.02 ppm to 0.06 ppm. Avermectin $B_1$ is referred to as simply abamectin throughout this document. The analytical method is titled ''Determination of Macrocyclic Lactone Residues in Bovine and Ovine Tissues,'' referenced as Method No. AATM-R-53. The method involves maceration of the tissue sample with acetonitrile, homogenization, filtration, partition, extraction and cleanup with analysis by high performance liquid chromatography (HPLC) - fluorescence detection. The method is sufficiently sensitive to detect residues at a limit of detection of 0.002 ppm and a limit of quantification of 0.005 ppm. Both levels are below the tolerances proposed. The method has undergone independent laboratory validation as required by PR Notice 96-1. Contact: Thomas Harris, (703) 308–9423, *harris.thomas@epa.gov*.

4. *PP 8F7452*. (EPA–HQ–OPP–2008–0813). Bayer CropScience, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709, proposes to reduce the tolerance for residues of the herbicide tembotrione, 2-[2-chloro-4-methylsulfonyl)-3-[(2,2,2-trifluoroethoxy)methyl]benzoyl]-1,3-cyclohexanedione, and its metabolite (M5), 2-[2-chloro-4-(methylsulfonyl)-3-[(2,2,2-trifluoroethoxy)methyl]benzoyl]-4,6-dihydroxy-1,3-cyclohexanedione in or on corn, sweet, forage at 0.09 ppm; corn, sweet, kernel plus cob with husks removed at 0.01 ppm; corn, sweet, stover at 0.15 ppm. Independently validated, analytical methods for plants, plant products and animal matrices, suitable for enforcement purposes, have been submitted for measuring tembotrione and all significant metabolites. Typically, residues are extracted from plant or animal using accelerated solvent extraction. Following concentration, quantitation is by liquid chromatography/mass spectrometry/mass spectrometry (LC/MS/MS) using deuterated internal standards. AE 1392936 requires additional clean-up by anion exchange, solid phase extraction prior to quantitation. Determination of AE 1417268 in ruminant samples requires a hexane wash prior to quantitation. Contact: Michael Walsh, (703) 308–2972, *walsh.michael@epa.gov*.

**New Exemptions from an Inert Tolerance**

1. *PP 8E7362*. (EPA–HQ–OPP–2008–0601). Ag-Chem Consulting, 12208 Quinque Lane, Clifton, VA 21024 on behalf of Caltex Inc., 2 Market Street, Sydney Australia, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of the ultraviolet (UV) stabilizer Phenol, 2-(2H-benzotriazol-2-yl)-6-dodecyl-4-methyl (CAS No. 23328–53–2) when used as a pesticide inert ingredient in pesticide spray oil formulations at a maximum concentration of 0.6% in or on Adzuki beans, canola, chickpeas, cotton, faba beans, field peas, lentils, linola, linseed, lucerne, lupins, mungbeans, navy beans, pigeon peas, safflower, sunflower, and vetch. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

2. *PP 8E7363*. (EPA–HQ–OPP–2008–0602). Ag-Chem Consulting, 12208 Quinque Lane, Clifton, VA 21024 on behalf of Caltex Inc., 2 Market Street, Sydney Australia, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of the ultraviolet (UV) stabilizer 2-(2'-hydroxy-3',5'-di-t-amylphenyl)-benzotriazole (CAS No. 25973–55–1) when used as a pesticide inert ingredient in pesticide spray oil formulations at a maximum concentration of 0.6% in or on Adzuki beans, canola, chickpeas, cotton, faba beans, field peas, lentils, linola, linseed, lucerne, lupins, mungbeans, navy beans, pigeon peas, safflower, sunflower, and vetch. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

3. *PP 8E7387*. (EPA–HQ–OPP–2008–0671). Loveland Products, Inc., P.O. Box 1286, Greeley, CO 80632–1286, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.920 for residues of the choline chloride (CAS No. 67–48–1) when used as a pesticide inert ingredient as a solvent in pesticide formulations. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Karen Samek, (703) 347–8825, *samek.karen@epa.gov*.

4. *PP 8E7421*. (EPA–HQ–OPP–2008–0794). Akzo Nobel Surface Chemistry, LLC, 525 West Van Buren Street, Chicago, IL 60607–3823, proposes to establish an exemption from the requirement of a tolerance in 40 CFR 180.960 for residues of formaldehyde, polymer with 2-methyloxirane and 4-nonylphenol (CAS No. 37523–33–4) when used as a pesticide inert ingredient in pesticide formulations. Akzo Nobel submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA) requesting an exemption from the requirements of a tolerance. This petition requests the elimination of the need to establish a maximum permissible level for residues of formaldehyde, polymer with 2-methyloxirane and 4-nonylphenol in or on all raw agricultural commodities. Because this petition is a request for an exemption from the requirement of a tolerance, no analytical method is required. Contact: Alganesh Debesai, (703) 308–8353, *debesai.alganesh@epa.gov*.

**List of Subjects**

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: November 25, 2008.

**Lois Rossi,**

*Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. E8–28668 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0102; FRL–8392–5]**

## Exposure Modeling Public Meeting; Notice of Public Meeting

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** An Exposure Modeling Public Meeting (EMPM) will be held for one day on December 9, 2008. This notice announces the location and time for the meeting and sets forth the tentative agenda topics.

**DATES:** The meeting will be held on December 9, 2008 from 9:00 am to 4:00 pm.

To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

**ADDRESSES:** The meeting will be held at Environmental Protection Agency, Office of Pesticide Programs (OPP), One Potomac Yard (South Building), 1st Floor South Conference Room, 2777 S. Crystal Drive, Arlington, VA 22202.

**FOR FURTHER INFORMATION CONTACT:** Stephen Wente, Environmental Fate and Effects Division (7507P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–0001; fax number: (703) 305–6309; e-mail address: *wente.stephen@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. General Information

*A. Does this Action Apply to Me?*

You may be potentially affected by this action if you are required to conduct testing of chemical substances under the Toxic Substances Control Act (TSCA), the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 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 nay questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

*B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket.* EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2008–0102. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

### II. Background

On a triannual interval, an Exposure Modeling Public Meeting will be held for presentation and discussion of current issues in modeling pesticide fate, transport, and exposure in support of risk assessment in a regulatory context. Meeting dates and abstract requests are announced through the ''empmlist'' forum on the LYRIS list server at *https://lists.epa.gov/read/all_forums/*.

### III. How Can I Request to Participate in this Meeting?

You may submit a request to participate in this meeting to the person listed under **FOR FURTHER INFORMATION CONTACT**. Do not submit any information in your request that is considered CBI. Requests to participate in the meeting, identified by docket ID number EPA–HQ–OPP–2008–0102, must be received on or before December 18, 2008.

### IV. Tentative Topics for the Meeting

General Theme: Riparian Zone Modeling and Best Management Practices

Specific Topics:

Riparian Ecosystem Management Model (REMM)

Comparative Modeling of Soil and Water Assessment Tool (SWAT) and REMM

REMM and Turf Modeling

Agricultural Policy EXtender (APEX) Model

Best Management Practices (BMP) Assessment Tools

### List of Subjects

Environmental protection, Modeling, Model, Best Management Practices, Ecosystem, Pesticides.

Dated: November 11, 2008.

**Donald J. Brady,**

*Director, Environmental Fate and Effects Division, Office of Pesticide Programs.*

[FR Doc. E8–28665 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2008–0743; FRL–8385–9]**

## Pesticide Products; Registration Applications

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces receipt of applications to register pesticide products containing new active ingredients not included in any currently registered products pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

**DATES:** Comments must be received on or before February 2, 2009.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0743, by one of the following methods:

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

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

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

*Instructions*: Direct your comments to docket ID number EPA–HQ–OPP–2008–0743. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business

Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket*: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

**FOR FURTHER INFORMATION CONTACT:** Melody Banks, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5413; e-mail address: *banks.melody@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

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

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

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

### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Registration Applications

EPA received applications as follows to register pesticide products containing active ingredients not included in any previously registered products pursuant to the provision of section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

File Symbol: 71711-GN. Applicant: Nichino America, Inc., 4550 New Linden Hill Rd., Linden Park, Suite 501, Wilmington, DE 19808. Product Name: Tolfenpyrad Technical 15EC. Active Ingredient: Tolfenpyrad PC Code: 090111. Tolfenpyrad is a METl site 1 (iRAC Class 21) insecticide. Use: Tolfenpyrad PC will be used to control thrips (including Western Flower), aphids, and scales in the greenhouse on non-food ornamentals. The product will be applied as a direct spray, with a backpack sprayer or similar low-volume equipment in the greenhouse. The end-use product, 71711-GR, is a 15% emulsifiable concentrate (EC). (M. Banks).

### List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 18, 2008.

**Donald R. Stubbs,**

*Acting Director, Registration Division, Office of Pesticide Programs.*

[FR Doc. E8–28595 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

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## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OPP–2007–0837; FRL–8391–2]**

## Malathion; Amendments to Terminate Uses

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces EPA's order for the amendments to terminate uses, voluntarily requested by the registrant and accepted by the Agency, of products containing the pesticide malathion, pursuant to section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

This cancellation order follows an October 8, 2008 **Federal Register** Notice of Receipt of Request (73 FR 58952) (FRL–8384–1) from the malathion registrant to voluntarily terminate uses of their malathion product registrations. For the affected product registrations, this cancellation order terminates malathion use in or on commercial storage/warehouse premises (excluding stored grain facilities such as silos), commercial transportation facilities – feed/food – empty, commercial transportation facilities – nonfeed/nonfood, commercial/institutional/industrial premises/equipment (indoor), commercial/institutional/industrial premises/equipment (outdoor), dairies/cheese processing plant equipment (food contact), eating establishments, food processing plants (excluding stored grain facilities such as silos), golf course turf, greenhouse – empty, indoor hard surfaces, indoor premises, residential dust formulations, residential lawns (broadcast), residential pressurized can formulations, and sewage systems. These are not the last malathion products registered for use in the United States. In the October 8, 2008 Notice, EPA indicated that it would issue an order implementing the amendment to terminate uses, unless the Agency received substantive comments within the 30–day comment period that would merit its further review of these requests, or unless the registrant withdrew their request within this period. The Agency received comments on the notice but none merited its further review of the requests. Further, the registrant did not withdraw their request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested amendments to terminate uses. Any distribution, sale, or use of the malathion products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

**DATES:** The cancellations are effective December 3, 2008.

**FOR FURTHER INFORMATION CONTACT:** Eric Miederhoff, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8028; fax number: (703) 308–7070; e-mail address: *miederhoff.eric@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

## I. General Information

### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

### *B. How Can I Get Copies of this Document and Other Related Information?*

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0837. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

## II. What Action is the Agency Taking?

This notice announces the amendments to terminate uses, as requested by a registrant, of certain manufacturing-use malathion products registered under section 3 of FIFRA. These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1.—MALATHION PRODUCT REGISTRATION AMENDMENTS TO TERMINATE USES

| EPA Registration Number | Product Name |
|---|---|
| 4787–5 | Fyfanon Technical |
| 4787–43 | Malathion Technical |

Table 2 of this unit includes the name and address of record for the registrant of the products in Table 1 of this unit by EPA company number.

TABLE 2.—REGISTRANT OF AMENDED MALATHION PRODUCTS

| EPA Company Number | Company Name and Address |
|---|---|
| 4787 | Cheminova, Inc. Washington Office, 1600 Wilson Boulevard, Suite 700, Arlington, VA 22209 |

## III. Summary of Public Comments Received and Agency Response to Comments

The Agency received four comments during the 30–day comment period. Two comments recommended cancellation of all malathion uses. However, neither comment provided a substantive rationale for the course of action suggested. A third comment suggested that termination of the use of malathion in greenhouses will limit control options for commercial growers treating ornamental grasses for cereal leaf beetle. Prior to publication of the malathion reregistration eligibility decision in 2006, the technical registrant for malathion requested that greenhouse uses be deleted from the malathion registrations. Consequently, potential risks associated with the use of malathion in greenhouses were not evaluated during the reregistration process. Also, the Agency has determined that there are several alternative chemicals which are suitable for control of cereal leaf beetle on ornamental grasses. The fourth comment indicated support for the continued use of malathion on mushrooms. This order does not address malathion use on mushrooms. For these reasons, the Agency does not believe that the comments submitted during the comment period merit further review or a denial of the requests for voluntary cancellation.

## IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested amendments to terminate uses of malathion registrations identified in Table 1 of Unit II. Accordingly, the Agency orders that the malathion product registrations identified in Table 1 of Unit II. are hereby amended to terminate the affected uses. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the Provisions for Disposition of Existing Stocks set forth in Unit VI. will be considered a violation of FIFRA.

### V. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the Administrator may approve such a request.

### VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The cancellation order issued in this notice includes the following existing stocks provisions.

1. The registrant may continue to sell and distribute existing stocks of Fyfanon Technical, EPA Reg. No. 4787–5, and Malathion Technical, EPA Reg. No. 4787–43, with previously approved labeling that includes uses terminated by this cancellation order, until June 3, 2009.

2. Persons other than the registrant may continue to sell and/or distribute existing stocks of Fyfanon Technical, EPA Reg. No. 4787–5, and Malathion Technical, EPA Reg. No. 4787–43, with previously approved labeling that includes the terminated uses until such stocks are exhausted.

3. Persons other than the registrant may continue to use existing stocks of Fyfanon Technical, EPA Reg. No. 4787–5, and Malathion Technical, EPA Reg. No. 4787–43, with previously approved labeling that includes the terminated uses, provided that they are not used to formulate products labeled for any use described in Unit II. of this cancellation order, until such stocks are exhausted.

### List of Subjects

Environmental protection, Pesticides and pests.

Dated: November 25, 2008.

**Steven Bradbury,**

*Director, Special Review and Reregistration Division, Office of Pesticide Programs.*

[FR Doc. E8–28664 Filed 12–2–08; 8:45 am]

**BILLING CODE 6560–50–S**

## EXPORT-IMPORT BANK OF THE UNITED STATES

### Sunshine Act Meeting

**ACTION:** Notice of a Partially Open Meeting of the Board of Directors of the Export-Import Bank of the United States.

**TIME AND PLACE:** Friday, December 5, 2008 at 9:30 a.m. The meeting will be held at Ex-Im Bank in Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

**OPEN AGENDA ITEMS:** Item No. 1: Ex-Im Bank Advisory Committee for 2009.

**PUBLIC PARTICIPATION:** The meeting will be open to public participation for Item No. 1 only.

**FOR FURTHER INFORMATION CONTACT:** For further information, contact: Office of the Secretary, 811 Vermont Avenue, NW., Washington, DC 20571 (Tele. No. 202–565–3957).

**Kamil Cook,**

*Deputy General Counsel.*

[FR Doc. E8–28623 Filed 12–2–08; 8:45 am]

**BILLING CODE 6690–01–M**

## FEDERAL MARITIME COMMISSION

**[Docket No. 08–06]**

### Western Holding Group, Inc., Marine Express, Inc. and Corporación Ferries del Caribe, Inc. v. Mayagüez Port Commission and Holland Group Port Investment (Mayagüez), Inc.; Notice of Filing of Complaint and Assignment

Notice is given that a complaint has been filed with the Federal Maritime Commission (''Commission'') by Western Holding Group, Inc. (''Western Holding''), Marine Express, Inc. (''Marine Express'') and Corporación Ferries del Caribe, Inc. (''Ferries del Caribe''), hereinafter ''Complainants''. Complainants assert that they are for-profit corporations organized and existing pursuant to the laws of the Commonwealth of Puerto Rico. Complainants allege that Respondent Mayagüez Port Commission (''Port Commission'') is a public corporation and that Respondent Holland Group Port Investment (Mayagüez), Inc. (''Holland Group'') is a for-profit corporation. Complainants further allege that both Respondent corporations are organized and existing pursuant to the laws of the Commonwealth of Puerto Rico.

Complainants assert that Complainant Western Holding owns and charters the vessel *M/V CARIBBEAN EXPRESS*. Complainants aver that Marine Express and Ferries del Caribe transport passengers, goods and vehicles between the Dominican Republic and Puerto Rico on said vessel. Complainants Ferries del Caribe and Marine Express maintain that they are common carriers within the meaning of the Shipping Act of 1984, as amended (''The Shipping Act''). *See* 46 U.S.C. 40102(6).

Complainants assert that Respondent Mayagüez Port Commission is responsible for all port business within the Port of Mayagüez, and that Respondent Holland Group administers and operates the Mayagüez port facilities. Complainants contend that Respondents Mayagüez Port Commission and Holland Group are marine terminal operators within the meaning of The Shipping Act. *See* 46 U.S.C. 40102(14).

Complainants allege that ownership of the Port of Mayagüez was transferred to Respondent Port Commission in July 2004, with a requirement to honor the terms of Complainant Marine Express' existing lease, and that this requirement was not honored. Complainants contend that Respondents' actions, including aforesaid action, constitute violations of The Shipping Act including unjust, unreasonable and unlawful practices in violation of Section 41102(c), and unreasonable refusals to negotiate, unreasonable discrimination and undue or unreasonable prejudice and disadvantages in violation of Sections 41106(1)–(3). 46 U.S.C. 41102(c), 41106(1)–(3).

Complainants request that the Commission order Respondents to: (1) Cease and desist from the violations of The Shipping Act described in this Complaint; (2) establish and put in force such practices as the Commission determines lawful and reasonable; (3) pay to the Complainants reparations of $25,000,000.00 including attorney's fees, interests and costs; and (4) take any other action or provide any other relief as the Commission determines to be warranted under the circumstances.

This proceeding has been assigned to the Office of Administrative Law Judges. Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61, and only after consideration has been given by the parties and the presiding officer to the use of alternative forms of dispute resolution. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that

the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by November 26, 2009, and the final decision of the Commission shall be issued by March 26, 2010.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. E8–28638 Filed 12–2–08; 8:45 am]

**BILLING CODE 6730–01–P**

## FEDERAL MARITIME COMMISSION

**[Petition No. P2–08]**

### Petition of APM Terminals Pacific Ltd., California United Terminals, Inc.; Eagle Marine Services, Ltd.; International Transportation Services, Inc.; Long Beach Container Terminal, Inc.; Seaside Transportation Service LLC; Total Terminals LLC; West Basin Container Terminal LLC; Pacific Maritime Services, LLC; SSA Terminal (Long Beach), LLC Trans Pacific Container Service Corporation; Yusen Terminals, Inc.; and SSA Terminals, LLC, (''Marine Terminal Operators''); and Portcheck LLC; Notice of Filing and Request for Comments

This is to provide notice of filing and to invite comments on or before December 15, 2008, with regard to the Petition described below.

The marine terminal operators as listed above and PortCheck LLC, parties to FMC Agreement No. 201199, the *Port Fee Services Agreement* (''Petitioners'') have petitioned the Commission pursuant to 46 CFR 502.69 of the Commission's Rules of Practice and Procedure, for a review of a staff action taken concerning the effective date of Petitioners' agreement filed on November 3, 2008. In particular, Commission staff found that the agreement was not eligible for an exemption from the statutory 45-day agreement waiting period under Section 40304(c) of the Shipping Act of 1984 (''Shipping Act''), and the Commission's Rules at 46 CFR 535.308(a).

Certain interested parties have already submitted comments on this Petition. One letter, submitted by counsel on behalf of licensed motor carriers Swift Transportation Company and Knight Transportation, Inc., indicate that they have been ''informed by the Ports'' of the Commission staff action thereon. Accordingly, it appears that there may be broad public interest.

In order for the Commission to make a thorough evaluation of the Petition, interested persons are requested to submit views or arguments in reply to the Petition no later than December 15, 2008. Replies shall consist of an original and 15 copies, be directed to the Secretary, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573–0001, and be served on Petitioner's counsel, David F. Smith and Wayne R. Rohde, Sher and Blackwell LLP, Suite 900, 1850 M Street, NW., Washington, DC 20036. A copy of the reply shall be submitted in electronic form (Microsoft Word) by e-mail *to Secretary@fmc.gov.*

The Petition will be posted on the Commission's Web site at *http://www.fmc.gov/reading/Petitions.asp*. Replies filed in response to this petition also will be posted on the Commission's Web site at this location.

Parties participating in this proceeding may elect to receive service of the Commission's issuances in this proceeding through e-mail in lieu of service by U.S. mail. A party opting for electronic service shall advise the Office of the Secretary in writing and provide an e-mail address where service can be made.

**Karen V. Gregory,**

*Secretary.*

[FR Doc. E8–28637 Filed 12–2–08; 8:45 am]

**BILLING CODE 6730–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–1390–N2]**

**RIN 0938–AP15**

### Medicare Program; Hospital Inpatient Prospective Payment Systems and Fiscal Year 2009 Rates: Fiscal Year 2009 Wage Index Changes Following Implementation of Section 124 of the Medicare Improvement for Patients and Providers Act of 2008

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This notice contains fiscal year (FY) 2009 revised final wage indices and hospital reclassifications for 27 hospitals. These revised final wage indices and hospital reclassifications were made according to special procedural rules set forth in the FY 2009 hospital inpatient prospective payment systems final rule (73 FR 48588–9).

**DATES:** *Effective Date:* The provisions of this notice are effective on December 3, 2008,

*Applicability Date:* The final wage indices and hospital reclassifications are applicable for discharges beginning October 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** Tzvi Hefter, (410) 786–4487.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

On July 15, 2008 the Medicare Improvement for Patients and Providers Act of 2008 (MIPPA) (Pub. L. 110–275) was enacted. Section 124 of Public Law 110–275 extends through FY 2009 wage index reclassifications under section 508 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) and certain special exceptions (for example, those special exceptions contained in the final rule promulgated in the August 11, 2004 **Federal Register** (69 FR 49105 and 49107) and extended under section 117 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) (Pub. L. 110–173)). Because of the timing of the enactment of Public Law 110–275, we were not able to recompute the fiscal year (FY) 2009 wage index values for any hospital reclassified under section 508 and special exception hospitals in time for inclusion in the FY 2009 hospital inpatient prospective payment system final rule published in the August 19, 2008 **Federal Register** (73 FR 48434) (hereinafter referred to as the FY 2009 IPPS final rule). Instead, we stated that we would issue the final FY 2009 wage index values and other related tables, in a separate **Federal Register** notice published subsequent to the final rule.

In the October 3, 2008 **Federal Register** (73 FR 57888), we published the FY 2009 IPPS final notice including the final wage indices and geographic reclassifications. The final notice reflects the reclassification withdrawal and termination decisions we made on behalf of hospitals in accordance with special procedural rules explained in the FY 2009 IPPS final rule (73 FR 48588).

In accordance with such rules, hospitals had until October 20, 2008 to notify us if they wished to revise the decision that we made on their behalf. We received requests from 31 hospitals. Of these hospitals, three hospitals were ineligible for a revision because the hospitals were not reclassified to or located in areas containing hospitals whose reclassifications or special exceptions were extended by section 124 of Public Law 110–275. A fourth

hospital was ineligible because we did not make a decision on behalf of the hospital.

**II. Provisions of This Notice**

This notice provides the revisions to the final wage index values and hospital reclassifications for 27 hospitals based on hospitals' requests. As stated in the FY 2009 IPPS final rule (73 FR 48588) and the October 3, 2008 notice (73 FR 57888), we did not further recalculate the wage indices (including any rural floors or imputed rural floors) or standardized amounts based on the revisions for these 27 hospitals. Changes based on hospitals' requests affect the data presented in Tables 2, 4J, 9A, and 9B of the October 3, 2008 notice. Therefore, this notice provides the revisions to those tables for the specified providers.

*A. Wage Index Revisions for Table 2*

The wage data for the listed providers are revised as follows:

TABLE 2—HOSPITAL CASE-MIX INDEXES FOR DISCHARGES OCCURRING IN FEDERAL FISCAL YEAR 2007; HOSPITAL WAGE INDEXES FOR FEDERAL FISCAL YEAR 2009; HOSPITAL AVERAGE HOURLY WAGES FOR FEDERAL FISCAL YEARS 2007 (2003 WAGE DATA), 2008 (2004 WAGE DATA), AND 2009 (2005 WAGE DATA); AND 3-YEAR AVERAGE OF HOSPITAL AVERAGE HOURLY WAGES

| Provider No. | Case mix index | FY 2009 wage index | Average hourly wage FY 2007 | Average hourly wage FY 2008 | Average hourly wage FY 2009 | Average hourly wage (3 years) |
|---|---|---|---|---|---|---|
| 050069 | 1.7315 | 1.2032 | 34.6353 | 35.3850 | 38.1339 | 36.1121 |
| 050168 | 1.5718 | 1.2032 | 37.9784 | 40.5973 | 40.8362 | 39.8630 |
| 050173 | 1.3439 | 1.2032 | 29.0576 | 31.6717 | 32.3265 | 30.9929 |
| 050193 | 1.2326 | 1.2032 | 33.9520 | 29.0623 | 36.7240 | 32.9059 |
| 050224 | 1.6646 | 1.2032 | 32.5010 | 35.7280 | 37.3442 | 35.2849 |
| 050226 | 1.5109 | 1.2032 | 32.4411 | 35.4597 | 36.5354 | 34.8258 |
| 050230 | 1.5465 | 1.2032 | 34.0600 | 35.8490 | 38.8901 | 36.2987 |
| 050348 | 1.7778 | 1.2032 | 31.5156 | 32.7107 | 33.5276 | 32.6288 |
| 050426 | 1.4602 | 1.2032 | 33.2031 | 34.9855 | 37.6505 | 35.2298 |
| 050526 | 1.1838 | 1.2032 | 28.1997 | 33.3964 | 35.5457 | 32.2794 |
| 050543 | 0.7528 | 1.2032 | 29.4443 | 24.4913 | 32.8367 | 28.6013 |
| 050548 | 0.7102 | 1.2032 | 39.2234 | 41.1075 | * | 40.1570 |
| 050551 | 1.3450 | 1.2032 | 34.0467 | 37.2506 | 37.6223 | 36.3787 |
| 050567 | 1.5114 | 1.2032 | 35.7063 | 37.6384 | 39.0114 | 37.5242 |
| 050570 | 1.5522 | 1.2032 | 34.5161 | 38.4373 | 40.6761 | 37.8616 |
| 050580 | 1.1501 | 1.2032 | 31.5806 | 34.1531 | 35.0966 | 33.6235 |
| 050589 | 1.2415 | 1.2032 | 34.5100 | 37.6886 | 37.2056 | 36.5102 |
| 050603 | 1.4514 | 1.2032 | 34.0275 | 35.0279 | 35.4809 | 34.9113 |
| 050609 | 1.3266 | 1.2032 | 41.7208 | 39.7397 | 43.4555 | 41.6214 |
| 050678 | 1.3259 | 1.2032 | 32.4473 | 33.7633 | 35.8411 | 34.1151 |
| 050693 | 1.3935 | 1.2032 | 34.5797 | 39.6838 | 42.8266 | 38.9562 |
| 050720 | 0.9629 | 1.2032 | 29.4726 | 30.3595 | 32.1173 | 30.5950 |
| 050744 | 1.7431 | 1.2032 | * | * | 48.4951 | 48.4951 |
| 050745 | 1.3420 | 1.2032 | * | * | 42.5523 | 42.5523 |
| 050746 | 1.8199 | 1.2032 | * | * | 43.2015 | 43.2015 |
| 050747 | 1.5410 | 1.2032 | * | * | 44.5887 | 44.5887 |
| 250078 | 1.5862 | 0.8418 | 22.1243 | 22.8430 | 23.9598 | 22.9835 |

*B. Revisions to Table 4J*

The entry in the second column titled, ''Reclassified for FY 2009'', for the following listed providers has been revised to include an asterisk to indicate that the providers have been reclassified to CBSA 31084 Los Angeles-Long Beach-Glendale, CA for FY 2009; and, therefore, are ineligible to receive an outmigration adjustment for FY 2009:

TABLE 4J—OUT-MIGRATION ADJUSTMENT—FY 2009

| Provider No. | Reclassified for FY 2009 | Out-migration adjustment | Qualifying county name | County code |
|---|---|---|---|---|
| 050069 | * | 0.0013 | Orange | 05400 |
| 050168 | * | 0.0013 | Orange | 05400 |
| 050173 | * | 0.0013 | Orange | 05400 |
| 050193 | * | 0.0013 | Orange | 05400 |
| 050224 | * | 0.0013 | Orange | 05400 |
| 050226 | * | 0.0013 | Orange | 05400 |
| 050230 | * | 0.0013 | Orange | 05400 |
| 050348 | * | 0.0013 | Orange | 05400 |
| 050426 | * | 0.0013 | Orange | 05400 |
| 050526 | * | 0.0013 | Orange | 05400 |
| 050543 | * | 0.0013 | Orange | 05400 |
| 050548 | * | 0.0013 | Orange | 05400 |
| 050551 | * | 0.0013 | Orange | 05400 |

TABLE 4J—OUT-MIGRATION ADJUSTMENT—FY 2009—Continued

| Provider No. | Reclassified for FY 2009 | Out-migration adjustment | Qualifying county name | County code |
|---|---|---|---|---|
| 050567 | * | 0.0013 | Orange | 05400 |
| 050570 | * | 0.0013 | Orange | 05400 |
| 050580 | * | 0.0013 | Orange | 05400 |
| 050589 | * | 0.0013 | Orange | 05400 |
| 050603 | * | 0.0013 | Orange | 05400 |
| 050609 | * | 0.0013 | Orange | 05400 |
| 050678 | * | 0.0013 | Orange | 05400 |
| 050693 | * | 0.0013 | Orange | 05400 |
| 050720 | * | 0.0013 | Orange | 05400 |
| 050744 | * | 0.0013 | Orange | 05400 |
| 050745 | * | 0.0013 | Orange | 05400 |
| 050746 | * | 0.0013 | Orange | 05400 |
| 050747 | * | 0.0013 | Orange | 05400 |

*C. Revisions to Table 9A*

The geographic reclassification data for listed providers have been revised as specified in the following table:

TABLE 9A—HOSPITAL RECLASSIFICATIONS AND REDESIGNATIONS—FY 2009

| Provider No. | Geographic CBSA | Reclassified CBSA | LUGAR |
|---|---|---|---|
| 050069 | 42044 | 31084 | |
| 050168 | 42044 | 31084 | |
| 050173 | 42044 | 31084 | |
| 050193 | 42044 | 31084 | |
| 050224 | 42044 | 31084 | |
| 050226 | 42044 | 31084 | |
| 050230 | 42044 | 31084 | |
| 050348 | 42044 | 31084 | |
| 050426 | 42044 | 31084 | |
| 050526 | 42044 | 31084 | |
| 050543 | 42044 | 31084 | |
| 050548 | 42044 | 31084 | |
| 050551 | 42044 | 31084 | |
| 050567 | 42044 | 31084 | |
| 050570 | 42044 | 31084 | |
| 050580 | 42044 | 31084 | |
| 050589 | 42044 | 31084 | |
| 050603 | 42044 | 31084 | |
| 050609 | 42044 | 31084 | |
| 050678 | 42044 | 31084 | |
| 050693 | 42044 | 31084 | |
| 050720 | 42044 | 31084 | |
| 050744 | 42044 | 31084 | |
| 050745 | 42044 | 31084 | |
| 050746 | 42044 | 31084 | |
| 050747 | 42044 | 31084 | |
| 250078 | 25620 | 25060 | |

*D. Revisions to Table 9B*

In Table 9B, entitled ''Hospital Reclassifications and Redesignations by Individual Hospital under Section 508 of Public Law 108–173 and Special Exceptions Wage Index Assignments—FY 2009'', provider 25–0078 is removed because the provider is now listed in Table 9A (see section II.C. of this notice) as reclassified to CBSA 25060, Gulfport-Biloxi, MS.

## III. Regulatory Impact Statement

We do not consider this notice to constitute a rule under 5 U.S.C. 553(b). The notice announces wage index values and reclassifications based upon policies already adopted in the FY 2009 IPPS final rule. Thus, we do not believe that reviews under Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)) are required. Nevertheless, we have examined the impact of this notice under the aforementioned authorities.

Executive Order 12866 (as amended by Executive Orders 13258 and 13422)

directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). We estimate that FY 2009 IPPS payments will increase approximately $3 million based on the changes included in this notice. Therefore, we note that not only does this notice not constitute a substantive rule, but it also does not reach the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because the notice is not a substantive rule, and we have determined, and the Secretary certifies, that this notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2008, that threshold is approximately $130 million. This notice will have no consequential effect on State, local, or tribal governments or on the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Since this notice does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

**Authority:** (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program).

Dated: November 20, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: *November 25, 2008.*

**Michael O. Leavitt,**

*Secretary.*

[FR Doc. E8–28619 Filed 12–2–08; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. FDA–2008–D–0609]**

### Draft Guidance for Industry on the Submission of Patent Information for Certain Old Antibiotics; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry entitled ''Submission of Patent Information for Certain Old Antibiotics.'' The draft guidance describes the agency's current thinking on the implementation of certain provisions of the Q1 Program Supplemental Funding Act (the Q1 Act) that concern old antibiotics and addresses which sponsors of new drug applications (NDAs) must submit patent information under the Q1 Act by December 5, 2008.

**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 February 2, 2009.

**ADDRESSES:** Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 2201, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. 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*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

**FOR FURTHER INFORMATION CONTACT:** Mary Ann Holovac, Center for Drug Evaluation and Research (HFD–615), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8971.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Submission of Patent Information for Certain Old Antibiotics.'' The draft guidance provides information regarding FDA's current thinking on the implementation of section 4(b)(1) of the Q1 Act (Public Law 110–379).

The Q1 Act amends section 505 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 355) by adding subsection (v), which establishes, among other things, certain conditions under which the patent listing, patent certification, and marketing exclusivity provisions of sections 505(c) and (j) of the FD&C Act, and the patent term extension provisions of 35 U.S.C. 156 apply to marketing applications for drugs that contain an antibiotic that was the subject of any marketing application received by FDA on or before November 20, 1997 (an old antibiotic). The transitional rules at section 4(b) of the Q1 Act provide for the submission of the patent information by sponsors of certain NDAs, the publication of such patent information by FDA, and the certification to such patents by applicants of pending abbreviated new drug applications to be deemed ''a first applicant'' (as defined in section 505(j)(5)(B)(iv) the FD&C Act), not later than 60, 90, and 120 days after enactment of the Q1 Act, respectively.

Specifically, section 4(b)(1) of the Q1 Act requires the submission to FDA of patent information by sponsors of certain NDAs for drugs (including

combination drugs) containing old antibiotics by December 5, 2008.[1] The draft guidance describes FDA's current thinking on the implementation of section 4(b)(1) of the Q1 Act and addresses which sponsors of NDAs must submit patent information to the agency under section 4(b)(1) of the Q1 Act by December 5, 2008.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on the submission of patent information under section 4(b)(1) of the Q1 Act. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

### II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Please note that on January 15, 2008, the FDA Division of Dockets Management Web site transitioned to the Federal Dockets Management System (FDMS). FDMS is a Government-wide, electronic docket management system. Electronic comments or submissions will be accepted by FDA only through FDMS at *http://www.regulations.gov*.

### III. Paperwork Reduction Act of 1995

This 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 314.50(h) and 314.53 have been approved under OMB control number 0910–0513.

### IV. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/cder/guidance/index.htm* or *http://www.regulations.gov*.

Dated: November 26, 2008.

**Jeffrey Shuren,**

*Associate Commissioner for Policy and Planning.*

[FR Doc. E8–28657 Filed 12–2–08; 8:45 am]

**BILLING CODE 4160–01–S**

[1] Section 4(b)(1) of the Q1 Act requires the submission of patent information to FDA ''not later than sixty days after enactment of [the Q1 Act].'' Sixty days after enactment falls on Sunday, December 7, 2008. Therefore, to be in compliance with this provision, sponsors must submit the patent information on or before the weekday preceding December 7, 2008, that is, on or before December 5, 2008.

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical 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:* National Institute of General Medical Sciences, Special Emphasis Panel, Large-Scale Collaborative Project Awards (U54).

*Date:* December 22, 2008.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Lisa Dunbar, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov*. (Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: November 21, 2008.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. E8–28509 Filed 12–2–08; 8:45 am]

**BILLING CODE 4140–01–M**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice; 30-day notice and request for comments; Extension, without change, of a currently approved collection, OMB Number 1660–0024, No Form.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.*, the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

**Collection of Information**

*Title:* Federal Assistance for Offsite Radiological Emergency Planning.

*OMB Number:* 1660–0024.

*Abstract:* In accordance with Executive Order 12657, FEMA will need certain information from the licensee (the utility which has applied for or received a license from the Nuclear Regulatory Commission (NRC) to operate a nuclear power plant) in order to form a decision, based on the advice of the NRC, as to whether or not a condition of ''decline or fail'' exists on the part of State or local governments (44 CFR 352.3–4). This information will be collected by the appropriate FEMA Regional Office or Headquarters.

*Affected Public:* Business or other for-profit.

*Number of Respondents:* 1.

*Estimated Time per Respondent:* 160 hours.

*Estimated Total Annual Burden Hours:* 160 hours.

*Frequency of Response:* Once.

*Comments:* Interested persons are invited to submit written comments on

the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–6974. Comments must be submitted on or before January 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection should be made to Acting Director, Records Management Division, 500 C Street, SW., Washington, DC 20472, Mail Drop Room 301, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@dhs.gov.*

**Lawann Johnson,**

*Acting Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.*

[FR Doc. E8–28688 Filed 12–2–08; 8:45 am]

**BILLING CODE 9110–21–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R5–R–2008–N0204; 50133–1265–LKUP; S3]**

### Lake Umbagog National Wildlife Refuge, Coos County, NH, and Oxford County, ME

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability: Final comprehensive conservation plan and environmental impact statement.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability for review of our final comprehensive conservation plan (CCP) and environmental impact statement (EIS) for Lake Umbagog National Wildlife Refuge (NWR). This document describes how we propose to manage the refuge for the next 15 years.

**DATES:** We will sign a record of decision no sooner than 30 days after the publication of this notice.

**ADDRESSES:** You may view or obtain copies of the final CCP/EIS by any of the following methods. You may request a print copy or CD–ROM.

*Agency Web Site:* Download a copy of the document(s) at *http://library.fws.gov/ccps.htm.*

*E-mail: northeastplanning@fws.gov.* Include ''Lake Umbagog Final CCP/EIS'' in the subject line of your message.

*Mail:* P.O. Box 240, Errol, NH 03579–0240.

*In-Person Viewing or Pickup:* Call 603–482–3415, ext. 20, to make an appointment during regular business hours at Route 16 North, Errol, NH.

**FOR FURTHER INFORMATION CONTACT:** For answers to questions about the refuge, contact Paul Casey, Refuge Manager, 603–482–3415, ext. 20, e-mail: *paul_casey@fws.gov* or, for questions about the planning process, contact Nancy McGarigal, Natural Resource Planner, 413–253–8562, e-mail: *northeastplanning@fws.gov.* Please remember to put ''Lake Umbagog NWR Final CCP/EIS'' in the subject line of your message.

**SUPPLEMENTARY INFORMATION:**

#### Introduction

Our publishing this notice of availability facilitates the CCP process for Lake Umbagog NWR that we started by publishing a notice of intent in the **Federal Register** (67 FR 136; July 16, 2002). For more about the process, see that notice. We released the draft CCP/EIS to the public and requested your comments in a notice of availability in the **Federal Register** (72 FR 129; July 6, 2007).

We are announcing the availability of the final CCP/EIS for Lake Umbagog NWR, and our preferred actions for managing it, in accordance with the National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)). The document contains a thorough analysis of impacts on the human environment. Our next planning step will be to complete a Record of Decision no sooner than 30 days after publication of this notice (40 CFR 1506.10(b)(2)).

The CCP will guide us in managing and administering the refuge for the next 15 years. We propose that alternative B, the Service-preferred alternative, serve as the foundation for the final, stand-alone CCP. We highlight the modifications we made to alternative B between the draft and final CCP/EIS in ''Comments,'' below.

Our first purchase of land for the refuge established it in 1992. Its purposes are to provide long-term protection for unique wetlands, federal- and state-listed threatened or endangered species, migratory birds of conservation concern, and regionally significant concentrations of wildlife.

This 21,650-acre refuge lies in Coos County, New Hampshire, and Oxford County, Maine. It contains widely diverse types of upland and wetland habitats around the 8,500-acre Umbagog Lake. Since establishing the refuge, we have focused primarily on conserving land within its approved boundary, monitoring the occupancy and productivity of its common loon, bald eagle, and osprey nesting sites and protecting them from human disturbance, conducting baseline biological inventories, and providing public opportunities for wildlife-dependent recreation.

#### Background

*The CCP Process*

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee; Improvement Act), which amends the National Wildlife Refuge System Administration Act of 1966, requires us to develop a CCP for each national wildlife refuge. The purpose for developing CCPs is to provide refuge managers with 15-year plans for achieving refuge purposes, contributing toward the mission of the National Wildlife Refuge System (NWRS), and conforming to sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public: Hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update the CCP at least once every 15 years, also in accordance with the Improvement Act.

#### CCP Alternatives

Our draft CCP/EIS (72 FR 129) and this final CCP/EIS fully analyze three alternatives for the future management of the refuge. During the planning process, we identified and addressed 18 major issues generated by several sources: the public, state or federal agencies, other Service programs, and our planning team. Both the draft and final plans identify alternative B as the Service-preferred alternative.

#### Comments

We solicited comments on the draft CCP/EIS for Lake Umbagog refuge for a 45-day period starting on July 6, 2007 (72 FR 129). In response to requests for additional time, we extended that comment period another 32 days, until September 21, 2007. We held five public hearings and two information sessions during that time, and received 14,269 responses, both oral and written. We evaluated all of the written and electronic correspondence and oral testimony we received, and responded to them in final CCP/EIS appendix O, ''Summary of, and the Service's

Response to, Public Comments Received on the Draft Comprehensive Conservation Plan and Environmental Impact Statement (Draft CCP/EIS) for Lake Umbagog National Wildlife Refuge.'' We present here some of the changes we made in our final CCP/EIS, which are also discussed in appendix O.

1. In response to concerns about local economic impacts, our expansion proposal replaces some fee acquisition with easement acquisition in Maine, and reduces the total number of acres. We now propose to acquire from willing sellers 47,807 acres (formerly, 49,718 acres), and change the acquisition ratio to 56 percent in fee and 44 percent in easement. Appendix A, ''Land Protection Plan,'' shows our revised proposal.

2. Two new maps clarify our proposal on the roads and trails we would open for public use on both current refuge lands and refuge expansion lands. Chapter 2, ''Alternatives Considered, Including the Service-preferred Alternative,'' clarifies them in maps 2.8 and 2.9. Item 6, below, describes them.

3. We propose to postpone our decision on whether to manage furbearer species, and whether that management could include trapping. We will conduct further analysis and prepare a more detailed Furbearer Management Plan. That change, which we propose in both alternatives B and C, is included in chapter 2, in the section ''Actions Common to Alternatives B and C Only.'' Before trapping would be permitted under a Furbearer Management Plan, we will analyze the appropriateness of this use and issue a compatibility determination, if warranted, analyzing whether this use is compatible with the mission of the NWRS and refuge purposes, and under what conditions.

4. We propose to postpone our decision on whether to expand our current hunt program to incorporate bobcat hunting in Maine and turkey hunting in Maine and New Hampshire. That action would have made our hunt program consistent with the states' hunt programs. However, we have determined the need to conduct further analysis, in conjunction with a revised Hunt Plan and environmental assessment, and include additional public comment. We propose that change in both alternatives B and C in the same section of chapter 2. If our hunt program is expanded in the future, we will issue a new compatibility determination with any changes to the current program.

5. The same section of chapter 2 also clarifies our hunting and fishing programs. The public comments we received revealed the misunderstanding that our implementing alternatives B and C would result in new restrictions in our programs. That is not the case. We now provide a better explanation, and point out that we intend to implement the same programs on any newly acquired lands.

6. We revise alternative B to allow certain public uses in designated areas that we originally planned not to allow. Those include dog sledding, horseback riding, bicycling, and collecting certain berries, fiddleheads, mushrooms, and shed antlers for personal use.

7. We modify our proposal in alternatives B and C regarding boat access, by eliminating our original proposals for a boat launch at Sturtevant Pond and major improvements at B Pond. We are scaling back our proposal at B Pond to include a small parking area near the road, away from the shore. We also propose keeping the boat launch at the current refuge headquarters on Route 16 North open to public access, instead of closing it.

**Public Availability of Documents**

In addition to the methods in **ADDRESSES**, above, you can view or obtain the documents at the following locations.

- Our Web site, *http://library.fws.gov/ccps.htm*.
- The Errol Town Library, during regular hours.

Dated: September 24, 2008.

**Wendi Weber,**

*Acting Regional Director, Region 5, U.S. Fish and Wildlife Service, Hadley, MA 01035.*

[FR Doc. E8–28649 Filed 12–2–08; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Notice of Availability for the Record of Decision on the Final General Management Plan and Environmental Impact Statement, Pipestone National Monument, MN

**AGENCY:** National Park Service, Department of the Interior.

**ACTION:** Notice of Availability for the Record of Decision on the Final General Management Plan and Environmental Impact Statement, Pipestone National Monument, Minnesota.

**SUMMARY:** Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)), the National Park Service (NPS) announces the availability of the Record of Decision (ROD) for the Final General Management Plan and Environmental Impact Statement (GMP/EIS), Pipestone National Monument (national monument), Minnesota. On September 30, the Midwest Regional Director approved the ROD for the project. As soon as practicable, the NPS will begin to implement the preferred alternative contained in the final EIS.

The NPS will implement the preferred alternative as described in the Final GMP/EIS issued on March 28, 2008. Alternative 1, the preferred alternative, will reduce the development in the heart of the national monument, preserving its setting, site history, and spiritual significance as the source of pipestone. The NPS will remove the visitor center and parking, enabling visitors to see the site much as it appeared prior to 1937. The national monument will acquire a parcel of school district land to the northeast and will seek a cooperative agreement with the U.S. Fish and Wildlife Service and the Minnesota Department of Natural Resources to coordinate management of the 100-acre Pipestone Wildlife Management Area. American Indian ceremonial use of the Three Maidens area will be unchanged. The Hiawatha Club will continue to use the Three Maidens as a backdrop for its pageant under permit restrictions, and the area will be restored to prairie. Sun Dances will continue, but modifications of use might be made on the basis of impact and the sustainability of resources. Quarries will continue to be allocated by permit.

The GMP/EIS evaluated this course of action and two other action alternatives, and a no action alternative. The full range of foreseeable environmental consequences were assessed and appropriate mitigating measures were identified.

The ROD includes a statement of the decision made, synopses of other alternatives considered, the basis for the decision, a description of the environmentally preferable alternative, a finding on impairment of park resources and values, a listing of measures to minimize environmental harm, and an overview of public involvement in the decisionmaking process.

**FOR FURTHER INFORMATION CONTACT:** Superintendent Glen Livermont, 36 Reservation Avenue, Pipestone, Minnesota 56164–1269, or by calling 507–825–5464. Copies of the ROD are available upon request from the above address or may be viewed online at *http://parkplanning.nps.gov/pipe.*

Dated: September 30, 2008.

**Ernest Quintana,**

*Regional Director, Midwest Region.*

[FR Doc. E8–28671 Filed 12–2–08; 8:45 am]

**BILLING CODE 4312–AA–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–269, 50–270, and 50–287]**

### Duke Energy Carolinas, LLC; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Renewed Facility Operating License Nos. DPR–38, DPR–47, and DPR–55, issued to Duke Energy Carolinas, LLC (the licensee), for operation of Oconee Nuclear Station, Units 1, 2, and 3 located in Seneca, South Carolina.

The proposed amendments would accommodate the replacement of the current analog-based reactor protective system (RPS) and engineered safeguards protective system (ESPS) with a digital computer-based RPS/ESPS.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the person(s) may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person(s) whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request via electronic submission through the NRC E-filing system for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner/requestor in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule, which the NRC promulgated on August 28, 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek a waiver in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the petitioner/requestor must contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov*, or by calling (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html*. Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*.

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered

complete at the time the filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The EIE system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 4:15 p.m., Eastern Time, Monday through Friday. The help line number is (800) 397–4209 or locally, (301) 415–4737.

Participants who believe that they have a good cause for not submitting documents electronically must file a motion, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition and/or request should be granted and/or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/ehd_proceeding/home.asp*, unless excluded pursuant to an order of the Commission, an Atomic Safety and Licensing Board, or a Presiding Officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submissions.

For further details with respect to this license amendment application, see the application for amendment dated January 31, 2008, supplemented by letters dated April 3, April 29, May 15, May 28, September 30, October 7, October 16, October 23, and October 28, 2008, which are available for public inspection at the Commission's 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 ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737, or by e-mail to *pdr.resource@nrc.gov*.

Dated at Rockville, Maryland, this 24th day of November 2008.

For the Nuclear Regulatory Commission.

**John F. Stang,**

*Project Manager, Plant Licensing Branch II–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. E8–28678 Filed 12–2–08; 8:45 am]

**BILLING CODE 7590–01–P**

## POSTAL REGULATORY COMMISSION

**[Docket No. PI2008–1; Order No. 140]**

## Postal Service Plan for Service Performance Measurement

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** This document approves most elements of a proposed Postal Service plan for service performance measurement. Both the Postal Service's plan and the Commission's approval respond to requirements in a 2006 federal law that revised and updated the regulatory approach to postal operations.

**DATES:** Postal Service response: June 1, 2009.

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

**SUPPLEMENTARY INFORMATION:**

### Regulatory History

72 FR 72395 (December 20, 2007)
73 FR 36136 (June 25, 2008)
73 FR 39996 (July 11, 2008)

### I. Executive Summary

The Commission today approves a Postal Service request to employ internal service measurements developed from its Intelligent Mail Barcode (IMb) data to track service performance of bulk letters and flats. This data would be combined with externally collected information to provide the first system measuring the speed and consistency of delivery for most types of mail.

A major feature of the Postal Accountability and Enhancement Act of 2006 is the requirement that the Postal Service begin to measure and publicly report on its service performance for all market dominant products. That law directs that external measurement systems be used for this task unless alternate systems are approved by the Postal Regulatory Commission.

This order reviews a Postal Service request to employ both external and internal service measurement systems, and the public's comments on that proposal. The Commission authorizes most aspects of the plan.

The Postal Service states that reliable external measurement of all products would be very expensive and hard to implement. In particular, to be reliable, test pieces must be indistinguishable from ''real mail'' while being sufficiently physically diverse and geographically dispersed to reflect service performance for different types of mail in all parts of the country. The Postal Service claims this would be very difficult to achieve in any affordable fashion.

The comments agree that it is important to utilize reliable existing data sources where possible, and to avoid requiring costly new external measurement systems.

The Postal Service proposes to expand its existing external system for measuring single-piece First-Class Mail, and use its existing Delivery Confirmation data to measure parcel service. For the majority of its volume, letter and flat-shaped mail sent in bulk by businesses, it proposes to measure performance with a hybrid system that would use data from its new IMb program, scheduled for implementation in May 2009, in combination with already available externally derived service information.

A measurement system that tracks representative, live mail from deposit to delivery would provide the most meaningful measure of service performance. The Postal Service believes that its planned ''full service'' IMb program will meet that standard. It will allow the Postal Service to begin measurement when it receives mail, and track containers and individual pieces as they proceed through its processing and transportation networks. These data would be combined with externally measured data quantifying time from ready-for-delivery, to actual delivery, providing end-to-end service measurement.

Assuming IMb scanning and reporting technology can be successfully implemented, and full service IMb is utilized by a representative cross-section of mailers, this service measurement program should produce high quality, minimal cost results. Therefore, the Commission approves its use, and urges the Postal Service to proceed quickly to deploy this system.

The Postal Service is to provide quarterly public progress reports while full service IMb is being tested and implemented. The Commission will carefully monitor IMb implementation and usage to assure that accurate and representative performance data are obtained. If necessary, modifications to the service performance measurement plan will be developed. A separate public proceeding will be initiated shortly to establish specific requirements for the periodic reporting of service achievement by type of mail.

In one area, the Commission has identified problems that require immediate adjustment. The Postal Service proposes to combine the measurements for its diverse special services into an index. The Commission finds that the proposed measures fail to reflect actual performance for several of the more important services, including Delivery Confirmation and Return Receipt. More realistic measures of actual performance need to be developed in these areas.

## II. Background

The Postal Accountability and Enhancement Act (PAEA), Public Law 109–435, 120 Stat. 3218 (2006), requires the Postal Service, in consultation with the Postal Regulatory Commission, to establish by regulation a set of modern service standards for market dominant products. 39 U.S.C. 3691. Initial consultations between the Commission and the Postal Service concluded on November 16, 2007, with the Commission providing the Postal Service with comments addressing the Postal Service's service standards proposals.[1] The Postal Service completed this task by publishing as a final rule Modern Service Standards for Market-Dominant Products, December 19, 2007 (Service Standards).[2]

Having established service standards, the Postal Service is developing systems to measure actual service performance. On November 29, 2007, the Postal Service provided the Commission with a draft of its Service Performance Measurement plan (Initial Plan), and through a continuation of the consultation process, sought the views of the Commission. The Commission posted the Initial Plan on its Web site as an attachment to Order No. 48, which also established Docket No. PI2008–1 for this matter and provided interested persons an opportunity to comment on the Postal Service's service performance measurement proposals.[3] The Commission received 18 sets of comments and 9 sets of reply comments from the mailing community.[4]

Since November, the Postal Service has been consulting with its customers, working with its external measurement vendors, and working through the implementation of the Intelligent Mail Barcode system. This has led to the continuous refinement of the Service Performance Measurement plan. In June 2008, the Postal Service provided the Commission with a second draft of its Service Performance Measurement plan (Revised Plan). The Commission posted the June 2008 draft Service Performance Measurement document on its Web site as an attachment to Order No. 83, and again provided interested persons an opportunity to comment.[5] The Commission received 10 sets of additional comments addressing the Revised Plan.

## III. Statutory Requirements

The Postal Service's Revised Plan provides proposals both for performance measurement systems and for reporting data generated by the performance measurement systems. Performance measurement systems and reporting of data are linked, but evaluation of each requires consideration of different statutory requirements and issues unique to each area. They appropriately may be considered separately. The focus of this Order is on the first topic, the approaches proposed for the various measurement systems.

Because the Postal Service's Revised Plan also includes proposals for data reporting and comments were solicited in this area, this order also describes the Postal Service's proposals for data reporting and reviews the comments that were submitted, with limited Commission discussion. A comprehensive review of the data items required by the Commission for annual determination of compliance, including more detailed reporting on a quarterly basis, will await a rulemaking as previously suggested in Docket No. RM2008–4.[6]

### *A. Internal Versus External Measurement Systems*

An objective in designing service performance standards is for the Postal Service to provide ''a system of objective external performance measurements for each market-dominant product as a basis for measurement of Postal Service performance.'' 39 U.S.C. 3691(b)(1)(D). However, ''with the approval of the Postal Regulatory Commission an internal measurement system may be implemented instead of an external measurement system'' for individual

[1] Comments of the Postal Regulatory Commission on Modern Service Standards for Market Dominant Products, November 16, 2007. The consultations are described as ''initial'' because of the ongoing nature of consultations that are necessary to transition from a set of standards to an operational measurement system encompassing performance goals (*see* uncodified section 302(b)(1) of the PAEA) and reporting mechanisms (*see* 39 U.S.C. 3652).

[2] 72 FR 72216 (December 19, 2007) (codified at 39 CFR parts 121 and 122).

[3] PRC Order No. 48, Notice of Request for Comments on Service Performance Measurement Systems for Market Dominant Products, December 4, 2008 (Order No. 48).

[4] The members of the mailing community that have filed comments, reply comments, and additional comments are identified after the signature of this order. As a matter of convenience, citations to these comments will identify the party's comments as comments, reply comments, or additional comments. For example, Pitney Bowes' comments are cited as Pitney Bowes Comments at xx; reply comments are cited as Pitney Bowes Reply Comments at xx; and additional comments are cited as Pitney Bowes Additional Comments at xx.

[5] PRC Order No. 83, Second Notice of Request for Comments on Service Performance Measurement Systems for Market Dominant Products, June 18, 2008 (Order No. 83).

[6] *See* Docket No. RM2008–4, Notice of Proposed Rulemaking Prescribing Form and Content of Periodic Reports, August 22, 2008, at 11–12 for a discussion of the future rulemaking.

products. 39 U.S.C. 3691(b)(2). The Revised Plan presents the various measurement systems the Postal Service proposes to use to measure the standards presented in the Service Standards document. In the Revised Plan, the Postal Service proposes various internal, external, and hybrid (containing both internal and external elements) measurement systems to measure the performance of its mail products.[7]

The Postal Service submitted the Revised Plan for the Commission's ''review, feedback, and concurrence.'' [8] In consultations with the Commission, the Postal Service indicated that it seeks approval of the direction that it is taking with its measurement systems, specifically whether the Commission finds any issues that may be ''show-stoppers'' to proceeding with the various external and hybrid measurement systems.

This order provides the Postal Service with the requested feedback. Specific approvals will be subject to review as the quality of the data produced is evaluated.

*B. Data Reporting*

The Postal Service's Revised Plan also describes how it proposes to report to the Commission the data generated by its measurement systems. The Postal Service states:

> In accordance with § 3652 of the Postal Accountability and Enhancement Act, the Postal Service is required to report measures of the quality of service on an annual basis. The Postal Service's proposal for service measurement goes far beyond annual reporting and will instead provide quarterly reporting for all market-dominant products, almost entirely at a district level.

Revised Plan at 12 39 U.S.C. 3652 requires that the Postal Service include in an annual report to the Commission an analysis of the quality of service ''for each market-dominant product provided in such year'' by providing ''(B) measures of the quality of service afforded by the Postal Service in connection with such product, including—(i) the level of service (described in terms of speed of delivery and reliability) provided; and (ii) the degree of customer satisfaction with the service provided.''

As noted above, the Commission intends on initiating a rulemaking to develop rules for both annual and periodic reports of service performance measurements through its authority to (1) prescribe by regulation the content and form (including the methodologies used) of the annual report to the Commission (39 U.S.C. 3652(a)(1) and (e)(1)), and (2) prescribe data reporting requirements as part of designing a modern system for regulating rates and classes for market dominant products (39 U.S.C. 3622(a)). The Postal Service proposals presented in its Revised Plan, along with all comments received, will be incorporated by reference and considered in that rulemaking docket.

## IV. Review of the Postal Service Performance Measurement Systems Proposals

Many service performance measurement issues are common to multiple mail products. These issues include the structure and reliability of a hybrid measurement system, exclusions from measurement, and IMb adoption rates, among others. The Commission addresses these issues first, discussing its concerns with the Postal Service's proposals, including where applicable, concerns presented by mailers.

The Commission then reviews service performance measurement issues as applicable to the individual classes of mail. The review addresses specific Commission concerns and provides recommendations on the approaches that the Postal Service is proposing for service performance measurement systems and data reporting. It also considers mailer comments specific to individual mail products.

*A. Multiproduct Issues*

1. The Hybrid Measurement System

The Postal Service proposes service performance measurement systems that incorporate both internal and external measurement elements to measure the performance of First-Class Mail presort letters and cards, Standard Mail non-saturation letters and flats, and Package Services presort flats. The systems for each type of mail share similar attributes. Collectively, these measurement systems are referred to as the ''hybrid measurement system.''

The hybrid measurement system hinges on successful implementation and mailer adoption of the internal IMb system.[9] Only mail using the full service option of IMb will be included in the measurement.[10] The measurement system uses a sampling, not a census, of full service IMb-compliant mail.

A prerequisite for mail to be measured is the submission of electronic mailing documentation by the mailer. Generally, the mailer's submission of electronic mailing documentation and the documented arrival time at a postal facility starts the clock of the measurement.[11]

The hybrid measurement system measures end-to-end service performance in two steps. In the first step, a mail processing factor is developed. The mail processing factor is the time from the start-the-clock event described above to the last recorded mail processing scan using IMb system data. In the second step, a delivery factor is developed. The delivery factor represents the time from the last recorded mail processing scan to actual delivery of a mailpiece. In calculating the delivery factor, an external contractor uses the last recorded mail processing scan reported by the IMb system, and the actual delivery date recorded by external reporters with scanners capable of reading IMbs. The mail processing factor is combined with the delivery factor to provide an end-to-end measurement of service performance.[12]

A variety of mailers support the hybrid measurement system approach. AMEE Comments at 2; DFS Reply Comments at 1; MMA Comments at 2; NPPC Comments at 4; Pitney Bowes Comments at 3; and PostCom/DMA Comments at 7.

AMEE and MMA comment that the existing External First-Class (EXFC) infrastructure used by the hybrid system and external reporters will add credibility to the system. AMEE Comments at 2; and MMA Comments at 2. However, Pitney Bowes and Valpak suggest eventually eliminating the external reporters to reduce costs once IMb becomes widespread enough to ensure statistical validity of the system. Pitney Bowes Comments at 3; and

[7] For the purposes of the statutory requirements, the Commission will consider all hybrid systems to be internal systems because of the level of control that the Postal Service exerts over the internal elements of the proposed hybrid systems.

[8] Letter from Thomas G. Day, Senior Vice President, United States Postal Service, to Dan G. Blair, Chairman, Postal Regulatory Commission, June 3, 2008.

[9] The Intelligent Mail Barcode is a new data rich, four-state barcode that the Postal Service is in the process of introducing. The IMb system includes the process and documentation requirements for inducting mail into the postal system, and the data system to monitor and report on mail containing IMbs.

[10] Full service and basic options are available for IMb. Basic IMb requires mailers to use an IMb that includes a Barcode ID, Service Type ID, Mailer ID, Serial Number (does not have to be unique and can include all zeroes), and a Delivery Point ZIP Code. In addition to the requirements for basic service IMb, full service IMb mailpieces must include serial numbers that are unique for 45 days, unique Tray/Container barcodes, and electronic documentation.

[11] The actual start-the-clock takes into consideration the critical entry time (CET) for that type of mail.

[12] The external reporters generate an actual stop-the-clock event, which also can be used to develop an actual end-to-end measurement. At this time, it is unclear how this end-to-end measurement will be incorporated into the reported service performance measurement.

Valpak Comments at 8–9; *see also* IWCO Additional Comments at 1. PostCom/DMA and DFS also suggest eliminating the external reporters as a cost savings measure, but suggest using an independent study as an internal delivery proxy instead. PostCom Comments at 7; and DFS Reply Comments at 3.

*Commission analysis*. The Commission supports the approach the Postal Service is taking to implement the hybrid system for service performance measurement, with the following caveats.

The mail sampled by the hybrid system must be representative of the overall mail subject to performance measurement for the system to produce meaningful results. Representativeness is further discussed in section VI.A.2 which addresses mail excluded from measurement. A representative sample also may depend on mailers' adoption of the IMb system, which is further discussed in section VI.A.3.

The Commission notes the common analytical and statistical practice of combining the results of more than one separate and independent analytical sample. The Postal Service proposes to achieve an end-to-end measurement of service performance by combining the mail processing factor (step one estimation) with the delivery factor (step two estimation). It appears that the volume of data used in the step one estimations will be much larger than the volume used in the step two analysis. Although independence appears to hold between the two separate analyses for the two separate factors, the Commission suggests that it will be important to monitor if that independence is true for all components within each analyses for all classes of mail so as to avoid possible unintended bias effects.

The Commission also recommends monitoring and testing for potentially negative influences on measurement resulting from the type/frequency of mismatched data pairs that may enter the analyses such as a reliable start-the-clock with no final external reporter scan, or no reliable start-the-clock with a reliable final external reporter scan. The methodology for incorporating (or scrubbing) mismatch data pairs into the measurement may bias the measurement result. Thus, the methodology must be fully understood and disclosed to assure that any bias is reasonably limited.[13]

As suggested by AMEE and MMA, the Commission finds that the existing EXFC infrastructure and the external panel of reporters equipped with devices to scan all IMb First-Class, Periodical, and Standard letters/cards and flats delivered to their in-home addresses will add credibility to the hybrid system. The option of reducing or eliminating the use of external reporters to reduce costs may be considered at a later date.

2. Exclusions From Measurement

Mail that is excluded from measurement may impact the ability of the sampled mail to represent the total of the mail subject to measurement. For the IMb-based measurement systems, only mail participating in full service IMb is measured. This excludes mail participating in only the basic IMb service. Similar questions exist for DelTrak and Red Tag, and the Delivery Confirmation-based systems, where a significant portion of the mail does not utilize these systems. Finally, mailers express concern with the exclusion from measurement of mail that does not meet preparation requirements.

Valpak expresses concern that the exclusion from measurement of (Standard) bulk mail not using full service IMb raises the possibility of bias, and the possibility that the measurement is not representative of the wider universe. It suggests that the Postal Service provide an annual explanation of the universe from which performance data is derived and an explanation of what universe this data can be considered to represent. Where the represented universe is larger than the performance data universe, the Postal Service also should explain why the data universe is representative of the larger universe. Valpak Comments at 4–5; and Valpak Reply Comments at 7–8; *see also* Research International Additional Comments at 2.

GCA provides an example of where representativeness issues may exist with single-piece mail. It requests clarification on the treatment of mis- or badly-addressed single-piece mail in the measurement system. GCA Comments at 1.

MOAA comments that it is reasonable to exclude mail that does not meet mail preparation requirements, but further suggests procedures are necessary to inform mailers of any mail that is excluded from measurement.[14] MOAA Comments at 1–2. APWU contends that excluding mail that does not meet mail preparation requirements may cause measurements that are not reflective of the mail being sent. APWU Comments at 2. PostCom/DMA adds that data excluded from service performance measurement should be provided to mailers to resolve service issues and improve mail quality. PostCom/DMA Comments at 16.

*Commission analysis*. The Commission recognizes that the full service IMb mail used in the end-to-end service measurement calculations may not be representative of the larger populations it seeks to represent in making service measurement claims. The full service IMb mail and the remainder of the mail of a given class may differ in terms of mail characteristics, geographical location, and most importantly, service performance. If these two sets of mail groups do indeed differ significantly in important characteristics, then the ''estimated'' measures for the full service IMb mail may be very different than the service performance for the rest of the mail.

To assess this potential bias problem, the Commission recommends limited performance measurement tests be conducted for mailpieces excluded from the primary measurement system and used for comparison purposes. For example, the Postal Service could apply unique identifying barcode information to a random sample of mailpieces that do not use full service IMb to obtain an estimate of service performance. This estimate could then be compared to the estimate obtained from the full service IMb pieces to monitor how representative full service IMb pieces are as adoption rates increase. A plan for implementing a system for ascertaining the representativeness of annual compliance report (ACR) service performance measurements based on IMb should be provided with the 2009 ACR.

The Commission finds that the Postal Service is taking a reasoned approach to addressing the MOAA, *et al.* concerns of determining whether to include or exclude mail from measurement because of a variety of mail validation deficiencies. *See* Revised Plan, Appendix, para. 4. In some instances, the mailer will be provided an opportunity to correct the deficiencies and the mail then will be included in the performance measurement. In all

[13] For example, a mailpiece with a valid start-the-clock but without a valid stop-the-clock (due to the mailpiece never being delivered) that is scrubbed from the dataset will not be represented in the overall measurement of service performance, i.e., the measurement system will indicate a higher level of service performance than what is actually occurring. This is a complex issue because the decisions concerning atypical data typically affect measurement bias.

[14] For bulk mail, the Postal Service proposes only to measure end-to-end performance of mail that is verified as satisfying mail preparation requirements associated with applicable price categories and that complies with the requirements of full service IMb. Revised Plan, Appendix, para. 4.

instances of this nature, communication between the Postal Service and the mailer is beneficial to reducing the occurrence of validation issues so that the mail system operates smoothly.

3. IMb Adoption

The IMb system, used to capture internal service performance data, is the centerpiece of several of the measurement systems proposed by the Postal Service. In particular, successful operation of the IMb system is necessary for implementation of the hybrid measurement system. Thus, the rate at which mailers are likely to start using the IMb, specifically the full service option of IMb that is required by the measurement systems, along with whether the IMb mail presented by the adopting mailers is representative of intended total population subject to measurement, must be considered.

AMEE has an expectation of rapid adoption of IMb, but comments that undefined Postal Service requirements, the mailer's own data requirements, the Postal Service IT infrastructure, and the issue of rate incentives could add uncertainty to its expectations. AMEE Comments at 4. NPPC comments that the effectiveness of the hybrid system will depend on IMb adoption rates; however, NPPC contends that it is unclear how fast IMb will mature, when the Postal Service will specify business requirements, and how mailers will convert to IMb. NPPC Comments at 4. Pitney Bowes asserts that the hybrid measurement system is critically dependent upon mailer participation in IMb, and suggests promoting adoption with meaningful price incentives and advance notice regarding the size of these incentives. *In accord*, PostCom/DMA Additional Comments at 5–6.

PostCom/DMA and Pitney Bowes suggest implementation of a data collection process to monitor IMb adoption. Pitney Bowes explains the adoption monitoring system can be used to assess the validity of the hybrid system. Additionally, PostCom/DMA assert that the Postal Service must work aggressively with mailers to overcome implementation barriers to IMb, and that a monitoring system can be used to explore alternate requirements or measurement systems if IMb adoption rates are significantly less than anticipated. Pitney Bowes Comments at 4; and PostCom/DMA Comments at 18–19.

Research International questions whether a system based on the natural adoption of IMbs for bulk mail will produce a measurement that is representative. It contends that adoption may be skewed by geography, size of mailer, types of mailing, or other factors. Alternatively, Research International suggests a system using seeded mailings, including transponders, to give a more complete end-to-end measurement. Research International Comments at 1. To the extent that the Postal Service may need to supplement IMb data, McGraw-Hill comments that the Postal Service should evaluate the costs and benefits of the Research International approach. McGraw-Hill Reply Comments at 5.

*Commission analysis*. The Commission recognizes that mailer adoption of full service IMb that provides a representative cross-section of the mail population being measured is critical to the success of the hybrid system. It is uncertain, at this time, when sufficient adoption of IMb will occur. In the Initial Plan, the Postal Service projected presort First-Class and letter-shaped Standard Mail adoption at 25–50 percent in FY 2009 with a projected increase to 50–75 percent in FY 2010. The Revised Plan does not give projection percentages for full service IMb adoption.

The Postal Service has made several statements to the mailing community concerning the operational date of the IMb system and possibly developing differential rates specific to IMb mail. Uncertainty in the mailing community of IMb requirements, implementation dates, and applicable rates may lead to delay in the adoption of the system. Additional issues that may impede adoption are mailer concerns over final Postal Service requirements, mailer data requirements, and Postal Service IT infrastructure.

The Commission also finds that tracking the representativeness of the actual full service IMb sample is important. For presort mail, the sample of full service IMb presort mailers must be representative of the entire population of presort mailers. The Commission expects the Postal Service to develop a protocol for testing to assess whether this sample is in fact representative.

To the extent that uncertainty exists, the Commission agrees with the mailers' suggestions that it will be necessary to monitor IMb adoption rates so that possible solutions may be formulated to ensure reasonably representative and unbiased service performance estimates. The appropriate place to consider periodic reporting of IMb adoption rates and analysis of representativeness is the upcoming rulemaking on service performance data reporting requirements.

4. Start-the-Clock and Critical Entry Times

Most mailers concerned with a credible service performance measurement system comment on some aspect of start-the-clock. MOAA Comments at 2; MPA Comments at 2–3; NPPC Comments at 2–3; PostCom/DMA Comments at 14; Time Warner Comments at 2–3; NPPC Additional Comments at 2–5; Valpak Comments at 5–8; and McGraw-Hill Reply Comments at 4–5. Generally, start-the-clock is the date and time that a mailpiece enters the mailstream for the purpose of service performance measurement.[15] It is the starting point from which performance measurements are made. The issues are broad and encompass anything from documenting mail arrival times to mail acceptance. They include highly technical issues such as concerns with the need for better definitions of the electronic mailing information necessary to start-the-clock. AMEE Comments at 1–2; and MMA Comments at 2.

In many cases, there is a CET associated with start-the-clock. The Postal Service defines the CET as ''the latest time that a reasonable amount of a class of mail can be received at designated induction points in the postal network for it to be processed and dispatched in time to meet service standards.'' Revised Plan at 3. For mail accepted before the posted CET for that day, the day of entry is designated as the ''start-the-clock.'' For mail accepted after the posted CET for that day, the mailpiece has a start-the-clock date of the following applicable acceptance day. The Postal Service has established national CETs for destination-entered Standard Mail, and has established locally-defined facility CETs for all other classes of mail. A C/SA may identify an alternate acceptance window.

Several mailers ask the Postal Service to better define how CETs will be established and modified, and to develop a method for communicating CETs and changes to CETs to the mailing industry. AMEE Comments at 1–2; BAC Comments at 2; MMA Comments at 2; and Public Representative Reply Comments at 5. In addition, NPPC suggests specifying CETs in the service standards and providing a Web-based system for mailers to access CET information. NPPC Comments at 3–4. MPA supports

[15] Where applicable, start-the-clock takes into consideration critical entry times (CET) and customer/supplier agreements (C/SA). For certain Special Services, start-the-clock is the date and time when the mail service is initiated.

a centralized system for mailers to access CETs for all facilities, and also proposes the establishment of a centralized process for national mailers to negotiate C/SAs that cover all of their entry points. MPA Additional Comments at 4. Time Warner and DFS generally support locally established CETs that reflect local conditions. Time Warner Comments at 3; and DFS Reply Comments at 3–4.

The Postal Service indicates that it ''will be centrally documenting local product-specific CETs on a facility-by-facility basis for the purpose of responding to mailer information access concerns.'' Postal Service Reply Comments at 9.

*Commission analysis.* The Postal Service is to be commended for addressing many mailer concerns in the time between submitting its Initial Plan and its Revised Plan. Successfully generating accurate start-the-clock times is essential to the development of a credible performance measurement system. The Commission perceives start-the-clock as a detailed and difficult issue, and urges the Postal Service to continue working with the mailing community in developing a working, user-friendly, information system. The Commission supports the Postal Service's proposal to document CETs and encourages it to develop systems to make this information publicly available in the very near future.

Bulk mailers that rely on CETs make several good suggestions for increasing the visibility and the transparency of CETs that the Commission fully supports. Additionally, the Postal Service is reminded that CETs also are important to low-volume and single-piece mailers when entering mail at a window or into a blue collection box. Easy access to CET information is essential to informing mailers of what service is to be expected.

The Commission also is aware of the potential impact that gradual small changes to CETs could have on service performance. Readily transparent access to CET information will allow for monitoring of this particular situation.

5. Miscellaneous Issues

*Implementation benchmarks.* APWU suggests the establishment of benchmarks to track the development and implementation of the performance measurement system and to ensure that the system accurately reflects actual performance. APWU Comments at 2, *see also* PostCom/DMA Comments at 21; and Valpak Reply Comments at 3.

*External audits.* Noting the removal of the section describing external service performance measurement validation from the Postal Service's Revised Plan, PostCom/DMA stresses the need for independent external auditing and evaluation of the service performance measurement systems, processes, and data quality/accuracy. PostCom/DMA Additional Comments at 7.

*Data security.* BAC, NPPC, PostCom/DMA, and Time Warner are concerned with the security of the data generated by the performance measurement system and contend that this issue has not been adequately addressed by the Postal Service. BAC Comments at 1; PostCom/DMA Comments at 20; PostCom/DMA Additional Comments at 6; Time Warner Comments at 1–2; and NPPC Additional Comments at 5–6.

*Commission analysis.* The Commission recognizes the importance of each of these issues. Establishing benchmarks to track the various stages of system development are essential management tools that the Postal Service properly has been employing. The Commission concludes that public acceptance of IMb, and the use of IMb in service performance measurement reporting, will be significantly enhanced by greater transparency in this area. Therefore, the Postal Service is to provide reports at the beginning of each fiscal quarter on progress toward its benchmarks for implementing full service IMb for each mail shape. In the rulemaking on reporting that will shortly follow this order, the Commission will suggest for public comment specific periodic updates on the progress toward full implementation and the development of representative samples for measuring performance.

External audits will protect the credibility of various internal and hybrid measurement systems. Although the Postal Service no longer describes such audits in its proposal, the Commission expects to require appropriate verification that reported service performance is representative. This may well involve audits of service achievement in various processing streams. At this juncture, however, it seems premature to focus resources on exploring methods for auditing systems that are not yet operational.

Security also is an essential aspect of developing any information collection and reporting system. Mailers reasonably want assurances that data on their business activities will be properly safeguarded. The Postal Service may not have included extensive details on security in its request as this topic is somewhat tangential to whether IMb can provide robust performance data. As this system is implemented, the Postal Service will be expected to remain vigilant to preserve its long established record of attention to data security issues.

*B. Class-Specific Issues*

The Postal Service proposes new measurement systems based on the IMb (the hybrid measurement systems), Delivery Confirmation scans (predominately the parcel-shaped mail measurement systems), DelTrak and Red Tag (the Periodicals mail measurement systems), and the International Mail Measurement System to measure the various types of mail. The Postal Service also will continue use of the External First-Class (EXFC) system for measuring most single-piece First-Class Mail. The DelTrak and Red Tag systems are proposed as interim measurement solutions until IMb-based systems become viable. IMb-based systems also may replace the Delivery Confirmation-based systems in the future.

The Commission finds that these measurement systems are likely to be representative of a significant portion of the mail sent as First-Class Mail, Standard Mail, Periodicals, and Package Services, and have the potential of producing meaningful data. Notwithstanding the concerns previously noted, and noted in the additional comments below, the Commission approves of the Postal Service's general approach in these areas.

The Commission, however, cannot approve the approaches that the Postal Service is proposing for the majority of the Special Services. More robust measurement systems capable of generating data that is representative of the services being offered must be developed.

The remainder of this section discusses the Postal Service's individual proposals for implementing performance measurement systems by mail class. Issues identified by the mailing community are discussed, and specific recommendations by the Commission are presented.

1. First-Class Mail

First-Class Mail includes Single-Piece Letters/Postcards; Presorted Letters/Postcards; Flats; Parcels; Outbound Single-Piece First-Class Mail International; and Inbound Single-Piece First-Class Mail International. Of all domestic First-Class Mail, 38.0 percent are single-piece letters and cards, 3.3 percent are single-piece flats, 0.4 percent are single-piece parcels, 57.1 percent are presort letters and cards, 1.0 percent are presort flats, and 0.2 percent are presort parcels. Revised Plan at 13.

*Single-piece letters, cards, and flats.* The Postal Service proposes to continue

measuring single-piece letters, cards, and flats using the EXFC measurement system. EXFC is an end-to-end time to delivery measurement system administered by an external contractor. Mail droppers employed by the external contractor report the date and time test mailpieces are deposited into the mail system to the external contractor. The time and date that the mail is dropped starts the clock of the measurement. Mail reporters employed by the external contractor record the date they receive test mailpieces and report this information to the external contractor. The date the mail reporter receives the mailpiece stops the clock of the measurement. The difference, in calendar days, between the start-the-clock event and the stop-the-clock event is reported as the service performance measurement.[16]

The Public Representative suggests expanding EXFC to include a statistically valid measurement system for single-piece First-Class Mail letters and flats delivered to post office boxes. Public Representative Comments at 33.

The Commission asks the Postal Service to consider whether it is possible to incorporate pieces delivered to post office boxes and pieces requiring forwarding and return into its current EXFC design. The Postal Service should consider both the benefits of measuring pieces with these delivery characteristics and the added costs involved, and inform the Commission of its analysis by the conclusion of fiscal year 2009.

GCA stresses the importance of non-standard aspect ratio mailpieces which currently are not being represented by EXFC. GCA Comments at 1–2.

The Commission finds that EXFC does not include any non-machinable mail (such as square envelopes) in its seeded mailings, nor will nonmachinable mail be captured by the IMb-based systems. Consequently, this mail will not be represented in the performance measurement system. This issue eventually may require a special study to measure non-machinable mail performance.

BAC and NPPC suggest disaggregating the service performance measurement of remittance mail and treating remittance mail as a distinct category of First-Class Mail. BAC Comments at 2; and NPPC Comments at 7.

*Presort letters and cards.* The Postal Service proposes to use the hybrid measurement system to measure presort letters and cards.

*Presort flats.* The Postal Service does not propose a measurement system for presort flats. It proposes use of the EXFC measurement for single-piece flats (machine addressed only) as a proxy for the presort flats measurement. It states that presort flats make up only 0.4 percent of the total mailstream. The Postal Service notes the possibility of employing the IMb measurement system in the future if the volume of mailpieces with IMbs is sufficient to provide actual measurements.

Several mailers oppose the proposal to use the EXFC measurement for single-piece flats (machine addressed only) as a proxy for the presort flats measurement. They acknowledge the low volume of presort flats, but contend that to qualify for automation rates they will be required to adopt IMb and other processes that are identical between letters and flats. AMEE Comments at 2; MMA Comments at 2; Pitney Bowes Comments at 3–4; Pitney Bowes Additional Comments at 3; and PostCom/DMA Comments at 4–5. These mailers suggest using the hybrid system to obtain performance measurements. BAC adds that there should be enough presort flats with IMbs in the system to measure performance without the need to use a proxy. BAC Comments at 4. PostCom/DMA ponders why a statistically valid system cannot be developed for presort flats when the Postal Service proposes a distinct measurement system for retail parcels that comprise less mail volume. PostCom/DMA Comments at 4. The Public Representative views the proposal ''a request to avoid measuring directly that price category of the First-Class Flats.'' Public Representative Comments at 34–35.

The Commission acknowledges the mailer comments opposing use of the EXFC single-piece flat measurement as a proxy for presort flats. However, because the single-piece flat mail measured by EXFC is all machinable and does not include address correction, these pieces are likely to be representative of ''clean'' mail. Presort flats are also likely to be clean. Therefore, the Commission accepts the Postal Service's proposal to use the EXFC's First-Class single-piece flats measurement as a proxy for presort flats with the understanding that IMb will be used instead when it becomes possible to do so.

*Retail and presort parcels.* The Postal Service proposes an internal measurement system for retail and presort parcels. Only parcels that have purchased Delivery Confirmation will be measured. For retail parcels, the Delivery Confirmation scan at the time of purchase at the retail counter starts the clock of the measurement. For presort parcels, the documented arrival time at the Postal Service acceptance facility along with the mailer provided electronic mailing documentation starts the clock of the measurement. The clock is stopped when the Postal Service scans the Delivery Confirmation label at delivery or attempted delivery. The difference, in calendar days, between the start-the-clock event and the stop-the-clock event is reported as the service performance measurement.

The Commission notes that use of Delivery Confirmation scan data when evaluating service performance for First-Class retail and presort parcels has limitations that relate to the limited use of Delivery Confirmation service by First-Class presort parcel mailers. Additionally, First-Class single-piece parcels using Delivery Confirmation is estimated to be only 3.9 percent. The Postal Service will have to analyze this system and demonstrate that it produces a representative measurement. The Postal Service should include such an analysis with its annual compliance report for fiscal year 2009.

*Inbound and outbound single-piece international letters.* Inbound and outbound single-piece international letter-shaped mail will be measured using the external International Mail Measurement System (IMMS). IMMS is an end-to-end system provided by an external contractor based on sample mailpieces entered into the system by droppers and received by reporters. Only domestic transit time will be measured. The system also relies on an internal ID tag and/or PLANET Code scan (PLANET Code will be phased out and replaced with IMb) to signal when the mailpiece either enters or leaves the control of the Postal Service.

*Single-piece international flats.* Single-piece international flats will not be measured, and single-piece domestic flats external EXFC data will be used as a proxy for its service measurement.

The Commission finds that single-piece domestic flats external EXFC data can be used as an acceptable proxy for single-piece international flats service measurement.

*Single-piece international parcels.* Single-piece international parcels will not be measured, and single-piece domestic parcels internal Delivery Confirmation data will be used as a proxy for its service measurement.

The Commission finds that single-piece domestic parcels internal Delivery Confirmation data can be used as an acceptable proxy for single-piece international parcels service measurement.

[16] Non-delivery days are factored into the service performance calculation.

*Miscellaneous comments.* The Public Representative contends that ''the forwarding (and return or wasting) of undeliverable-as-addressed First-Class Mail remains a large and costly problem for the Postal Service.'' Public Representative Comments at 10. This category of First-Class Mail is not measured. Thus, the Public Representative, joined by Pitney Bowes, suggest establishment of service standards for undeliverable-as-addressed, forwarded, and returned mail. Public Representative Comments at 8–12; and Pitney Bowes Reply Comments at 4. The Postal Service should explore the cost of periodically conducting studies of service performance for forwarded and returned First-Class Mail and inform the Commission of their feasibility by the conclusion of fiscal year 2009.

2. Standard Mail

Standard Mail includes High Density and Saturation Letters; High Density and Saturation Flats/Parcels; Carrier Route; Letters; Flats; and Not Flat-Machinables (NFMs)/Parcels. Of all Standard Mail, 61.1 percent are presort letters and cards, 38.3 percent are presort flats, and 0.6 percent are presort parcels. Revised Plan at 26.

*Saturation letters and flats.* The Postal Service proposes to use a variation of the hybrid measurement system to measure saturation letters and flats. Unique barcodes are not required on saturation mail, which presents additional challenges to stopping-the-clock for both mail processing and delivery measurement. The Postal Service states it will develop alternative methods for external recipients to identify saturation mail and to stop the clock of the measurement.

The Commission recognizes that using the hybrid system for saturation letters and flats is problematic. Service performance cannot be accurately measured without a valid stop-the-clock event. The Commission understands that the Postal Service is working to develop stop-the-clock measurements and encourages it to do so expeditiously.

*Non-saturation letters and non-saturation flats.* The Postal Service proposes to use the hybrid measurement system to measure both non-saturation letters and non-saturation flats.

*Miscellaneous comments concerning flats.* MOAA suggests that the Postal Service develop tracing at the destination delivery unit (DDU) for flats entered as carrier route mail. MOAA Comments at 3.

*Parcels.* The Postal Service proposes an internal measurement system for parcels. Only parcels that have purchased Delivery Confirmation will be measured. The mailer's documented arrival time at the Postal Service acceptance facility is used to start the clock of the measurement. The Postal Service's scan of the Delivery Confirmation label at delivery, or attempted delivery, stops the clock of the measurement. The number of calendar days from when the clock is started to when it is stopped is reported as the measure of service performance.

3. Periodicals

Periodicals include Within County Periodicals and Outside County Periodicals. Of all Periodicals, 1.5 percent are letters, and 98.5 percent are flats. Revised Plan at 33.

As an interim solution, the Postal Service proposes using the external Red Tag and DelTrak service measurement providers to measure the service performance of Periodicals. The long-term solution is to switch to an internal IMb-based system once there is a sufficient volume of Periodicals mail using IMbs.

The Red Tag and DelTrak systems rely on mailer reported induction times to generate a start-the-clock event.[17] A delivery date reported online by external reporters generates a stop-the-clock event. The measurement of service performance is the number of calendar days from the start-the-clock event to the stop-the-clock event.

MPA supports the use of DelTrak and Red Tag as an interim solution until IMb is implemented for Periodicals. MPA Comments at 2. Research International expresses concern over the representativeness of DelTrak and Red Tag. It notes that mailers must pay to participate in Red Tag, Red Tag mail is identifiable to the Postal Service, and the receiving reporters are volunteers. Research International Additional Comments at 4–5.

McGraw-Hill asserts that ''[a]ccurate service performance measurement is important for smaller mailers no less than for larger mailers.'' It questions the eventual adoption rate of IMb by small mailers and whether measurements from IMb Periodicals will be representative of the class as a whole. It suggests studying the temporary use of seed mail. McGraw-Hill Reply Comments at 4–5. The Postal Service is currently working to assure that Red Tag and DelTrak will provide it with a representative sample of Periodical publications. It should include an analysis of representativeness of the Periodicals measurements with its 2009 ACR.

NNA suggests that there are many hurdles to overcome before IMbs begin to appear on newspapers and comments on the many unique problems of representing smaller publications in the measurement system. NNA Comments at 3–6. NNA concludes that it is content with leaving Within County unmeasured for the time being. *Id.* at 11.

The Commission recognizes the opinion of Within County mailers that it is acceptable for the time being for their mail to escape measurement. Nonetheless, service problems for nationally distributed pieces paying Within County rates have been reported, and the statute does not provide an exemption from measurement for this significant segment of Periodicals mail. Thus, the Postal Service must strive to develop an appropriate measurement system for Within County mail and inform the Commission of its proposal by the conclusion of fiscal year 2010.

The Commission notes that an additional benefit of the Red Tag- and DelTrak-based systems will be to serve as a check on the IMb-based system that the Postal Service proposes for the future. Both systems should be run in parallel at the start to make appropriate comparisons.

4. Package Services

Package Services includes Single-Piece Parcel Post; Inbound Surface Parcel Post (at UPU rates); Bound Printed Matter Flats; Bound Printed Matter Parcels; and Media Mail/Library Mail. Package Services contains both parcel-shaped and flat-shaped mail. Of the parcel-shaped mail, 14.5 percent is considered retail and 85.5 percent is considered presort.

*Retail parcels.* The Postal Service proposes an internal measurement system for retail parcels based on Delivery Confirmation scans. Thus, only parcels with purchased Delivery Confirmation will be measured. The Delivery Confirmation scan at the time of purchase starts the clock of the service performance measurement. The Postal Service scan of the Delivery Confirmation label at delivery, or attempted delivery, stops the clock of the service performance measurement. The difference, in calendar days, between the start-the-clock event and the stop-the-clock event is reported as the service performance measurement.

[17] It is unclear whether the mailer-reported induction time is reported to the Postal Service or directly to the external service measurement providers. If the information flow of the mailer-reported induction time is not directly from the mailer to the external measurement providers, the measurement system incorporates features of both internal and external measurement systems.

*Presort parcels.* The Postal Service proposes an internal measurement system for presort parcels based on Delivery Confirmation scans. Thus, only parcels with purchased Delivery Confirmation will be measured. The documented arrival time at the Postal Service acceptance facility starts the clock of the service performance measurement. The Postal Service scan of the Delivery Confirmation label at delivery, or attempted delivery, stops the clock of the service performance measurement. The difference, in calendar days, between the start-the-clock event and the stop-the-clock event is reported as the service performance measurement.

Publishers Clearing House comments that industry and the Postal Service need to work together to overcome adoption barriers to placing Delivery Confirmation barcodes on small parcels (of all classes). Publishers Clearing House Comments at 1–2.

PostCom/DMA, joined by PSA, and Publishers Clearing House oppose using Delivery Confirmation data from retail Package Services as a proxy to measure presort Package Services. PostCom/DMA Comments at 5–6; PSA Comments at 6–7; and Publishers Clearing House Comments at 2. They infer that the Postal Service proposes to use Delivery Confirmation data from retail Package Services as a proxy to measure presort Package Services from its Initial Plan.[18] PostCom/DMA asserts that the Postal Service's intentions for measuring parcel-shaped presort Package Services are unclear. It contends that retail Package Services and presort Package Services have different entry and operational characteristics, and that there is adequate Delivery Confirmation data to separately measure retail and presort Package Services. PostCom/DMA Comments at 5–6.

The Commission notes that the references implying use of a proxy do not appear in the Revised Plan. The Revised Plan appears to indicate that retail and presort will be measured separately with Delivery Confirmation-based systems.[19] The Postal Service appears to propose separate measurement systems based on Delivery Confirmation scans for retail and presort parcel-shaped Package Services mail. The Commission approves of the separate measurement approach.

*Presort flats.* The Postal Service proposes to use the hybrid measurement system to measure presort flats.

The Commission looks forward to the development of this aspect of the performance measurement system. Until the hybrid measurement system for flats becomes a reality, the Postal Service should include a discussion of its progress toward implementing this system with every annual compliance report.

5. Special Services

Special Services are services offered by the Postal Service related to the delivery of mailpieces, including acceptance, collection, sorting, transportation, or other functions. Services within the Ancillary Services and the International Ancillary Services products can be purchased only in conjunction with the purchase of mail service. Other Special Services products can be purchased on a stand-alone basis. Special Services includes Ancillary Services;[20] International Ancillary Services;[21] Address List Services; Caller Service; Change-of-Address Credit Card Authentication; Confirm; International Reply Coupon Service; International Business Reply Mail Service; Money Orders; and Post Office Box Service.

*Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, electronic Return Receipt, and Collect on Delivery.* The Postal Service proposes service measurements for Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, electronic Return Receipt, and Collect on Delivery that use internally generated data from delivery event barcode scans to measure the time between when delivery information is collected to when the information is made available to the customer. The service performance score is the percentage of information available within 24 hours.

The Public Representative notes that the Postal Service is measuring only the time between when delivery information was collected and when that information was made available to the mailer. However, mailpieces that do not receive a delivery scan event to stop-the-clock will not be measured, *i.e.*, a failed performance will not be counted. The Public Representative suggests that the Postal Service also report the ratio of the number of pieces scanned at delivery to the number of such pieces scanned at acceptance. Public Representative Comments at 48–52.

*Confirm and automated Address Correction.* The Postal Service proposes service measurements for Confirm and automated Address Correction that use passive scans of individual IMb mailpieces on automated mail processing equipment. For Confirm, the start-the-clock event is the time stamp of the mailpiece scan, and the stop-the-clock is the date and time when data is made available to the subscribers. For automated Address Correction, the start-the-clock event is the date and time that data is transmitted to the Address Correction system, and the stop-the-clock is the date and time when data are forwarded to the participants. The service performance score is the percentage of on-time information availability.

The Public Representative finds deficiencies similar to what is discussed above with Confirm and Address Correction measurements. *Id.* at 52. PostCom/DMA makes similar comments in the areas of Confirm and Delivery Confirmation Service. PostCom/DMA Comments at 8–9.

*Post Office Box Service.* The Postal Service proposes a measurement for Post Office Box Service that uses internally generated scanning technology to measure the percentage of post office box sections that meet their up-time service standards.

The Public Representative notes that this system does not prevent the Postal Service from changing post office box up-times, and further contends that the system lacks controls to prevent premature scanning of the barcode to meet the up-time service standard. The Public Representative proposes expanding EXFC coverage and using EXFC reporters to measure post office box up-times. Public Representative Comments at 52–54; *see also* Popkin Reply Comments at 1–2.

*Insurance Claims Processing, Postal Money Order Inquiry Processing, and Address List Services.* For Insurance Claims Processing, Postal Money Order Inquiry Processing, and Address List

[18] ''The existing Delivery Confirmation performance reports for mail originating at postal retail units can be used in the short-term to measure the service performance of all Package Services until service measurement can be extended to Presort parcels.'' Initial Plan at 11.

[19] *See* Revised Plan at 37–38, para. 7.2 (retail) and para. 7.3 (presort).

[20] Ancillary Services include Address Correction Service; Applications and Mailing Permits; Business Reply Mail; Bulk Parcel Return Service; Certified Mail; Certificate of Mailing; Collect on Delivery; Delivery Confirmation; Insurance; Merchandise Return Service; Parcel Airlift (PAL); Registered Mail; Return Receipt; Return Receipt for Merchandise; Restricted Delivery; Shipper-Paid Forwarding; Signature Confirmation; Special Handling; Stamped Envelopes; Stamped Cards; Premium Stamped Stationery; and Premium Stamped Cards.

[21] International Ancillary Services include International Certificate of Mailing; International Registered Mail; International Return Receipt; International Restricted Delivery; International Insurance; and Customs Clearance and Delivery Fee.

Services the Postal Service proposes to internally measure the percentage of time that the services meet their maximum processing duration standards. The system for Insurance Claims Processing generates a start-the-clock event when all information is received by the Customer Inquiry Claims Response System, and generates a stop-the-clock event upon the transmission to the customer of the adjudicator's decision to pay, deny, or close the claim. The system for Postal Money Order Inquiry Processing generates a start-the-clock event upon the purchase of the service, and generates a stop-the-clock event upon the transmission of a response to the customer. The system for Address List Services generates a start-the-clock event upon the receipt of the address list or address cards from the mailer at the delivery unit of the postal district Address Management System office, and generates a stop-the-clock event upon the transmission to the customer of corrected address information.

*Caller Service.* The Postal Service contends that measuring Caller Service is not practical because there is no one up-time as many customers arrange for multiple pickups each day. It proposes to address this issue through individual agreements.

Mailers concerned with remittance mail request establishing a service standard for Caller Service. MMA Comments at 3; NPPC Comments at 7; PostCom/DMA Comments at 9; Publishers Clearing House Comments at 2; and NPPC Additional Comments at 9–11. BAC further contends that using the single post office box up-time measurement does not represent the needs of remittance mailers. BAC Comments at 3.

*Change-of-Address.* The Postal Service does not propose a specific measurement system for Change-of-Address service.

Noting the challenges of keeping up with the current addresses of customers, BAC urges the Postal Service to establish standards for Change of Address Service. BAC Comments at 3. The Public Representative echoes this suggestion describing change of address requests and forwarded mail as the Achilles' heel of First-Class Mail service performance. Public Representative Comments at 8–12.

*Commission analysis of Special Services.* Special Services include approximately 35 postal services with diverse attributes and a wide range of revenue production levels.[22] This diversity contributes to the challenges of designing meaningful performance measurement systems for each service. Some services such as Certificate of Mailing or Stamped Cards essentially are transactions that may not merit much performance measurement attention.[23] Other services such as Insurance and Delivery Confirmation are more complex and may warrant development of measurement systems specifically tailored to the services being provided.

The different levels of revenue production for the various services also may provide some indication of the effort warranted for developing measurement systems. However, just because a service does not produce a large revenue stream does not mean that the service is not important to the customer that undertakes the additional effort to purchase the service.

Three services—Certified Mail, Post Office Boxes, and Return Receipts—account for nearly 70 percent of overall Special Services revenue. It may be desirable to place special emphasis on these to assure that they maintain a high level of service performance based on revenue production alone.

For several of the services that include a barcode scan, the Postal Service proposes to measure the time from the barcode scan event to the time this information is made available to the customer. The percentage of time that this duration falls within the applicable service standard is reported as the measure of service performance. Although this measurement may provide some information on one component of the service, that measurement is not representative of the service that a customer has purchased or expects.

As an example, the Postal Service states in the Domestic Mail Manual that ''Delivery Confirmation service provides the mailer with information about the date and time an article was delivered and, if delivery was attempted but not successful, the date and time of the delivery attempt.'' Thus, a typical mailer purchasing Delivery Confirmation reasonably could expect to be provided with information concerning the date and time of delivery or attempted delivery. If Delivery Confirmation performs as advertised (or slower than advertised), the proposed measurement system will capture whether or not delivery information was provided to the customer in a reasonable period of time. However, if Delivery Confirmation fails to report any information at all to the customer, the measurement system will not report this as a failure. Failures such as not scanning a mailpiece at delivery or attempted delivery, or a failure of the scanning equipment itself, are failures that will not be reported through the proposed performance measurement system. In this case, the measurement is not representative of the service being offered. At a minimum, the Postal Service must incorporate into its proposed measurement systems for Delivery Confirmation and other similar electronic systems a factor for the volume of services purchased versus the volume of services successfully completed.[24]

The measurement system for Return Receipt service presents additional concerns. The Postal Service proposes to use the same measurement system as described for Delivery Confirmation. However, the vast majority of Return Receipt service is provided through delivery of the green return receipt card. It is not apparent how a delivery scan-based measurement system can be representative of the delivery of green return receipt cards. As mentioned above, Return Receipt is one of the highest revenue producing Special Services. It warrants a more robust, independent performance measurement system.

The problems discussed above are symptomatic of many of the measurement systems proposed for Special Services. The Commission finds that the proposed measurement system does not take into account the diverse attributes of these individual services, and does not provide informative insight into their level of performance. The Commission recommends that the Postal Service determine the attributes of each service including the customer's reasonable expectations of what is being purchased, and then design measurement systems considering these parameters. A cost benefit analysis factoring in the sophistication of the proposed measurement systems, the particular reliance a customer or group of customers may have on a service, and the revenue generated by a particular service also may be appropriate. Before providing the Postal Service with an

[22] As noted above, most of the approximately 35 individual services are components of either Ancillary Services or International Ancillary Services.

[23] Similarly, some services such as Caller Service may not be susceptible to any meaningful measurement because of the nature of the service itself.

[24] Arguments have been made that this cannot be accomplished because the Postal Service does not know exactly when to expect a final scan or will not have an actual stop-the-clock. However, reasonable assumptions can be made that overcome these arguments. The Postal Service will now be developing and reporting measures of time-to-delivery for all products.

endorsement of its approach to these internal measurement systems, the Commission awaits further development of the systems to provide a representative measure of the service being provided. The Postal Service either should proceed with external measurement of service performance for Certified, Return Receipt, and Delivery Confirmation or develop an alternative internal measurement system by June 2009.

Post Office Box Service provides an exception to the above comments. The proposed measurement system for post office boxes, which measures the up-time, or the time that a day's mail becomes available to customers, should provide a reasonable measure of performance. The Commission recommends that the measurement system provide for internal audits to verify that up-times are properly recorded by Postal Service personnel, and that up-times are conspicuously available to mailers to both inform customers of when mail is available and to deter any tendency to shift up-times to later in the day in order to meet service standards.

The Commission also approves the proposals for internally measuring the percentage of time that Insurance claims processing, Postal Money Order inquiry processing, and Address List Services meet their maximum processing duration standards. For these systems, it appears appropriate to measure the noted processing times instead of attempting to develop a performance measurement of the product itself. These systems can be enhanced in the future if necessary.

## V. Review of the Postal Service Data Reporting Proposals

This section of the order provides a discussion of the Postal Service's proposals for reporting data generated by its performance measurement systems. The discussion includes consideration of the comments submitted by the mailing community with limited recommendations from the Commission. As mentioned previously, the Commission intends to comprehensively consider annual and periodic data reporting issues related to service performance measurement in a separate rulemaking. The discussion that follows is a first step in framing the issues that will be considered in that rulemaking.

It is important to note that this section does not discuss the additional data reporting requirements that need to be developed to assure that the measurement system provides representative and statistically valid data. This also is an appropriate topic for future rulemaking.

### *A. Postal Service Reporting Proposals*

The Postal Service proposes providing two types of reports to the Commission. The first is an annual report for the purpose of reviewing compliance with service performance standards. Other reports will be provided on a quarterly basis and provide more detail than the annual report.

#### 1. Annual Report Proposals

*First-Class Mail.* The Postal Service proposes reporting three national aggregate annual percentage on-time service performance scores for single-piece First-Class Mail: Overnight, 2-day, and 3-day/4-day/5-day mail.[25] It proposes reporting three national aggregate annual percentage on-time service performance scores for presort First-Class Mail: Overnight, 2-day, and 3-day mail. It proposes reporting a single national aggregate annual percentage on-time service performance score for single-piece International First-Class Mail.

*Standard Mail.* The Postal Service proposes reporting a single national aggregate annual percentage on-time service performance score for Standard Mail. The score aggregates all of the 2- through 22-day service performance standard groups for letter-, flat-, and parcel-shaped mail.

*Periodicals.* The Postal Service proposes reporting a single national aggregate annual percentage on-time service performance score for Periodicals. The score aggregates each of the 1- through 8-day service performance standard groups for letter- and flat-shaped mail.

*Package Services.* The Postal Service proposes reporting a single national aggregate annual percentage on-time service performance score for Package Services. The score aggregates each of the 2- through 20-day service performance standard groups for Package Services mail.

*Special Services.* The Postal Service proposes reporting a single national ''index'' representative of all Special Services. The index weights and aggregates the various Special Services.

#### 2. Quarterly Report Proposals

*First-Class Mail.* The Postal Service proposes providing data which reports First-Class Mail on-time service performance and service variances. Separate reports will be provided for domestic single-piece, domestic presort, and international single-piece mail.

The on-time service performance reports provide the same information as provided annually, but at a disaggregated level. The domestic reports will be disaggregated by postal district and by overnight, 2-day, and 3-day mail. The international reports will be disaggregated by postal administrative area level and by inbound and outbound mail.

The variance reports provide data on the percentages of mail delivered within 1 day, 2 days, or 3 days of the applicable service performance standard at the same level of disaggregation as the on-time service performance reports.

*Standard Mail.* The Postal Service proposes providing data which reports Standard Mail on-time service performance and service variances.

The on-time service performance report provides the same information as provided annually, but at a disaggregated level. The report will be disaggregated by postal district and by destination entry versus end-to-end mail.[26]

The variance report provides data on the percentages of mail delivered within 1 day, 2 days, or 3 days of the aggregated service performance standard. This report also will display data by postal district and by destination entry versus end-to-end mail.

*Periodicals.* The Postal Service proposes providing data which reports Periodicals on-time service performance and service variances.

The on-time service performance report provides the same information as provided in the Annual Compliance Report filing, but at a disaggregated level. The report will be disaggregated by postal administrative area level.

The variance report provides data on the percentages of mail delivered within 1 day, 2 days, or 3 days of the aggregated service performance standard. This report also will display data by postal administrative area level.

*Package Services.* The Postal Service proposes providing data which reports

[25] The business rules defining 1- through 5-day domestic First-Class Mail service standards appear at 72 FR 72225 (December 19, 2007). The Postal Service proposes to aggregate the reporting of 4-day and 5-day service standard mail (predominately mail with an origin and/or a destination outside of the 48 contiguous states) with the reporting of 3-day service standard mail (predominantly origin-destination mail within the 48 contiguous states). An estimated 99.7 percent of First-Class Mail pieces will have a service standard of either 1, 2, or 3 days, and 0.3 percent will have a service standard of either 4 or 5 days. *Id.* For brevity, 3-day/4-day/5-day mail will be referred to as 3-day mail hereafter.

[26] Destination entry includes destination bulk mail center, destination area distribution center, destination sectional center facility, and destination delivery unit.

Package Services on-time service performance and service variances.

The on-time service performance report provides the same information as provided in the Annual Compliance Report filing, but at a disaggregated level. The report will be disaggregated by postal district.

The variance report provides data on the percentages of mail delivered within 1 day, 2 days, or 3 days of the aggregated service performance standard. This report also will display data by postal district.

*Special Services.* The Postal Service proposes providing a performance score which aggregates Delivery Confirmation, Signature Confirmation, Certified Mail, Registered Mail, electronic Return Receipt, and Collection on Delivery reported by postal district. A quarterly score is reported for post office boxes disaggregated by postal district. The performance scores for Confirm, automated Address Correction, Insurance Claims Processing, Address List Services, and Money Order Inquiry Processing each will be reported separately at the national level.

*B. Concerns of the Mailing Community*

1. Granularity of Reporting

*Reporting by product.* Pitney Bowes, joined by DFS, requests that the performance measurement plan reflect service performance data reported by product as required by 39 U.S.C. 3691(b)(1)(D). They contend that reporting by groups of products may make it difficult, or impossible, for a mailer of a particular product to assess performance. DFS Reply Comments at 3; Pitney Bowes Comments at 6–7; and Pitney Bowes Additional Comments at 7.

General support is expressed by others for performance reporting by product. PostCom/DMA contends that ''[m]easurement at the class level obscures actual performance at product levels because of volume differences by shape.'' PostCom/DMA Additional Comments at 2–3. McGraw-Hill supports disaggregate reporting by product. McGraw-Hill Reply Comments at 3. Valpak contends that saturation letters and carrier route flats are separate products and should be measured separately. Valpak Comments at 3–4; and Valpak Additional Comments at 5–7.

The Commission finds that compliance with the requirements of 39 U.S.C. 3691(b)(1)(D) is an appropriate issue to be considered in the previously mentioned rulemaking on service performance data reporting requirements.

*Reporting by shape.* Several mailers request shape-based reporting. BAC Comments at 3; NPPC Comments at 6; PostCom/DMA Comments at 12–13; Time Warner Comments at 3; Publishers Clearing House Comments at 1; Valpak Comments at 10; DFS Reply Comments at 2; and NPPC Additional Comments at 7.

MOAA extends this request to include separately reporting Standard Mail letters and flats, tracing flats entered as carrier route on the basis of entry as bundles or pallets, reporting by level of entry, and by rate tiers. MOAA Comments at 2–3.

PSA argues that Standard Mail parcels and First-Class Mail parcels are distinct products, and that the associated performance measurements should be reported separately from other mail shapes. PSA Comments at 3–5; and PSA Additional Comments at 3–4. PostCom/DMA also opposes aggregating the measurement of parcels with other shaped mail for each of the respective classes. PostCom/DMA Comments at 5–6.

The Postal Service contends that the PAEA does not require the establishment of standards based on price category or mailpiece shape to satisfy the Commission's regulatory responsibilities. Postal Service Reply Comments at 5–6.

Shape-based reporting in general might be informative to evaluate the Postal Service's mail processing systems, since most mail processing systems are designed around shape and not class or product. Thus, the Commission finds that reporting by shape is an appropriate issue to be considered in the previously mentioned rulemaking on service performance data reporting requirements.

*Reporting by service standard day.* To allow for adequate evaluation of service performance to the non-contiguous United States, PostCom/DMA suggests separate reporting of 3-day and 4/5-day First-Class Mail which is largely comprised of the 3-digit pairs that include the non-contiguous United States. PostCom/DMA Additional Comments at 4–5.

The Commission finds that the level of aggregation of service standard days is an appropriate issue to be considered in the previously mentioned rulemaking on service performance data reporting requirements. This issue is applicable to all classes of mail that have specific days to delivery standards.

*Data rich reporting.* Most mailers submitting comments are interested in obtaining service performance measurement data at a higher level of detail than proposed by the Postal Service. Generally, they request reporting most statistics by 30-digit ZIP Code pairs. AMEE Comments at 2; NPPC Comments at 5; BAC Comments at 3–4; PostCom/DMA Comments at 10–11; PostCom/DMA Additional Comments at 2–3; NPPC Additional Comments at 6–8; Publishers Clearing House Comments at 2; DFS Reply Comments at 2–3; IWCO Additional Comments at 2; and Public Representative Comments at 46, 48.

In addition, some mailers request timely, or real time, Web-based access to this data. McGraw-Hill Reply Comments at 2–3; Pitney Bowes Comments at 5–6; and Time Warner Comments at 4. Other mailers propose monthly interim reports as opposed to the proposed quarterly interim reports. MMA Comments at 3; and PSA Comments at 5–6.

McGraw-Hill, MOAA, and Publishers Clearing House argue that mailers should be able to obtain reports on their own mail down to 3-digit pairs, together with the aggregate periodic reports. McGraw-Hill Reply Comments at 4, n.4; MOAA Comments at 2; and Publishers Clearing House Comments at 2.

The Postal Service responds that although the PAEA does not require the generation of customer-specific reports, it intends on working with the mailing industry in this area. It suggests that the degree of customer access to disaggregate service performance data (in excess of that required for the regulatory process), may have the character of an ancillary service. Postal Service Reply Comments at 6.

The Commission observes that business needs of some mailers may vastly exceed the needs of the regulator to perform its functions. Although the Commission may well specify reporting in a greater level of detail over time, it is not anticipated that the level of reporting will reach the provision of near real time data envisioned by some mailers. The Postal Service should be allowed time to explore the business needs of its customers and propose information products to meet those needs outside the context of the regulatory requirements.

*Reporting volume information.* AMEE and MMA suggest including reporting volumes to determine relative weightings of the data. AMEE Comments at 2; and MMA Comments at 2.

The Commission will require the reporting of volume data with the quarterly reports. The need to be able to aggregate the quarterly data up to annual levels was discussed during the consultation between the Commission and the Postal Service. This includes provision of respective volumes to

establish the necessary weighting of data. The Postal Service has verbally agreed to providing volume information and a means to aggregate the data from the quarterly reports up to the annual level.

*Separate reporting of inbound and outbound International Mail.* Separate reporting of service performance for inbound and outbound International Mail was discussed during the consultation between the Commission and the Postal Service. Currently, the IMMS report is not disaggregated in this fashion although the data to do so appears to be available. The Postal Service indicated that it is possible to provide separate reporting. This will be further examined in the previously mentioned rulemaking on service performance data reporting requirements.

2. Tail-of-the-Mail

A theme expressed in many comments is the need to expand tail-of-the-mail reporting to obtain a more accurate picture of service performance. The variance reports proposed by the Postal Service generally provide data on the percentages of mail delivered within 1 day, 2 days, or 3 days of the applicable service performance standard.

NPPC stresses the importance to the remittance industry of a system that distinguishes the distribution of late delivery by days of lateness. NPPC Additional Comments at 9. Commenters generally express opposition to truncating the variance reports at 3 days. Several mailers propose expanding the variance reports to include the additional days until delivery reaches a 99 percent level. BAC Comments at 4; MPA Additional Comments at 4–5; McGraw-Hill Reply Comments at 3–4; NPPC Comments at 5–6; NPPC Additional Comments at 8; PostCom/DMA Comments at 14; PostCom/DMA Additional Comments at 4; and Public Representative Comments at 45, 47–48.

Other approaches to expanding tail-of-the-mail reporting include adding a column to the variance reports to show mail that is not delivered within 3 days of the applicable standard (PSA Comments at 3), and calculating and presenting the average number of days by which all mailpieces are delivered in excess of the standard (Valpak Comments at 11–14; and Valpak Additional Comments at 3–4). Valpak also suggests reporting tail-of-the-mail in the annual report in addition to what is presented in the variance reports. Valpak Additional Comments at 4–5.

The other side of tail-of-the-mail is early delivery of mail. Standard mailers in particular are sensitive to the consistency of delivery for planning advertising to reach homes on specific dates. These mailers propose expanding the variance reports to include reporting on early deliveries of mail. AMEE Comments at 2; BAC Comments at 4; MMA Comments at 2; IWCO Additional Comments at 2; MOAA Comments at 3; NPPC Additional Comments at 9; and Valpak Additional Comments at 2–3.

The Commission recognizes the benefits to mailers of more detailed reporting of delivery variance and consistency. The proposed measurement systems should be able to capture this type of data and provide the Postal Service with significant actionable data to troubleshoot its systems. However, the Commission is not convinced that data on early delivery is required for the Commission's purposes. Mailers will still be able to work with the Postal Service when specific problems are identified. This area is subject to re-evaluation once the measurement systems begin generating actual data and specific problems are identified.

3. Miscellaneous Issues

*Consideration of customer satisfaction.* The Public Representative contends that the plan does not adequately measure or report customer satisfaction, nor does it provide a mechanism to assess whether customers, especially those with physical impairments, believe their needs are being met. Public Representative Comments at 12–19.

The Postal Service asserts that it intends to redesign its Customer Satisfaction Measurement survey to meet the requirements of the PAEA and to generate customer satisfaction data on a product-by-product basis. Postal Service Reply Comments at 10–11. It notes that the survey's respondents are randomly solicited without regard to physical impairment, and can be expected to include the view of customers with such impairments. *Id.* at 12.

The Commission notes that the Postal Service is required to provide an analysis of customer satisfaction in its annual report to the Commission. *See* 39 CFR 3652(a)(2)(B)(ii). The Postal Service's Revised Plan addresses measurement systems and data reporting. Discussion of customer satisfaction appears beyond the scope of the Postal Service's proposals and was appropriately omitted until the Customer Satisfaction Measurement Survey has been redesigned.

*Quality of service performance index.* The Public Representative proposes a Quality of Service Performance Index ''to review objectively the results of the service performance measurements of the Postal Service.'' The index can represent all postal products or groups of products. The index would reduce the variety of performance statistics to a single, or a few, numbers, and permit objective comparisons of service over time. Public Representative Comments at 19–32.

McGraw-Hill supports the idea of an index to track performance over time. McGraw-Hill Reply Comments at 1–3. NPPC calls this idea intriguing and worthy of consideration. NPPC Reply Comments at 5. PostCom/DMA does not oppose development of an index for each product or each group of products, but opposes one overall index because such an index would mask performance issues by specific products. PostCom/DMA Reply Comments at 4–6. The Postal Service argues that the index is beyond the statutorily defined scope of the Commission's regulatory oversight. Postal Service Reply Comments at 11.

The Commission finds the proposal to provide indexes for the entire service performance measurement system or for product groups therein noteworthy, but premature. The immediate goal is to develop and implement a performance measurement system and begin reporting data. Specific indexes may be considered in the future to evaluate the data once the measurement systems become operational.

*Class-specific miscellaneous issues.* MPA supports the revision to the Postal Service's original proposal to report Periodicals service measurement by performance area instead of only reporting a national aggregate. MPA Additional Comments at 2. However, it continues to suggest reporting Periodicals by postal district once IMb is in place. MPA Comments at 3; and MPA Additional Comments at 2.

BAC and NPPC suggest disaggregating the service performance measurement of remittance mail and treating remittance mail as a distinct category of First-Class Mail. BAC Comments at 2; and NPPC Comments at 7.

The Commission distinguishes separate reporting of remittance mail from treating remittance mail as a distinct category of First-Class Mail. The Postal Service has indicated to the Commission in consultations that it is considering ways to separately measure the performance of remittance mail, which indicates a future potential for separate reporting of remittance mail. However, treating remittance mail as a distinct category of First-Class Mail raises classification issues that are beyond the scope of this discussion.

## VI. Opportunity for Further Review

The PAEA provides the Postal Service and the Commission with the flexibility to develop a useful and beneficial performance measurement system over time. The Commission approves of the approach that the Postal Service is taking to establish most of its measurement systems recognizing that these systems are in the early stage of development.

The Commission is greatly appreciative of the Postal Service's efforts thus far in making the measurement of service standards a reality. The task is complex and will require continuing effort.

Inevitably, problems will arise as the systems are implemented that will require changes to these systems. Informal procedures are available for the Postal Service to keep the Commission apprised of developments and to seek consultation where necessary as the measurement systems progress. Regular meetings between the Postal Service and the Commission to provide updates on progress and problems are beneficial, including workgroup meetings at the staff level. Continuing attention is necessary to keep the implementation of the measurement systems on track. The Commission supports the ideas expressed in the comments for the Postal Service to share its internal milestones with the public, and to regularly report on progress. *See* APWU Comments at 21; PostCom/DMA Comments at 21; and Valpak Reply Comment at 3. The Postal Service will provide such reports to the Commission at the beginning of each fiscal quarter.

Many formal avenues also are available by statute for reviewing and improving the performance measurement system. These methods may be employed as the needs of the Commission, the Postal Service, and the mailing community change over time, or when specific issues arise that require closer examination. The Commission will shortly initiate a rulemaking to prescribe the content and form of public reports (and any nonpublic annex and supporting materials) for performance data in the Postal Service's annual report to the Commission. 39 U.S.C. 3652(e)(1). It also may prescribe the methodologies used in preparing the annual report. 39 U.S.C. 3652(a)(1).

Progress towards a smoothly functioning, broadly representative, measurement system based on full service IMb must be monitored, and the Postal Service should include with its ACR, discussions of the extent to which various measures are representative. In this order, the Commission identifies several potential problem areas the Postal Service should focus on. Should it appear that progress toward reliable measurement has ceased, or that ''the quality of service data has become significantly inaccurate or can be significantly improved[,]'' proceedings may be initiated to remedy identified problems. 39 U.S.C. 3652(e)(2).

The effort to improve service through establishing standards and measuring performance will be continuing. The modern service standards are subject to review through the complaint process. 39 U.S.C. 3691(d). Additionally, the Commission may, if necessary, initiate reporting requirements through its obligation to establish a modern system for regulating rates and classes for market dominant products. 39 U.S.C. 3622(a).

## VII. Ordering Paragraphs

*It is Ordered:*

1. The Commission approves of the approaches that the Postal Service is taking in developing internal measurement systems for various classes of mail as specified in the body of this order.

2. The Commission finds the proposed measurement systems for several Special Services are inadequate as specified in the body of this order. Remedial action is to be proposed by June 1, 2009.

3. The Postal Service is to provide progress reports and analyses of reliability for its measurement systems as specified in the body of this order.

4. The Motion of the Public Representative for Late Acceptance of Comments on United States Postal Service June 2008 Service Performance Measurement Plan for Market-Dominant Products, filed July 10, 2008, is granted.

5. The Secretary shall arrange for publication of this order in the **Federal Register**.

## VIII. Concurring Opinion of Commissioner Goldway

I agree with my colleagues that the initial approach to service performance measurement proposed by the Postal Service offers the potential of a reliable, low cost system. The Postal Service seeks to use scans of Intelligent Mail Barcodes (IMb) to gauge service performance by measuring the processing and transportation of bulk letters and flats.

The Commission identifies a number of areas where the ability of this system to accurately depict actual service performance will depend on whether a representative mix of mail uses ''full service'' IMb. For this reason, the Commission also directs the Postal Service to provide quarterly progress reports on IMb implementation and to include with its Annual Compliance Reports analyses of the representativeness of certain service performance measurement results.

I write separately to clarify that, while the language of the order offers options and suggestions on how to proceed to the Service, these analyses and reports must be undertaken promptly and be complete in their scope.

The Commission and the Postal Service have been consulting on these issues for almost two years. The Commission views accurate and comprehensive service performance measurement as a requirement of the Postal Accountability and Enhancement Act. Unjustified, further delay in obtaining reliable, representative service performance measurements will not be acceptable.

ATTACHMENT A—COMMENTS TO SERVICE PERFORMANCE MEASUREMENT SYSTEMS FOR MARKET DOMINANT PRODUCTS

| Participant | Title | Filing date |
|---|---|---|
| American Postal Workers Union, AFL–CIO (APWU). | Initial Comments of American Postal Workers Union, AFL–CIO, on Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| Association for Mail Electronic Enhancement (AMEE). | Comments of the Association for Mail Electronic Enhancement. | January 18, 2008. |
| Association for Postal Commerce and Direct Marketing Association (PostCom/DMA). | Initial Comments of the Association for Postal Commerce Joined by the Direct Marketing Association. | January 18, 2008. |

ATTACHMENT A—COMMENTS TO SERVICE PERFORMANCE MEASUREMENT SYSTEMS FOR MARKET DOMINANT PRODUCTS—Continued

| Participant | Title | Filing date |
|---|---|---|
| | Reply Comments of the Association for Postal Commerce Joined by the Direct Marketing Association (Corrected Version). | February 1, 2008. |
| | Comments of the Association for Postal Commerce Joined by the Direct Marketing Association: Order No. 83. | July 9, 2008. |
| Bank of America Corporation (BAC) | Comments of the Bank of America Corporation | January 18, 2008. |
| Condè Nast Publications | Comments of Condè Nast Publications | July 8, 2008. |
| Discover Financial Services LLC (DFS) | Reply Comments of DFS Services LLC in Response to Notice for Request for Comments. | February 1, 2008. |
| Greeting Card Association (GCA) | Comments of the Greeting Card Association | January 18, 2008. |
| IWCO Direct | Comments of IWCO Direct | July 9, 2008. |
| Magazine Publishers of America, Inc. (MPA) | Comments of Magazine Publishers of America, Inc. | January 18, 2008. |
| | Comments of Magazine Publishers of America, Inc. | July 9, 2008. |
| Mail Order Association of America (MOAA) | Comments of the Mail Order Association of America on the Postal Service's ''Service Performance Measurement'' for Market Dominant Products. | January 17, 2008. |
| Major Mailers Association (MMA) | Comments of Major Mailers Association | January 18, 2008. |
| McGraw-Hill Companies, Inc. (McGraw-Hill) | Reply Comments of The McGraw-Hill Companies, Inc. | February 1, 2008. |
| National Newspaper Association (NNA) | Comments of National Newspaper Association on Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| National Postal Policy Council (NPPC) | Comments of National Postal Policy Council | January 18, 2008. |
| | Reply Comments of National Postal Policy Council. | February 1, 2008. |
| | Comments of National Postal Policy Council | July 9, 2008. |
| Parcel Shippers Association (PSA) | Comments of the Parcel Shippers Association on Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| | Further Comments of the Parcel Shippers Association on Service Performance Measurement Systems for Market Dominant Products. | July 9, 2008. |
| Pitney Bowes Inc. (Pitney Bowes) | Initial Comments of Pitney Bowes Inc. in Response to Notice of Request for Comments on Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| | Reply Comments of Pitney Bowes Inc. in Response to Notice of Request for Comments on Service Measurement Systems for Market Dominant Products. | February 1, 2008. |
| | Comments of Pitney Bowes Inc. in Response to the Second Notice of Request for Comments on Service Performance Measurement Systems for Market Dominant Products. | July 9, 2008. |
| David B. Popkin (Popkin) | Initial Comments of David B. Popkin | January 18, 2008. |
| | Reply Comments of David B. Popkin | February 1, 2008. |
| Public Representative | Public Representative Initial Comments in Response to Notice of Request for Comments on Service Performance Measurement Systems for Market-Dominant Products. | January 18, 2008. |
| | Public Representative Reply Comments in Response to Notice of Request for Comments on Service Performance Measurement Systems for Market-Dominant Products. | February 1, 2008. |
| | Public Representative Comments on United States Postal Service June 2008 Service Performance Measurement Plan to Market-Dominant Products. | July 10, 2008. |
| Publishers Clearing House | Comments on Docket No. PI2008–1 Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| Research International | Comments of Research International | January 14, 2008. |
| | Research International Second Notice of Request for Comments on Service Performance Measurement Systems for Market Dominant Products. | July 8, 2008. |

ATTACHMENT A—COMMENTS TO SERVICE PERFORMANCE MEASUREMENT SYSTEMS FOR MARKET DOMINANT PRODUCTS—Continued

| Participant | Title | Filing date |
|---|---|---|
| Time Warner Inc. (Time Warner) | Comments of Time Warner Inc. in Response to Commission Order No. 48. | January 18, 2008. |
| United States Postal Service (Postal Service) | Reply Comments of the United States Postal Service. | February 1, 2008. |
| Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. (Valpak). | Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Service Performance Measurement Systems for Market Dominant Products. | January 18, 2008. |
| | Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Reply Comments on Service Performance Measurement Systems for Market Dominant Products. | February 1, 2008. |
| | Valpak Direct Marketing Systems, Inc. and Valpak Dealers' Association, Inc. Comments on Service Performance Measurement Systems for Market Dominant Products in Response to Order No. 83. | July 9, 2008. |

By the Commission.

**Steven W. Williams,**

*Secretary.*

[FR Doc. E8–28643 Filed 12–2–08; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59025; File No. SR–NYSE–2008–123]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Establish the Minimum Price Variation of $0.0001 for Orders and Quotations in Equity Securities That Are Priced Below $1.00 per Share

November 26, 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 November 26, 2008, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been 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

The Exchange proposes to amend Exchange Rule 62 (Variations) to establish the minimum price variation of $0.0001 for orders and quotations in equity securities that are priced below $1.00 per share, which will enable the Exchange to accept orders in sub-penny increments for those securities.

The text of the proposed rule change is available at *http://www.nyse.com*, NYSE's principal office, and 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 the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange seeks to amend Exchange Rule 62 (Variations) to establish the minimum price variation of $0.0001 for orders and quotations in equity securities that are priced below $1.00 per share, which will enable the Exchange to accept orders in sub-penny increments [3] for those securities.

Background

On August 28, 2000, the Exchange began trading in decimals.[4] At that time, the Exchange amended NYSE Rule 62 to provide that bids and offers in securities traded on the NYSE would be at a minimum price variation set by the NYSE.[5] At the initiation of decimal trading, the NYSE announced that the minimum price variation for all stocks trading on the Exchange would be one cent ($.01).[6] Rule 62 was subsequently amended to establish a minimum price variation of $.10 (ten cents) for securities trading on the Exchange priced at $100,000 and above.[7]

On April 6, 2005, the SEC adopted Regulation NMS, which is a series of initiatives designed to modernize and improve the national market system for trading equity securities. Rule 612 of Regulation NMS [8] permits markets to accept, rank and display orders priced less than $1.00 per share in a minimum pricing increment of $0.0001.

Currently the Exchange systems do not accept orders in sub-penny increments for securities priced below $1.00; however, Exchange systems recognize protected quotations with a sub-penny component in its round-lot [9]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange is currently modifying its systems to enable it to quote and trade in sub-penny increments and will file a separate proposal with the Commission at a later date.

[4] *See* Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010 (June 19, 2000).

[5] *See* Securities Exchange Act Release No. 43230 (August 30, 2000), 65 54589 (September 8, 2000) (SR–NYSE–00–22).

[6] *Id.*

[7] *See* Securities Exchange Act Release No. 49374 (March 8, 2004), 69 FR 11923 (March 12, 2004) (SR–NYSE–2004–10).

[8] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) 17 CFR 242.612.

[9] The Exchange system enhancements that will enable recognition of sub-penny quotations for pricing of odd-lots in the odd-lot system are

Continued

market and accommodate away market executions in sub-pennies, in compliance with SEC Rules 611 and 612.

Proposed Amendment to NYSE Rule 62

The Exchange proposes to amend its Rule 62 to conform to the provisions of SEC Rule 612 by establishing that the minimum price variation for orders and quotations in equity securities on the Exchange below a $1.00 will be $0.0001. Specifically, the Exchange proposes to amend .10 under Supplementary Material of Rule 62 to provide the following table:

| Price of order or interest | Minimum price variation |
|---|---|
| Less than $1.00 | $.0001 |
| $1.00–99,999.99 | .01 |
| $100,000 and greater | .10 |

When an order is received on the NYSE that contains a sub-penny component, the Exchange will round down any bid price down to the next round penny and round any offer price up to the next round penny. The order will be sent to NYSE trading systems and the Consolidated Quotation System [10] with the rounded price. The Exchange therefore proposes to replace .20 under Supplementary Material with language to indicate that for securities whose MPV is $.0001, the Exchange will round the bid price down to the next whole penny or round the offer price up to the next whole penny when transmitting the bid or offer to the Consolidated Quotation System. The rounded price assigned to the order or quotation is used for all order handling purposes including routing and execution.

The Exchange intends to initiate the systemic operation related to the above rule change on November 28, 2008. Commencing operation on that date will enable the Exchange, on a traditionally moderate trading day, to ensure the optimal efficiency of its software prior to resumption of normal trading on December 1, 2008.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the ''Act'') [11] for this proposed rule change is the requirement under Section 6(b)(5) [12] that an Exchange have rules that are designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The proposed rule change also is designed to support the principles of Section 11A(a)(1) [13] in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market and provide an opportunity for investors' orders to be executed without the participation of a dealer. The Exchange believes that the instant proposal is in keeping with these principles in that it seeks to amend NYSE Rule 62 to conform to the provisions of SEC Rule 612 by establishing that the minimum price variation for securities trading on the Exchange below a $1.00 will be $0.0001.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15]

NYSE requested that the Commission waive the 30-day operative delay, which would make the rule change operative as of November 28, 2008. The Commission hereby grants the Exchange's request and believes this action is consistent with the protection of investors and the public interest.[16] The Exchange's proposed rule is based on that of another exchange [17] and does not appear to raise any novel or significant issues. Accordingly, the Commission designates the proposed rule change operative as of November 28, 2008.

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.[18]

## 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–2008–123 on the subject line.

contained in the technology associated with Phase 2 implementation of the New Market Model. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46). Until the conclusion of the second Phase of implementation, which is scheduled to be completed no longer than ten weeks after October 24, 2008, those odd-lot orders that would receive an execution price based on the NBBO as set forth in NYSE Rule 124 will be priced at the last NBBO that did not contain a sub-penny price.

[10] This practice is currently done on NYSE Arca Exchange. Commentary .04 NYSE Arca Rule 7.6(a) provides:

The minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001, *provided, however, that the Corporation shall round the bid down to the next whole penny or the offer up to the next whole penny and display the rounded bid or offer in the consolidated quotation system.*

[11] 15 U.S.C. 78a.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78k–1(a)(1).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

[16] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] *See supra* note 10.

[18] 15 U.S.C. 78s(b)(3)(C).

*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–2008–123. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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–2008–123 and should be submitted on or before December 24, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. E8–28662 Filed 12–2–08; 8:45 am]

**BILLING CODE 8011–01–P**

[19] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59027; File No. SR–NYSEALTR–2008–11]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC To Establish the Minimum Price Variation of $0.0001 for Orders and Quotations in Equity Securities that are Priced Below $1.00 Per Share

November 28, 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 November 26, 2008, NYSE Alternext US LLC (the ''Exchange'' or ''NYSE Alternext'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been 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 Rule 62–NYSE Alternext Equities to conform with amendments to NYSE Rule 62 recently filed by the New York Stock Exchange LLC (''NYSE'').

### 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. The text of the proposed rule change is available on the Exchange's Web site, at the Exchange's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

*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 amend Rule 62–NYSE Alternext Equities to conform with amendments to NYSE Rule 62 recently filed by the NYSE.

*Background*

As described more fully in a related rule filing, NYSE Euronext acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext U.S. LLC,[3] and will continue to operate as a national securities exchange registered under Section 6 of the Act.[4] The effective date of the Merger was October 1, 2008.

In connection with the Merger, the Exchange will relocate all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York (the ''86 Trinity Trading Systems''), to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation''). The Exchange's equity trading systems and facilities at 11 Wall Street (the ''NYSE Alternext Trading Systems'') will be operated by the NYSE on behalf of the Exchange.[5]

Similarly, the Exchange will relocate the trading of certain debt securities currently conducted on the 86 Trinity Trading Systems to an automated bond trading system (''NYSE Alternext Bonds'') that will be operated by the NYSE on behalf of the Exchange (the ''Bonds Relocation''). The Exchange will also relocate all options trading currently conducted on the 86 Trinity Trading Systems to new facilities of the Exchange to be located at 11 Wall Street, which will use a trading system based on the options trading system used by NYSE Arca, Inc. (the ''Options Relocation'').[6]

[3] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger).

[4] 15 U.S.C. 78f.

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[6] *See* Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008)

Continued

Post-Merger, all Exchange members and member organizations that were authorized to trade on the Exchange before the Merger will receive trading permits (referred to as ''86 Trinity Permits'') that authorize continued trading on the 86 Trinity Trading Systems. Holders of the 86 Trinity Permits are eligible to apply for NYSE Alternext equities trading licenses or options trading permits upon the Equities or Options Relocation, as applicable.[7] In addition, pursuant to the Merger, all NYSE Alternext members and member organizations that apply for NYSE Alternext equities trading licenses are automatically waived in as NYSE members and member organizations.[8] Similarly, all NYSE members and member organizations are automatically waived in as NYSE Alternext members and member organizations.[9]

*The NYSE Alternext Equities Rules*

In order to implement the Equities and Bonds Relocations, the Exchange adopted NYSE Rules 1–1004 as the NYSE Alternext Equities Rules to govern all trading on the NYSE Alternext Trading Systems and NYSE Alternext Bonds. Because the NYSE Alternext Trading Systems and NYSE Alternext Bonds will be operated by the NYSE on behalf of the Exchange, the NYSE Alternext Equities Rules, which will become operative as of the date of the Equities and Bonds Relocations, are substantially identical to the current NYSE Rules 1–1004, subject to such changes as were necessary to apply the rules to the Exchange.[10]

*Proposed Amendments to Rule 62–NYSE Alternext Equities*

The Exchange proposes to amend Rule 62–NYSE Alternext Equities to conform to amendments recently filed by the NYSE for its Rule 62.[11]

The Exchange therefore proposes to amend Supplementary Material .10 of Rule 62–NYSE Alternext Equities to include the following table of minimum price variation (MPV) values:

| Price of order or interest | Minimum price variation |
|---|---|
| Less than $1.00 | $.0001 |
| $1.00–99,999.99 | .01 |
| $100,000 and greater | .10 |

The Exchange further proposes to amend Supplementary Material .20 of Rule 62–NYSE Alternext Equities to provide that, when an order for a security containing a sub-penny component (*i.e.,* with MPV of $.0001) is received by the Exchange, the Exchange will round any bid price down to the next round penny and round any offer price up to the next round penny. The order will be sent to the NYSE Alternext Trading Systems and the Consolidated Quotation System with the rounded price, which will be used for all order handling purposes, including routing and execution.

*Operative Date*

The Exchange proposes that the operative date of the proposed rule change be the date of the Equities and Bonds Relocations, currently scheduled for December 1, 2008.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposal also supports the principles of Section 11A(a)(1)[14] of the Act in that it seeks to ensure the economically efficient execution of securities transactions, to make it practicable for brokers to execute investors' orders in the best market, and to provide an opportunity for investors' orders to be executed without the participation of a dealer.

The Exchange believes that the proposed rule change is necessary and appropriate to update the NYSE Alternext Trading Systems in conformity with changes made to the NYSE trading systems on which they are based, and, specifically, to conform Rule 62–NYSE Alternext Equities with the provisions of SEC Rule 612 by establishing the minimum price variation for securities trading on the Exchange below a $1.00.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange believes that this proposal qualifies for immediate effectiveness upon filing as a non-controversial rule change pursuant to Section 19(b)(3)(A) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16] The Exchange asserts that the proposed rule change (i) will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of

(SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation). The Exchange will submit a separate rule filing to adopt a new rule set to govern NYSE Alternext options trading following the Options Relocation.

[7] *See* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70) (describing and approving membership rule changes related to the Merger); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[8] *See* NYSE Rules 2.10 and 2.20. NYSE Alternext members and member organizations will have a six-month grace period within which to meet NYSE and NYSE Alternext Equities membership requirements. *See* NYSE Rule 300.10T and NYSE Alternext Equities Rule 300.10T.

[9] *See* NYSE Alternext Equities Rules 2.10 and .20.

[10] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation); Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation); *and* SR–NYSEALTR–2008–10 (formally filed November 26, 2008) (adopting amendments to NYSE Alternext Equities Rules to track changes to corresponding NYSE Rules).

[11] In its rule filing the NYSE proposed, in accordance with SEC Rule 612, to establish a minimum price variation of $0.0001 for orders and quotations in equity securities that are priced below $1.00 per share in order to enable the NYSE to accept orders in sub-penny increments for those securities. *See* SR–NYSE–2008–123 (formally filed November 26, 2008). The Exchange understands that the NYSE is in the process of modifying its trading systems to, in addition to accepting sub-penny orders, enable quotation and trading in sub-penny increments on the NYSE. These modifications to the NYSE trading systems will similarly modify the NYSE Alternext Trading Systems, and the Exchange will submit a companion rule filing at the same time the NYSE submits its rule filing for these system modifications.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78k–1(a)(1).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6).

this filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest.[17]

The Exchange has requested that the Commission waive the 30-day operative delay, and designate the proposal as operative as of December 1, 2008. NYSE Alternext notes that it has previously announced its intention to relocate its equities and bonds trading from the 86 Trinity Trading Systems to the NYSE Alternext Trading Systems and NYSE Alternext Bonds on December 1, 2008, and has previously advised the Commission staff of its intention to harmonize the rules between NYSE and NYSE Alternext in order to facilitate this transition. Moreover, the Exchange believes that this filing is non-controversial because it is consistent with one that was previously submitted by NYSE for immediate effectiveness.[18]

The Commission hereby grants the Exchange's request [19] and believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The rule being adopted through this filing is based on a previously established rule of NYSE, and does not appear to raise any novel or significant issues. Furthermore, waiving the operative delay will facilitate the Equities Relocation, which is scheduled to occur on December 1, 2008. Therefore, the Commission designates the proposal operative as of December 1, 2008.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEALTR–2008–11 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–NYSEALTR–2008–11. 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–NYSEALTR–2008–11 and should be submitted on or before December 24, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E8–28679 Filed 12–2–08; 8:45 am]

**BILLING CODE 8011–01–P**

[17] In addition, Rule 19b–4(f)(6) 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 Commission has determined to waive the five-day pre-filing period in this case.

[18] *See* Securities Exchange Act Release No. 59025 (November 26, 2008) (SR–NYSE–2008–123).

[19] For 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. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59022; File No. SR–NYSEALTR–2008–10]**

## Self-Regulatory Organizations; NYSE Alternext U.S. LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Conform Its Rules With Those of the New York Stock Exchange

November 26, 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 November 26, 2008, NYSE Alternext U.S. LLC (the ''Exchange'' or ''NYSE Alternext'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been 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

The Exchange proposes to amend certain NYSE Alternext Equities Rules to conform with amendments to certain NYSE Rules filed by the New York Stock Exchange LLC (''NYSE''), and also additional technical amendments.

### 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. The text of the proposed rule change is available on the Exchange's Web site, at the Exchange's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*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 changes is to amend certain NYSE Alternext Equities Rules to conform with amendments to certain NYSE Rules filed by the NYSE.

Background

As described more fully in a related rule filing, NYSE Euronext acquired The Amex Membership Corporation (''AMC'') pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (the ''Merger''). In connection with the Merger, the Exchange's predecessor, the American Stock Exchange LLC (''Amex''), a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext U.S. LLC,[3] and will continue to operate as a national securities exchange registered under Section 6 of the Act.[4] The effective date of the Merger was October 1, 2008.

In connection with the Merger, the Exchange will relocate all equities trading conducted on the Exchange legacy trading systems and facilities located at 86 Trinity Place, New York, New York (the ''86 Trinity Trading Systems''), to trading systems and facilities located at 11 Wall Street, New York, New York (the ''Equities Relocation''). The Exchange's equity trading systems and facilities at 11 Wall Street (the ''NYSE Alternext Trading Systems'') will be operated by the NYSE on behalf of the Exchange.[5]

Similarly, the Exchange will relocate the trading of certain debt securities currently conducted on the 86 Trinity Trading Systems to an automated bond trading system (the ''Bonds Relocation'') that will be operated by the NYSE on behalf of the Exchange (''NYSE Alternext Bonds''). The Exchange will also relocate all options trading currently conducted on the 86 Trinity Trading Systems to new facilities of the Exchange to be located at 11 Wall Street, which will use a trading system based on the options trading system used by NYSE Arca, Inc. (''NYSE Arca'') (the ''Options Relocation'').[6]

Post-Merger, all Exchange members and member organizations that were authorized to trade on the Exchange before the Merger will receive trading permits (referred to as ''86 Trinity Permits'') that authorize continued trading on the 86 Trinity Trading Systems. Holders of the 86 Trinity Permits are eligible to apply for NYSE Alternext equities trading licenses or options trading permits upon the Equities or Options Relocation, as applicable.[7] In addition, pursuant to the Merger, all NYSE Alternext members and member organizations that apply for NYSE Alternext equities trading licenses are automatically waived in as NYSE members and member organizations.[8] Similarly, all NYSE members and member organizations are automatically waived in as NYSE Alternext members and member organizations.[9]

The NYSE Alternext Equities Rules

In order to implement the Equities and Bonds Relocations, the Exchange adopted NYSE Rules 1–1004 as the NYSE Alternext Equities Rules to govern all equities trading on the NYSE Alternext Trading Systems and NYSE Alternext Bonds. Because the NYSE Alternext Trading Systems and NYSE Alternext Bonds will be operated by the NYSE on behalf of the Exchange, the NYSE Alternext Equities Rules are substantially identical to the existing NYSE Rules, subject to such changes as were necessary to apply the rules to the Exchange. The NYSE Alternext Equities Rules are based on the NYSE Rules in their form as of July 18, 2008. NYSE Alternext Equities Rule 86, which is the principal rule governing trading on NYSE Alternext Bonds, is based on NYSE Rule 86 in the form it existed as of October 1, 2008.[10]

Proposed Amendments to NYSE Alternext Equities Rules

The NYSE Alternext Equities Rules will become operative as of the date of the Equities and Bonds Relocations. In the interim period since the filing and approval of the Equities Relocation, the NYSE has filed rule changes to some of its rules governing trading on its trading systems that would also impact trading on the NYSE Alternext Trading Systems and NYSE Alternext Bonds. The Exchange therefore proposes to amend the NYSE Alternext Equities Rules to conform to these rule changes, subject to such minor, technical changes as are necessary to apply the amended rules to the Exchange. Unless specifically noted, NYSE Alternext is proposing no substantive changes in this filing from the rule text approved for NYSE by the Commission or adopted pursuant to an immediately effective filing. The changes are summarized broadly below:

- Revisions and amendments to various NYSE Alternext and NYSE Alternext Equities rules necessary to implement the ''New Market Model'' adopted by the NYSE (''NMM'');[11]
- Revision of Rule 98–NYSE Alternext Equities and amendments to related rules (including the deletion of Rule 102–NYSE Alternext Equities) concerning the structure and operation of member organization specialist (now known as ''DMMs'') units and risk management;[12]

[3] *See* Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger).

[4] 15 U.S.C. 78f.

[5] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[6] *See* Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation). The Exchange will submit a separate rule filing to adopt a new rule set to govern NYSE Alternext options trading following the Options Relocation.

[7] *See* Securities Exchange Act Release No. 58706 (October 1, 2008), 73 FR 59019 (October 8, 2008) (SR–NYSE–2008–70) (describing and approving membership rule changes related to the Merger); Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[8] *See* NYSE Rules 2.10 and 2.20. NYSE Alternext members and member organizations will have a six-month grace period within which to meet NYSE and NYSE Alternext Equities membership requirements. *See* NYSE Rule 300.10T and NYSE Alternext Equities Rule 300.10T.

[9] *See* NYSE Alternext Equities Rules 2.10 and .20.

[10] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation). *See also* Securities Exchange Act Release No. 58833 (October 22, 2008), 73 FR 64642 (October 30, 2008) (SR–NYSE–2008–106) and Securities Exchange Act Release No. 58839 (October 23, 2008), 73 FR 64645 (October 30, 2008) (SR–NYSEALTR–2008–03) (together, approving the Bonds Relocation).

[11] In adopting what it calls the ''New Market Model'', the NYSE proposed a number of changes to its marketplace, including (i) Providing market participants with additional abilities to post hidden liquidity on Exchange systems; (ii) creating a Designated Market Maker (''DMM'') and phasing out the NYSE specialist; and (iii) enhancing the speed of execution through technological enhancements and a reduction in message traffic between NYSE trading systems and its DMMs. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (adopting NMM). *See also* Securities Exchange Act Release No. 58971 (November 17, 2008), 73 FR 71070 (November 24, 2008) (SR–NYSE–2008–115) (amendments thereto).

With the exception of the DMM net capital requirements (addressed separately in this filing), NYSE Alternext is not proposing any additional substantive changes in this filing different from the rule text approved for NYSE by the Commission or adopted pursuant to an immediately effective filing, although it is including corresponding technical rule changes to change references to ''specialists'' or internal cross-references that were incorrect or not included in the original NYSE filings (*see* Rules 2A(c)–, 15(b)–, 70.25–, 92(d)–, 98(c)–, 123(g)–, 123E(f)–, 124(f)–, 325–, 431–, 440G.10– and 900– (chart of rules)–NYSE Alternext Equities).

[12] The NYSE revised the regulatory requirements under its Rule 98 concerning how member organizations structure their DMM operations and

• Revisions to Rules 103A–NYSE Alternext Equities and 103B–NYSE Alternext Equities, Non-NYSE Alternext Equities Rule 476A, and amendments to related rules (including the deletion of Rule 106–NYSE Alternext Equities) concerning the allocation of registered securities to DMMs; [13]

• Amendments to various member firm conduct rules that are ''Common Rules'' shared with NYSE and the Financial Industry Regulatory Authority (''FINRA'') to conform with changes made by FINRA to its versions of these rules; [14]

• Amendments to Rule 48–NYSE Alternext Equities concerning extremely volatile market conditions and closing procedures; [15]

• Adoption of Rule 123B.30–NYSE Alternext Equities to provide for a standard sponsored access provision for the Exchange; [16]

• Amendments to Rule 123D–NYSE Alternext Equities regarding the elimination of the provision governing sub-penny trading halts; [17]

• Modification of Rule 1000–NYSE Alternext Equities to change the Liquidity Replenishment Point (''LRP'') values; [18]

• Amendments to Rule 431–NYSE Alternext Equities to codify the portfolio margin program set forth in paragraph (g) regarding (i) monitoring concentrated equity positions and (ii) timing of day trading margin calls; [19]

• Adoption of an operative date of March 31, 2009, for Rule 92(c)(3)–Alternext Equities, to correspond with the operative date of NYSE Rule 92(c)(3); [20] and

• Technical amendments to Rule 17–NYSE Alternext Equities.[21]

As noted in footnote 11, NYSE Alternext is retaining the net capital requirements it adopted with the NYSE Alternext Equities Rules (*see* current Rule 104.20, .23 and .24–NYSE Alternext Equities) but it will move them to new Rules 103.20 and .21–NYSE Alternext Equities to track the rule organization adopted by the NYSE.

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manage their risks, including: (i) Redefining the persons to whom NYSE Rule 98 would apply; (ii) allowing DMM operations to be integrated into better capitalized member organizations; (iii) permitting a DMM unit to share nontrading-related services with its parent member organization or approved persons; and (iv) providing flexibility to member organizations and their approved persons in how to conduct risk management of DMM operations. In addition the NYSE also made conforming amendments to other NYSE rules that rely on NYSE Rule 98 exemptions for approved persons. *See* Securities Exchange Act Release No. 58328 (August 7, 2008), 73 FR 48260 (August 18, 2008) (SR–NYSE–2008–45).

NYSE Alternext is proposing no substantive changes in this filing from the rule text approved for NYSE by the Commission or adopted pursuant to an immediately effective filing, except to the extent that proposed Rule 98 (Former)–NYSE Alternext Equities is based on legacy Amex Rule 193. At the time NYSE Alternext Equities Rules were initially adopted, the Exchange adopted legacy Amex Rule 193 in place of NYSE Rules 98 and 98A. *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63). Thus, the proposed amendments to create Rule 98 (Former)–NYSE Alternext Equities differ in form, though not in substance, from those proposed to create NYSE Rule 98 (Former).

[13] The NYSE modified its Allocation Policy to (i) Discontinue the use of the Specialist Performance Evaluation Questionnaire (''SPEQ''), (ii) establish a single quantifiable objective measure to determine a DMM unit's eligibility to participate in the allocation process, and (iii) provide issuers with more choice in the selection of their DMM unit. As part of these modifications, the NYSE eliminated its Allocation Committee as the overseer of the allocation process and the Allocation Panel from which the Allocation Committee members were selected. The NYSE also eliminated its Market Performance Committee as the entity that responsible for reallocating securities. *See* Securities Exchange Act Release No. 58857 (October 24, 2008), 73 FR 65435 (November 3, 2008) (SR–NYSE–2008–52). The NYSE filing specified that at least three DMM units (out of six) shall be presented for selection by issuers. Because NYSE Alternext has fewer DMM units (four, instead of six), NYSE Alternext is proposing to change the number of DMM units presented to two. If three of the four firms are not eligible to receive new allocations under the Allocation rules (*e.g.*, if they have not complied with the mandatory quoting requirements for new allocations), then the remaining eligible firm shall be required to apply for the allocation.

In addition, the Exchange proposes to modify Sections IV(A) and VI(F) of Rule 103B–NYSE Alternext Equities to eliminate cross-references to other NYSE Rules that are inapplicable to NYSE Alternext. Specifically, in Section IV(A), the Exchange removed cross-references to Rule 806.01 of the NYSE Listed Company Manual, which concerns the reallocation of a security at the issuer's request. The Exchange instead proposes to cross-reference and add supplementary Rule 103B.10–NYSE Alternext Equities, which will track NYSE Listed Company Manual Rule 806.01. The NYSE Rule was adopted as immediately effective. *See* Securities Exchange Act Release No. 57232 (January 30, 2008), 73 FR 6755 (February 5, 2008) (SR–NYSE–2008–08). In Section VI(F) the Exchange proposes to change the cross-reference to Rule 102 of the NYSE Listed Company Manual to Section 101 of the NYSE Alternext Company Guide.

[14] The amendments made by FINRA (and NYSE) include: (i) Replacing the term ''allied member'' with the newly defined category of ''principal executive''; (ii) repositioning and consolidating all ''Buy-In'' requirements and procedures (*see* Rules 283, 285–290–NYSE Alternext Equities) into one rule (Rule 282–NYSE Alternext Equities); (iii) moving certain provisions of Common Rules to other Common Rules; (iv) deleting Common Rules that are obsolete or no longer applicable; (v) eliminating certain provisions of Common Rules that do not have a corresponding NASD equivalent and therefore are unnecessary; (vi) amendments to further harmonize certain NYSE and NASD Rules; (vii) deleting Common Rules that are substantively duplicative of existing NASD Rules and procedures; (viii) limiting application of Common Rule 345(a) to securities lending representatives and supervisors only; and (ix) making corresponding technical changes to other rules as needed. *See* Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR–NYSE–2008–80).

NYSE Alternext is not proposing any substantive changes in this filing different from the rule text approved for NYSE by the Commission or adopted pursuant to an immediately effective filing, although it is including corresponding technical changes to other rules not included in the original FINRA filing since they are not Common Rules subject to FINRA's review (*see* Rules 17, 22, 25, 91, 93, 96, 99 (Former), 104T, 105, 112, 113 (Former), 122–123, 123G, 304–304A, 308–309, 410A, 422, 456–460–NYSE Alternext Equities and Non-NYSE Alternext Equities Rules 475–476A). In addition, FINRA did not make corresponding amendments to NYSE Rules 344 and 350 even though they are Common Rules. NYSE Alternext has included its version of these rules in its amendments.

[15] The NYSE amended its Rule 48 to provide it with the ability to suspend certain requirements at the closing when extremely high market volatility could negatively affect the ability to ensure a fair and orderly close. *See* Securities Exchange Act Release No. 58743 (October 7, 2008), 73 FR 60742 (October 14, 2008) (SR–NYSE–2008–102).

[16] *See* Securities Exchange Release No. 58429 (August 27, 2008), 73 FR 51676 (September 4, 2008) (SR–NYSE–2008–71) *and* Securities Exchange Act Release No. 58758 (October 8, 2008), 73 FR 62352 (October 20, 2008) (SR–NYSE–2008–100).

[17] At the time Regulation NMS was originally implemented, the NYSE's trading systems were not able to accommodate sub-penny executions on orders routed to better-priced protected quotations and could not recognize a quote disseminated by another market center if such quote had a sub-penny component. To prevent its systems from inadvertently trading through better protected quotations, the NYSE adopted Rule 123D(3), which provided that trading would be halted in any security whose price was about to fall below $1.00 and to route any subsequent orders received for that security to NYSE Arca, Inc. The NYSE now has the technical capability to recognize protected quotations with a sub-penny component in its round-lot market and to accommodate away market executions in sub-pennies in compliance with Regulation NMS and so it removed Rule 123D(3). *See* Securities Exchange Act Release No. 58936 (November 13, 2008), 73 FR 69704 (November 19, 2008) (SR–NYSE–2008–117).

[18] The NYSE amended its Rule 1000 to double the current LRP ranges in order to limit the number of times that an LRP is reached and the total number of times during the trading day that automatic execution is suspended as a result of an LRP being triggered. *See* Securities Exchange Act Release No. 58629 (September 24, 2008), 73 FR 57183 (October 1, 2008) (SR–NYSE–2008–85).

[19] The NYSE amended its Common Rule 431 to conform with amendments made by FINRA to its version of the rule. *See* Securities Exchange Act Release Nos. 58261 and 58269 (July 30, 2008), 73 FR 46114 and 46116 (August 7, 2008) (SR–NYSE–2008–65 and –66).

[20] In July 2007, in connection with the on-going harmonization of NYSE Rule 92 with FINRA's Manning Rule (NASD Rule 2111 and IM–2110–2), the NYSE amended Rule 92(c)(3) to require member firms to submit order execution reports to the NYSE's Front End Systemic Capture (''FESC'') database when executing riskless principal transactions. Because the rule change has required both the NYSE and member firms to make certain technological changes to their trading and order management systems, and to provide additional time for NYSE and FINRA to fully harmonize NYSE Rule 92 and FINRA's Manning Rule, the NYSE proposed delaying the operative date for implementation of NYSE Rule 92(c)(3) until March 31, 2009. *See* Securities Exchange Act Release No. 57682 (April 17, 2008), 73 FR 22193 (April 24, 2008) (SR–NYSE–2008–29).

[21] *See* Securities Exchange Act Release No. 58137 (July 10, 2008), 73 FR 41145 (July 17, 2008) (SR–NYSE–2008–55).

The Exchange is also adding provisions in 103.20(a)(i) and (ii) to provide that any Structured Products that are not subject to a trading halt pursuant to Rule 123D(4)–NYSE Alternext Equities as of the date of the Equities Relocation will be eligible to be allocated to a DMM if necessary until the security is halted and traded on NYSE Arca in accordance with that rule.[22]

The Exchange is also adding provisions (vii) through (x) to 103.20(a)–NYSE Alternext Equities. These provisions address DMM net capital issues, including the use of financing to meet net capital requirements, the requirement that a DMM meet the net capital requirements without including an investment account and the so-called ''early warning'' requirements. These provisions were supposed to have been included in the original NYSE Alternext Equities filing but were mistakenly not included.[23]

In addition, the Exchange proposes to amend Rule 440H–NYSE Alternext Equities concerning accumulated Section 31 fees held by the Exchange and its members and member organizations. In May 2008, the Commission approved Amex's (the Exchange's predecessor) adoption of Commentary .01 to Rule 393, which allows firms, on a one-time-only basis, to voluntarily remit to the Exchange historically accumulated Section 31 funds, which may be used to pay the Exchange's current Section 31 fees. In addition, a member or member organization may designate all or part of the accumulated fees held by the Exchange and allocated to such member to be used by the Exchange in accordance with the Rule. To the extent the payment of these historically accumulated funds or Exchange accumulated funds is in excess of the Section 31 fees due the Commission from the Exchange, such surplus shall be used by the Exchange to offset regulatory costs. The Exchange recently filed to extend the provisions of Commentary .01 to Rule 393 until January 13, 2009, and proposes amendments to Rule 440H–NYSE Alternext Equities to accommodate the extension and to ensure its applicability to Exchange members and member organizations operating under the NYSE Alternext Equities Rules after the Equities Relocation.[24]

The Exchange also proposes to adopt a new Rule 128–NYSE Alternext Equities concerning clearly erroneous executions, which will be operative until January 9, 2009. As described in the related rule filing, at the time the Exchange adopted the NYSE Alternext Equities Rules, it did not import the NYSE's rule governing clearly erroneous executions (NYSE Rule 128) because it was under review and was anticipated that it would be amended prior to the date of the Equities Relocation. However, that has not happened and the Exchange now proposes to delete the current Rule 128–NYSE Alternext Equities and adopt a new Rule 128–NYSE Alternext Equities that is based on the NYSE's current Rule 128. In this way the two exchanges will have the same clearly erroneous execution procedures that are operative during the same time frame.[25]

Finally, the Exchange proposes additional technical amendments to Rules 51–, 55–, 61–, 72–, 79A–, 86– and 123D–NYSE Alternext Equities to reflect proper internal cross-references to other NYSE Alternext Equities rules and to Rules 342.16–.19–NYSE Alternext Equities to add text inadvertently left out of the NYSE Alternext Equities rule set when it was adopted.[26]

Operative Date

The Exchange proposes that the operative date of the proposed rule changes be the date of the Equities and Bonds Relocations, currently scheduled for December 1, 2008.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[27] in general, and furthers the objectives of Section 6(b)(5) of the Act,[28] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule changes also support the principles of Section 11A(a)(1)[29] of the Act in that they seek to ensure the economically efficient execution of securities transactions and fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule changes are necessary and appropriate to reflect the recent changes to the NYSE Alternext market, the NYSE Alternext Trading Systems and the member conduct rules that govern NYSE Alternext members and member organizations.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange believes that this proposal qualifies for immediate effectiveness upon filing as a non-controversial rule change pursuant to Section 19(b)(3)(A) of the Act[30] and Rule 19b–4(f)(6) thereunder.[31] The Exchange asserts that the proposed rule change (i) Will not significantly affect the protection of investors or the public interest, (ii) will not impose any significant burden on competition, and (iii) by its terms, will not become operative for 30 days after the date of this filing, or such shorter time as the

[22] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation). The new language included in 103.20(a)(i) and (ii) was approved in the filing for the NMM submitted by the NYSE. *See* Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR–NYSE–2008–46) (adopting NMM).

[23] *See* Non-NYSE Alternext Equities Rule 171, Commentaries .01, .03, .06 and .07. These provisions were filed and approved by the Commission. *See, e.g.*, Securities Exchange Act Release No. 47703 (April 18, 2003), 68 FR 22425 (April 28, 2003) (SR–AMEX–2002–104).

[24] *See* Securities Exchange Act Release No. 58933 (November 12, 2008), 73 FR 69712 (November 19, 2008) (SR–NYSEALT–2008–05) (proposed extension of Commentary .01 to Rule 393 concerning accumulated Section 31 fees). *See also* Securities Exchange Act Release No. 58108 (July 7, 2008), 73 FR 40413 (July 14, 2008) (SR–NYSE–2007–64) (approving similar amendments to NYSE Rule 440H).

[25] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation). The NYSE's current version of its Rule 128 was approved by the Commission in February 2008 and is operative until January 9, 2009. *See* Securities Exchange Act Release No. 57323 (February 13, 2008), 73 FR 9371 (February 20, 2008) (SR–NYSE–2008–09) (adopting NYSE Rule 128); Securities Exchange Act Release No. 58732 (October 3, 2008), 73 FR 61183 (October 15, 2008) (SR–NYSE–2008–99) (extending the sunset provision of the rule).

[26] *See* Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR–Amex 2008–63) (approving the Equities Relocation).

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(5).

[29] 15 U.S.C. 78k–1(a)(1).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f)(6).

Commission may designate, if consistent with the protection of investors and the public interest.[32]

NYSE Alternext has requested that the Commission waive the 30-day operative delay and designate the proposal as operative as of December 1, 2008. NYSE Alternext notes that it has previously announced its intention to relocate its equities and bonds trading from the 86 Trinity Trading Systems to the NYSE Alternext Trading Systems and NYSE Alternext Bonds on December 1, 2008, and has previously advised the Commission staff of its intention to harmonize the rules between NYSE and NYSE Alternext in order to facilitate this transition. NYSE Alternext further notes that relocating the trading is a complex operation that involves numerous simultaneous actions. NYSE Alternext argues that the 30-day waiting period would make it impossible for NYSE Alternext to meet the December 1, 2008 relocation deadline, which would adversely affect the competitiveness of the Exchange and its members, and would impair the ability of investors and public customers of those members to effectively trade their securities.

Moreover, the Exchange believes that this filing is non-controversial because it raises no novel issues and is consistent with the Commission's prior approvals of the rule filings upon which this filing is modeled.[33] As noted above, the proposed rule change is based on rule text that was previously approved by the Commission for NYSE or previously submitted by NYSE for immediate effectiveness. Except as specifically noted, and subject to such minor technical changes as are necessary to apply the rules to the Exchange, NYSE Alternext is adopting the NYSE rules in the form that they were approved by the Commission for NYSE.

The Commission hereby grants the Exchange's request[34] and believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The rules being adopted through this filing are based on previously established rules of NYSE (or in a few cases Amex), and they do not appear to raise any novel or significant issues. Furthermore, waiving the operative delay will facilitate the Equities and Bonds Relocations, which are scheduled to occur on December 1, 2008. Therefore, the Commission designates the proposal operative as of December 1, 2008.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEALTR–2008–10 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–NYSEALTR–2008–10. 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–NYSEALTR–2008–10 and should be submitted on or before December 24, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E8–28680 Filed 12–2–08; 8:45 am]

**BILLING CODE 8011–01–P**

[32] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) 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.

[33] *See supra* footnotes 12–27 for a list of all relevant filings.

[34] For 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. 78c(f).

[35] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Agricultural Aircraft Operator Certificate Application

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. Certain organizations may apply to perform certification functions on behalf of the FAA. Standards have been established for the certification of agricultural aircraft. The information collected shows applicant compliance and eligibility for certification by FAA.

**DATES:** Please submit comments by February 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney on (202) 267–9895, or by e-mail at: *Carla.Mauney@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Federal Aviation Administration (FAA)**

*Title:* Agricultural Aircraft Operator Certificate Application.

*Type of Request:* Extension without change of an approved collection.

*OMB Control Number:* 2120–0049.

*Form(s):* 8710–3.

*Affected Public:* A total of 3,980 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden per Response:* Approximately 3.5 hours per response.

*Estimated Annual Burden Hours:* An estimated 14,037 hours annually.

*Abstract:* Standards have been established for the certification of agricultural aircraft. The information collected shows applicant compliance and eligibility for certification by FAA.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC on November 24, 2008.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. E8–28508 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Air Carriers Listing of Leading Outsource Maintenance Providers

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. Certain organizations may apply to perform certification functions on behalf of the FAA. The data from this report is used to target those leading outsource maintenance providers that may have a higher risk level which in turn would merit an increase of FAA surveillance.

**DATES:** Please submit comments by February 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney on (202) 267–9895, or by e-mail at: *Carla.Mauney@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

**Federal Aviation Administration (FAA)**

*Title:* Air Carriers Listing of Leading Outsource Maintenance Providers.

*Type of Request:* Extension without change of an approved collection.

*OMB Control Number:* 2120–0708.

*Form(s):* There are no FAA forms associated with this collection.

*Affected Public:* A total of 121 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden per Response:* Approximately 4 hours per response.

*Estimated Annual Burden Hours:* An estimated 484 hours annually.

*Abstract:* The data from this report is used to target those leading outsource maintenance providers that may have a higher risk level which in turn would merit an increase of FAA surveillance.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 24, 2008.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. E8–28507 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Request Revision From the Office of Management and Budget of a Currently Approved Information Collection Activity, Request for Comments; Washington, DC Metropolitan Area Special Flight Rules

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** The FAA invites public comments about our intention to request the Office of Management and Budget (OMB) to approve a current information collection. Certain organizations may apply to perform certification functions on behalf of the FAA. This information collection is required for compliance with the final rule that codifies special flight rules and airspace and flight restrictions for certain operations in the Washington, DC Metropolitan Area.

**DATES:** Please submit comments by February 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Carla Mauney on (202) 267–9895, or by e-mail at: *Carla.Mauney@faa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Federal Aviation Administration (FAA)**

*Title:* Washington, DC Metropolitan Area Special Flight Rules.

*Type of Request:* Extension without change of an approved collection.

*OMB Control Number:* 2120–0706.

*Form(s):* There are no FAA forms associated with this collection.

*Affected Public:* A total of 17,097 Respondents.

*Frequency:* The information is collected on occasion.

*Estimated Average Burden per Response:* Approximately 2.9 hours per response.

*Estimated Annual Burden Hours:* An estimated 49,223 hours annually.

*Abstract:* This information collection is required for compliance with the final rule that codifies special flight rules and airspace and flight restrictions for certain operations in the Washington, DC Metropolitan Area.

**ADDRESSES:** Send comments to the FAA at the following address: Ms. Carla Mauney, Room 712, Federal Aviation Administration, IT Enterprises Business Services Division, AES–200, 800 Independence Ave., SW., Washington, DC 20591.

*Comments are invited on:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on November 24, 2008.

**Carla Mauney,**

*FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.*

[FR Doc. E8–28506 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Release Certain Properties From all Terms, Conditions, Reservations and Restrictions of a Quitclaim Deed Agreement Between the City of Palatka and the Federal Aviation Administration for the Kay Larkin Field, Palatka Municipal Airport, Palatka, FL

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Request for Public Comment.

**SUMMARY:** The FAA hereby provides notice of intent to release certain airport properties (14.26 acres) at the Kay Larkin Field, Palatka Municipal Airport, Palatka, FL from the conditions, reservations, and restrictions as contained in an Agreement between the FAA and the City of Palatka, dated February 28, 1947. The release of property will allow the City of Palatka to dispose of the property for other than aeronautical purposes. The property is located in the Section 3, Township 10 South, Range 26 East, of Putnam County. The parcel is currently designated as non-aeronautical use. The property will be disposed of for the purpose of allowing for the construction of a floating dock manufacturing facility. The fair market value of the property has been determined by appraisal to be $25,000 per acre ($356,500). The airport will receive fair market value for the property, which will be subsequently reinvested in another eligible airport improvement project.

Documents reflecting the Sponsor's request are available, by appointment only, for inspection at the City of Palatka and the FAA Airports District Office.

**DATES:** January 2, 2009.

**SUPPLEMENTARY INFORMATION:** Section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21) requires the FAA to provide an opportunity for public notice and comment prior to the ''waiver'' or ''modification'' of a sponsor's Federal obligation to use certain airport land for non-aeronautical purposes.

**ADDRESSES:** Documents are available for review at the City of Palatka, 201 North 2nd Street, Palataka, FL 32117, and the FAA Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822. Written comments on the Sponsor's request must be delivered or mailed to: Richard Owen, Program Manager, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822–5024.

**FOR FURTHER INFORMATION CONTACT:** Richard Owen, Program Manager, Orlando Airports District Office, 5950 Hazeltine National Drive, Suite 400, Orlando, FL 32822–5024.

**W. Dean Stringer,**

*Manager, Orlando Airports District Office, Southern Region.*

[FR Doc. E8–28504 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Public Notice for Waiver of Aeronautical Land-Use Assurance

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of intent of waiver with respect to land.

**SUMMARY:** The Federal Aviation Administration (FAA) is considering a proposal to change a portion of the airport from aeronautical use to non-aeronautical use and to authorize the sale of certain airport property. The sale will include a perpetual navigational easement, precluding the building of any structures. The area is a 28.665-acre parcel of vacant land located east of the airport. The land was acquired via warranty deed dated November 18, 1987, recorded November 23, 1987, in Randolph County, Book No. 246, Page No. 490–491. There are no impacts to the airport by allowing the airport to sell the property. The land is not needed for aeronautical use.

Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in aid funding from the FAA. The disposition of the proceeds from the sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999. In accordance with Section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

**DATES:** Comments must be received on or before January 2, 2009.

**ADDRESSES:** Documents reflecting this FAA action may be reviewed at 2300 East Devon Avenue, Des Plaines, IL 60018, or at Randolph County Airport, Winchester, Indiana.

**FOR FURTHER INFORMATION CONTACT:** James G. Keefer, Manager, Chicago Airports District Office, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018. Telephone Number 847–294–7336/FAX Number 847–294–7046.

**SUPPLEMENTARY INFORMATION:** Following is a legal description of the property: A parcel of land situated in the Southwest Quarter of Section 24, Township 20 North, Range 14 East, White River Township, Randolph County, Indiana and being a part of the 40 Acre Tract as described in Randolph County Deed Records Volume 205, Page 49 and being more particularly described as follows: Beginning at a brass plug at the northwest corner of the Southwest Quarter of said Section 24, said corner being the northwest corner of the aforesaid 40 acre tract; thence North 89°26′56″ East 1304.61 feet along the half section line said line also being the approximately centerline of State Highway #32 to a P.K. Nail said P.K. nail being witnessed by an iron pin South 00°10′18″ East 30 feet; Thence South 00°10′18″ East 749.99 feet along an existing fence line to an iron pin; thence South 71°58′12″ West 1373.66 feet to a railroad spike on the west line of said Section 24; thence North 00°1′45″ West 1162.60 feet to the point of beginning containing 28.665 acres, more or less, and being subject to all legal easements and highways or record.

Issued in Des Plaines, Illinois, on November 21, 2008.

**James G. Keefer,**

*Manager, Chicago Airports District Office.*

[FR Doc. E8–28505 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

### Safety Advisory 2008–02

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of Safety Advisory; Safety Appliance Securement, Potential Failure of Welded Hand Brake Supports on GVSR 200000 Series Flatcars.

**SUMMARY:** FRA is issuing Safety Advisory 2008–02 in order to provide guidance to interested parties concerning the inspection and repair of GVSR series flatcars that have been modified to add welded vertical hand brake supports. FRA's Office of Safety Assurance and Compliance Motive Power and Equipment (MP&E) Division has been notified of a catastrophic failure of the welded securement of the vertical hand brake support on Flatcar GVSR 209000. The failure occurred on May 29, 2008, and resulted in the fatality of a Union Pacific Railroad (UP) train crewmember.

**FOR FURTHER INFORMATION CONTACT:** Tom Blankenship, Mechanical Engineer, MP&E Division (RRS–14); FRA Office of Safety Assurance and Compliance, 1200 New Jersey Avenue, SE., Washington, DC 20590, telephone: (202) 493–6446.

**SUPPLEMENTARY INFORMATION:** On May 29, 2008, at approximately 10:17 a.m. (CST), a railroad employee was riding a cut of four cars while attempting to set the hand brake on Flatcar GVSR 209000. During this task, the hand brake support angles, which had been previously welded, suddenly broke; this may have contributed to the employee falling under the rolling equipment, resulting in the fatality. Preliminary details of this incident indicate that the welded vertical hand brake support angles had an ''old break'' condition that allowed the remaining weld to fail when force was applied to the hand brake. Field investigation of the failed vertical hand brake support indicates that the hand brake and/or brackets were improperly applied or not mechanically fastened. See Title 49 Code of Federal Regulations (CFR) Sections 231.110B3, 231.1(a)(4)(iii), and 231.27(a)(4)(iii), requiring hand brake housing to be securely fastened to a car.

Flatcars in the GVSR 200000 series were built in Chicago, IL, by Thrall Manufacturing in 1973, with a horizontal hand brake assembly that was later modified for vertical hand brake operation. The flatcars that may have been modified from horizontal application to vertical application are in the following series and are owned by UP:

- GVSR 209000–209002
- GVSR 202000–202034
- GVSR 205000–205004
- GVSR 208000–208002
- GVSR 213000–213004

FRA believes there may be other flatcars that have been similarly converted and that they may be subjected to the same type of failure.

*Recommended Action:* Recognizing the need to ensure safety, FRA recommends that railroads and car owners operating flatcars that have a vertical hand brake support that is welded to the carbody carefully inspect the cars to determine the adequacy of any welded securement. Any car found with a defective condition should be immediately handled for repair in accordance with 49 U.S.C. 20303 and repaired in accordance with accepted industry practice or by using approved fasteners as outlined in 49 CFR Section 231.1(a)(4)(iii). Welding, where present, must be done in accordance with industry practice, as specified in American Welding Society Standards D1 and D15. FRA further recommends that UP inspect all of the above noted series flatcars and immediately handle for repair those cars found with defective fastening conditions. UP is encouraged to work closely with FRA by furnishing its MP&E Division with a complete list of affected cars, any inspection findings, a list of repairs made to the cars, and the date repairs were completed on the cars.

FRA may modify this Safety Advisory 2008–02, issue additional safety advisories, or take other appropriate action necessary to ensure the highest level of safety on the Nation's railroads.

Issued in Washington, DC, on November 26, 2008.

**Jo Strang,**

*Associate Administrator for Safety.*

[FR Doc. E8–28652 Filed 12–2–08; 8:45 am]

**BILLING CODE 4910–06–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Additional Designations Pursuant to Executive Order 13469 of July 25, 2008 ''Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe'' (the ''Order'')

**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 twenty-one newly-designated entities and four individuals whose property and interests in property are blocked pursuant to the Order.

**DATES:** The designation by the Director of OFAC of the twenty-one entities and four individuals identified in this notice, pursuant to the Order is effective November 25, 2008.

**FOR FURTHER INFORMATION CONTACT:** Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, 1500 Pennsylvania Avenue, NW. (Treasury Annex), Washington, DC 20220, Tel.: 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic and Facsimile Availability

Information about this designation and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

#### Background

On July 25, 2008, the President issued Executive Order 13469 with respect to Zimbabwe pursuant to, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–06). In the Order, the President took additional steps with respect to the national emergency declared in Executive Order 13288 of March 7, 2003, and relied upon for additional steps taken in Executive Order 13391 of November 22, 2005, in order to address the continued political repression and the undermining of democratic processes and institutions in Zimbabwe.

Section 1 of the Order blocks, with certain exceptions, all property, and interests in property, that are in, or hereafter come within, the United States or the possession or control of United States persons for persons determined by the Secretary of the Treasury, in consultation with the Secretary of State, to satisfy any of the criteria set forth in subparagraphs (a)(i) through (a)(viii) of Section 1. On November 25, 2008, the Director of OFAC designated, pursuant to one or more of the criteria set forth in subparagraphs (a)(i) through (a)(viii) of Section 1 of the Order, the following twenty-one entities and four individuals, whose names have been added to the list of Specially Designated Nationals and whose property and interests in property are blocked, pursuant to the Order:

*Entities*

1. ALPHA INTERNATIONAL (PRIVATE) LTD (a.k.a. ALPHA INTERNATIONAL (PRIVATE) LIMITED), Flat 1, Aileen Gardens, 51A Park Road, Camberley, Surrey GU15 2SP, United Kingdom [ZIMBABWE].

2. BRECO (ASIA PACIFIC) LTD, First Floor, Falcon Cliff, Palace Road, Douglas, IM2 4LB, Man, Isle of; Business Registration Document # M78647 (United Kingdom) [ZIMBABWE].

3. BRECO (EASTERN EUROPE) LTD (a.k.a. BRECO (EASTERN EUROPE)

LIMITED), Falcon Cliff, Palace Road, Douglas, IM99 1ZW, Man, Isle of; Hurst Grove, Sandford Lane, Hurst, Reading, Berkshire RG10 0SQ, United Kingdom; Business Registration Document # FC0021189 (United Kingdom) [ZIMBABWE].

4. BRECO (SOUTH AFRICA) LTD, Cumbrae House, Market Street, Douglas IM1 2PQ, Man, Isle of; 9 Columbus Centre, Pelican Drive, Road Town, Tortola, Virgin Islands, British; Business Registration Document # Q1962 (United Kingdom) [ZIMBABWE].

5. BRECO (U.K.) LTD (a.k.a. BRECO (U.K.) LIMITED), New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Business Registration Document # 2969104 (United Kingdom) [ZIMBABWE].

6. BRECO GROUP, Hurst Grove, Sandford Lane, Hurst, Reading, Berkshire RG10 0SQ, United Kingdom; Thetford Farm, P.O. Box HP86, Mount Pleasant, Harare, Zimbabwe; 10 Montpelier Square, London SW7 1JU, United Kingdom; Middleton House, Titlarks Hill Road, Sunningdale, Ascot, Berkshire SL5 0JB, United Kingdom; New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Mapstone House, Mapstone Hill, Lustleigh, Newton Abbot, Devon TQ13 9SE, United Kingdom; Dennerlei 30, Schoten, Belgium [ZIMBABWE].

7. BRECO INTERNATIONAL, 25 Broad Street, St. Helier JE2 3RR, Jersey [ZIMBABWE].

8. BRECO NOMINEES LTD, New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Business Registration Document # 2799499 (United Kingdom) [ZIMBABWE].

9. BRECO SERVICES LTD (a.k.a. BRECO SERVICES LIMITED), New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Business Registration Document # 2824946 (United Kingdom) [ZIMBABWE].

10. CORYBANTES LTD, New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Middleton House, Titlarks Hill Road, Sunningdale, Ascot, Berkshire SL5 0JB, United Kingdom; Business Registration Document # FC21190 (United Kingdom) [ZIMBABWE].

11. ECHO DELTA HOLDINGS LTD, Thetford Farm, P.O. Box HP86, Mount Pleasant, Harare, Zimbabwe; Hurst Grove, Sandford Lane, Hurst, Reading, Berkshire RG10 0SQ, United Kingdom; New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom [ZIMBABWE].

12. KABABANKOLA MINING COMPANY (a.k.a. KMC), Nr. 1106 Avenue Lomami, Lubumbashi, Katanga, Congo, Democratic Republic of the [ZIMBABWE].

13. MASTERS INTERNATIONAL LTD., New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Business Registration Document # 2927685 (United Kingdom) [ZIMBABWE].

14. MASTERS INTERNATIONAL, INC., 1905 S. Florida Avenue, Lakeland, FL 33803; US FEIN 133798020 (United States) [ZIMBABWE].

15. PIEDMONT (UK) LIMITED, New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom [ZIMBABWE].

16. RACEVIEW ENTERPRISES, Zimbabwe [ZIMBABWE].

17. RIDGEPOINT OVERSEAS DEVELOPMENTS LIMITED (a.k.a. RIDGEPOINT OVERSEAS DEVELOPMENTS LTD), C/O: Mossack Fonseca & Co. BVI Ltd, Akara Building, 24 DeCastro St, Road Town, Tortola, Virgin Islands, British; P.O. Box 3136, Road Town, Tortola, Virgin Islands, British [ZIMBABWE].

18. SCOTTLEE HOLDINGS (PVT) LTD, 124 Josiah Chinamano Avenue, P.O. Box CY3371, Causeway, Harare, Zimbabwe; New Boundary House, London Road, Sunningdale, Berkshire SL5 0DJ, United Kingdom [ZIMBABWE].

19. SCOTTLEE RESORTS (a.k.a. SCOTTLEE RESORTS LIMITED), 124 Josiah Chinamano Avenue, P.O. Box CY 3371, Causeway, Harare, Zimbabwe; New Boundary House, London Road, Sunningdale, Berkshire SL5 0DJ, United Kingdom [ZIMBABWE].

20. TIMPANI LTD (a.k.a. TIMPANI EXPORT LTD; a.k.a. TIMPANI LIMITED), Mapstone House, Mapstone Hill, Lustleigh, Newton Abbot, Devon TQ13 9SE, United Kingdom; Falcon Cliff, Palace Road, Douglas, Isle of Man, Man, Isle of; Moorgate House, King Street, Newton Abbot, Devon TQ12 2LG, United Kingdom; Business Registration Document # 3547414 (United Kingdom) [ZIMBABWE].

21. TREMALT LTD (a.k.a. TREMALT LIMITED), Virgin Islands, British; Thetford Farm, P.O. Box HP86, Mount Pleasant, Harare, Zimbabwe; Hurst Grove, Sandford Lane, Hurst, Reading, Berkshire RG10 0SQ, United Kingdom; New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom [ZIMBABWE].

*Individuals*

1. BREDENKAMP, John (a.k.a. BREDENKAMP, John A.; a.k.a. BREDENKAMP, John Arnold), Thetford Farm, P.O. Box HP86, Mount Pleasant, Harare, Zimbabwe; 10 Montpelier Square, London SW7 1JU, United Kingdom; Hurst Grove, Sandford Lane, Hurst, Reading, Berkshire RG10 0SQ, United Kingdom; New Boundary House, London Road, Sunningdale, Ascot, Berkshire SL5 0DJ, United Kingdom; Middleton House, Titlarks Hill Road, Sunningdale, Ascot, Berkshire SL5 0JB, United Kingdom; Mapstone House, Mapstone Hill, Lustleigh, Newton Abbot, Devon TQ13 9SE, United Kingdom; Dennerlei 30, Schoten, Belgium; 62 Chester Square, London, United Kingdom; DOB 11 Aug 1940; citizen Netherlands; alt. citizen Suriname; alt. citizen Zimbabwe; Passport ND1285143 (Netherlands); alt. Passport Z01024064 (Netherlands); alt. Passport Z153612 (Netherlands); alt. Passport 367537C (Suriname) (individual) [ZIMBABWE].

2. KECHIK, Mahmood Awang, Ampang Puteri Specialist Hospital, 1, Jalan Mamanda 9, Selangor Darul Ehsan 68000, Malaysia; DOB 22 Aug 1954; citizen Malaysia; nationality Malaysia; Dr. (individual) [ZIMBABWE].

3. RAUTENBACH, Muller (a.k.a. RAUTENBACH, Billy; a.k.a. RAUTENBACH, Muller Conrad); DOB 11 Nov 1950; alt. DOB 23 Sep 1959; citizen Zimbabwe; Passport ZE26547 (Zimbabwe) (individual) [ZIMBABWE].

4. TAVEESIN, Nalinee (a.k.a. TAVEESIN, Nalinee Joy; a.k.a. TAWEESIN, NALINEE), 14th Floor of Modern Tower, Tower 87/110 Sukhumvit 63, Wattana, Bangkok 10110, Thailand; 33 Soi Soonvijai 4, Rama IX Road, Soi 26, Success Tower, Huai Khwang, Bang Kapi, Bangkok 10320, Thailand; 19–8 Soi Passana 3, Sukhumvit Road, Pakanong Nua, Wattana, Bangkok 10110, Thailand; 33 Soi Soonwichai 4 Bangkapi, Huaykhwang, Bangkok 10310, Thailand; DOB 12 Feb 1960; citizen Thailand; nationality Thailand; Passport Z066420 (Thailand); Managing Director (individual) [ZIMBABWE].

Dated: November 25, 2008.

**Adam J. Szubin,**

*Director, Office of Foreign Assets Control.*

[FR Doc. E8–28642 Filed 12–2–08; 8:45 am]

**BILLING CODE 4811–42–P**

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

### PFF Bank & Trust, Pomona, CA; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for PFF Bank & Trust, Pomona, California (OTS No. 01450).

Dated: November 21, 2008.

By the Office of Thrift Supervision.

**Sandra E. Evans,**

*Federal Register Liaison.*

[FR Doc. E8–28484 Filed 12–2–08; 8:45 am]

BILLING CODE 6720–01–M

Federal Register

**Wednesday,**
**December 3, 2008**

## Part II

# Department of Health and Human Services

**Centers for Medicare & Medicaid Services**

**42 CFR Part 440**

**Medicaid Program; State Flexibility for Medicaid Benefit Packages; Final Rule**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Medicare & Medicaid Services**

**42 CFR Part 440**

**[CMS–2232–F]**

**RIN 0938 A048**

## Medicaid Program; State Flexibility for Medicaid Benefit Packages

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule will implement provisions of section 6044 of the Deficit Reduction Act of 2005, which amends the Social Security Act by adding a new section 1937 related to the coverage of medical assistance under approved State plans. It also provides States increased flexibility under an approved State plan to define the scope of covered medical assistance by offering coverage of benchmark or benchmark-equivalent benefit packages to certain Medicaid recipients. In addition, this final rule responds to public comments on the February 22, 2008, proposed rule that pertain to the State Medicaid benefit package provisions.

**DATES:** *Effective Date:* These regulations are effective on February 2, 2009.

**FOR FURTHER INFORMATION CONTACT:** Donna Schmidt, (410) 786–5532.

**SUPPLEMENTARY INFORMATION:**

### I. Background

Under title XIX of the Social Security Act (the Act), the Secretary is authorized to provide funds to assist States in furnishing medical assistance to needy individuals whose income and resources are insufficient to meet the costs of necessary medical services, including families with dependent children and individuals who are aged, blind, or disabled. To be eligible for funds under this program, States must submit a State plan, which must be approved by the Secretary. Programs under title XIX are jointly financed by Federal and State governments. Within broad Federal guidelines, each State determines the design of its program, eligible groups, benefit packages, payment levels for coverage and administrative and operating procedures.

Before the passage of the Deficit Reduction Act (DRA), States were required to offer at minimum a standard benefit package to eligible populations identified in section 1902(a)(10)(A) of the Act (with some specific exceptions, for example, for certain pregnant women, who could be limited to pregnancy-related services). Under section 1902(a)(10)(A) of the Act, this standard benefit package had to include certain specific benefits identified in the definition of ''medical assistance'' at section 1905(a) of the Act. These identified benefits include inpatient and outpatient hospital services, physician services, medical and surgical services furnished by a dentist, rural health clinic services, federally qualified health center services, laboratory and X-ray services, nursing facility services, early and periodic screening, diagnostic and treatment services for individuals under age 21, family planning services to individuals of child-bearing age, nurse-midwife services, certified pediatric nurse practitioner services, and certified family nurse practitioner services. Under section 1902(a)(10)(D) of the Act, the standard benefit package is also required to include home health services.

Section 6044 of the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171), enacted on February 8, 2006, amended the Act by adding a new section 1937 that allows States to amend their Medicaid State plans to provide for the use of benefit packages other than the standard benefit package, namely benchmark benefit packages or benchmark-equivalent packages, for certain populations. The statute delineates what benefit packages qualify as benchmark packages and what would constitute a benchmark-equivalent package. The statute also specifies those exempt populations that may not be included or mandated in the benchmark coverages. To be eligible for funds under this new provision, States must submit a State plan amendment, which must be approved by the Secretary. On March 31, 2006, we issued a State Medicaid Director letter providing guidance on the implementation of section 6044 of the DRA.

### II. Provisions of the Proposed Regulations

We published a proposed rule in the **Federal Register** on February 22, 2008 (73 FR 9714) that implemented the provisions of the DRA of 2005, which amends the Act by adding a new section 1937 related to the coverage of medical assistance under approved State plans. Under this new provision, States have increased flexibility under an approved State plan to define the scope of covered medical assistance by offering coverage of benchmark or benchmark-equivalent benefit packages to certain Medicaid recipients. For a complete and full description of the States' Medicaid Benefit Packages provisions as required by the DRA, see the February 2008 State Flexibility for Medicaid Benefit Packages proposed rule. In the February 2008 proposed rule, we proposed to add a new subpart C beginning with § 440.300 as follows:

*A. Subpart C—Benchmark Packages: General Provisions Sections 440.300, 440.305, and 440.310 Basis, Scope, and Applicability*

At proposed § 440.300 (Basis), § 440.305 (Scope), and § 440.310 (Applicability), the regulations would reflect the new statutory authority for States to provide medical assistance to recipients, within one or more groups of Medicaid eligible recipients specified by the State, through enrollment in benchmark coverage or benchmark-equivalent coverage. A State may only require that individuals obtain benefits by enrolling in that coverage if they are a ''full benefit eligible'' whose eligibility is based on an eligibility category under section 1905(a) of the Act that would have been covered under the State's plan on or before February 8, 2006, and are not within exempted categories under the statute. The proposed regulatory definition of full benefit eligible individuals would include individuals who would otherwise be eligible to receive the standard full Medicaid benefit package under the approved Medicaid State plan, but would not include individuals who are within the statutory exemptions, who are determined eligible by the State for medical assistance under section 1902(a)(10)(C) of the Act or by reason of section 1902(f) of the Act, or who are otherwise eligible based on a reduction of income based on costs incurred for medical or other remedial care (other medically needy and spend-down populations).

*B. Section 440.315 Exempt Individuals*

Proposed § 440.315 would reflect statutory limitations on mandatory enrollment of specified categories of individuals. A State may not require enrollment in a benchmark or benchmark-equivalent benefit plan by the following individuals:

- The recipient who is a pregnant woman who is required to be covered under the State plan under section 1902(a)(10)(A)(i) of the Act.
- The recipient who qualifies for medical assistance under the State plan on the basis of being blind or disabled (or being treated as being blind or disabled) without regard to whether the individual is eligible for SSI benefits under title XVI on the basis of being blind or disabled and including an

individual who is eligible for medical assistance on the basis of section 1902(e)(3) of the Act.

- The recipient who is entitled to benefits under any part of Medicare.
- The recipient who is terminally ill and is receiving benefits for hospice care under title XIX.
- The recipient who is an inpatient in a hospital, nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of the individual's income required for personal needs.
- The recipient who is medically frail or otherwise an individual with special medical needs (as described by the Secretary in section 440.315(f)). For purposes of this section, we proposed that individuals with special needs includes those groups defined by Federal regulations at § 438.50(d)(1) and § 438.50(d)(3) of the managed care regulations (that is, dual eligibles and certain children under age 19 who are eligible for SSI; eligible under section 1902(e)(3) of the Act, TEFRA children; in foster care or other out of home placement; or receiving foster care or adoption assistance). We did not propose a definition for medically frail populations but we invited public comments to assist us in defining this term in the final regulation.
- The recipient who qualifies based on medical condition for medical assistance for long-term care services described in section 1917(c)(1)(C) of the Act.
- The recipient who receives aid or assistance under part B of title IV for children in foster care or an individual with respect to whom adoption or foster care assistance is made available under part E of title IV, without regard to age.
- The recipient who qualifies for medical assistance on the basis of eligibility to receive assistance under a State plan funded under part A of title IV (as in effect on or after the welfare reform effective date defined in section 1931(i) of the Act). This provision relates to those individuals who qualify for Medicaid solely on the basis of qualification under the Temporary Assistance for Needy Families (TANF) rules (that is, the State links Medicaid eligibility to TANF eligibility).
- The recipient who is a woman receiving medical assistance by virtue of the application of sections 1902(a)(10)(ii)(XVIII) and 1902(a) of the Act. This provision relates to those individuals who are eligible for Medicaid based on the breast or cervical cancer eligibility provisions.
- The recipient who qualifies for medical assistance as a TB-infected individual on the basis of section 1902(a)(10)(A)(ii)(XII) of the Act.
- The recipient who is not a qualified alien (as defined in section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) and receives only care and services necessary for the treatment of an emergency medical condition in accordance with section 1903(v) of the Act.

*C. Section 440.320 State Plan Requirements: Optional Enrollment for Exempt Individuals*

At proposed § 440.320, we would allow States to offer exempt individuals specified in § 440.315 the option to enroll into a benchmark or benchmark-equivalent benefit plan. The State plan would identify in its State plan the exempt groups for which this coverage is available. There may be instances in which an exempt individual may benefit from enrolling in a benchmark or benchmark-equivalent benefit package. States would be permitted to elect in the State plan to offer exempt individuals a benchmark or benchmark-equivalent package, but States may not require them to enroll in one. For example, in some States the State employee benchmark coverage may be more generous than the State Medicaid plan. Secretary-approved coverage may offer the opportunity for disabled individuals to obtain integrated coverage for acute care and community-based long-term care services. Additionally, States may be able to better integrate disease management programs to provide better coordinated care which targets the specific needs of individuals with special health needs.

*D. Section 440.325 State Plan Requirements: Coverage and Benefits*

At proposed § 440.325, we set forth the conditions under which a State may offer enrollment to exempt recipients specified in § 440.315. When a State offers exempt recipients the option to enroll in a benchmark or benchmark-equivalent benefit package, the State would inform the recipients that enrollment is voluntary and that the individual may opt out of the benchmark or benchmark-equivalent benefit package at any time and regain immediate eligibility for the standard full Medicaid program under the State plan. The State would inform the recipient of the benefits available under the benchmark or benchmark-equivalent benefit package and provide a comparison of how they differ from the benefits available under the standard full Medicaid program. The State would document in the individual's eligibility file that the individual was informed in accordance with this paragraph and voluntarily chose to enroll in the benchmark or benchmark-equivalent benefit package.

At proposed § 440.325, a State would have the option to choose the benchmark or benchmark-equivalent coverage packages offered under the State's Medicaid plan. A State may select one or all of the benchmark plans described in § 440.330 or establish benchmark-equivalent plans described in § 440.335, respectively.

*E. Section 440.330 Benchmark Health Benefits Coverage*

At proposed § 440.330, benchmark coverage is described as any one of the following:

- Federal Employees Health Benefit Plan Equivalent Coverage (FEHBP—Equivalent Health Insurance Coverage). A benefit plan equivalent to the standard Blue Cross/Blue Shield preferred provider option service benefit plan that is described in and offered to Federal employees under 5 U.S.C. 8903(1).
- State employee coverage. A health benefits plan that is offered and generally available to State employees in the State involved.
- Health Maintenance Organization (HMO) plan. A health insurance plan that is offered through an HMO (as defined in section 2791(b)(3) of the Public Health Service Act) that has the largest insured commercial, non-Medicaid enrollment in the State.
- Secretary approved coverage. Any other health benefits coverage that the Secretary determines, upon application by a State, provides appropriate coverage for the population proposed to be provided that coverage. States wishing to opt for Secretarial approved coverage should submit a full description of the proposed coverage and include a benefit-by-benefit comparison of the proposed plan to one or more of the three benchmark plans specified above or to the State's standard full Medicaid coverage package under section 1905(a) of the Act, as well as a full description of the population that would be receiving the coverage. In addition, the State should submit any other information that would be relevant to a determination that the proposed health benefits coverage would be appropriate for the proposed population. The scope of a Secretary-approved health benefits package will be limited to benefits

within the scope of the categories available under a benchmark coverage package or the standard full Medicaid coverage package under section 1905(a) of the Act.

A State may select one or more benchmark coverage plan options. The State may also specify the benchmark plan for any specific recipient. For example, one recipient may be enrolled in the FEHBP and another may be enrolled into State Employee Coverage at the option of the State.

*F. Section 440.335 Benchmark-Equivalent Health Benefits Coverage*

At proposed § 440.335, we would provide that if a State designs or selects a benchmark plan other than those specified in § 440.330, the State must provide coverage that is equivalent to benchmark coverage. Coverage that meets the following requirements will be considered to be benchmark-equivalent coverage:

• Required Coverage. Benchmark-equivalent coverage includes benefits for items and services within each of the following categories of basic services and must include coverage for the following categories of basic services:

+ Inpatient and outpatient hospital services.

+ Physicians' surgical and medical services.

+ Laboratory and x-ray services.

+ ''Well-baby'' and ''well-child'' care, including age-appropriate immunizations.

+ Other appropriate preventive services, as designated by the Secretary.

• Aggregate actuarial value equivalent to benchmark coverage. Benchmark-equivalent coverage must have an aggregate actuarial value, determined in accordance with proposed § 440.340 that is at least equivalent to coverage under one of the benchmark packages outlined in § 440.330.

• Additional coverage. In addition to the categories of services set forth above, benchmark-equivalent coverage may include coverage for any additional services included in the benchmark plan or described in section 1905(a) of the Act.

• Application of actuarial value for benchmark-equivalent coverage that includes prescription drugs, mental health, vision, and hearing services. Where the benchmark coverage package used by the State as a basis for comparison in establishing the aggregate actuarial value of the benchmark-equivalent package includes any or all of the following four categories of services: Prescription drugs; mental health services; vision services; and hearing services; then the actuarial value of the coverage for each of these categories of service in the benchmark-equivalent coverage package must be at least 75 percent of the actuarial value of the coverage for that category of service in the benchmark plan used for comparison by the State.

If the benchmark coverage package does not cover one of the four categories of services mentioned above, then the benchmark-equivalent coverage package may, but is not required to, include coverage for that category of service.

*G. Section 440.340 Actuarial Report for Benchmark-Equivalent Health Benefit Coverage*

In accordance with 1937(a)(3) of the Act, at § 440.340, we proposed to require a State as a condition of approval of benchmark-equivalent coverage, to provide an actuarial report, with an actuarial opinion that the benchmark-equivalent coverage meets the actuarial requirements of § 440.335.

At § 440.340, we proposed to require the actuarial report to obtain approval for benchmark-equivalent health benefit coverage and to meet all the provisions of the statute. The actuarial report must state the following:

• The actuary issuing the opinion is a member of the American Academy of Actuaries (AAA) (and meets Academy standards for issuing an opinion).

• The actuary used generally accepted actuarial principles and methodologies of the AAA, standard utilization and price factors and a standardized population representative of the population involved.

• The same principles and factors were used in analyzing the value of different coverage (or categories of services) without taking into account differences in coverage based on the method of delivery or means of cost control or utilization used.

• The report should also state if the analysis took into account the State's ability to reduce benefits because of the increase in actuarial value of health benefits coverage offered under the State plan that results from the limitations on cost sharing (with the exception of premiums) under that coverage.

• The actuary preparing the opinion must select and specify the standardized set of utilization and pricing factors as well as the standardized population.

• The actuary preparing the opinion must provide sufficient detail to explain the basis of the methodologies used to estimate the actuarial value or, if requested by CMS, to replicate the State's result.

*H. Section 440.345 EPSDT Services Requirement*

At § 440.345, we proposed to require States to make available EPSDT services as defined in section 1905(r) of the Act that are medically necessary for those individuals under age 19 who are covered under the State plan. We expected that most benchmark or benchmark-equivalent plans will offer the majority of EPSDT services. To the extent that any medically necessary EPSDT services are not covered through the benchmark or benchmark-equivalent plan, States are required to supplement the benchmark or benchmark-equivalent plan in order to ensure access to these services. Individuals mandated into a benchmark or benchmark-equivalent plan and entitled to have access to EPSDT services cannot opt out of the benchmark or benchmark-equivalent plan just to receive these services. While individuals are required to have access to such medically necessary services first under the benchmark or benchmark-equivalent plan, the State may provide wrap-around or additional coverage for medically necessary services not covered under such plan. Any wrap-around benefits must be sufficient so that, in combination with the benchmark or benchmark-equivalent benefits package, an individual would have coverage for his or her medically necessary services consistent with the requirements under section 1905(r) of the Act. The State plan would include a description of how wrap-around benefits or additional services will be provided to ensure that these recipients have access to full EPSDT services under 1905(r) of the Act.

In addition, individuals would need to first seek coverage of EPSDT services through the benchmark or benchmark-equivalent plan before seeking coverage of such through wrap-around benefits.

*I. Section 440.350 Employer Sponsored Insurance Health Plans*

At § 440.350, we proposed that the use of benchmark or benchmark-equivalent benefit coverage would be at the discretion of the State and may be used in conjunction with employer sponsored health plans as a coverage option for individuals with access to private health insurance. Additionally, the use of benchmark or benchmark-equivalent coverage may be used for individuals with access to private health insurance coverage. For example, if an individual has access to employer sponsored coverage and that coverage is determined by the State to be benchmark or benchmark-equivalent, a State may, at its option, provide

premium payments on behalf of the recipient to purchase the employer coverage. Additionally, a State could create a benchmark or benchmark-equivalent plan combining employer sponsored insurance and wrap-around benefits to that employer sponsored insurance benefit package. The premium payments would be considered medical assistance and the State could require the recipient to enroll in the group health plan.

*J. Section 440.355 Payment of Premiums*

At § 440.355, we proposed that payment of premiums by the State, net of beneficiary contributions, to obtain benchmark or benchmark-equivalent benefit coverage on behalf of beneficiaries under this section will be treated as medical assistance under section 1905(a) of the Act.

*K. Section 440.360 State Plan Requirement for Providing Additional Wrap-Around Services*

At § 440.360, we proposed that a State may at its option provide additional wrap-around services to the benchmark or benchmark-equivalent plans. The wrap-around services do not need to include all State plan services. However, the State plan would need to describe the populations covered and the payment methodology for assuring those services. Such additional or wrap-around services must be within the scope of categories of services covered under the benchmark plan, or described in section 1905(a) of the Act.

*L. Section 440.365 Coverage of Rural Health Clinic and Federally Qualified Health Center (FQHC) Services*

At § 440.365, we proposed that a State that provides benchmark or benchmark-equivalent coverage to individuals must assure that the individual has access, through that coverage or otherwise, to rural health clinic services and FQHC services as defined in subparagraphs (B) and (C) of section 1905(a)(2) of the Act. Payment for these services must be made in accordance with the payment provisions of section 1902(bb) of the Act.

*M. Section 440.370 Cost Effectiveness*

At § 440.370, we proposed that benchmark or benchmark-equivalent coverage and any additional benefits must be provided in accordance with Federal upper payment limits, procurement requirements and other economy and efficiency principles that would otherwise be applicable to the services or delivery system through which the coverage and benefits are obtained.

*N. Section 440.375 Comparability*

At § 440.375, we proposed that a State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to comparability.

*O. Section 440.380 Statewideness*

At § 440.380, we proposed that a State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to statewideness.

*P. Section 440.385 Freedom of Choice*

At § 440.385, we proposed that a State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to freedom of choice. States may restrict recipients to obtaining services from (or through) selectively procured provider plans or practitioners that meet, accept, and comply with reimbursement, quality and utilization standards under the State Plan, to the extent that the restrictions imposed meet the following requirements:

(+) Do not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing the benchmark benefit package.

(+) Do not apply in emergency circumstances.

(+) Require that all provider plans are paid on a timely basis in the same manner as health care practitioners must be paid under § 447.45 of the chapter.

*Q. Section 440.390 Assurance of Transportation*

At § 440.390, we proposed that a State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to the assurance of transportation to medically necessary services requirement specified in § 431.53.

**III. Analysis of and Responses to Public Comments**

In response to the February 2008 proposed rule, we received over 1,100 timely items of correspondence. The majority of the commenters represented transportation providers, medical providers, and Medicaid beneficiaries, particularly Medicaid beneficiaries who rely on dialysis treatments. Other commenters represented State and local advocacy groups, national associations that represent various aspects of beneficiary groups, State Medicaid agency senior officials, and human services agencies. In this section, we provide a discussion of the public comments we received on the proposed rule. Comments related to the impact of this rule are addressed in the ''Collection of Information Requirements'' section of this regulation.

Additionally, we published a proposed rule in the **Federal Register** on February 22, 2008 (73 FR 9727) titled, ''Medicaid Program: Premiums and Cost Sharing'' (CMS–2244–P). Comments on CMS–2244–P were also due March 24, 2008 similar to this rule. Some comments for CMS–2244–P were forwarded as comments to this rule (CMS–2232–P). Consistent with the Administrative Procedures Act, CMS is not responding to those comments in this regulation, but we addressed the issues raised by otherwise timely comments in our publication of CMS–2244–F.

*A. General Comments*

*Comments:* A few commenters supported the rule. Some commenters also requested a more restrictive interpretation of the statutory provisions. However, most commenters oppose the rule. Many commenters are concerned that the benchmark or benchmark-equivalent benefit packages are inadequate benefit packages for, among others, individuals with mental illness, children with serious emotional disturbance, the disabled and elderly, individuals with end-stage renal disease, and American Indians. Many of the commenters believed that to enroll Medicaid beneficiaries in benchmark or benchmark-equivalent benefit packages without the assurance of transportation could lead to poorer health outcomes, costlier care because individuals will be forced into hospital emergency rooms, and shifts in costs to the Emergency Medical Services.

*Response:* We thank those commenters who supported the rule. Those who opposed the rule generally raised concerns about the underlying wisdom of the statutory provision at section 1937 of the Act, which this final rule implements. CMS is charged with implementing the statute as written. We address suggestions for restrictive interpretations below in the discussion of specific proposed provisions.

*Comment:* Several commenters believe that the accelerated pace of this short comment period, given the broad implications, will lead to a short-cited, onerous rule that has dangerous health impacts for the poor. This rule was issued in the **Federal Register** on

February 22, 2008. The deadline for submission of comments was March 24, 2008. Other rulemaking has taken a longer period. Given the impact of the discussion, a longer time period is warranted.

Some commenters stated that the 30-day comment period was not sufficient for Tribes to comment on a regulation that could potentially have a significant impact on Tribal communities.

Other commenters noted that while the Department views the rule as merely formalizing its earlier policy statements delivered only to State Medicaid Directors, a 30-day public comment period is too short for meaningful public review, analysis, and comment. Some commenters believe that the 30-day comment period is discouraging of full review and consideration by States.

One commenter requests that the public comment period be extended 60 days for a total of a 90-day comment period. Additional time is needed to provide sufficient time for stakeholders to be able to adequately assess the potential effects of the proposed rule.

*Response:* We disagree with the commenters suggesting that 30 days is too short of a time period to respond to the regulation. Section 553(c) of the Administrative Procedures Act requires that after the publication of a proposed rule, the Agency shall give interested persons an opportunity to participate in the rulemaking. Neither the Administrative Procedures Act nor the Medicaid statute specify a time period for submission of comments. For Medicaid rules we allow 30 days or 60 days based on the complexity and size of the rule, or the need to publish the final rule quickly. We elected a 30-day comment period because of the limited deviation from plain statutory requirements and the interest of getting guidance quickly to States on the DRA flexibilities contained herein. Since this provision of the DRA was effective March 31, 2006 it made sense to provide guidance to States as quickly as possible.

*B. Section 440.300 Basis*

*Comment:* One commenter believed that the proposed limitations on eligibility groups who can be provided alternative benefit packages are overly restrictive. The commenter suggested that the rule should allow application to any eligibility category the State had the option to implement on or before the date of enactment of section 1937 (February 8, 2006). The commenter reasoned that States are continually adding and changing eligibility requirements and these program changes are inherent in Medicaid programs. The commenter asserted that, if the rule is considered beneficial for recipients in eligibility categories that existed before February 8, 2006, it is logical to suppose it would also be beneficial for those created after that date.

*Response:* The language in section 1937(a)(1)(B) of the Act specifies that the State may only exercise the option to offer benchmark or benchmark-equivalent coverage for an individual eligible under an eligibility category that had been established under the State plan on or before February 8, 2006. In an effort to provide States with maximum flexibility, we have interpreted this statutory term to mean any eligibility category listed under section 1905(a) of the Act. Thus, all recipients within a category covered or potentially covered under the State's Medicaid plan would be eligible to participate in a benchmark or benchmark-equivalent plan at the State's option, unless specifically excluded by statute, even when the State makes modifications to the income and resource eligibility levels or methodologies, ages covered, etc., for a group or category after February 8, 2006.

*C. Section 440.305 Scope*

*Comment:* Numerous commenters believed that offering benchmark and benchmark-equivalent benefit packages to certain Medicaid recipients will deter those individuals, including children, from receiving appropriate care. Commenters indicated that individuals with low incomes are likely to forgo needed treatment if all medically necessary services and transportation are not included in the benchmark program. Most commenters believed that our most vulnerable populations, those with chronic medical needs, will be required to choose to provide for their basic needs like food and shelter rather than obtain necessary medical health care because of the rigor created by following a private health insurance model of benefits and the need to provide their own method of transportation.

*Response:* We have developed these policies based on what is provided for in statue. And, since the Medicaid program is administered broadly by the States, they have the flexibility to determine how they will design their programs. We do review and approve all State plan amendments to assure continuity of and access to necessary medical health care.

*Comment:* Other commenters indicated that the DRA does not require that States offer the same Medicaid benefits statewide, meaning States could design different benefit packages for rural and urban areas. States may also ''tailor'' packages for different populations, although the commenter acknowledges, certain groups are exempt from mandatory changes to their Medicaid benefits package. In States where this has already been done, behavioral healthcare advocates report the changes have been unsatisfactory. Several commenters believed that allowing States to ''tailor'' benefit packages would mean that individuals may not have access to the services they need. Benefit packages designed outside the important consumer protections in traditional Medicaid may fail to meet beneficiaries' needs, and will not save money if these individuals experience significant unmet needs that escalate into problems that require treatment in emergency rooms.

One commenter mentioned that private health plans such as those listed as benchmarks under the law, frequently have limited coverage of mental health services. The commenter asserted that few cover any of the intensive community services that are covered by Medicaid under the rehabilitation category or the home and community-based services option. The commenter noted that, under the DRA, these limited mental health benefits can be further reduced by 25 percent of their actuarial value. Other commenters expressed concern that the reliance on commercial benefit plans is inappropriate for Medicaid recipients. Those commenters are concerned that many private insurance plans do not provide adequate mental health services. And other commenters noted that benchmark coverage is likely to prove entirely inadequate for individuals who need mental health services. They noted that children with serious mental and/or physical disorders often qualify for Medicaid on a basis of family income and are not, for various reasons, receiving Supplemental Security Income (SSI) benefits or otherwise recognized as children with disabilities and would not be exempt from mandatory enrollment. In addition, they noted that many low-income parents on Medicaid have been found to have serious depression, which could not be adequately treated with a very limited mental health benefit.

In a similar vein, many commenters believed that the proposed rule has the potential to become the behavioral healthcare Medicaid Trojan horse: it appears harmless but it will reverse hard-fought progress won over years of struggle that brought about equitable, decent care for Medicaid recipients experiencing mental illness or who have

a developmental disability. They asserted that, in the end, these rules will have costlier results and not the desired economizing while also negatively impacting peoples' lives, their well-being and care, and our society.

Another commenter believed that it is critical for beneficiaries with life-threatening conditions such as HIV/AIDS to maintain access to the comprehensive range of medical and support services required to effectively manage HIV disease. The commenter stated that allowing States to ''tailor'' benefit packages in ways that essentially eliminate coverage for critical health services places the health of Medicaid beneficiaries with HIV/AIDS in serious jeopardy.

*Response:* The DRA was enacted in response to States' desire for more flexibility in modernizing their Medicaid programs and adopting benefit programs tailored to the needs of the varied populations they serve. This regulation is consistent with Congressional intent and reflects little interpretive policy by CMS. The DRA provides that States can impose alternative benchmark or benchmark-equivalent benefit packages at their option; that is, States are not required to implement these provisions.

As a result, we believe that the concerns expressed by these commenters on the sufficiency of potential alternative benefit packages should be addressed to States for consideration in determining whether to elect alternative benefit packages, and the scope of such packages.

We disagree that benchmark and benchmark-equivalent programs necessarily lead to barriers to access and care. Benchmark and benchmark-equivalent plans are simply tools that States can use to contain costs and inhibit over-utilization of health care through Medicaid, particularly through the emergency room, while at the same time providing States new opportunities to provide benefit plans to meet the appropriate health care needs of Medicaid populations. We believe States may use this flexibility to create innovative Medicaid programs that further strengthen and support the overall health care system.

This new flexibility provides States the tools they need to provide person-centered care to maximize health outcomes for individuals. These tools may be used in conjunction with other Medicaid and State Children's Health Insurance Program (SCHIP) authorities to strategically align the Medicaid program with today's health care environment and expand access to affordable mainstream coverage and improve quality and coordination of care.

Regarding the coverage of mental health services, children and adults with special medical needs, individuals with HIV/AIDS, and long-term care and community-based service options, benchmark and benchmark-equivalent plans must be appropriate to meet the health care needs of the population being served, which may mean that benchmark coverage may be more generous than a State's Medicaid plan. Benchmark coverage may offer the opportunity for disabled individuals to obtain integrated coverage for acute care and community-based long-term care services. Additionally, States may be able to better integrate disease management programs to provide better coordinated care, targeting the specific needs of individuals with special health needs.

We also think it is important to note that children under the age of 19 are required to receive EPSDT services either as a wrap-around service or as part of the benchmark or benchmark-equivalent benefit plan.

Moreover, certain Medicaid eligibility coverage groups cannot be included in a mandatory enrollment for an alternative benefit package—among others, pregnant women, dual eligibles, terminally ill individuals receiving hospice, inpatients in institutional settings, and individuals who are medically frail or have special medical needs. These individuals may be offered a choice to enroll and, in considering the choice, must be provided a comparison of benchmark benefits versus the traditional Medicaid State plan benefit. Their decision to enroll is voluntary and individuals must be provided the opportunity to revert back to traditional Medicaid at any time. The law provides that States can offer these alternative benefit packages and we do not believe this rule poses a barrier to accessing health care.

*Comment:* One commenter noted that the preamble language refers to meeting the ''* * * needs of today's Medicaid populations and the health care environment.'' The commenter believed the preamble should describe these needs in some detail so that there is a shared understanding of the types of needs this new flexibility is intended to address.

*Response:* We agree that it is important to understand the needs of today's Medicaid populations and the health care environment. States requested maximum flexibility in designing their Medicaid programs in order to provide appropriate health care coverage to our Nation's most vulnerable populations and to maintain growth and provide for the sustainability of the Medicaid program over the long term. Congress, in working with our Nation's leaders, responded and enacted the DRA of 2005.

In providing for benchmark benefit packages, several innovative ways of providing coverage to the Medicaid populations have been provided to States. Benchmark options include Federal Employees Health Benefits Plan Equivalent coverage, State Employee coverage, Health Maintenance Organization coverage, or Secretary approved coverage. States have the option of considering Employer Sponsored Insurance coverage as long as the Employer Sponsored Insurance coverage meets the criteria of benchmark coverage. States can also consider benchmark-equivalent coverage as long as the coverage includes basic services consisting of inpatient and outpatient hospital services, physicians' surgical and medical services, laboratory and x-ray services, well-baby and well-child care including age-appropriate immunizations, and other appropriate preventive services, such as emergency services. Specifically, benchmark plans can be designed to address the specific health care needs of specific populations, and a State may select one or more benchmark coverage options. The flexibility granted to States in considering these options provides that States can tailor benefits to better meet the needs of their low-income populations.

*Comment:* One commenter stated that the proposed rule, read together with other CMS rules like the citizenship documentation requirement and CMS's SCHIP crowd-out directive of August 17, 2007, create major barriers to access to appropriate health care, and that the proposed rule has a devastating impact on the low-income populations. In particular, some commenters raised concerns about requirements for Native Americans to prove both citizenship and identity in order to obtain Medicaid services. Commenters also raised concerns about the SCHIP review strategy outlined in an August 17, 2007 letter sent to State Health Officials. And commenters asserted that other proposed rules released by CMS like the Rehabilitation Rule and the Targeted Case Management Rule coupled with this rule will have a devastating effect on individuals in need of transportation since these rules also eliminate non-emergency medical transportation services.

*Response:* We disagree that providing States with benefit flexibility creates

barriers to accessing appropriate care and instead contend that this provides flexibilities to States in an effort to create benefit packages that appropriately meet the needs of their Medicaid populations. Citizenship documentation requirements, the August 17 State Health Officials letter, and the Rehabilitation and Case Management requirements are not part of this rule and we do not address them here. This regulation implements the statutory provisions of section 1937, and CMS policy discretion was very limited.

*Comment:* Several comments were provided by organizations that have an interest in how the benchmark and benchmark-equivalent benefit packages impact American Indians and Alaska Natives (AI/ANs). The commenters believed that alternative benefit packages serve as a substantial barrier to AI/AN enrollment in the Medicaid program. They noted that, because of the Federal Government's trust responsibility to provide health care to AI/ANs, implementing benchmark and benchmark-equivalent benefit packages have specific tribal implications that were not addressed in these proposed rules. Several commenters believed that AI/ANs should be exempt from mandatory enrollment in benchmark and benchmark-equivalent benefit programs entirely.

*Response:* In Medicaid, there is no statutory basis to exempt AI/ANs from Medicaid alternative benefit provisions. Section 1937 of the Act does not provide for such an exemption. Section 1937 provides some specific exemptions from mandatory enrollment into benchmark or benchmark-equivalent benefit packages and it is possible that some AI/ANs would fit into one of these exempt groups. Section 1937 does not give CMS authority to identify additional exempt groups.

To address the unique needs of the AI/AN population, we recommend working with States to ensure that alternative benefit packages recognize the unique services offered by IHS and tribal providers, and the unique health needs of the AI/AN population.

*Comment:* One commenter contended that there are no provisions to require States to ensure that AI/ANs continue to have access to culturally competent health services through the Indian Health Service (IHS) or tribally operated health programs. The commenter stated that the proposed rules allow States to offer coverage without regard to comparability, statewideness, freedom of choice, the assurance of transportation to medically necessary services, and other requirements. There are large disparities between AI/ANs' health care status and the health care status of the rest of the country. The commenter added that for AI/ANs, the patient should always have the option of the provider being an Indian Health Service or tribal health program.

*Response:* State Medicaid programs provide health care services to many diverse populations including AI/ANs. We believe that culturally competent services are important for all Medicaid beneficiaries and access to care and facilities in remote parts of the country, where it is especially difficult to find providers who will agree to participate in the Medicaid program, is paramount. The Medicaid statute does not provide any special protections for benefit packages applicable to AI/AN recipients, but this does not mean that benefit packages will be deficient. As noted above, to address the unique needs of the AI/AN population, we recommend working with States to ensure that alternative benefit packages recognize the unique services offered by IHS and tribal providers, and the unique health needs of the AI/AN population. Futhermore, AI/AN beneficiaries are not prevented from going to IHS or tribal facilities for health care as a result of this rule.

*Comment:* Another commenter stated on behalf of AI/ANs, the Indian and tribal health care system is woefully under-funded and tribal providers rely on Medicaid revenues to supplement that meager funding. Forcing AI/ANs into benchmark plans, which may have dramatically reduced coverage or payments, would thus jeopardize Indian health, injure tribal health systems, and thereby violate the Federal trust obligation to care for the health needs of Indian people.

*Response:* CMS does not anticipate a dramatic decrease in services furnished under benchmark plans versus traditional Medicaid benefits. In fact, to date CMS has approved nine benchmark benefit programs, and most offer State plan services plus additional services like preventive care, personal assistance services, or disease management services. Indeed, for individuals under the age of 19, section 1937 ensures that all needed services will be available through the requirement that EPSDT services must be provided either as wrap-around to, or as part of, the benchmark or benchmark-equivalent plan.

Moreover, section 1937 does not provide a basis to exclude IHS or tribal health providers from participation in the delivery system for alternative benefits. In terms of the assertion of overall under-funding for IHS and tribal health programs, CMS does not determine those funding levels.

*Comment:* Some commenters believed that the proposed rule did not comply with the Department of Health and Human Services' Tribal Consultation policy, since CMS did not consult with Tribes in the development of these regulations before they were promulgated.

These commenters noted that CMS did not obtain advice and input from the CMS Tribal Technical Advisory Group (TTAG), even though the TTAG meets on a monthly basis through conference calls and holds quarterly face to face meetings in Washington, DC. They also noted that CMS did not utilize the CMS TTAG Policy Subcommittee, which was specifically established by CMS for the purpose of obtaining advice and input in the development of policy guidance and regulations.

These commenters also noted that the proposed rule does not contain a Tribal summary impact statement describing the extent of the tribal consultation or lack thereof, nor an explanation of how the concerns of Tribal officials have been met. Several commenters request that these regulations not be made applicable to AI/AN Medicaid beneficiaries until Tribal consultation is conducted, or be modified to specifically require State Medicaid programs to consult with Indian Tribes before the development of any policy which would require mandatory enrollment of AI/ANs in benchmark or benchmark-equivalent plans. One commenter suggested that this consultation should be similar to the way in which consultation takes place with Indian Tribes in the development of waiver proposals. And, a commenter urged that, after appropriate tribal consultation and revision reflecting these and other comments, the rule be republished with a longer public comment period.

One Tribe commented that the proposed rule does not honor treaty obligations for health services that are required by the Federal Government's unique legal relationship with Tribal governments.

*Response:* CMS currently operates under the Department of Health and Human Services' Tribal Consultation Policy. The Departmental guidelines provide information as to the regulatory activities that rise to the level that require consultation (include prior notification of rulemaking). We have considered the Departmental guidelines and believe that there was no requirement for consultation on this rule, since the effect on AI/AN

recipients results from the statute itself, and not this rule. The rule itself does not have a direct effect on such individuals, or on the relationship between the Federal government and Tribes. Therefore, we have concluded that this rule does not reach the threshold of requiring consultation.

We encourage States which decide to implement alternative benefit packages to consult with Tribes and notify them whenever possible on policies that will directly affect the Tribes. In terms of exempting AI/ANs from benchmark plans, it is important to note that this rulemaking was taken directly from provisions of section 1937 of the Act, as added by section 6044 of the DRA. These provisions give States increased flexibilities in the management of their Medicaid programs. This regulation exempts from mandatory enrollment in an alternative benefit package the groups specifically set forth in section 1937. The statute provides no authority to mandate exemption of other groups. It is possible that some AI/ANs fit into one of the exempt groups.

These regulations implement section 1937 of the Act, as enacted by Congress, and do not address treaty rights of American Indians. These regulations neither diminish nor increase such treaty rights.

*Comment:* Several commenters believed that States should not have the ability to create benchmarks that allow for increases in cost sharing. Specifically, States can establish a benchmark coverage package that requires copays for health care access, whereby the cost sharing will actually be a limitation on coverage. However, if the selected benchmark plan indicates that it provides coverage for only half of the cost of mental health services, CMS views that as a coinsurance requirement rather than as a limitation on coverage. Premiums and cost sharing act as a deterrent to those receiving health care and may cause low-income populations to choose between health care and basic needs such as food. The commenter indicated that Native Americans and other low-income groups should be exempt from premiums and cost-sharing requirements.

*Response:* This rule concerns new flexibility for States in providing health care coverage through alternate benefit packages that was authorized under section 1937 of the Act. To the extent that these benchmark packages impose premiums or cost sharing, this final regulation stipulates that any cost sharing and premiums for recipients may not exceed cost-sharing limits applicable under sections 1916 and 1916A of the Act. Under section 1916A of the Act, there are tiered individual service limits based on family income, and an aggregate cap of 5 percent of family income. These limits protect individuals in benchmark plans.

It is important to note, first, that alternative benefit package programs are at a State's option. Second, numerous Medicaid eligibility categories are exempt from mandatory enrollment in alternative benefit packages and can be enrolled only voluntarily. Such individuals must be provided a comparison of the benchmark option versus the State plan option before they choose to enroll. That comparison would include information on the cost-sharing obligations of beneficiaries. In choosing the benchmark option over the State plan option, these individuals would thus have made an informed choice. And if the benchmark option is not meeting the exempt individual's needs, they may revert back to traditional Medicaid at any time.

*Comment:* One commenter urged CMS to add provisions to provide special protections for individuals with disabilities, dual-eligibles, and persons with other chronic medical conditions to ensure access to benchmark packages that are uniquely designed to address physical impairments and rehabilitation needs.

Another commenter believed CMS should require State Medicaid agencies to provide access to care management and care coordination services to Medicaid recipients who are incapable of managing their benchmark plan services. The commenter further believed that home health services should be included in all benchmark plan packages.

Several commenters recommended that all State programs include prevention services and promote health, wellness, and fitness. Physical therapists are involved in prevention by promoting health, wellness and fitness, and in performing screening activities.

One commenter is concerned that the managed care model is better suited for a ''well'' population as opposed to children with chronic special health care needs and adults with disabilities.

*Response:* To the extent that the commenter is concerned that alternative benefit packages will result in a reduction in services, we do not believe that will necessarily be the case. For the nine benchmark State plan amendments approved to date, most offer traditional State plan services as well as additional services like prevention and disease management.

By tying benefit flexibility to benchmark plans, Congress ensured that alternative benefit packages will be similar to those available in the marketplace. This protects Medicaid recipients from significant reductions in benefits. Benchmark options include Federal Employees Health Benefits Plan coverage, State Employee coverage, coverage offered by a Health Maintenance Organization in the State with the largest commercial non-Medicaid population, or Secretary approved coverage. States have the option of considering Employer Sponsored Insurance coverage so long as the Employer Sponsored Insurance coverage meets the criteria of benchmark coverage. States can also consider benchmark-equivalent coverage as long as the coverage includes basic services such as inpatient and outpatient hospital services, physicians' surgical and medical services, laboratory and x-ray services, well-baby and well-child care including age-appropriate immunizations, and other appropriate preventive services. We have determined that other appropriate preventive services should include emergency services.

Benchmark equivalent plans may include care management, care coordination, and/or home health services, but it is possible that some plans will not include these services and we do not believe that a requirement that States include these specific services would be consistent with the statutory goal of increasing State flexibility.

Another important protection from benefit reduction is that the alternative benefit package is required to include the EPSDT benefit for children under the age of 19. If the services are not provided as part of the benchmark or benchmark-equivalent plan, these services must be provided by the State as wrap-around benefits. Further, States, at their option, can provide for additional services or wrap-around services to benchmark or benchmark-equivalent programs.

Another protection is that exempt individuals have the opportunity to make an informed choice before enrolling in benchmark or benchmark-equivalent plans. This includes the requirement that States must provide exempt individuals with a comparison of the benefits included in the benchmark or benchmark-equivalent plan versus the benefits included in traditional State plan coverage. If the benchmark or benchmark-equivalent is not meeting the exempt individual's health care needs, the exempt individual has the option to return to State plan coverage immediately. If the exempt individual is in need of these services and they are not offered in the

benchmark plan, the individual can return to the regular Medicaid benefit package.

*Comment:* One commenter believed current regulations governing managed care in Medicaid that describe the information States must provide and how that information should be provided should be incorporated in the rule governing benchmark benefit plans. The information should include a comparison of features between Medicaid and the benchmark plan, whenever they differ.

Other commenters urged CMS to allow States to deviate from the lock-in provisions of Medicaid managed care regulations at 42 CFR part 438. They assert that, if beneficiaries covered by an alternative benefit package, rather than full Medicaid benefits, can pick and choose benefits during an enrollment period by plan-hopping, plans will have no way to establish cost-effective premiums tied to the limited benefit package. The commenters requested that CMS allow States providing alternate benefit packages to offer as little as a 30-day change period after initial assignment, and that differences in covered benefits be excluded as a justifiable cause for beneficiaries to switch health plans after the change period.

*Response:* We have revised the regulation at § 440.305 to incorporate compliance with managed care requirements at section 1932 of the Act and at 42 CFR part 438 of Federal regulations, except when the State demonstrates that such requirements are impractical in the context of, or inconsistent with, methods of offering coverage that is appropriate to meet the needs of the targeted population. This would mean that, in providing information to beneficiaries who are offered managed care plans to obtain alternate benefit coverage, States would be required to comply with the requirements at § 438.10, so that States must provide all enrollment notices, informational materials, and instructional materials relating to the enrollees and potential enrollees in a manner and format that may be easily understood. This informational material must include, among other things, information concerning enrollment rights and protections; any restrictions on freedom of choice among providers; procedures for obtaining benefits including prior authorization requirements; information on grievances and fair hearings procedures; information on physicians, the amount, duration, and scope of benefits; and the process and procedures for obtaining emergency services.

In order to maintain State flexibility, State plan amendments will be reviewed on an individual case-by-case basis and could provide for exceptions from managed care requirements when impractical or inconsistent with the methods of delivering appropriate coverage to the targeted population. This would mean that, if States can meet the standard of offering benchmark or benchmark-equivalent coverage that is appropriate to meet the health care needs of the targeted population, CMS would consider State program designs that require flexibility in this regard.

*Comment:* Some commenters believed that CMS should require that all non-managed care plans ensure adequate access to providers that accept assignment of benefits and bill benchmark plans directly.

*Response:* If States choose to offer benchmark or benchmark-equivalent plans to Medicaid beneficiaries, States must assure that access to providers and claims payment must be in compliance with current Federal regulations.

*Comment:* One commenter raised potential problems of billing alternate benefit insurers. The commenter believed CMS should ensure that benchmark plan options should impose no additional administrative burdens on participating Medicaid providers. Providers should not be depended upon to refund payments and rebill plans in the event that a plan is billed for a Medicaid recipient who is retroactively enrolled into a different plan. Individual plan requirements should be streamlined into the existing system to minimize complexity to the already complex billing requirements.

*Response:* This rule does not address provider billing issues because this is the kind of administrative issue that is more properly handled on a State level. Provider billing procedures will vary among the States based on the particular health care delivery system in the State at issue. We do not anticipate that provider billing under an alternative benefit program will necessarily differ from the way in which providers currently bill for Medicaid services, or that providers will have to establish new processes and systems to calculate, track, bill, and report benchmark services. Moreover, because most States already offer managed care enrollment, they already have experience ensuring coordination of provider claims among different managed care entities. Thus, we do not believe that the offering of alternate benefit packages will impose significant administrative burdens on providers.

*Comment:* One commenter asserted that the final rule should require States to provide an exceptions process in which beneficiaries can obtain services not covered by a benchmark plan when they are medically necessary, and to educate beneficiaries about how to pursue this essential safeguard.

Similarly, States should also be required to provide hardship exemptions if beneficiaries are unable to meet cost-sharing requirements in benchmark plans and should review each beneficiary's eligibility category to ensure they meet statutory requirements for assignment to benchmark plans.

*Response:* CMS agrees with the commenter that States should review each beneficiary's eligibility category to ensure they meet statutory requirements for assignment to benchmark plans. The requirements for which mandatory enrollment can occur are outlined in § 440.431 and specify that only full benefit eligibles can be mandatorily enrolled in benchmark benefit packages. We have required in § 440.320 that exempt individuals be fully informed regarding the choice for enrollment in benchmark or benchmark-equivalent plans. We have also required that States comply with the managed care regulations including the information requirements for enrollees and potential enrollees.

We are not requiring that States provide a process for beneficiaries to obtain services not covered by a benchmark plan when they are medically necessary, because such a process is not authorized by section 1937 of the Act. Benchmark or benchmark-equivalent plans offered to beneficiaries constitute the individual's medical assistance health care coverage and the services provided by the benchmark plan are expected to be appropriate to meet the needs of the population it serves.

It is important to note that for those who voluntarily enroll in benchmark or benchmark-equivalent plans, if medically necessary services are needed that are not provided as part of the benchmark program, such individuals can revert to traditional Medicaid coverage at any time to receive the services. Requests for individuals to opt out must be acted upon promptly. Further, we included a requirement for States to have a process in place to ensure continuous access to services while any opt out request is being processed. See 42 CFR 440.320.

In terms of cost sharing, States are required to ensure that benchmark or benchmark-equivalent plans comply with the cost-sharing requirements at sections 1916 and 1916A of the Act, which includes the provision that premiums and/or cost sharing not

exceed 5 percent of the family's income. These sections provide States with the flexibility to consider individuals who are unable to meet their cost-sharing obligations and establish a course of action that will be taken in such an instance. Exemptions for individuals in the case of undue hardship, however, are a state option and may not be available in all States.

*Comment:* One commenter believed alternative plans should include a provision for mandatory cost sharing, where applicable, in return for treatment or services. Uncollected cost-sharing places an unfair financial burden on providers.

*Response:* States are required to ensure that benchmark or benchmark-equivalent plans comply with the cost-sharing requirements at Sections 1916 and 1916A of the Act. These sections provide that States can impose premiums and cost sharing on certain Medicaid beneficiaries, and Section 1916A provides for enforcement of such premiums and cost sharing on certain Medicaid beneficiaries (certain limitations do apply). The enforcement of premiums and cost sharing is at a State's option. CMS is not requiring that cost sharing be mandated in return for treatment or services, since this would be inconsistent with the statutory language provided by Congress in the DRA.

*Comment:* One commenter mentioned that because of the potential for harm to beneficiaries, this rule should mandate strong requirements for meaningful public input at both the Federal and State level when States propose use of alternative benefit packages. Only a full open process in which all stakeholders can participate will provide the thorough, thoughtful analysis needed to determine whether specific changes will foster genuine efficiency or threaten beneficiaries' access to appropriate care.

These commenters noted that the State plan amendment process provides almost no meaningful opportunity for public input. They complained that States can implement changes the day after publishing a notice, with no requirement to acknowledge or address comments.

The commenter suggested that meaningful opportunities for public comment could include well-publicized and easily accessible public hearings, ample opportunity for stakeholders to provide written comments, and a requirement that State and Federal officials provide written responses to comments.

*Response:* We agree that States should seek public input concerning plans to offer alternative benefit packages. Thus, we are requiring in § 440.305 Scope that States secure public input prior to any submission to CMS of a proposed State plan amendment that would provide for an alternative benefit package. We are not requiring any specific process to secure public input, in order to permit States flexibility to design and use a public input process that meets State needs.

We note that there are already a number of Federal requirements for States to provide public notice of, and seek public involvement in, Medicaid program issues. CMS requires in § 447.205 that States must provide public notice of any significant proposed change in its methods and standards for setting payment rates for services. There are public process requirements for setting institutional payment rates at section 1902(a)(13)(A) of the Act. We also require in § 438.50(b)(4) that States offering benefits through a mandatory managed care program must specify the process the State uses to involve the public in both design and initial implementation of the managed care program and the methods it uses to ensure ongoing public involvement once the managed care program has been implemented. Additionally, States submitting a section 1115 demonstration proposal must provide a written description of the process the State will use for receipt of public input into the proposal. (See 59 FR 49249).

*Comment:* One commenter suggested that CMS require States to include in Medicaid contracts with alternative benefit packages provisions that require fair reimbursement for providers at rates no less than rates paid under the traditional Medicaid program, including a reasonable dispensing fee for pharmacy providers.

Further, the commenter believed that CMS should prohibit States from procuring contracts that contain mail order prescription requirements for Medicaid recipients. The commenter asserts that Medicaid recipients who are required to enroll in benchmark plans should have the option of receiving pharmacy services in a retail pharmacy setting. CMS should also require that contracts contain an assurance that allows extended quantities of medications from retail pharmacies for Medicaid recipients receiving treatment for chronic illnesses.

*Response:* Rate setting is a process that States undertake with their contracted providers. It is outside the scope of this rule, and was not addressed by the provisions of section 1937 of the Act. Nor did section 1937 address or limit the use of mail order prescription requirements, or otherwise address or limit the coverage of, or payment for, prescription drugs. These issues are outside of the scope of this rule.

*Comment:* One commenter recommended that CMS include in its rule an evaluation of the impact on beneficiaries of the benchmark benefit packages.

*Response:* CMS points the commenter to the ''Regulatory Impact Analysis'' in section VI.B ''Anticipated Effects'' of this regulation.

*D. Section 440.310 Applicability*

*Comment:* One commenter disagreed that the medically needy population should be exempt from participating in benchmark plans. The commenter believed the rule should permit voluntary enrollment of medically needy into benchmark plans in States such as Minnesota which provide full benefits across the board to both categorically and medically needy. Section 1937 of the Act only expressly prohibits required participation by the medically needy but is silent as to whether they can be voluntarily enrolled. It is illogical for CMS to interpret Congressional intent to permit scaled back benefit coverage for the categorically needy, while shielding the medically needy from scaled back benefit packages.

*Response:* We agree with the commenter's suggestion that medically needy populations may be offered voluntary enrollment in an alternative benefit package. Thus, we have revised the rule at § 440.315 ''Exempt Individuals'' to indicate that benchmark and benchmark-equivalent benefits can be offered as a voluntary option to medically needy or those eligible as a result of a reduction of countable income based on costs incurred for medical care.

*E. Section 440.315 Exempt Individuals*

*Comment:* One commenter believed that these alternative benefit packages should provide exemptions to additional Medicaid coverage groups. Other commenters suggested that CMS use its discretion to expand the categories of exempt individuals to include adults with serious mental illness and children with serious emotional disturbances.

Some commenters believed that all people with mental illness should be exempt.

*Response:* The statute does not authorize CMS to exempt additional categories of individuals from alternate benefit package requirements. We have included the medically needy with the

list of exempt populations because the medically needy population is effectively exempted by exclusion from the definition of ''full benefit eligible''.

We note that we have allowed States flexibility to define the exempt group of ''medically frail and special needs'' individuals, and States could include in this group, for example, children with serious emotional disturbances and individuals with mental illness.

We encourage States to broadly define medically frail and/or individuals with special medical needs to include these individuals.

*Comment:* One commenter requested a definition for exempt individuals ''who qualify for Medicaid solely on the basis of qualification under the State's TANF rules.'' The commenter noted that no individual can qualify to receive Medicaid benefits solely on the basis of their TANF eligibility, since TANF is not linked to Medicaid.

*Response:* We released a State Medicaid Director's letter on June 5, 1998 in which CMS provided guidance that Medicaid eligibility is not tied under Federal law to States' TANF eligibility criteria.

The impact of this exemption in the context of alternative benefit packages would be that only individuals receiving medical assistance solely on the basis of the individual's TANF eligibility can be exempt from mandatory enrollment into benchmark or benchmark-equivalent packages. Because we believe linking does not currently occur in State Medicaid programs, we believe there are no individuals affected by this exemption. It is important to note that individuals eligible under section 1931 of the Act can be mandatorily enrolled in benchmark or benchmark-equivalent plans and are also not affected by this exemption.

*Comment:* A commenter stated the proposed rule defines the exempt ''special medical needs'' group to include two of the three groups that are also exempt from mandatory enrollment in managed care plans under section 1932(a)(2) of the Act, ''dual eligibles'' and certain children. However, the proposed rule does not exempt the third group that is exempt from mandatory enrollment in managed care plans, AI/ANs. Several commenters believed that the same compelling policy reasons for excluding AI/ANs from mandatory managed care support excluding them from mandatory enrollment in benchmark plans, and request that we revise the rule to be consistent with current policy described in the Medicaid managed care rule of 2002.

*Response:* The commenter pointed out that we mistakenly confused two distinct groups in our definition of ''individuals with special needs'' and included individuals eligible for Medicare as a special needs population when it is identified in section 1937 as a separate exempt population. That was a misreading of the statute and we have deleted that reference. Section 1937(a)(2)(iii) of the Act exempts individuals entitled to Medicare benefits (dual eligibles), regardless of medical need, from mandatory enrollment in an alternative benefit package. There is a separate statutory exempt category at section 1937(a)(2)(vi) for individuals who are medically frail or have special medical needs. This final regulation includes both of these groups separately.

Specifically, in the proposed rule, we specified that ''individuals with special needs'' means the populations identified in § 438.50(d)(1) and § 438.50(d)(3). The reference to § 438.50(d)(1) was the erroneous reference to the dual eligible population discussed above. The reference to § 438.50(d)(3) was made because that population was a pre-existing definition of the statutory term ''children with special medical needs'' contained at section 1932(a)(2)(A) of the Act. We did not contain a separate definition of adults with special medical needs.

After reviewing public comment, we have determined to allow States flexibility to adopt reasonable definitions of ''individuals with special medical needs'' as long as that definition includes the children specified in § 438.50(d)(3).

We recognize that Congress included special protections for American Indians under the managed care provisions at section 1932(a)(2)(C) of the Act, but we must also recognize that those special protections were not included under section 1937. It is possible that the managed care protections were based on the fact that American Indians have access to the IHS and tribal health care delivery system, and there was concern about mandating enrollment in a managed care plan that would not be consistent with that health care delivery system.

While AI/ANs are not a statutory group that is exempt from enrollment in an alternative benefit package, they remain exempt from mandatory enrollment in managed care. As a result, a State that operates an alternative benefit package through managed care providers must provide AI/ANs with a health care delivery system that is consistent with the special protections related to managed care enrollment contained in section 1932(a)(2)(C) of the Act.

*Comment:* One commenter believed that States may be discouraged from pursuing the benchmark option because of the extra work required for determining eligibility, along with the fact that potential savings may be limited. The commenter asked that CMS not impose any additional definition of sub-groups that must be identified and carved out of benchmark plans.

*Response:* CMS does not believe there is extra work involved in determining eligibility that would reduce potential savings. CMS currently has approved nine State plan amendments offering benchmark benefits to Medicaid beneficiaries. Some States have converted some of their section 1115 populations into State plan populations covered through benchmark benefit packages. CMS also has several benchmark State plan amendments pending Federal review. We would like to point out that this Medicaid State plan option was modeled partly based on the success seen in separate SCHIP programs as well as in section 1115 demonstrations with similar flexibility. Additionally, CMS has identified in section VI of the ''Regulatory Impact Analysis'' of this regulation that savings can accrue if States choose to adopt alternative benefit programs and that savings will be achieved through cost avoidance of future anticipated costs by providing appropriate benefits based on meeting a population's health care needs, achieving appropriate utilization of services, and through gains in efficiencies through contracting. We believe States will be able to take greater advantage of marketplace dynamics within their State, and we anticipate that a number of States will use this flexibility to create programs that are similar to their SCHIP programs. We believe that because States are no longer tied to statewideness and comparability, States will be able to offer individuals and families different types of plans consistent with their health care needs and available delivery systems.

*Comment:* One commenter asked for additional clarification of the phrase ''or being treated as being blind or disabled'' in § 440.315 of this regulation.

*Response:* This phrase needs to be interpreted by each State in light of the particular eligibility conditions in that State. For example, the phrase could refer to 209(b) States, since States with this classification can have a more restrictive definition of blindness or disability. The term could also refer to one of the working disabled groups, since one group has a categorical requirement that the person have a

medically determinable severe impairment, which does not exactly match the criteria for a determination of ''disabled''. And the Territories operate on a different definition of blindness and disability than the 50 States.

*Comment:* Some commenters stated that the proposed rule exempts from mandatory enrollment the ''medically frail.'' Several commenters suggested this term be given specific meaning in the rule. They suggested it include anyone who is eligible for or is receiving Medicare or Medicaid services for home health, hospice, personal care, rehabilitation or home and community-based waivers, or who is at imminent risk of need for these types of services.

Another commenter suggested this group be defined as individuals with multiple medical conditions and/or a chronic illness.

*Response:* We have not defined this term in this rule and, after considering public comment on the issue, have determined to allow State flexibility in adopting a reasonable interpretation. CMS will require that States offering alternative benefit packages to inform CMS as to their definition of ''medically frail.'' States will be required to include information regarding which population groups will be mandatorily enrolled in the benchmark program and will need to ensure that enrollment is optional for exempt populations, including individuals defined by the State as ''medically frail.'' Additionally, CMS intends to interpret the required public input process, to include informing interested parties of the State's proposed definition of ''medically frail.''

*Comment:* Another commenter suggested CMS use the existing HHS (Maternal and Child Health Bureau) definition of ''children with special health care needs'': ''Children who have or are at increased risk for a chronic physical, developmental, behavioral, or emotional condition and who also require health and related services of a type or amount beyond that required by children generally.''

Other commenters believed the ''special medical needs individuals'' should include adults who meet the Federal definition of an individual with serious mental illness and children who meet the Federal definition of children with serious emotional disturbance, as promulgated by the Substance Abuse and Mental Health Services Administration (SAMHSA). The SAMHSA definition would include some individuals who, for one reason or another, are not eligible as persons with a disability, but nevertheless are significantly impaired by their mental disorder.

*Response:* In the proposed rule, we defined individuals with special medical needs to be consistent with § 438.50(d)(3), which implements and interprets the term ''children with special medical needs'' used in section 1932(a)(2)(A) of the Act. This definition refers to children under age 19 who are eligible for SSI, section 1902(e)(3) of the Act TEFRA children, children in foster care or receiving other out of home placement, children receiving foster care or adoption assistance or are receiving services through a community based coordinated care system.

We appreciate commenters' suggestions of additional populations for inclusion in the definition of special medical needs. In this final rule, we are allowing States flexibility to adopt a reasonable definition of the term. CMS encourages States to consider all of these individuals for inclusion in the definition of ''individuals with special medical needs.''

To maintain maximum State flexibility, we are thus not imposing a Federal definition other than requiring that the population include at least those children identified in § 438.50(d)(3). CMS will require that States offering alternative benefit packages inform CMS as to their definition of ''special medical needs.'' States will be required to ensure that exempt populations, including individuals with ''special medical needs'' are not mandatorily enrolled in alternative benefit packages, but are instead offered an informed choice. Additionally, CMS intends to interpret the required public input process to include informing interested parties as to the proposed definition of ''special medical needs.''

*F. Section 440.320 State Plan Requirements—Optional Enrollment for Exempt Individuals*

*Comment:* One commenter supported our regulation at § 440.320 and appreciated the willingness of CMS to provide for optional enrollment of otherwise exempt individuals. Several other commenters urged CMS to require States to provide more information and assistance to exempt individuals who are given the option to enroll in alternative coverage.

*Response:* We agree with the commenter that States should provide information and assistance to exempt individuals who are given the option to enroll in alternative coverage so they can make an informed choice. We proposed in § 440.320 that States must inform the recipients that enrollment is voluntary and that the individual may opt out of the benchmark or benchmark-equivalent benefit package at any time and regain immediate eligibility for the standard full Medicaid program under the State plan. We also proposed that States must inform the recipient of the benefits available under the benchmark or benchmark-equivalent benefit package and provide a comparison of how the benefits differ from the benefits available under the standard full Medicaid program. We also required that the State document in the individual's eligibility file that the individual was informed and voluntarily chose to enroll in the benchmark or benchmark-equivalent benefit package.

After considering public concerns as to the importance of the informed choice process, we have revised the proposed rule at § 440.320(a)(1) to require that the State must ''effectively'' inform the individuals. To the extent that the informed choice process continues to raise concerns, we may issue guidance as to what processes are necessary to insure that the informed choice process is effective.

*Comment:* One commenter believed the proposed rule was silent on the requirement that the State provide information in plain language that is understood by the individual, parent, or guardian including clear instructions on how to access EPSDT services not provided by the benchmark plan and how to opt out.

*Response:* We agree that it is important to provide information in plain language and individuals should be provided clear instructions on how to access EPSDT services not provided by benchmark plans. Further, individuals should also receive information on how to opt out of benchmark plans. We are requiring in § 440.320 that States effectively inform exempt individuals of the choice, and provide sufficient information in order to make an informed choice, including a comparison of benefits. Exempt individuals must be afforded the opportunity to opt out of benchmark or benchmark-equivalent coverage if it is determined that the coverage is not meeting their health care needs.

In addition, when alternative benefit packages are furnished through managed care contractors, all managed care requirements apply, as indicated at § 440.305(e). For managed care entities, pursuant to § 438.10, all informational materials and instructional materials relating to enrollees and potential enrollees must be provided in a manner and format that may be easily understood.

*Comment:* Some commenters stated that the rules should provide for

immediate revocation of any voluntary election at the discretion of those excluded individuals who elect an alternative plan. They urged that revocation be permitted through telephone, in writing, in person, by electronic communication, or by a designee, so as to make revocation as simple as possible and as quick as possible for beneficiaries. They also asserted that the State should be required to provide immediate notification to such individuals of the right to revoke their election if they fall into an excluded category. And they urged that coverage and payment should not be interrupted during changes in election and marketing should not be permitted by alternate plans to excluded groups.

These commenters asked that the disenrollment process from benchmark plans allow a seamless transition to and from the selected program and minimize the administrative burden on the provider while ensuring care delivery is not interrupted.

*Response:* We agree that coverage and payment should not be interrupted during changes in election. It is important that coordination of care continue during any time of transition either from one Medicaid eligibility group to another or from one benefit program to another. Thus, in considering the commenters' suggestions, we have provided in § 440.320 that, for individuals who voluntarily enroll and later determine it necessary to revert to traditional Medicaid and/or for individuals who are later determined eligible for an exempted group, opt out requests must be acted upon promptly and States must have a process in place to ensure continuous access to services while opt out requests are being processed.

*Comment:* Some commenters recommended that CMS enhance the proposed rule to include a section on CMS oversight containing a requirement that CMS approve State informational materials that provide comparative information and information on choice. Other commenters were concerned that inappropriate marketing activities such as those they believe are being used by some Medicare Advantage plans, may be adopted by benchmark plans. These commenters urged CMS to be aware of the potential for inappropriate marketing tactics, require States to oversee marketing activities, and impose limits on marketing to ensure individuals are not enrolled under false pretenses.

*Response:* To the extent that benchmark and benchmark-equivalent benefit packages are provided through managed care plans, States must comply with the Medicaid managed care rules at 42 CFR part 438. Marketing requirements for managed care plans are described in § 438.104. States must consider these requirements in contracting with these entities.

At this time, we do not see a need for additional oversight measures when alternative benefit packages are offered outside of the managed care context.

*Comment:* Other commenters indicated that CMS should require strong beneficiary protections for people, including frail older and disabled beneficiaries, who have the opportunity to voluntary opt into benchmark plans. The commenters indicated that these protections should include objective counseling to make sure they understand the potential for higher costs and make truly informed decisions, a ban on aggressive and coercive marketing such as door-to-door sales, a requirement to document network adequacy for additional populations, and ongoing monitoring to ensure that these beneficiaries are getting the care they need. Some commenters indicated that, even with full information, individuals who voluntarily enroll may be likely to make an inappropriate election. They suggested a professional counselor independent of the plan be available to review their plan selection.

*Response:* We believe a professional counselor or enrollment broker would be a reasonable administrative protection that could be adopted by a State, but we are not requiring it. This is an operational issue that may depend on the circumstances of a particular State's program. States who contract with an enrollment broker can receive administrative match from CMS at the 50 percent match rate. To the extent that the State offers alternative benefits through managed care plans, enrollment brokers must operate consistently with the requirements at § 438.810. And, consistent with the managed care rules at § 438.10, States are encouraged to provide information at least annually as to an individual's enrollment choice under the benchmark option or the traditional State plan option. This could be accomplished at the point of redetermining eligibility for enrollees.

Additionally, if it becomes apparent that a change in eligibility status has occurred (for example, non-pregnant female mandatorily enrolled in the benchmark plan becomes pregnant and is no longer eligible for mandatory enrollment), it is incumbent upon the State to provide the individual with information about their benefit options. These individuals must have the opportunity to receive State plan services that may not be available in the benchmark plan either as wrap-around to the benchmark plan or by reverting to traditional Medicaid.

*Comment:* Several commenters believed exempt individuals will be automatically enrolled without their expressed consent and wanted an assurance that this will not occur. These commenters urged CMS to safeguard exempt individuals from being enrolled in benchmark or benchmark-equivalent plans without their prior informed consent by more expressly prohibiting States from taking an ''opt-out'' approach to their enrollment. They suggested that the proposed language could allow or even encourage States to adopt an opt-out approach without further clarification, the language could be read to allow States to initially enroll all exempt persons who do not affirmatively opt out. These commenters indicated that failure to clarify this point would be construed as approval of opt-out practices and would not protect against any form of automatic or ''presumed voluntary'' enrollment.

*Response:* Section 1937 provides that exempt individuals cannot be mandatorily enrolled in benchmark or benchmark-equivalent plans. We proposed to permit States to offer exempt individuals a voluntary option to enroll, based on informed choice. In order for exempt individuals not to be mandatorily enrolled and to have made an ''informed choice'' about enrollment, the choice must take place before enrollment in the benchmark or benchmark-equivalent plan. We have amended the final rule to make this clear. Further, these actions should occur before the receipt of services in a benchmark or benchmark-equivalent plan. We mentioned earlier that we require that the individual's file is documented to reflect that an exempt individual is fully informed and has chosen to be enrolled in a benchmark or benchmark-equivalent plan. CMS, in response to these comments, has made it clear that individuals cannot be enrolled until an informed election is made.

In terms of CMS monitoring, we provide in Federal regulations at § 430.32 for program reviews of State and local administration of the Medicaid program. In order to determine whether the State is complying with the Federal requirements and the provisions of its Medicaid plan, we may conduct reviews that include analysis of the State's policies and procedures, on-site review of selected aspects of agency operation,

and examination of individual case records.

*Comment:* One commenter believed that the rule should describe the level of detail required in the State's description of the difference between State Plan benefits and benchmark-equivalent plan benefits because the commenter believed it is important that there be a detailed, written comparison.

*Response:* We agree with the commenter on the importance of the benefit comparison. We have required that if the State chooses to provide benchmark or benchmark-equivalent benefit options, individuals exempt from mandatory enrollment must be given, prior to benchmark enrollment, a comparison of traditional State plan benefits and the benefits offered in the benchmark or benchmark-equivalent benefit package. We believe that in order for exempt individuals to make an informed choice, the information must be fully detailed. But we have determined not to include specific standards for these benefit crosswalks in the regulation itself because we believe this issue is better addressed in case-by-case program reviews.

*Comment:* Another commenter believed CMS should prohibit States from implementing procedures that make it harder for beneficiaries to stay in the regular Medicaid program than to enroll in benchmark benefit plans. Beneficiaries should not be asked to make a choice without being afforded a reasonable time to evaluate the options.

*Response:* We agree that individuals should be given a reasonable time to evaluate the options in considering traditional Medicaid benefits versus benchmark or benchmark-equivalent options. In order for individuals to make an informed choice, individuals must have ample time to consider the options available. Therefore, we have revised the regulatory provision at § 440.320(a)(3) to require that the State document that the individual had ample time for an informed choice. We are not prescribing standards for what constitutes ''ample time'' because we believe this may vary based on the circumstances and/or individual involved.

*Comment:* Another commenter believed CMS should require States to institute expedited processes to transition out of benchmark plans those individuals who become eligible for exempted categories.

*Response:* We agree with the commenter that States should provide for transition of individuals if they become eligible for exempt categories and thus not required to be mandatorily enrolled in a benchmark plan. Congress clearly identified individuals who are exempt from mandatory enrollment in benchmark or benchmark-equivalent plans. As mentioned previously, we have revised the final rule at § 440.320 to require that opt out requests are acted upon promptly and that States must have a process in place to ensure continuous access to services while any opt out requests are being processed. These State plan requirements would mean that if an individual becomes part of an exempt population for which no mandatory enrollment can occur, it is incumbent upon the State to ensure that procedures are in place to transition individuals quickly and/or to provide information to individuals quickly to ensure an informed choice. We believe that States should not rely on the individual's ability to revert back to Medicaid. These individuals are entitled to the full range of Medicaid benefits. They must have the choice to receive them either as part of, or as wrap-around to, the benchmark plan or as part of the traditional Medicaid State plan.

*Comment:* One commenter asked for clarification on whether the benchmark or benchmark-equivalent benefit packages would apply to ''unqualified individuals'' who fall under the ''exempt category'' and who could be offered optional enrollment in a benchmark benefit package.

*Response:* We wish to clarify that unqualified individuals (aliens who are not lawfully admitted for permanent residence in the United States or otherwise do not meet the Medicaid eligibility requirements for aliens; for example, aliens who are residing in the U.S. illegally or who have not met the 5-year bar for lawful permanent resident aliens) are exempt individuals that cannot be mandatorily enrolled in benchmark plans.

Unqualified individuals are not entitled to Medicaid unless they are aliens eligible for Medicaid coverage in situations where care and services are necessary for the treatment of the alien's emergency medical condition (see section 1903(v) of the Act). Thus, these individuals can be enrolled in a benchmark or benchmark-equivalent plan on a voluntary basis. The limitations in § 440.320 and section 1903(v) of the Act would apply.

*G. Section 440.330 Benchmark Health Benefits Coverage*

*Comment:* A few commenters questioned the coverage standards of a Secretary-approved benefit package. They contended that under this option, CMS could approve coverage of any kind, one that may include or exclude any benefits the State chooses. They asserted that this failure to recognize any minimum set of required benefits in Medicaid could limit access to critical health care services. They argued that allowing States even greater flexibility, by not requiring that coverage meet benchmark levels, is inappropriate and is likely to result in more beneficiaries going without health care services until they become sick and require emergency treatment.

Another commenter agreed and stated that the proposed rule says, ''Secretary approved coverage is any other health benefits coverage that the Secretary determines * * * provides appropriate coverage for the population proposed to be provided this coverage.'' The commenter finds this statement troublesome. This provision gives the Secretary the wide discretion to approve a number of plans that are more flexible than the benchmark plan requirements as articulated in this rule. This provision would give States the option to craft qualifying plans that include or exclude any benefits that the State chooses.

The commenters urged CMS to remove this fourth option for Secretary-approved benchmark packages from the proposed rule.

*Response:* The statute provides States with the option of Secretary-approved coverage, and we believe we have provided for sufficient protections to ensure that this option will be consistent with the statutory purpose of meaningful health benefits coverage while also allowing State flexibility. In this final rule, we have articulated the general standard that Secretary-approved coverage must be appropriate coverage to meet the needs of the population provided that coverage. The regulations also provide a number of documentation requirements so that CMS can determine that this standard has been met. States are required to submit a full description of the proposed coverage. They must include a benefit-by-benefit comparison of the proposed plan to one or more of the three benchmark plans specified in § 440.330 or to the State's standard full Medicaid coverage package under section 1905(a) of the Act, as well as a full description of the population that would receive the coverage. Additionally, States will be providing to CMS any other information that would be relevant in making a determination that the proposed coverage would be appropriate for the proposed population. In considering Secretary approved coverage, we will review individual State designs on a case-by-case basis. To the extent that State

designs deviate from the other options for benchmark coverage (for example, State employees coverage, etc.) or traditional Medicaid State plan coverage, we will consider the information provided as a result of the public input process and any other information States submit that would be relevant to a determination that the proposed coverage would be appropriate for the proposed population.

We believe that Secretary-approved coverage can be appropriate to meet the needs of the targeted population provided that coverage. We have approved six Secretary-approved benchmark plans. All of these six plans include not only all regular Medicaid State plan services but provide for additional services like disease management and/or preventive services as well.

*Comment:* Some commenters believed that to allow States to establish alternative health benefit programs that do not include family planning services is counter productive to ensuring the health of Americans and maintaining the sustainability of the Medicaid program. Also, a benchmark or benchmark-equivalent plan would not be appropriate for individuals of childbearing age if it did not include access to family planning services. The commenter believed that no health benefits package would be ''appropriate'' for individuals of childbearing age if it did not include access to family planning services and supplies, and asked CMS to revise the proposed rule to clarify that, in order to be considered ''appropriate,'' a benchmark or benchmark-equivalent plan must include coverage of family planning services and supplies.

The commenter also urged CMS to amend the rule to allow beneficiaries to disenroll from any such alternative benefit plan and reenroll in traditional Medicaid if the plan does not cover family planning services and supplies.

Several commenters noted that family planning is basic preventive health care for women and that ensuring a women's freedom of choice is critical in the delivery of these services. Birth control, the main component of family planning coverage, is the most effective way to: (1) Prevent unwanted pregnancies, (2) safely space pregnancies in the interest of the mother and child's health, and (3) keep women in the workforce. Furthermore, birth control enables preventive behaviors and allows for the early detection of disease by getting women into doctor's offices for regular health screenings.

One commenter believed that the legislation authorizes the Secretary to approve benchmark plans that provide ''appropriate coverage for the population proposed to be provided that coverage.'' Similarly, the legislation requires benchmark-equivalent coverage to include ''other appropriate preventive services, as designated by the Secretary.'' Coverage offered to women of reproductive age cannot be considered ''appropriate'' if it excludes coverage of family planning services and supplies.

Some commenters asserted that permitting some plans to exclude coverage of family planning runs directly counter to three of the major goals articulated by the legislation's supporters: reducing Medicaid costs, promoting personal responsibility and improving enrollees' health.

Other commenters believed that approximately half of all pregnancies in the United States are unplanned and there is a strong correlation between unintended pregnancies and failure to obtain timely prenatal care. They stated that guaranteeing coverage of family planning services for women enrolled in Medicaid benchmark plans increases the likelihood that these women will be under the care of a health professional before pregnancy, and that when they do become pregnant they will obtain timely prenatal care as recommended by the American College of Obstetricians and Gynecologists.

The commenters urged the Department to revise § 440.330 to clarify that in order for Secretary-approved coverage to be considered appropriate coverage for women of reproductive age, it must include family planning services and supplies. In addition, the commenters urged the Department to modify § 440.335 to designate family planning services and supplies as a required preventive service that must be included in all benchmark-equivalent plans offered to women of reproductive age.

*Response:* Even if one of the statutorily-specified benchmark packages did not contain family planning services, the statute nonetheless permits States to base an alternative benefit package on that benchmark. CMS has no authority to disapprove the use of a statutorily-specified benchmark plan as the basis for an alternative benefit package. Consequently, we are revising § 440.375 to update the title and revise the text of this section to indicate that States can provide benchmark or benchmark-equivalent coverage to recipients without regard to the requirements relating to the scope of coverage that would otherwise apply under traditional Medicaid benefit packages. The scope of coverage would still need to be consistent with the requirements for the scope of coverage contained in this subpart, which are based on the statutory benchmark or benchmark-equivalent coverage provisions.

With respect to Secretarially-approved coverage, we agree with the commenters that if a benchmark benefit plan is provided to individuals of child bearing age that did not include family planning services, it may not be appropriate to meet the needs of the population it serves. Additionally, if a benchmark or benchmark-equivalent benefit package does not include family planning services, States have the option of providing wrap-around or additional benefits to the benchmark. Because of the flexibility granted by the DRA, States can submit innovative designs for implementing Medicaid programs to their beneficiaries. CMS will review each State plan amendment on a case by case basis and will consider the merit of each design based on the standard that benchmark benefit packages ''are appropriate to meet the needs of the targeted population.''

*Comment:* Other commenters believed that one reason States may wish to design a plan under the option for benchmark-equivalent or Secretary approved is to offer beneficiaries important services that are not otherwise covered by Medicaid or a standard benchmark plan. The commenters stated that this rule does not permit this. CMS should allow States to submit proposals that include other services and judge the overall plan proposed by the State to assess its efficiency.

*Response:* Section 1937 provides that benchmark-equivalent or Secretary-approved can be offered as benchmark plans, so long as basic services are provided as part of the benchmark-equivalent benefits or the benefit package is appropriate to meet the needs of the population it serves for Secretary-approved coverage. The rule is consistent with these flexibilities. Additionally, the rule provides that the scope of a Secretary-approved health benefits package or any wrap-around or additional benefits will be limited to benefits within the scope of the categories available under a benchmark coverage package or the standard full Medicaid coverage under section 1905(a) of the Act. This provision allows States flexibility to offer additional health care services that would not otherwise be offered. Additional services are limited to those in categories offered under a benchmark

plan or section 1905(a) of the Act because section 1937 of the Act did not expressly authorize coverage beyond the defined scope of medical assistance, and these limits ensure that additional services will be of the type generally considered as health care services.

In considering the benchmark packages that have been approved by CMS, States have created innovative designs that do offer additional services and do provide for efficiency.

*H. Section 440.335 Benchmark-Equivalent Health Benefits Coverage*

*Comment:* One commenter urged CMS to clarify that plans cannot use actuarial methods that further reduce benefits because of cost-sharing limits.

Another commenter noted that the preamble of the proposed rule indicates that even if the benchmark plan has 50 percent coinsurance, the State would have to ensure that cost sharing does not exceed the applicable limits in Medicaid, which are substantially lower.

However, § 440.340 specifies that the actuarial report ''should also state if the analysis took into account the State's ability to reduce benefits because of the increase in actuarial value of health benefits coverage offered under the State plan that results from the limitations on cost sharing * * * under that coverage.'' The commenter strongly urged CMS to clarify that this language does not allow States to reduce mental health benefits below 75 percent of the value of the benchmark benefits because there are less co-payments in the benchmark-equivalent plan. Congress intended that individuals would get 75 percent of the value of the benefit; they did not intend to reduce the value of this benefit through cost-sharing limitations.

*Response:* We agree that clarification is needed in terms of using actuarial methods to further reduce benefits because of cost-sharing limits. We have specified in § 440.340 that, as a condition of approval of benchmark-equivalent coverage, States must provide an actuarial report with an actuarial opinion that the benchmark-equivalent coverage meets the actuarial requirements for coverage specified in § 440.335. We have also specified in § 440.340 that the actuarial report must—

- Be prepared by a member of the American Academy of Actuaries and must meet the standards of this Academy;
- Use generally accepted actuarial principles and methodologies of the Academy, standard utilization and price factors, and a standardized population representative of the population involved;
- Use the same principles and factors in analyzing the value of different coverage (or categories of services) without taking into account differences in coverage based on the method of delivery or means of cost control or utilization use;
- Indicate if the analysis took into account the State's ability to reduce benefits because of the increase in actuarial value of health benefits coverage offered under the State plan that results from the limitations on cost sharing under that coverage;
- Select and specify the standardized set of utilization and pricing factors as well as the standardized population; and
- Provide sufficient detail to explain the basis of the methodologies used to estimate the actuarial value.

In considering the actuarial value, we expect that the States and the actuaries making the determination of actuarial equivalence will account for changes in cost sharing between the benchmark-equivalent plan and the benchmark plan as well as account for any differences in income and assets between Medicaid beneficiaries and the enrollees in the benchmark plan. Cost sharing for the Medicaid benchmark-equivalent plan will still be subject to the limitations set forth in this rule and in sections 1916 and 1916A of the Act. The determination of actuarial equivalence should provide an aggregate actuarial value that is at least equal to the value of one of the benchmark benefit packages, or if prescription drugs, mental health services, vision and/or hearing services are included in the benchmark plan, an aggregate actuarial value that is at least 75 percent of the actuarial value of prescription drugs, mental health services, vision and/or hearing services of one of the benchmark benefit packages. Changes to the benchmark-equivalent plans, including changes in the cost-sharing structure that would result in expected benefit amounts less than under the benchmark plan or less than 75 percent of the actuarial value of prescription drugs, mental health services, vision and/or hearing services, would not be allowed under this rule.

*Comment:* Several commenters note that the standard for adopting a benchmark-equivalent coverage package is set at 75 percent of the actuarial value of that category of services in the benchmark plan and wants to understand if the percentage is set in statute. The commenters believe that if this percentage is not a statutory provision, it would be important to describe the basis for this standard.

*Response:* The DRA provides for this standard. Section 1937(b)(2)(C) of the Act specifies that the benchmark-equivalent coverage with respect to prescription drugs, mental health services, vision services, and/or hearing services must have an actuarial value equal to at least 75 percent of the actuarial value of the coverage of that category of services in the benchmark plan. We have maintained this standard in the rule consistent with the statutory provision.

*Comment:* Another commenter pointed out that the benchmark plans are allowed to provide 75 percent of the actuarial value of mental health and prescription drugs. The commenter is concerned that if the plan used as a benchmark does not cover mental health treatment or prescription drugs, the new Medicaid benefit package does not have to provide this coverage.

Other commenters are concerned about language indicating that a benchmark-equivalent coverage package is not required to include coverage for prescription drugs, mental health services, vision services, or hearing services. The commenter believed all of these services are necessary medical services.

*Response:* CMS clarifies that any and all services under section 1905(a) of the Act must meet medical necessity. Prescription drugs, mental health services, vision services, or hearing services would meet the test of medical necessity, however, it is important to note that these services are not considered mandatory services under the State plan but rather are considered optional services. Many States have chosen not to provide Medicaid beneficiaries with optional services under their state's Medicaid State plan.

Further, it is the DRA that specifies if coverage for prescription drugs, mental health, vision and/or hearing is provided in the benchmark plan, the benchmark-equivalent plan must provide at least 75 percent of the actuarial value of the coverage. If coverage is not provided under the benchmark plan, the benchmark-equivalent is also not required to provide the coverage. This would be logical since, in calculating the actuarial value of the benchmark-equivalent, the actuarial value would be calculated based only on the services included in the benchmark plan and not calculated based on services that are not included. This is consistent with the statutory provision, and we have maintained this flexibility in the rule.

*Comment:* Some commenters questioned how the State will assure the aggregate actuarial value is equivalent if there is lesser coverage in prescription drugs, mental health, vision, and/or hearing services.

*Response:* Section 1937(b)(2)(C) of the Act specifies that, in considering a benchmark-equivalent benefit, if prescription drugs, mental health, vision, and/or hearing are provided in the benchmark plan, the benchmark-equivalent must provide at least 75 percent of the actuarial value of that coverage. This section specifies the minimum coverage levels but does not specify the maximum level. Thus, States have the option to cover these services at higher than 75 percent of the actuarial value. To assure that the aggregate actuarial value is equivalent, we required in § 440.340 that, as a condition of approval of benchmark-equivalent coverage, States must provide an actuarial report that provides, among other things, sufficient detail as to the basis of the methodologies used to estimate the actuarial value of the benchmark-equivalent coverage.

*Comment:* Another commenter suggested that rehabilitation services should be added to the list of services included at § 440.335.

*Response:* The DRA specifies that benchmark-equivalent coverage must include basic services; that is, inpatient and outpatient hospital services; physicians' surgical and medical services; laboratory and x-ray services; well-baby and well-child care including age-appropriate immunizations; and other appropriate preventive services. We have interpreted other appropriate preventive services to include services such as emergency services, but have left States with flexibility to define other appropriate preventive services. We disagree with the commenter that additional services should be added to the list of services that are required services under benchmark-equivalent plans.

It is important to note, however, that States, at their option, can provide additional or wrap-around services to benchmark or benchmark-equivalent plans. Including rehabilitation services may be appropriate for some populations. Additional and wrap-around services are discussed in § 440.360 of this rule.

We did not receive any comments to § 440.340 Actuarial report. Therefore, § 440.340 will adopted as written in the proposed rule of February 22, 2008.

*I. Section 440.345 EPSDT Services Requirement*

*Comment:* Some commenters supported the proposed regulation that would require individuals to first seek coverage of EPSDT services through the benchmark or benchmark-equivalent plan before seeking coverage of services through wrap-around benefits. Commenters believed that when individuals need to access additional services as a wrap-around either for children or adults, States should be required to ensure they continue to be able to receive services from the same provider.

*Response:* We agree that it is important for individuals to receive services from the same provider, whenever possible. We believe that an individual's primary care provider is in the best position to ''manage'' an individual's care. For individuals enrolled in a benchmark or benchmark-equivalent benefit plan, the primary care provider is going to be serving the individual under that plan. If an individual is entitled to additional services, the primary care provider should be responsible for providing and/or coordinating the individual's care and should be aware of any additional services the individual needs.

*Comment:* Some commenters objected to the provision in the proposed rule that stipulates that individuals must first seek coverage of EPSDT services through the benchmark plan before seeking coverage of these services through wrap-around benefits. These commenters asserted that Congress intended to allow States the option of providing these benefits directly to Medicaid beneficiaries or to provide these benefits in whole or in part by the benchmark provider. They indicated that CMS provides no justification as to why children must first wrestle with the administrators of the benchmark benefit package before accessing EPSDT services. One commenter asked that the rule be amended to eliminate the requirement that a family first seek coverage of EPSDT services through the benchmark plans.

*Response:* It is important for individuals to first seek coverage of EPSDT services through the benchmark plan since we believe the benchmark provider should serve as the ''medical home'' for the individual. Thus, the benchmark provider becomes the one central source of a child's pediatric record and can guard against duplication and gaps in services. The benchmark provider ensures that care is managed and coordinated, providing access to specialists and necessary support services. Also, the benchmark provider facilitates access to information regarding the services to which the individual is entitled and information regarding how and when to access such services. We believe that in accessing services first through the benchmark plan the provider can act as a facilitator who coordinates and leverages the attributes and resources of a complex healthcare system and advocate for the beneficiary as they navigate care options and information available to them. As such, we believe the individual will be provided with better health care service and will experience better health care outcomes overall.

*Comment:* One commenter believed that families are unlikely to realize that their children have access to more coverage than that provided through the benchmark. Even if they understood, they may not know how to request such a service. The commenter suggested that this section be strengthened by requiring States to explain, in detail, how a family will be informed of their rights under EPSDT once they are enrolled in a benchmark plan and to explain the specific process the state will then go through to approve or disapprove these services. States should also explain timelines for consideration of EPSDT requests in emergency, urgent and routine cases.

The commenter goes on further to say the preamble to the proposed rule stated, ''the State may provide wrap-around * * * under such plan.'' The commenter urged that CMS clarify that the word ''may'' should be read ''must'' because the word ''may'' inaccurately suggested that States are not required to provide these services. The commenter noted that, in other areas of the proposed rule, CMS correctly stated that EPSDT services must wrap-around benchmark plans.

*Response:* We agree that States should be required to inform families of their rights under EPSDT. The commenter is correct that children enrolled in benchmark or benchmark-equivalent plans may be entitled to additional services. Therefore, we are clarifying that States must ensure that information is provided to all EPSDT eligibles and/or their families about the benefits of preventive health care, what services are available under the EPSDT benefit, where and how to access those services, that transportation and scheduling assistance are available, and that services are available at no cost. This is consistent with the requirements of section 1902(a)(43)(A) of the Act and current policy outlined in Section 5121

of the State Medicaid Manual. Information must be given to individuals no later than 60 days of the individual's initial Medicaid eligibility determination, and annually thereafter if they have not utilized EPSDT services. We believe most States have booklets to inform individuals of their benefits, rights, responsibilities, etc. This information is typically presented to families by the eligibility worker at the time of application and/or sent to individuals as part of an enrollment packet from the managed care plan. These types of documents should clearly explain the benchmark and wrap-around benefits available to EPSDT eligibles under the age of 19.

Additionally, we agree with the commenter that the word ''may'' was inaccurate in the preamble to the proposed rule. The law specifically requires that States are required to wrap-around services (if the full range of EPSDT services is not provided as part of the benchmark or benchmark-equivalent plan) to assure that all EPSDT services are available to eligibles. We are providing clarification here in response to the comment; however, we are not revising the regulation text, since the language in § 440.345 clearly indicates that this is a requirement, and not a choice.

*Comment:* One commenter stated that the rule was silent on the requirement that the state provide information in plain language that is understood by the individual, parent or guardian including clear instructions on how to access EPSDT services not provided by the benchmark plan and how to opt out.

*Response:* We agree that it is important that individuals be provided with clear instructions in plain language on how to access EPSDT services not provided by the benchmark plan and how to opt out. This is already required by the EPSDT outreach provisions of section 1902(a)(43) of the Act, which are applicable to alternative benefit packages. To the extent that alternative benefit packages are delivered through managed care plans, States must also comply with managed care rules at 42 CFR part 438. According to § 438.10, information provided must be in an easily understood language and format.

*Comment:* One commenter noted that proposed § 440.350 failed to specify that under the employer-sponsored insurance plan option States must still ensure that children have access to the wrap-around EPSDT benefit. This section should be amended to note this requirement.

*Response:* The requirement to provide EPSDT benefits to children under the age of 19 applies to benchmark and benchmark-equivalent coverage. We have provided that States can offer employer sponsored insurance if the insurance is considered a benchmark plan. Additionally, we have indicated in § 440.350(b) that the State must assure that employer sponsored plans meet the requirements of benchmark or benchmark-equivalent coverage, including the cost-effectiveness coverage requirements at § 440.370. By requiring that employer sponsored plans meet the requirements of benchmark or benchmark-equivalent coverage and since benchmark or benchmark-equivalent coverage must provide EPSDT to children under the age of 19 either as part of, or as wrap-around to, the benchmark or benchmark-equivalent plan, we are requiring that any employer sponsored insurance coverage provide EPSDT services to children under the age of 19. We believe this is clear in the regulation, so we have not revised the regulation text in this regard.

*Comment:* Another commenter believed that limiting the mandatory EPSDT benefit to children under age 19 rather than under age 21 denies 19 and 20 years olds access to critical health care services. The commenter stated that this provision is inconsistent with the title XIX definition of EPSDT. Removing EPSDT for 19 and 20 years olds may exacerbate existing health disparities for minority adolescents, compromise 19 and 20 years olds' ability to transition successfully into adulthood, and impede identification of physical and mental conditions.

*Response:* We have promulgated language in this rule consistent with the statutory language enacted in the DRA. Requiring States to extend EPSDT benefits to 19 and 20 year olds enrolled in benchmark plans would require a change in law since section 1937(a)(1)(A)(ii) of the Act provides only that children under 19 years old must receive coverage of EPSDT as defined in section 1905(r) of the Act. States are given the option to extend EPSDT benefits in benchmark plans to 19 and 20 year olds. This option is similar to the choice States currently have in extending Medicaid eligibility to 19 and 20 year olds; thus, extending EPSDT to 19 and 20 year olds under the State plan. We note that in approving nine benchmark State plan amendments, most States with approved benchmark plans have extended EPSDT coverage to 19 and 20 year olds enrolled in these plans.

*Comment:* One State Medicaid official suggested, instead of the current language in the published proposed rule on (page 9727) of the **Federal Register** regarding EPSDT, the following amendment be made to be consistent with Federal laws: ''(a) The State must ensure access to EPSDT services, through benchmark * * * for any child under 19 years of age eligible under the State plan in a category under section 1902(a)(10)(A) of the Act.''

*Response:* We agree to adopt the language precisely as included in the statute. We have revised the rule to effectuate the clarification.

*I. Section 440.350 Employee-Sponsored Insurance Health Plans*

*Comment:* One commenter requested information about enrollment in commercial plans and suggested a discussion of how such arrangements might actually be operationalized; that is, how premiums would be paid and tracked, and the level of Medicaid contribution to such plans.

*Response:* Benchmark or benchmark-equivalent benefit coverage may be offered through employer sponsored insurance health plans for individuals with access to private health insurance. If an individual has access to employer sponsored coverage and that coverage is determined by the State to offer a benchmark or benchmark-equivalent benefit package (either alone or with the addition of wrap-around services covered separately under Medicaid), a State may elect to provide premium payments on behalf of the recipient to purchase the employer coverage. Non-exempt individuals can be required to enroll in employer sponsored insurance, and the premium payments would be considered medical assistance. The requirement for children under the age of 19 to receive EPSDT either as wrap-around or as part of the benchmark coverage would still be applicable. The premium payments and any other cost-sharing obligations by beneficiaries would be subject to the premium and cost-sharing requirements outlined in sections 1916 and 1916A of the Act, including the requirement that cost sharing not exceed the aggregate limit of 5 percent of the family's income, as applied on a monthly or quarterly basis specified by the State.

If the employer plan is cost-effective, States have the flexibility to take advantage of the coverage, without requiring a uniform employer contribution. It is likely that a substantial employer contribution would be necessary in order to meet the cost-effectiveness requirement. States must identify the specific minimum contribution level that they are requiring of participating employers.

We have not approved any Medicaid benchmark programs at this time that provide for employer sponsored

coverage; however, we have approved section 1115 demonstrations in which States have provided premium assistance payments and employer sponsored insurance coverage to Medicaid beneficiaries. For these section 1115 demonstration programs, some States have required beneficiaries to provide proof of premium assistance payments. Then, after such proof is received, the State reimburses the beneficiary directly. Some States use a voucher system in which they provide a monthly voucher directly to the beneficiary for the premium payment in purchasing the employer sponsored insurance. We are not specifying the way in which States operationalize employer sponsored insurance benchmark plans; however, we provide this information for consideration.

*Comment:* One commenter supported the inclusion of wrap-around services in general and wrap-around services for employer sponsored insurance plans as an option available to States, but does not support a requirement for additional wrap-around services. The commenter requested that language be added to describe the permissibility of various types of market innovations in coverage such as high deductible plans, health savings accounts, consumer-directed plans and wellness plans or that there be language added indicating such market innovations are acceptable as ''Secretary-approved coverage'' through a State plan amendment.

*Response:* Section 1937(a)(1)(C) of the Act provides that wrap-around or additional benefits are options that can be added by the State as additional benefits to benchmark or benchmark-equivalent coverage. Any wrap-around services that are added do not need to include all State plan services; however, wrap-around services must be within the scope of categories of services covered under the benchmark plan, or described in section 1905(a) of the Act.

The only requirement for wrap-around services is at section 1937(a)(1)(A)(ii) of the Act, which provides that if children under the age of 19 are receiving services in a benchmark or benchmark-equivalent benefit plan, they are entitled to EPSDT services as defined in section 1905(r) of the Act and so must receive medically necessary services consistent with EPSDT either as services provided in the benchmark or as wrap-around to the benchmark plan.

We have further provided in § 440.330 that Secretary-approved coverage can be offered as benchmark coverage, consistent with the DRA. This coverage must be appropriate to meet the needs of the targeted population. We have required that States wishing to opt for Secretary-approved coverage should submit a full description of the proposed coverage and include a benefit-by-benefit comparison of the proposed plan to one or more of the other benchmark options listed in this section or to the State's standard full Medicaid coverage package under section 1905(a) of the Act, as well as a full description of the population that would be receiving the coverage. In addition, the State should submit any other information that would be relevant to a determination that the proposed health benefits coverage would be appropriate for the proposed population. The scope of the Secretary-approved health benefits package will be limited to benefits within the scope of the categories available under a benchmark coverage package or the standard full Medicaid coverage package under section 1905(a) of the Act.

To the extent that a benchmark coverage plan that is used as the comparison for the Secretary-approved benchmark plan provides for market innovations such as high deductible health plans, health savings accounts, consumer-directed plans, and/or wellness plans, we would consider these on a case-by-case basis as components included in a Secretary-approved benchmark option. It should be noted that CMS has approved nine benchmark programs. Of these nine, six have been approved as Secretary-approved programs. At least one of the Secretary-approved plans includes such innovations as high deductible health plans.

We did not receive any comments to § 440.355 Payment of premiums. Therefore, § 440.355 will be adopted as written in the proposed rule of February 22, 2008.

*J. Section 440.360 State Plan Requirement for Providing Additional Wrap-Around Services*

*Comment:* A dental provider indicated that the proposed rules give States the ability to create new benefit packages tailored to different populations and that States have the flexibility to provide ''wrap-around'' and ''additional benefits.'' The commenter noted that CMS cited in a press release ''dental coverage'' as an example of ''additional benefits'' but, in the actual language of the proposed rule there are no examples or reference to ''dental coverage.'' Further, the commenter noted that the conference report to the DRA includes guidance to States by explaining that both benchmark and benchmark-equivalent coverage would include ''qualifying child benchmark dental coverage.'' The commenter also noted that in the context of employer group health plans, stand-alone dental arrangements are very often offered as a supplemental coverage that is separate from medical care coverage. The commenter indicated that this option would align Medicaid more closely with private market insurance options and give States more control over their Medicaid benefit packages.

The commenter requested that CMS provide guidance to the States with respect to ''additional benefits'' such as ''dental coverage.'' The commenter recommended the rule be amended to include an additional paragraph that would provide that States have the option to provide additional benefits that specifically include dental benefits that may be offered as a supplement to medical care coverage.

*Response:* The House Conference Report 109–362 provided for the language that benchmark or benchmark-equivalent coverage would include ''qualifying child benchmark dental coverage.'' The conference agreement removed this reference. Thus, the final provisions of section 1937 of the Act includes no such requirement for the inclusion of dental coverage as wrap-around or additional services. In fact, section 1937 of the Act provides no examples of wrap-around or additional coverage. The rule provides that additional or wrap-around services do not need to include all State plan services but would be health benefits that are of the same type as those covered under the benchmark or considered to be health benefits under the Medicaid statute.

We do agree that dental coverage could be added to benchmark or benchmark-equivalent benefit plans. Further, it is possible that, because of the plan options that have been identified by Congress as benchmark coverage, dental services may already be covered services in these plans.

If the commenter is concerned that children will not receive dental coverage, we wish to point out that children under the age of 19 must receive EPSDT services consistent with section 1905(r) of the Act either as part of, or as wrap-around to, the benchmark plan. Therefore, dental coverage will be provided to children under the age of 19 enrolled in benchmark plans.

*K. Section 440.365 Coverage of Rural Health Clinic and Federally Qualified Health Center (FQHC) Services*

*Comment:* One commenter was concerned that the proposed rule only

stipulated that States with benchmark plans need only assure that these individuals have access through such coverage and that FQHCs are to be reimbursed for such services as provided under the FQHC reimbursement requirements found in section 1902(bb) of the Act. The commenter indicated further concern that CMS did not elaborate further on these requirements, and particularly, that it did not lay out minimum steps a State must take to assure that these patient and health center protections are effectively implemented. The commenter believed it is important that the final rule and preamble make clear that there are minimum steps a State must take to be in compliance with these FQHC statutory requirements.

Specifically, the commenter asked that it should be clear that recipients who are mandatorily or voluntarily enrolled in a benchmark plan: (1) Remain eligible to receive from an FQHC all of the services included in the definition of the services of an FQHC, as provided in section 1902(a)(2)(C); and (2) must be informed that one or several of the providers by whom they may choose to be treated under this coverage is (or are) an FQHC. The commenter asserted that, to the extent these same individuals receive benchmark coverage, both the State and the benchmark plans must be encouraged to contract with FQHCs as providers of services to these enrolled Medicaid populations. These FQHC(s) must be identified by name. The commenter further stated that, in the event the benchmark plans identified do not contract with an FQHC, enrollees must be informed that they still may receive Medicaid covered services from FQHCs. In the preamble and final rule, the commenter provided that CMS should underline to the States the importance of full compliance with the FQHC reimbursement requirements of section 1937(b)(4) of the Act and § 440.365. The commenter added that adoption of these recommendations is important to assure that the requirements of section 1937(b)(4) of the Act are met.

*Response:* We agree with the commenters and we have required in § 447.365 that if a State provides benchmark or benchmark-equivalent coverage to individuals, it must assure that the individual has access, through that coverage or otherwise, to rural health clinic services and FQHC services and that payment for these services must be made in accordance with the payment provisions of section 1902(bb) of the Act. We also agree that individuals always have access to FQHC services, even if the State does not contract with an FQHC to provide such services, and we encourage States to contract with FQHCs as providers.

We did not receive any comments to § 440.370 Cost-effectiveness. Therefore, we will adopt § 440.370 as written in the proposed rule of February 22, 2008.

*L. Section 440.375 Comparability*

*Comment:* One commenter encouraged CMS to require comparability across traditional Medicaid and Medicaid benchmark alternatives.

*Response:* The language included in the rule allowing for States to offer benchmark or benchmark-equivalent health care coverage without regard to comparability is based on the DRA language providing that ''notwithstanding any other provision of Title XIX'' States can offer medical assistance to certain Medicaid beneficiaries through benchmark or benchmark-equivalent benefit packages. We interpreted this ''notwithstanding language'' to provide that States could offer benchmark or benchmark-equivalent coverage to certain specified Medicaid populations, considering different benefit packages, and to different regions within the State. This provision gives meaning to the statutory language permitting States to offer benchmark or benchmark-equivalent coverage to certain, but not all, Medicaid populations.

For example, States could craft benchmark options that provide individuals with a benefit that integrates acute care and long term care services and a different benefit that provides for traditional State plan services with the addition of disease management services. We believe this provides that States can better meet the needs of their Medicaid populations, and we further believe that this is consistent with Congressional intent in establishing maximum flexibility for implementing benchmark benefit options.

*M. Section 440.380 Statewideness*

*Comment:* One commenter is concerned that States are given the option to amend their State plan to provide benchmark plan coverage to Medicaid recipients without regard to statewideness. This proposed regulation would likely result in health care disparities among individuals living in different parts of the State, has no basis in the statute, and should therefore be excluded from the final regulations. The commenter stated that the proposed § 440.380 should be revised to ensure that beneficiaries across the State are not subject to disparities in health care services.

*Response:* The language included in the rule allowing for States to offer benchmark or benchmark-equivalent health care coverage without regard to statewideness is based on the DRA language providing that ''notwithstanding any other provision of Title XIX'' States can offer medical assistance to certain Medicaid beneficiaries through benchmark or benchmark equivalent benefit packages. We interpreted this ''notwithstanding language'' to provide that States could offer benchmark or benchmark-equivalent coverage to certain Medicaid populations, considering different benefit packages, and to different regions within the State. This provision also gives meaning to the language permitting States to offer benchmark or benchmark-equivalent coverage to certain, but not all, Medicaid populations.

For example, States could craft benchmark options that provide individuals with a benefit in an urban area of the State that is different from the benefit offered to individuals in the rural area of the State. Moreover, States can test new concepts in pilot areas before expanding the benchmark program to the entire State. We believe this provides that States can better meet the needs of their Medicaid populations, and we further believe that this is consistent with Congressional intent in establishing maximum flexibility for benchmark benefit options.

*N. Section 440.385 Freedom of Choice*

*Comment:* One commenter noted that CMS protects the free choice of emergency services providers but failed to do so for family planning services providers. The commenter urged CMS to preserve the free choice of family planning services providers by amending the rule to include a provision preserving the free choice of family planning providers. The commenter believes that this has been a long standing policy of the Congress and the Medicaid program.

The commenter added that the proposed rules would permit States to deny freedom of choice of a provider for managed care enrollees seeking family planning services and supplies. The commenter argued that this provision lacks any basis in the statute and is contrary to the clear, repeated articulated intent of Congress.

The provider asserted that provider freedom of choice is critical because of the potentially sensitive nature of the service. The commenter argued that, unable to obtain confidential services from the provider of their choice, some managed care enrollees may forgo

obtaining family planning services entirely. This would threaten beneficiaries' access to high quality, confidential reproductive health care and set a precedent of inequity between beneficiaries in fee-for-service programs and beneficiaries in managed care plans.

The commenter noted that Congress has clearly indicated that while States may require Medicaid beneficiaries to enroll in managed care plans and obtain care from providers affiliated with those plans, an exception should be made for individuals seeking family planning. The commenter also noted that Federal regulations at § 431.51 state, ''A recipient enrolled in a primary care case management system, a Medicaid MCO, or other similar entity will not be restricted in freedom of choice of providers of family planning services.'' The commenters urged the Department to revise § 440.385 to reflect that provider freedom of choice for family planning should be retained.

*Response:* We agree. Accordingly, we have revised the regulation to ensure that selective contracting does not apply to family planning services providers.

*Comment:* One commenter requested that CMS explain the concept of ''selective contracting'' and provide more detail as to how this would be operationalized under benchmark plans.

*Response:* Selective contracting is a term usually referred to in the context of section 1915(b)(4) waiver programs. Selective contracting provides States with the opportunity to contract with certain providers so long as certain other criteria are maintained. Specifically, the State must ensure that in order to selectively contract with providers, the selective process does not restrict providers in emergency situations; is based on reimbursement, quality and utilization standards under the State plan; and does not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing benchmark benefit packages. Also, all providers must be paid on a timely basis consistent with Federal regulations at § 447.45. States previously requested section 1915(b)(4) waiver authority for selective contracting, but now because of the flexibilities outlined in the DRA, we will provide that States can selectively contract with providers in offering benchmark benefit coverage without requesting a 1915(b) waiver. By using State plan authority, the burden for requesting waiver renewals every 2 years would be eliminated.

We believe the authority to provide for selectively contracting is as a result of the DRA language that provides that ''notwithstanding any other provision of Title XIX,'' States can offer medical assistance through the use of alternative benchmark benefits to certain Medicaid beneficiaries. We believe that Congress intended for States to have a great amount of flexibility to tailor benefit packages appropriate to specified groups of Medicaid recipients. We also believe that Congress intended that efficiency and cost-effectiveness should be maintained in implementing State Medicaid programs. Thus, we have required in § 440.370 that benchmark or benchmark-equivalent coverage must be provided in accordance with economy and efficiency principles. Selective contracting of providers affords the greatest amount of flexibility, works to provide beneficiaries with continuity of care, and is cost-effective.

*Comment:* One commenter noted that CMS should include an ''any willing provider'' provision in Medicaid contracts for alternate plans that allow Medicaid participating providers the opportunity to continue serving those who are required by the State to enroll in a benchmark plan.

*Response:* We are not requiring States to incorporate an ''any willing provider'' requirement when selectively contracting for benchmark or benchmark-equivalent benefits. We believe that the protections we have incorporated into the selective contracting provisions at § 440.385 are sufficient to ensure beneficiary access to benchmark or benchmark-equivalent benefits. And, even under the selective contracting provisions, States have the option to provide that ''any willing provider'' can provide services to individuals who enroll in benchmark plans, so long as the provider is a qualified provider that meets the criteria established in title XIX and in Federal regulations as a qualified provider, and agrees to accept the reimbursement, quality, and utilization standards set forth in the State plan.

This would mean that States can contract with specific providers in offering specific services; for example, States could contract with a dental managed care plan to provide Medicaid beneficiaries with dental services. We recognize that individuals may have concerns with the flexibility granted herein that States can selectively contract with providers if certain conditions are met. However, over the years States have selectively contracted with providers and we believe individuals continue to receive quality care. We believe that to allow States the option to selectively contract with providers gives States the flexibility to provide for benchmark or benchmark-equivalent packages consistent with the intent of the DRA while still providing that individuals continue to receive quality health care.

*O. Section 440.390 Assurance of Transportation*

*Comment:* One commenter agreed with the interpretation of the notwithstanding language to ''bypass'' the assurance of transportation, including the elimination of non-emergency medical transportation (NEMT). The commenter noted that the ability of States to exclude NEMT services in their benchmark benefits is evident not only from the broad language of the statute but also from Congressional intent. The commenter noted that one of the stated purposes of section 6044 of the DRA is to allow States to offer benefit packages that mirror commercial packages.

*Response:* We agree that offering benchmark or benchmark-equivalent benefit packages without regard to the assurance of transportation is consistent with the benchmark options that Congress specified: Federal Employees Health Benefit Plan equivalent coverage, State employees coverage, and coverage offered by an HMO in the State with the largest insured commercial non-Medicaid population. These benchmark plans generally do not pay for NEMT to and from medical providers in all instances. Since section 1937 of the Act gives States the flexibility to provide benefits that are similar to commercial packages, it would appear inconsistent with that flexibility to require the States to provide NEMT that the selected benchmark package do not offer.

*Comment:* A preponderance of commenters, however, disagreed with the provision in the rule that would allow States the option to exclude NEMT as a benefit under a benchmark and benchmark-equivalent plan. Generally, these comments were submitted by transportation providers, medical providers, and Medicaid beneficiaries, particularly Medicaid beneficiaries who rely on dialysis treatments.

Most of the commenters believed that the goals of the Medicaid program would be undermined if needy individuals were unable to get to and from healthcare services and such an option would create a barrier to care. They asserted that assurance of transportation is a vital component of the Medicaid program and is of particular importance to mentally and physically disabled and elderly patients. They expressed concern that vulnerable populations might not receive medically necessary and often life sustaining

services because of their difficulty to access the needed care. For example, one commenter stated that, in the case of patients with ESRD, many patients would be unable to access dialysis services.

*Response:* We disagree that benchmark and/or benchmark-equivalent plan options undermine the intent of the Medicaid program and create major barriers to access appropriate care. The benchmark and benchmark-equivalent plan options provide unprecedented flexibilities to States in an effort to create benefit packages that appropriately meet the needs of their Medicaid populations. In order to provide States with maximum flexibility, the rule provides that States can offer benchmark or benchmark-equivalent coverage without regard to the assurance of transportation, which will align these plans with today's health care environment.

Generally, private health insurance plans do not offer non-emergency medical transportation as a medical benefit to enrollees. However, many private health plans do cover emergency ambulance transport, and in some cases, non-emergency ambulance transport for circumstances such as transporting beneficiaries between facilities. When a State selects a private health plan that provides coverage of emergency ambulance and/or non-emergency ambulance transport, the State is required to follow the coverage policy for transportation that is contained in the private health plan.

If, however, the private health plan does not provide emergency transportation or NEMT benefits, the State may choose to provide some or all transportation assistance as a wrap-around service to the benchmark plan. To date, nine States have approved benchmark State plans. Of these nine States, only three do not provide NEMT services to beneficiaries enrolled in benchmark programs.

It is, therefore, important to recognize that section 1937 of the Act contains protections for children and exempt individuals. Children will continue to have access to NEMT as an EPSDT benefit. Exempt individuals will have an informed choice to determine whether enrollment in a alternative benefit package is advantageous, and may take into account the availability of NEMT in making that election.

*Comment:* Several commenters noted that elimination of the requirement to provide transportation would actually drive up Medicaid costs because medical visits would become less frequent, resulting in a higher incidence of more serious and costly medical problems, an increase in the use of emergency medical services, and an increase in long term nursing home admissions. A number of these commenters cited a 2006 Cost Benefit Analysis conducted by the Marketing Institute of Florida State University College of Business as proof of the cost effectiveness of providing NEMT to Medicaid beneficiaries. Another commenter cited several studies that compared Medicaid recipients residing in States that do provide access to NEMT. The commenter stated that these studies found that access to non-emergency transportation produces cost savings and increased health care results.

One commenter indicated that CMS requires States to comply with economy and efficiency principles in offering benchmark or benchmark-equivalent benefit packages to Medicaid beneficiaries, but does not require non-emergency medical transportation in benchmark or benchmark-equivalent plans, when according to several studies it has been proven that providing this service is cheaper overall and leads to better health outcomes for Medicaid beneficiaries.

One commenter suggested that this rule sets up a system that would limit mileage payments to drivers for non-emergency doctor visits. The commenter indicated that medical mileage is funded in part to drivers who transport people for medical care on a non-emergency basis.

*Response:* Generally, the populations that are mandated to enroll in a benchmark program are healthier and require medical services less frequently than most Medicaid eligibles. Moreover, children who are enrolled in benchmark or benchmark-equivalent coverage will continue to receive NEMT services because NEMT is required under EPSDT. The most vulnerable individuals are statutorily exempt individuals, such as those with disabilities or special medical needs, who cannot be mandated to enroll in a benchmark benefit plan but rather must be provided the choice to enroll, including a comparison of the benefits in the benchmark or benchmark-equivalent plan versus those in the traditional State plan package. If exempt individuals choose to enroll in a plan that does not cover NEMT services, these individuals have the right to disenroll at any time if they find that they need transportation assistance. Because the population for which NEMT may not be provided could be very limited, we do not agree that the impact of allowing States to choose not to provide NEMT will be great enough to increase Medicaid costs.

To the extent that the commenters are correct that noncoverage of NEMT will lead to higher eventual costs, we believe that States will respond by ensuring coverage for NEMT. It is a State's choice whether to include NEMT benefits when offering benchmark or benchmark-equivalent coverage. It is certain States will consider the potential impact on costs and beneficiaries' health care utilization and status when they make these decisions.

*Comment:* One commenter stated that the number one reason that dentists and doctors do not wish to accept Medicaid patients is that Medicaid beneficiaries do not show-up for appointments or are late for appointments. If CMS does not require transportation benefits, no-shows will increase and the result will be that fewer providers will participate in Medicaid.

*Response:* We do not agree with the commenter that not requiring NEMT will result in fewer providers participating in the Medicaid program. Provider participation in Medicaid is based on a number of reasons, including patient loads and reimbursement rates.

To the extent that the commenters are correct that noncoverage of NEMT will lead to lower provider participation, we believe that States will respond by ensuring coverage for NEMT. It is a State's choice whether to include NEMT benefits when offering benchmark or benchmark-equivalent coverage. It is certain States will consider the potential impact on provider participation when they make these decisions.

*Comment:* Many of the commenters focused on the impact that the proposed regulation would have on dialysis patients who require 3 weekly trips to and from dialysis facilities in order to survive. They noted that effective care of ESRD patients requires meticulous coordination of dialysis treatment and drug therapy with frequent and specialized care. Dialysis patients often have multiple co-morbidities and, therefore, require frequent transportation to multiple services. The severity of the complications that develop due to missed treatments is often life threatening. Elimination of transportation services would make it very difficult and often impossible for beneficiaries with ESRD to consistently access the frequent dialysis services that sustain their lives.

Many commenters stated that individuals with physical or mental disabilities have difficulty using public transportation and require specialized transportation that would otherwise not be available should State Medicaid

programs be allowed to stop providing transportation. For many beneficiaries, the cost of frequent trips in specialized vehicles would be unaffordable. Often beneficiaries live in rural areas where the only available transportation to and from medical appointments is provided through the Medicaid program. Without Medicaid transportation services, many beneficiaries would be unable to access needed care and ultimately would require more costly services, costly emergency care, and expensive emergency ambulance services and/or expensive non-medical wheelchair van care.

Other commenters indicated that co-occurring physical health conditions such as diabetes or heart disease, as well as mental health conditions such as depression and anxiety affect an individual's ability to drive.

Several commenters indicated that people suffering with HIV/AIDS, some in wheel chairs, others who are extremely fragile or elderly, have monthly office visits where they are assessed and treated. To remove their only means of free transportation will take away their compliance with medical office treatment.

*Response:* As we stated in a previous response, beneficiaries with end-stage renal disease who rely on dialysis treatments and beneficiaries with other physical and mental disabilities, individuals with HIV/AIDS, and those who are medically frail and elderly are likely exempt populations for which mandatory enrollment in benchmark or benchmark-equivalent plans may not occur. If exempt individuals who voluntarily enroll in benchmark plans determine that the plan is not meeting all of their health care needs including NEMT, such exempt individuals must be given the opportunity to disenroll from the benchmark program and revert to traditional Medicaid at any time. Additionally, children under the age of 19 must be provided with EPSDT services and thus will receive NEMT. Furthermore, the benchmark or benchmark-equivalent plans available may provide NEMT services. Consequently, we believe that only a very limited number of the cited individuals would not be provided with NEMT services.

*Comment:* Many commenters stated that the possible elimination of transportation will not only decrease access to healthcare but would imperil the financial stability of ambulance services across the Emergency Medical Services (EMS) community. EMS providers depend on reimbursement from non-emergency transports to sustain operational costs and maintain optimal readiness standards for emergency transports. Without adequate reimbursement from Medicaid for non-emergency transports, many ambulance providers, especially those in rural areas, would cease to stay in business, causing a serious reduction in the overall availability of ambulance services. Many commenters stated the provision would likely cause over-utilization of emergency ambulance services, since beneficiaries would need to rely more frequently on more expensive emergency ambulance transport. One commenter suggested that CMS implement the same ''medically necessary transportation'' guidelines for the Medicaid program that already exist and govern non-emergency ambulance transportation for Medicare patients, because commercial insurance almost universally uses these guidelines as the benchmark for reimbursement for non-emergency ambulance transportation.

One commenter noted that the GAO has found that the current Medicare rates for ambulance transportation is on average 6 percent below the cost of providing care. Medicaid rates are currently even less. Ambulance transportation is a vital service for Medicaid beneficiaries, and ambulance companies are currently operating under a fee schedule that does not compensate them for the cost of providing that care. To further reduce the overall reimbursement to the ambulance providers while leaving benefits in tact for hospitals, physicians, and labs is unfair. Ambulance transport is a vital link between the patient and these other services, and should not be relegated to non-payment.

*Response:* Because there are significant portions of the Medicaid population that will still be able to receive NEMT services, even if their State has chosen to implement the benchmark plan option, we do not believe that the flexibility in not providing NEMT to beneficiaries enrolled in benchmark plans would greatly reduce the overall availability of ambulance services, nor would it imperil the financial stability of ambulance services across the EMS community. It should also be noted that Medicaid is not responsible for the general operation or deficit financing of public or private transportation providers. The commenter's assumption that the elimination of NEMT would likely cause over-utilization of emergency ambulance services is unfounded. States as well as private insurers have in place policies stipulating when transport by emergency ambulance is appropriate, and these policies make it less likely that there would be abuse on the part of beneficiaries.

With regard to the comment that CMS implement the same ''medically necessary transportation'' guidelines for the Medicaid program that already exist and govern non-emergency ambulance transportation for Medicare patients, because commercial insurance almost universally uses these guidelines as the benchmark for reimbursement for non-emergency ambulance transportation, we do not believe that it is necessary to require in this regulation specific guidelines that are universally used by commercial insurance. Due to the benchmarking requirements, services in universal use will probably be included in benchmark or benchmark-equivalent plans.

*Comment:* Many commenters indicated that the proposed rule would shift financial responsibility for Medicaid non-emergency transportation to non-profit and municipal fire service-based EMS systems, ADA paratransit programs, beneficiaries, beneficiaries' families, and other segments of the population who often do not have sufficient funds to pay for trips to and from providers. The commenters believed that the proposed cuts in transportation conflict with the protections afforded to the disabled under the Americans with Disabilities Act. Commenters stated the shifting of the financial burden for Medicaid non-emergency transportation to ADA paratransit services and local transit programs without any additional funding constitutes an unfunded mandate.

*Response:* We continue to believe that the responsibility for Medicaid NEMT will not be shifted to municipal EMS systems, ADA paratransit programs, or beneficiaries. Many beneficiaries are exempt from mandatory enrollment in benchmark benefit plans and therefore will continue to receive NEMT services if they choose to remain in traditional State plan coverage. If they enroll in benchmark or benchmark-equivalent coverage and determine that the coverage is not meeting their needs, they can revert to traditional Medicaid State plan coverage at any time. Also, children under the age of 19 will receive NEMT because of the EPSDT requirements. Consistent with Federal regulations, States are required to assure non-emergency transportation only when the beneficiary has no other means of transportation.

*Comment:* Several commenters stated that under section 1937 of the Act, a benchmark-equivalent package must offer a specific range of services set forth

in § 440.335(b)(1)–(5) of the proposed regulation and that the majority of qualifying benchmark plans cover emergency ambulance services. To ensure that enrollees in benchmark-equivalent plans receive coverage that is qualitatively equivalent to benchmark plans that provide emergency ambulance transportation, CMS should require benchmark-equivalent plans to cover emergency ambulance transportation.

*Response:* Benchmark and benchmark-equivalent plans model the private health insurance plans which frequently cover emergency medical transportation. Thus, there is no need to specifically require coverage of emergency ambulance transportation.

*Comment:* One commenter noted that instead of saving money by eliminating non-emergency transportation, CMS should do a better job of policing the system to reduce fraud and abuse. Another commenter indicated that coordinating transportation would reduce the cost of providing transportation.

*Response:* Coordination and monitoring of the provision of transportation services is not relevant to this rule. We agree that the reduction of fraud and abuse by States should always be considered by States when designing or implementing their State Medicaid program.

*Comment:* One commenter believed that during the DRA process CMS attempted to end the Medicaid transportation service. This attempt was turned back by Congress with the clear intention that transportation was essential for adequate access to health services. It is clear that the proposed rule is contrary to the intent of Congress.

*Response:* We are unaware of any attempt by CMS during this regulatory process to end the requirement for States to assure Medicaid non-emergency transportation. On the contrary, on August 23, 2007, CMS published a rule on the ''State Option to Establish a Non-Emergency Medical Transportation Program.'' When implemented, this regulation will enhance the ability of States to provide NEMT by offering the new option to provide more cost effective non-emergency transportation as a medical service through a brokerage program.

*Comment:* One commenter noted the proposed rule on the State Option to Establish a Non-Emergency Medical Transportation Program providing guidance on section 6083 of the DRA and wonders how CMS on one hand is providing guidance regarding non-emergency medical transportation and encourages use of a brokerage program, while at the same time provides guidance on the elimination of non-emergency medical transportation in benchmark or benchmark-equivalent plans.

Additionally, the commenter believed that the transportation benefit currently operates in a fiscally sound manner. As currently structured, the commenter asserted that the transportation benefit is cost effective in most States. The commenter noted that States generally limit reimbursement for transportation to the least costly form of transport that is medically appropriate based on the beneficiary's condition. Moreover, Medicaid beneficiaries are generally required to use free transportation resources before the program will provide reimbursement for transportation. The commenter stated that, consequently, patients who receive transportation under State Medicaid programs are required, as a condition of coverage, to have no other means of getting to or from providers of medical care.

*Response:* CMS understands that there are two separate provisions in the DRA, one providing for a brokerage program for non-emergency medical transportation and the other offering benchmark or benchmark-equivalent benefits to certain Medicaid beneficiaries. These benchmark plans can be offered without regard to the assurance of transportation, including non-emergency medical transportation. CMS understands the confusion this may cause; however, it should be noted that in adopting these transportation provisions in the DRA, Congress provided States with additional flexibilities to redesign their Medicaid programs in order to maintain sustainability. These options are intended to be used by States to improve the delivery of health care to Medicaid beneficiaries as well as to reduce overall costs, including improving the delivery of non-emergency medical transportation.

The brokerage program option for delivering non-emergency medical transportation and the benchmark or benchmark-equivalent benefits option that allows States to deliver benchmark health plans without regard to the assurance of transportation do not contravene each other as the commenter suggests. These are merely options that are part of an array of improvements and cost saving measures that can be selected by States. Because there is no requirement for a State to select either the brokerage program option or the benchmark or benchmark-equivalent option we do not believe that these transportation provisions are contradictory.

Moreover, as noted below, the fact that States have options to operate fiscally sound transportation programs simply indicates that the flexibility with respect to benchmark and benchmark-equivalent coverage will not necessarily result in the elimination of needed transportation benefits.

*Comment:* A few commenters stated that in the proposed rule CMS proposed to create more ''flexibility'' for States by allowing them to craft more mainstream packages like those found in the private health insurance market, and private health plans do not offer transportation as a covered benefit for enrollees. These commenters disagreed with this assumption because it assumes that Medicaid patients are of equal financial standing with enrollees of private health care plans in their ability to assume the cost of transportation to and from health care services and that private health plans do not provide non-emergency ambulance transportation, when in fact they do.

*Response:* The DRA provided that benchmark or benchmark-equivalent plans be available to States at their option and States are not required to implement these provisions. If States choose to offer benchmark or benchmark-equivalent benefit packages to Medicaid beneficiaries, States must comply with the requirements of section 1937 of the Act including EPSDT for children under age 19 and voluntary enrollment and informed choice to exempt individuals. Further, States can offer additional or wrap-around services to beneficiaries. If NEMT and emergency ambulance services are included in the benchmark or benchmark-equivalent plan the State has chosen to offer Medicaid beneficiaries, these transportation services should be provided to the beneficiaries enrolled in the benchmark or benchmark-equivalent plan. States also have the option of providing NEMT and/or emergency transportation services as a wrap-around benefit.

*Comment:* One commenter stated that CMS did not conduct an analysis of the impact that excluding the transportation benefit would have on the populations affected or on the States. The commenter also noted that in the ''Regulatory Impact Analysis,'' CMS states that they are under no obligation to assess anticipated costs and benefits of this rule, even if the rule may result in expenditures by the State, local, or tribal governments or the private sector, because States are not mandated to participate in the benchmark plans. This precludes any discussion of the shift in

costs to other agencies that may result from the exclusion of transportation benefits. The commenter stated that in the proposed rule CMS says that shifting the financial burden to the vulnerable Medicaid populations is simply a matter of personal responsibility. The commenter believed that the elimination of transportation is a scenario for less effective, more expensive health care because fewer people will seek preventive care since they won't have transportation and will therefore end up needing more expensive medical services.

*Response:* We disagree with the commenter. In the ''Regulatory Impact Analysis,'' we made two key assumptions: (1) The per capita cost of benchmark plans relative to per capita costs for Medicaid, and (2) the rate at which these plans will be used. Given the amount of flexibility States have in designing these plans, we do not have information that drills down into service-level estimates. Subsequently, we did not specifically account for the impact that not providing NEMT would have. In our opinion, the proposed rule provides States with so much flexibility it would not be possible to anticipate how many States might have benchmark plans that would have an impact on transportation. Furthermore, since there are significant portions of the Medicaid population that will still be able to receive transportation services, even if their State chooses to implement a benchmark or benchmark-equivalent plan that has limited or no transportation coverage, we do not believe the impact as being significant since beneficiaries have always been personally responsible for seeking alternative transportation before requesting assistance from the Medicaid program.

*Comment:* Several commenters noted the lack of definition addressing the difference between emergency and non-emergency transportation. Several other commenters requested that CMS provide a universal definition of non-emergency transportation, because without this guidance there would be chaos and an inability to adjudicate issues and disputes over what is and is not non-emergency transportation.

One commenter urged CMS to require that benchmark and benchmark-equivalent plans cover emergency ambulance transportation and do so by clarifying that the reference to ''emergency services'' in proposed § 440.335 includes emergency ambulance services. Several commenters stated the regulation fails to make a distinction between emergency and non-emergency transport and CMS assumes that ''to and from providers'' means non-emergency medical transportation; however, this may not always be the case. According to the commenter, transport is often required for Medicaid patients who develop critical conditions that require immediate care beyond the scope of the initial facility, resulting in the patient being transported to another facility for care. If States are no longer required to ensure necessary transportation for recipients to and from providers, the State will likely not cover this type of transport under a benchmark or benchmark-equivalent plan. This type of transport fits the parameters of the regulation because it is from one provider to another, but the regulation does not make the distinction that it must be a non-emergency transport.

Other commenters believed ambulance service, whether considered non-emergency or emergency transportation, should be required in all benchmark or benchmark-equivalent plans.

*Response:* States have broad flexibility in designing non-emergency and emergency transportation programs for the Medicaid population. Consistent with this flexibility, we believe that States are best suited to define the differences between emergency and non-emergency transportation and when and under what conditions it is appropriate to transport beneficiaries by ambulance. In determining this difference, we expect States to remain consistent with the definition of transportation found in § 440.170.

Additionally, experience has shown us that many of the States that have submitted benchmark State plan amendments have included transportation as a covered benefit, even when the private plan does not provide a transportation benefit.

*Comment:* A number of commenters disagreed with the assumption that non-emergency transportation is not covered by private health insurance. They stated that many private health insurance plans do provide coverage for non-emergent ambulance transportation when medically necessary. One commenter stated that CMS is ignoring the fact that many commercial plans have provided services to Medicaid beneficiaries and are thus equipped to provide the transportation benefit. The same commenter requested that if the provision on non-emergency transportation remains in the final regulation, CMS should require that no benchmark or benchmark-equivalent plan be allowed to require emergency ambulance services to join a network as a condition of obtaining necessary information for billing or as a condition of prompt payment, and that benchmark and benchmark-equivalent plans be required to pay for emergency ambulance transportation at a rate not less than the State Medicaid approved rate. One commenter noted that if CMS intends to make this a rationale for the elimination of Medicaid benefits, it should first study this issue and release its findings.

*Response:* We acknowledge that many private health plans cover emergency medical transport and some also cover non-emergency ambulance transport. Therefore, it is highly likely that benchmark plans will cover these services. However, we maintain that private health plans do not generally cover transportation to and from outpatient providers for routine services.

In terms of contracting with providers, the contracting process between States and providers is a State process. CMS is not intending to enter into that process as part of this rule.

*Comment:* Many of the commenters voiced concerns that CMS has overreached in its rationale for allowing States to opt-out of the transportation requirements, and that CMS did not support its rationale. Several commenters stated that CMS did not have the legal authority to allow States to choose not to provide non-emergency transportation. One commenter stated that § 440.390 exceeds the Department's administrative authority, results in an impermissible legislative action by the agency, and violates the separation of powers doctrine of the Constitution. Generally, an executive agency's authority is limited to implementing laws and to clarifying ambiguities in statutes passed by Congress (*Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)).

A number of commenters noted that CMS's interpretation of the language in section 1937 of the Act is ''overbroad'' because it permits CMS too much discretion. Several commenters also stated that in believing that it could change a long standing Medicaid policy on the assurance of transportation, CMS wrongly interpreted the statute and had not supported its rationale for allowing States to waive the provider-to-provider transportation requirement. A number of commenters believed that allowing States to choose not to provide transportation was inconsistent with Medicaid's mission of increasing access to healthcare. Many commenters indicated that exempting States from the transportation requirement set forth in § 431.53 ''renders those provisions to mere surplusage'' and that CMS's

interpretation affords CMS the unfettered ability to make ad hoc determinations about what laws and regulations will apply to benchmark and benchmark-equivalent plans. Many commenters stated that the requirements in § 431.53 exist to protect beneficiaries and to ensure that they receive access to healthcare. Also, CMS should not be permitted to allow States to deprive Medicaid recipients of necessary transportation based upon an illogical interpretation of a provision of the Act.

Several commenters stated that CMS is providing sufficient flexibility to States through the option to provide benchmark or benchmark-equivalent coverage without regard to comparability, statewideness, and freedom of choice. The commenter did not see how relieving the State of the requirement to assure transportation to and from providers offers any additional flexibility.

*Response:* We disagree with the commenters that believe we do not have authority to allow for States to offer benchmark or benchmark-equivalent plans without regard to the assurance of transportation. Section 1937 permits States to offer benchmark or benchmark-equivalent coverage ''notwithstanding any other provision of Title XIX.'' We have interpreted this language to provide a basis for flexibility with regard to requirements related to the scope of benefits available through benchmark or benchmark-equivalent coverage to provide that such benefits can be offered without regard to the requirement at § 431.53 to assure transportation to and from covered medical services. This regulation is thus consistent with the statutory language, and the overall purpose to ensure State flexibility in offering benefits. Moreover, the assurance of transportation is not a statutory benefit, but is a regulatory requirement that should not be given precedence over the statutory flexibility expressly provided by Congress. The statute itself provides that States can impose alternative benchmark or benchmark-equivalent benefit packages at their option, and must reasonably be read to include flexibility in the scope of benefits including transportation benefits.

We also note that the availability of this flexibility does not mean that beneficiaries will necessarily lose transportation benefits. States are not required to offer benchmark or benchmark-equivalent coverage and, if they do, they are not required to limit coverage of transportation to and from providers. As noted above, States may determine that such coverage is essential to ensuring appropriate coverage to meet the needs of the target population.

*Comment:* Several commenters mentioned earlier that CMS offered a definition of ''special medical needs'' but pointed out that CMS did not offer a definition of ''medically frail.'' The commenters urged CMS, in considering transportation, to include in any definition of ''medically frail'' a recipient who might require medically necessary ambulance transportation due to their physical or mental condition, illness, injury, disability, in a bed confined or wheelchair confined state, such that transportation by any means other than ambulance would likely jeopardize the patient's health or safety.

*Response:* As stated earlier, we have not defined ''medically frail'' because CMS wishes to maintain the State flexibility; however, we encourage States to consider all of these examples in their definition, when considering that these individuals may be in need of transportation.

*Comment:* Several commenters stated the proposed elimination of transportation was discriminatory because individuals with special needs are not able to access transportation services and will be de facto denied the medical services that other Medicaid recipients receive. Also, the commenters asserted that the ''notwithstanding any other provision of this title'' will not pass a challenge in the court system because it discriminates against disabled individuals.

*Response:* We disagree with the commenters that the flexibility to not assure transportation is discriminatory because this requirement applies to all individuals enrolled in benchmark or benchmark-equivalent plans (with certain limitations). All individuals are treated equally including all exempt individuals. Disabled individuals can only enroll in a benchmark program that does not include NEMT by choice.

*Comment:* Several commenters noted that Executive Order 13330 requires coordination for elderly and handicapped transportation programs among Federal agencies. Creating Federal DHHS standards for appropriate service levels would promote this coordination effort and in the interests of quality services, lower costs and enhanced coordination, DHHS should develop parallel standards that would drive cost savings derived by competitive procurement instead of denying services to those who need it the most. Removing an essential element such as transportation in order to save money will ultimately result in greater reliance on institutional care at a much higher cost. One commenter believed that CMS should withdraw the regulation and allow the Coordinating Council on Access and Mobility, which was established by Executive Order 13330, to develop the benchmark policy on non-emergency transportation.

*Response:* We do not believe that this rule contravenes Executive Order 13330, which requires coordination of transportation among Federal agencies, but does not supersede program coverage limitations or purposes. In other words, section 1937 simply does not require NEMT to be included as a benefit or administrative activity of alternative benefit programs, and Executive Order 13330 does not change that circumstance.

*Comment:* One commenter, submitting on behalf of the Alaska Natives (ANs) Tribal Health Consortium, wrote that in Alaska nearly 40 percent of the Medicaid eligible populations are ANs. The vast majority of AN villages are accessible only by plane, boat, snow-machine, or dog-sled. Due to the extreme poverty found in AN villages, Congress authorized tribal health programs to bill the Medicare and Medicaid programs for covered services. Tribal health services rely heavily on Medicaid and Medicare payments. The commenter is profoundly concerned that the proposed rule would allow States to curtail Medicaid coverage of crucial health services currently provided to ANs and would eliminate coverage of transportation needed by ANs to access medical services.

*Response:* We understand that Alaska has unique transportation needs and that the vast majority of AN villages are accessible only by plane, boat, snow machine, or dog-sled. We are also aware that tribal health services provide the majority of health care to Medicaid eligible tribal populations. Before the passage of the DRA, Alaska provided transportation through a broker under section 1915(b) authority. In 2006, Alaska converted its non-emergency transportation waiver to the State plan non-emergency medical transportation brokerage program option provided by the DRA.

While AN beneficiaries have not been specifically excluded from mandatory enrollment in a benchmark plan, due to the rural nature of the areas in which these beneficiaries live and the unique transportation needs of ANs in Alaska, we do not believe that AN beneficiaries are at risk of losing needed transportation benefits. We do not believe it is in the interest of the State to eliminate such benefits, nor that it would be consistent with appropriate

coverage to meet the needs of the targeted population.

**IV. Provisions of the Final Regulations**

For the most part, this final rule incorporates the provisions of the February 2008 proposed rule. Those provisions of this final rule that differ from the February 2008 proposed rule are as follows:

*Scope (§ 440.305)*

We have added a new paragraph (d) at § 440.305 to provide for public input, which states ''Any state that opts to offer alternative benchmark or benchmark-equivalent coverage to Medicaid beneficiaries must secure public input prior to the submission of any State plan amendment to CMS.''

We have also added a new paragraph (e) at § 440.305 to indicate that in implementing benchmark or benchmark-equivalent package, States must comply with the managed care rules at section 1932 of the Act and 42 CFR part 438 if benchmark or benchmark-equivalent benefits are provided through managed care plans, except when the State demonstrates that such requirements are impractical in the context of, or inconsistent with, methods of offering coverage that is appropriate to meet the needs of the targeted population.

*Exempt Individuals (§ 440.315)*

We have revised paragraph (f) to indicate that the definition of individuals who are medically frail and/or the definition of individuals with special medical needs will be left to State discretion but the definition for individuals with special medical needs must at least include those individuals described in § 438.50(d)(3). Further, we deleted the reference to § 438.50(d)(1) for individuals entitled to Medicare benefits as these individuals are already exempt individuals for whom voluntary enrollment because of the requirement in section 1932(a)(2)(iii) of the Act.

We have added a new paragraph (m) in § 440.315 to include medically needy or those eligible as a result of a reduction of countable income based on costs incurred for medical care in the list of populations for which voluntary enrollment in benchmark or benchmark-equivalent plans can occur.

*Section 440.320 State Plan Requirements: Optional Enrollment for Exempt Individuals*

We have revised paragraphs (a)(1), (a)(2), and (a)(3) to indicate that the State must effectively inform exempt individuals prior to enrollment that the individual has the opportunity to voluntarily enroll in a benchmark or benchmark-equivalent plan, must inform the individual of the benefits in the benchmark or benchmark-equivalent plan and provide a comparison of how they differ from traditional Medicaid State plan coverage, and document the individual's eligibility file that prior to enrollment he was provided a comparison of the benefit package, was given ample time to make an informed choice as to enrollment and voluntarily choose to enroll in the benchmark or benchmark-equivalent plan.

We have added a new paragraph (a)(4) to indicate that States must comply with the requirements of § 440.320(a)(1), (a)(2), and (a)(3) within 30 days after a determination is made that an individual has become part of an exempt group while enrolled in benchmark or benchmark-equivalent coverage.

We have added a new paragraph (b)(1) and (b)(2) to discuss the disenrollment/opt out process and require that States act upon opt out requests promptly for those exempt individuals who choose to opt out of benchmark or benchmark-equivalent coverage and must have a process in place to ensure continuous access to services while requests to opt out of benchmark or benchmark-equivalent coverage are being processed.

*EPSDT Services Requirement (§ 440.345)*

We have revised paragraph (a) in § 440.345 to be completely reflective of the statutory language, which indicates that ''The State must assure access to early and periodic screening, diagnostic and treatment (EPSDT) services through benchmark or benchmark-equivalent plan benefits or as wrap-around benefits to those plans for any child under 19 years of age eligible under the State plan in a category under section 1902(a)(10)(A) of the Act.''

*Comparability and Scope of Coverage (§ 440.375)*

We revised the title and text of this section to indicate that States have the option to amend their State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to comparability or requirements relating to the scope of coverage other than those contained in this subpart.

*Freedom of Choice (§ 440.385)*

We have redesignated paragraph (b)(3) as paragraph (b)(4) in § 440.385 of this regulation. In newly revised paragraph (b)(3), we have made clarifying changes to indicate that selective contracting does not apply to family planning providers.

**V. Collection of Information Requirements**

While the following requirements are subject to the PRA, they are currently approved under OMB# 0938–0993 with an expiration date of October 31, 2009.

*Section 440.320 State Plan Requirements: Optional Enrollment for Exempt Individuals*

Section 440.320(a) requires a State to: (1) Inform the individuals that the enrollment is voluntary and that the individual may opt out of the benchmark or benchmark-equivalent coverage at any time and regain immediate access to standard full Medicaid coverage under the State plan; (2) Inform the exempt recipient of the benefits available under the benchmark or benchmark-equivalent benefit package and provide a comparison of how they differ from the benefits available under the standard full Medicaid program; and, (3) Document in the exempt recipient's eligibility file that the recipient was informed in accordance with this section and voluntarily chose to enroll in the benchmark or benchmark-equivalent benefit package.

*Section 440.330 Benchmark Health Benefits Coverage*

Section 440.330(d) requires States wishing to opt for Secretarial-approved coverage to submit a full description of the proposed coverage and include a benefit-by-benefit comparison of the proposed plan to one or more of the three other benchmark plans specified.

*Section 440.340 Actuarial Report for Benchmark-Equivalent Coverage*

Section 440.340 requires a State trying to obtain approval for benchmark-equivalent health benefits coverage described in 440.335 to submit, as part of its State Plan Amendment, an actuarial report. The report must provide sufficient detail to explain the basis of the methodologies used to estimate the actuarial value or, if requested by CMS, to replicate the State's result.

*Section 440.345 Requirement To Provide EPSDT Services*

Section 440.345(a)(2) requires a State to include a description in their State Plan of how the wrap-around benefits or additional services will be provided to ensure that recipients receive full EPSDT services. The description must describe the populations covered and

the procedures for assuring those services.

*Section 440.350 Employer-Sponsored Insurance Health Plans*

Section 440.350(b) requires a State to set forth in the State plan the criteria it will use to identify individuals who would be required to enroll in an available group health plan to receive benchmark or benchmark-equivalent coverage.

*Section 440.360 State Plan Requirement for Providing Additional Wrap-around Services*

This section requires States opting to provide additional services to the benchmark-equivalent plans, to describe the populations covered and the payment methodology for these services in their State plan.

*Section 440.390 Assurance of Transportation*

At proposed § 440.390, a State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to the assurance of transportation to medically necessary services requirement specified in section 42 CFR 431.53.

**VI. Regulatory Impact Analysis**

*A. Overall Impact*

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism (August 4, 1999), and Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

We issued a State Medicaid Director's letter on March 31, 2006, providing guidance on the new flexibilities available to States as a result of the enactment of the Deficit Reduction Act of 2005. This final rule simply codifies that guidance. States have already begun implementing this provision well in advance of this final rule. As a result, while we anticipate that implementation of this flexibility will be economically significant, the significance is based on the changes authorized by statute and not based on discretionary policies contained in the rule itself. The impact of the rule will be limited to ensuring uniform policies for States that implement the flexibility afforded under section 1937 of the Act, as added by the DRA of 2005. The aggregate amount of Federal savings is estimated to be $2.3 billion from FY 2006 through FY 2010.

We have estimated the impact of this rule by analyzing the potential Federal savings related to lower per capita spending that may be achieved if States choose to enroll beneficiaries in eligible populations in plans that are less costly than projected Medicaid costs. To do this, we developed estimates based on the following assumptions:

- The number of eligible beneficiaries and the Federal Medicaid costs of these beneficiaries are based on 2003 Medicaid Statistical Information System (MSIS) data;
- Projections of the number of eligible beneficiaries and their associated Federal Medicaid costs were made using assumptions from the President's Budget 2007, including enrollment growth rates and per capita spending growth rates;
- The relative costs of the new plans allowed under this rule to current Medicaid spending were estimated based on reviews of Medicaid spending data and the plans described in this rule. Additionally, we have assumed that not all States would immediately use the options made available through this rule; therefore, we assume that State use of these plans will continue to increase through 2011. We assume that use in 2006 will be about 10 percent of 2011-level of use; 40 percent in 2007; 60 percent in 2008; 80 percent in 2009; and 90 percent in 2010.

These estimates assume that there will be a negligible impact on State administration costs. As States already have experience in dealing with alternative plan designs, including through waivers or managed care plans, we have assumed States are equipped to implement these plans and will be part of their normal administrative spending.

These estimates are subject to a substantial amount of uncertainty and actual experience may be significantly different. The range of possible experience is greater than under most other rules for the following two reasons. First, this rule provides the option for States to use alternative plans; to the extent that States participate more or less than assumed here (both the number of States that participate and the extensiveness of States' use of these plans), Federal savings may be greater than or less than estimated. Second, this rule also provides a wide range of options for States in designing these plans; to the extent that States use plans that are relatively more or less costly than assumed here, Federal savings may be less than or greater than estimated.

ESTIMATED ANNUAL FEDERAL SAVINGS DISCOUNTED AT 0 PERCENT, 3 PERCENT AND 7 PERCENT—FROM FY 2006 TO FY 2010

[In millions]

| Discount rate | 2006 | 2007 | 2008 | 2009 | 2010 | Total 2006–2010 |
|---|---|---|---|---|---|---|
| 0% | $70 | $280 | $460 | $660 | $810 | 2,280 |
| 3% | 68 | 264 | 421 | 586 | 699 | 2,038 |
| 7% | 65 | 245 | 375 | 504 | 578 | 1,767 |

We anticipate that States will phase in alternative benefit programs, and changes will not be fully realized until 2010. The majority of savings will be achieved through cost avoidance of future anticipated costs by providing appropriate benefits based on a population's health care needs, appropriate utilization of services, and through gains in efficiencies through contracting. States will be able to take greater advantage of marketplace

dynamics within their State. We also anticipate that a number of States will use this flexibility to create programs that are more similar to their SCHIP programs. Because States are no longer tied to statewideness and comparability rules for non-disabled, non-aged, and non-blind populations, they will be able to offer individuals and families different types of plans consistent with their needs and available delivery systems.

ESTIMATED ANNUAL STATE SAVINGS DISCOUNTED AT 0 PERCENT, 3 PERCENT AND 7 PERCENT—FROM FY 2006 TO FY 2010

[In millions]

| Discount rate | 2006 | 2007 | 2008 | 2009 | 2010 | Total 2006–2010 |
|---|---|---|---|---|---|---|
| 0% | $50 | $210 | $350 | $500 | $610 | $1,720 |
| 3% | 49 | 198 | 320 | 444 | 526 | 1,537 |
| 7% | 47 | 183 | 286 | 381 | 435 | 1,332 |

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities as that term is used in the RFA (include small businesses, nonprofit organizations, and small governmental jurisdictions). The great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the SBA definition of a small business (having revenues of less than $6.5 million to $31.5 million in any 1 year.) Individuals and States are not included in the definition of a small entity. We have determined, and the Secretary certifies, that this provision applies to States only and will not affect small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We have determined, and the Secretary certifies, that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2008, that threshold is approximately $127 million. Because this rule does not mandate State participation in using these benchmark plans, there is no obligation for the State to make any change to their Medicaid program. Therefore, there is no mandate for the State. We believe this final rule will not mandate expenditures in that amount.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not impose direct cost on States or local government or preempt State law. The rule will provide States the option to implement alternative Medicaid benefits through a Medicaid State plan amendment.

*Comment:* One commenter questioned the validity of CMS's Regulatory Impact Analysis, believing that the proposed rule will cause additional administrative effort in order for AI/AN beneficiaries to participate.

*Response:* CMS is required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)) to conduct a regulatory analysis of the impact of any regulatory revision to the Medicare, Medicaid, and/or State Children's Health Insurance Program before adoption of any rule. A Regulatory Impact Analysis was completed for this rule. We believe there is negligible impact on State administrative costs since States already have experience in dealing with alternative plan designs, including through waivers or managed care plans. Thus, we have assumed States are equipped to implement these plans and that costs will be part of their normal administrative spending. We believe this would be true for any State that chooses to offer benchmark or benchmark-equivalent plans to the Medicaid beneficiaries including AI/AN Medicaid beneficiaries.

*B. Anticipated Effects*

Before section 6044 of the DRA became effective on March 31, 2006, State Medicaid programs generally were required to offer at minimum the same standard benefit package to each recipient, regardless of income, eligibility category, or geographic location. Some States offered alternative benefit packages to certain recipients under section 1115 demonstration waivers approved by the Centers for Medicare & Medicaid Services. This provision allows for similar program alternatives under the State plan without the constraints of a waiver. Moreover, Medicaid families will gain continuity in coverage as family members move together from Medicaid and the State Children's Health Insurance Program (SCHIP) to, eventually, private coverage. Today, because of the lack of flexibility in Medicaid, one child may be receiving Medicaid, another in SCHIP, and the parent has access to private coverage. With benefit flexibility in State Medicaid programs, families could enroll under the same plan, with the same providers and one set of administrative rules. Administrative simplification can help families maintain health insurance coverage and give them experience with private insurance coverage that would become important when their income rises above Medicaid and SCHIP eligibility levels and mitigate the need for dependence. States with strong employer-based coverage may emphasize family coverage premium assistance. States may form larger pools by combining Medicaid recipients with their public employees.

*C. Alternatives Considered*

This rule finalizes requirements for States to elect alternative Medicaid benefit programs through the adoption

of a Medicaid State plan amendment. The final requirements in this rule were designed to maximize State flexibility while assuring that beneficiaries will get quality care that meets their needs. Under this rule, we will permit States to define the alternative benefit packages only by reference to the benchmark or benchmark-equivalent standard (with the exception of the EPSDT wrap-around benefits). We will also permit States to combine an alternative benefit package with alternative benefit delivery methods, such as through managed care, employer-based coverage, or selective contracting. An alternative might have been to require the State to document any deviation from otherwise applicable State plan requirements, much as is required under section 1115 demonstration waivers, 1915(b) waivers, 1915(c) waivers, or any combination thereof. We have not elected this alternative because it would be cumbersome for States, it will not be consistent with the statutory use of benchmark and benchmark-equivalent coverage as reference points for permissible benefit packages, and it will not improve the clarity of the State plan. Another alternative might have been to limit State flexibility under this provision to variation in the amount, duration and scope of benefits without providing authority for an integrated approach combining alternative benefits with alternative benefit delivery methods. We have not elected this alternative because an integrated approach allows greater State flexibility to tailor both benefits and delivery methods to the eligible groups of individuals being served.

*D. Accounting Statement*

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 15 below, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this rule. This table provides our best estimate of the decrease in Medicaid payments as a result of the changes presented in this rule. All savings are classified as transfers to the Federal Government, as well as to States.

TABLE—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED SAVINGS, FROM FY 2006 TO FY 2010

[In $millions]

| Category | Transfers | | | | |
|---|---|---|---|---|---|
| Annualized Monetized Transfers | Year dollar | Units discount rate | | | Period covered |
| | | 7% | 3% | 0% | |
| | 2006 | −$430.8 | −$445.0 | −$456.0 | 2006–2010 |
| From Whom To Whom? | Federal Government to Beneficiaries, Providers | | | | |
| Year | 2006 | 2007 | 2008 | 2009 | 2010 |
| Annualized Monetized Transfers | −$70 | −$280 | −$460 | −$660 | −$810 |
| From Whom to Whom? | Federal Government to Beneficiaries, Providers | | | | |
| Annualized Monetized Transfers | Year dollar | Units discount rate | | | Period covered |
| | | 7% | 3% | 0% | |
| | 2006 | −$324.9 | −$335.7 | −$344.0 | 2006–2010 |
| From Whom to Whom? | State Governments to Beneficiaries, Providers | | | | |
| Year | 2006 | 2007 | 2008 | 2009 | 2010 |
| Annualized Monetized Transfers | −$50 | −$210 | −$350 | −$500 | −$610 |
| From Whom to Whom? | State Governments to Beneficiaries, Providers | | | | |

Column 1: Category—Contains the description of the different impacts of the rule; it could include monetized, quantitative but not monetized, or qualitative but not quantitative or monetized impacts; it also may contain unit of measurement (such as, dollars). In this case, the only impact is the Federal annualized monetized impact of the rule.

Column 2: Primary Estimate—Contains the quantitative or qualitative impact of the rule for the respective category of impact. Monetized amounts are generally shown in real dollar terms. In this case, the federalized annualized monetized primary estimate represents the equivalent amount that, if paid (saved) each year over the period covered, would result in the same net present value of the stream of costs (savings) estimated over the period covered.

Column 3: Year Dollar—Contains the year to which dollars are normalized; that is, the first year that dollars are discounted in the estimate.

Column 4: Unit Discount Rate—Contains the discount rate or rates used to estimate the annualized monetized impacts. In this case, three rates are used: 7 percent; 3 percent; 0 percent.

Column 5: Period Covered—Contains the years for which the estimate was made.

Rows: The rows contain the estimates associated with each specific impact and each discount rate used.

''From Whom to Whom?''—In the case of a transfer (as opposed to a change in aggregate social welfare as described in the OMB Circular), this section describes the parties involved in the transfer of costs. In this case, the costs represent a reduction in Federal Government spending on behalf of beneficiaries. The table may also contain minimum and maximum

estimates and sources cited. In this case, there is only a primary estimate and there are no additional sources for the estimate.

Estimated Savings—The following table shows the discounted costs (savings) for each discount rate and for each year over the period covered. ''Total'' represents the net present value of the impact in the year the rule takes effect. These numbers represent the anticipated annual reduction in Federal Medicaid spending under this rule.

*E. Conclusion*

We project that the use of benchmark plans under this rule will result in $2.3 billion in Federal savings from 2006–2010. These savings would arise as States use the plans described by this rule to manage the costs of their Medicaid program by modifying plan benefits for targeted beneficiaries. The actual savings will heavily depend on the number of States that ultimately implement these plans, the number of beneficiaries States cover with these plans, and the specific design and selection of benchmark plans.

For reasons stated above, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

**List of Subjects in 42 CFR Part 440**

Grant programs—health, Medicaid.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

## PART 440—SERVICES: GENERAL PROVISIONS

■ 1. The authority citation for part 440 continues to read as follows:

**Authority:** Sec. 1102 of the Social Security Act (42 U.S.C. 1302)

■ 2. A new subpart C, consisting of § 440.300 through § 440.390, is added to part 440 to read as follows:

**Subpart C—Benchmark Benefit and Benchmark-Equivalent Coverage**

Sec.

440.300 Basis.
440.305 Scope.
440.310 Applicability.
440.315 Exempt individuals.
440.320 State plan requirements: Optional enrollment for exempt individuals.
440.325 State plan requirements: Coverage and benefits.
440.330 Benchmark health benefits coverage.
440.335 Benchmark-equivalent health benefits coverage.
440.340 Actuarial report for benchmark-equivalent coverage.
440.345 EPSDT services requirement.
440.350 Employer-sponsored insurance health plans.
440.355 Payment of premiums.
440.360 State plan requirement for providing additional wrap-around services.
440.365 Coverage of rural health clinic and federally qualified health center (FQHC) services.
440.370 Cost-effectiveness.
440.375 Comparability and Scope of Coverage.
440.380 Statewideness.
440.385 Freedom of choice.
440.390 Assurance of Transportation.

## Subpart C—Benchmark Benefit and Benchmark-Equivalent Coverage

### § 440.300 Basis.

This subpart implements section 1937 of the Act, which authorizes States to provide for medical assistance to one or more groups of Medicaid-eligible recipients specified by the State under an approved State plan amendment through enrollment in coverage that provides benchmark or benchmark-equivalent health care benefit coverage.

### § 440.305 Scope.

(a) *General.* This subpart sets out requirements for States that elect to provide medical assistance to certain Medicaid eligible recipients within one or more groups of individuals specified by the State, through enrollment of the recipients in coverage, identified as ''benchmark'' or ''benchmark-equivalent.''

(b) *Limitations.* A State may only apply the option in paragraph (a) of this section for an individual whose eligibility is based on an eligibility category under section 1905(a) of the Act that would have been covered under the State's plan on or before February 8, 2006.

(c) A State may not require but may offer enrollment in benchmark or benchmark-equivalent coverage to the Medicaid eligible individuals listed in § 440.315. States allowing individuals to opt in must be in compliance with the rules specified at § 440.320.

(d) Any State that opts to offer alternative benchmark or benchmark-equivalent coverage to Medicaid beneficiaries must secure public input prior to the submission of any State plan amendment to CMS.

(e) In implementing benchmark or benchmark-equivalent package, States must comply with the managed care rules at section 1932 of the Act and part 438 of this chapter if benchmark or benchmark-equivalent benefits are provided through managed care plans unless the State demonstrates that such requirements are impractical in the context of, or inconsistent with, methods of offering coverage appropriate to meet the health care needs of the targeted population.

### § 440.310 Applicability.

(a) *Enrollment.* The State may require ''full benefit eligible'' recipients not excluded in § 440.315 to enroll in benchmark or benchmark-equivalent coverage.

(b) *Full benefit eligible.* A recipient is a full benefit eligible if determined by the State to be eligible to receive the standard full Medicaid benefit package under the approved State plan if not for the application of the option available under this subpart.

### § 440.315 Exempt individuals.

For recipients within one (or more) of the following categories, the State plan may offer, but may not require under § 440.310, the opportunity to obtain benefits through enrollment in benchmark or benchmark-equivalent coverage:

(a) The recipient is a pregnant woman who is required to be covered under the State plan under section 1902(a)(10)(A)(i) of the Act.

(b) The recipient qualifies for medical assistance under the State plan on the basis of being blind or disabled (or being treated as being blind or disabled) without regard to whether the individual is eligible for Supplemental Security Income benefits under title XVI on the basis of being blind or disabled and including an individual who is eligible for medical assistance on the basis of section 1902(e)(3) of the Act.

(c) The recipient is entitled to benefits under any part of Medicare.

(d) The recipient is terminally ill and is receiving benefits for hospice care under title XIX.

(e) The recipient is an inpatient in a hospital, nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and is required, as a condition of receiving services in that institution under the State plan, to spend for costs of medical care all but a minimal amount of the individual's income required for personal needs.

(f) The recipient is medically frail or otherwise an individual with special medical needs. For these purposes, the State's definition of individuals with special needs must at least include

those individuals described in § 438.50(d)(3) of this chapter.

(g) The recipient qualifies based on medical condition for medical assistance for long-term care services described in section 1917(c)(1)(C) of the Act.

(h) The recipient is an individual with respect to whom aid or assistance is made available under part B of title IV to children in foster care and individuals with respect to whom adoption or foster care assistance is made available under part E of title IV, without regard to age.

(i) The recipient qualifies for medical assistance on the basis of eligibility to receive assistance under a State plan funded under part A of title IV (as in effect on or after welfare reform effective date defined in section 1931(i) of the Act). This provision relates to those individuals who qualify for Medicaid solely on the basis of qualification under the State's TANF rules.

(j) The recipient is a woman who is receiving medical assistance by virtue of the application of sections 1902(a)(10)(ii)(XVIII) and 1902(a) of the Act.

(k) The recipient qualifies for medical assistance on the basis of section 1902(a)(10)(A)(ii)(XII) of the Act.

(l) The recipient is not a qualified alien (as defined in section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996) and receives care and services necessary for the treatment of an emergency medical condition in accordance with section 1903(v) of the Act.

(m) The recipient is determined eligible as medically needy or eligible because of a reduction of countable income based on costs incurred for medical or other remedial care under section 1902(f) of the Act or otherwise based on incurred medical costs.

**§ 440.320 State plan requirements: Optional enrollment for exempt individuals.**

(a) *General rule.* A State plan that offers exempt individuals as defined in § 440.315 the option to enroll in benchmark or benchmark-equivalent coverage must identify in its State plan the exempt groups for which this coverage is available, and must comply with the following provisions:

(1) In any case in which the State offers an exempt individual the option to obtain coverage in a benchmark or benchmark-equivalent benefit package, the State must effectively inform the individual prior to enrollment that the enrollment is voluntary and that the individual may opt out of the benchmark or benchmark-equivalent coverage at any time and regain immediate access to standard full Medicaid coverage under the State plan.

(2) Prior to any enrollment in benchmark or benchmark-equivalent coverage, the State must inform the exempt recipient of the benefits available under the benchmark or benchmark-equivalent benefit package and provide a comparison of how they differ from the benefits available under the standard full Medicaid program.

(3) The State must document in the exempt recipient's eligibility file that the recipient was informed in accordance with this section prior to enrollment, was given ample time to arrive at an informed choice, and voluntarily chose to enroll in the benchmark or benchmark-equivalent benefit package.

(4) For individuals who the State determines have become exempt individuals while enrolled in benchmark or benchmark-equivalent coverage, the State must comply with the requirements in paragraphs (a)(1) through (a)(3) of this section within 30 days after such determination.

(b) Disenrollment or Opt/Out Process.

(1) The State must act upon requests promptly for exempt individuals who choose to opt out of benchmark or benchmark-equivalent coverage.

(2) The State must have a process in place to ensure that exempt individuals have continuous access to services while opt out requests are being processed.

**§ 440.325 State plan requirements: Coverage and benefits.**

Subject to requirements in § 440.345 and § 440.365, States may elect to provide any of the following of types of health benefits coverage:

(a) Benchmark coverage in accordance with § 440.330.

(b) Benchmark-equivalent coverage in accordance with § 440.335.

**§ 440.330 Benchmark health benefits coverage.**

Benchmark coverage is health benefits coverage that is equal to the coverage under one or more of the following benefit plans:

(a) *Federal Employees Health Benefit Plan Equivalent Coverage (FEHBP—Equivalent Health Insurance Coverage).* A benefit plan equivalent to the standard Blue Cross/Blue Shield preferred provider option service benefit plan that is described in and offered to Federal employees under 5 U.S.C. 8903(1).

(b) *State employee coverage.* Health benefits coverage that is offered and generally available to State employees in the State.

(c) *Health maintenance organization (HMO) plan.* A health insurance plan that is offered through an HMO, (as defined in section 2791(b)(3) of the Public Health Service Act) that has the largest insured commercial, non-Medicaid enrollment in the State.

(d) *Secretary approved coverage.* Any other health benefits coverage that the Secretary determines, upon application by a State, provides appropriate coverage to meet the needs of the population provided that coverage. States wishing to opt for Secretarial approved coverage should submit a full description of the proposed coverage, (including a benefit-by-benefit comparison of the proposed plan to one or more of the three other benchmark plans specified above or to the State's standard full Medicaid coverage package under section 1905(a) of the Act), and of the population to which the coverage would be offered. In addition, the State should submit any other information that would be relevant to a determination that the proposed health benefits coverage would be appropriate for the proposed population. The scope of a Secretary-approved health benefits package will be limited to benefits within the scope of the categories available under a benchmark coverage package or the standard full Medicaid coverage package under section 1905(a) of the Act.

**§ 440.335 Benchmark-equivalent health benefits coverage.**

(a) *Aggregate actuarial value.* Benchmark-equivalent coverage is health benefits coverage that has an aggregate actuarial value, as determined in § 440.340 that is at least actuarially equivalent to the coverage under one of the benchmark benefit packages described in § 440.330 for the identified Medicaid population to which it will be offered.

(b) *Required coverage.* Benchmark-equivalent health benefits coverage must include coverage for the following categories of services:

(1) Inpatient and outpatient hospital services.

(2) Physicians' surgical and medical services.

(3) Laboratory and x-ray services.

(4) Well-baby and well-child care, including age-appropriate immunizations.

(5) Other appropriate preventive services, such as emergency services as designated by the Secretary.

(c) *Additional coverage.*

(1) In addition to the categories of services of this section, benchmark-equivalent coverage may include coverage for any additional services in

a category included in the benchmark plan or described in section 1905(a) of the Act.

(2) If the benchmark coverage package used by the State for purposes of comparison in establishing the aggregate actuarial value of the benchmark-equivalent package includes any of the following four categories of services: prescription drugs; mental health services; vision services; and hearing services; then the actuarial value of the coverage for each of these categories of service in the benchmark-equivalent coverage package must be at least 75 percent of the actuarial value of the coverage for that category of service in the benchmark plan used for comparison by the State.

(3) If the benchmark coverage package does not cover one of the four categories of services in paragraph (c)(2) of this section, then the benchmark-equivalent coverage package may, but is not required to, include coverage for that category of service.

**§ 440.340 Actuarial report for benchmark-equivalent coverage.**

(a) A State plan amendment that would provide for benchmark-equivalent health benefits coverage described in § 440.335, must include an actuarial report. The actuarial report must contain an actuarial opinion that the benchmark equivalent health benefits coverage meets the actuarial requirements set forth in § 440.335. The report must also specify the benchmark coverage used for comparison.

(b) The actuarial report must state that it was prepared according to the following requirements:

(1) By an individual who is a member of the American Academy of Actuaries (AAA).

(2) Using generally accepted actuarial principles and methodologies of the AAA.

(3) Using a standardized set of utilization and price factors.

(4) Using a standardized population that is representative of the population involved.

(5) Applying the same principles and factors in comparing the value of different coverage (or categories of services).

(6) Without taking into account any differences in coverage based on the method of delivery or means of cost control or utilization used.

(7) Taking into account the ability of the State to reduce benefits by taking into account the increase in actuarial value of health benefits coverage offered under the State plan that results from the limitations on cost sharing (with the exception of premiums) under that coverage.

(c) The actuary preparing the opinion must select and specify the standardized set of factors and the standardized population to be used in paragraphs (b)(3) and (b)(4) of this section.

(d) The State must provide sufficient detail to explain the basis of the methodologies used to estimate the actuarial value or, if requested by CMS, to replicate the State's result.

**§ 440.345 EPSDT services requirement.**

(a) The State must assure access to early and periodic screening, diagnostic and treatment (EPSDT) services through benchmark or benchmark-equivalent plan benefits or as wrap-around benefits to those plans for any child under 19 years of age eligible under the State plan in a category under section 1902(a)(10)(A) of the Act.

(1) *Sufficiency:* Any wrap-around EPSDT benefits must be sufficient so that, in combination with the benchmark or benchmark-equivalent benefits plan, these individuals have access to the full EPSDT benefit.

(2) *State Plan requirement:* The State must include a description of how the wrap-around benefits will be provided to ensure that these recipients have access to the full EPSDT benefit.

(b) Individuals must first seek coverage of EPSDT services through the benchmark or benchmark-equivalent plan before seeking coverage of such through wrap-around benefits.

**§ 440.350 Employer-sponsored insurance health plans.**

(a) A State may provide benchmark or benchmark-equivalent coverage by obtaining employer sponsored health plans (either alone or with the addition of wrap-around services covered separately under Medicaid) for individuals with access to private health insurance.

(b) The State must assure that employer sponsored plans meet the requirements of benchmark or benchmark-equivalent coverage, including the cost-effectiveness requirements at § 440.370.

(c) A State may provide benchmark or benchmark-equivalent coverage through a combination of employer sponsored health plans and additional benefit coverage provided by the State that wraps around the employer sponsored health plan which, in the aggregate, results in benchmark or benchmark-equivalent level of coverage for those recipients.

**§ 440.355 Payment of premiums.**

Payment of premiums by the State, net of beneficiary contributions, to obtain benchmark or benchmark-equivalent benefit coverage on behalf of beneficiaries under this section will be treated as medical assistance under section 1905(a) of the Act.

**§ 440.360 State plan requirement for providing additional wrap-around services.**

If the State opts to provide additional or wrap-around coverage to individuals enrolled in benchmark or benchmark-equivalent plans, the State plan must describe the populations covered and the payment methodology for these services. Additional or wrap-around services must be in categories that are within the scope of the benchmark coverage, or are described in section 1905(a) of the Act.

**§ 440.365 Coverage of rural health clinic and federally qualified health center (FQHC) services.**

If a State provides benchmark or benchmark-equivalent coverage to individuals, it must assure that the individual has access, through that coverage or otherwise, to rural health clinic services and FQHC services as defined in subparagraphs (B) and (C) of section 1905(a)(2) of the Act. Payment for these services must be made in accordance with the payment provisions of section 1902(bb) of the Act.

**§ 440.370 Cost-effectiveness.**

Benchmark and benchmark-equivalent coverage and any additional benefits must be provided in accordance with Federal upper payment limits, procurement requirements and other economy and efficiency principles that would otherwise be applicable to the services or delivery system through which the coverage and benefits are obtained.

**§ 440.375 Comparability and scope of coverage.**

States have the option to amend their State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to comparability or requirements relating to the scope of coverage other than those contained in this subpart.

**§ 440.380 Statewideness.**

States have the option to amend their State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to statewideness.

**§ 440.385 Freedom of choice.**

(a) States have the option to amend their State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to the

requirements for free choice of provider in § 431.51 of this chapter.

(b) States may restrict recipients to obtaining services from (or through) selectively procured provider plans or practitioners that meet, accept, and comply with reimbursement, quality and utilization standards under the State Plan, to the extent that the restrictions imposed meet the following requirements:

(1) Do not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing the benchmark benefit package.

(2) Do not apply in emergency circumstances.

(3) Does not apply to family planning providers.

(4) Require that all provider plans are paid on a timely basis in the same manner as health care practitioners must be paid under § 447.45 of this chapter.

**§ 440.390 Assurance of transportation**

A State may at its option amend its State plan to provide benchmark or benchmark-equivalent coverage to recipients without regard to the assurance of transportation to medically necessary services requirement specified in § 431.53 of this chapter.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: August 8, 2008.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: September 29, 2008.

**Michael O. Leavitt,**

*Secretary.*

**Editorial Note:** This document was received in the Office of the Federal Register on Monday, November 24, 2008.

[FR Doc. E8–28330 Filed 12–2–08; 8:45 am]

BILLING CODE 4120–01–P

Federal Register

Wednesday,
December 3, 2008

## Part III

# Department of Labor

### Employment and Training Administration

**Planning Guidance for State Unified Plans and Unified Plan Modifications Submitted Under Section 501 of the Workforce Investment Act (WIA); Notice**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Planning Guidance for State Unified Plans and Unified Plan Modifications Submitted Under Section 501 of the Workforce Investment Act (WIA)

**AGENCY:** Employment and Training Administration.

**ACTION:** Notice.

**SUMMARY:** The purpose of this notice is to provide interested parties with the planning guidance for use by states in submitting their Unified State Plans under section 501 of the Workforce Investment Act of 1998 as well as Plan modifications. The Planning Guidance provides a framework for the collaboration of governors, local elected officials, businesses and other partners to continue the development of workforce investment systems that address customer needs, deliver integrated user-friendly services, and are accountable to the customers and the public.

**FOR FURTHER INFORMATION CONTACT:** Ms. Gay Gilbert, Administrator, Office of Workforce Investment, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–4231, Washington, DC 20210. Telephone: (202) 693–3980 (voice) (this is not a toll free number) or (202) 693–7755 (TTY).

**SUPPLEMENTARY INFORMATION:**

### Planning Guidance for State Unified Plans and Unified Plan Modifications Submitted Under Section 501 of the Workforce Investment Act (WIA)

OMB Control Number 1205–0398.
Expiration Date: Nov 30, 2011.

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### State Unified Plan Planning Guidance

*Part I. State Planning Instructions*

A. Statement of Purpose

The purpose of this document is to provide guidance to States which submit a State Unified Plan authorized by title V, section 501 of the Workforce Investment Act of 1998 (WIA). The State Unified Plan Planning Guidance facilitates the development and submission of such a Plan, which addresses two or more of the programs or activities specified at WIA section 501(b)(2). This Planning Guidance updates the requirements for the WIA/Wagner-Peyser Act and Senior Community Service Employment Program (SCSEP) portions of the Unified Plan. Options for programs funded by the U.S. Department of Education that are included in a Unified Plan also are discussed in this notice. Minor reference updates have been made for other programs authorized to be included in the Unified Plan.

An approved Strategic State Plan is required in order for States to receive formula allotments under WIA title I and the Wagner-Peyser Act. The current Plans expire June 30, 2009. States which choose to submit the WIA title I/Wagner-Peyser Plan as part of a Unified Plan must comply with the requirements of these guidelines. Guidelines for the submission of a Stand-Alone WIA title I Plan are being issued separately.

B. Background

The State Unified Plan Planning Guidance provides a framework for the collaboration of governors, local elected officials, businesses and other partners to design and build workforce investment systems that address customer needs; deliver integrated, user-friendly services; and are accountable to the customers and the public. Unified Planning Guidance provisions related to the SCSEP and Perkins IV have changed. There are only minor changes to the Unified Planning Guidance items that relate to WIA title I and Wagner-Peyser Act Plan. The Unified Plan requirements for other programs remain the same as those outlined in the April 12, 2005, version of this document (70 **Federal Register** 19222).

Senior Community Service Employment Program

On October 17, 2006, the President signed into law the Older Americans Act Amendments of 2006, Public Law 109–365, which authorizes SCSEP. The purpose of SCSEP is to foster individual economic self-sufficiency and promote useful opportunities in community service activities for unemployed low-income persons who are age 55 or older, particularly persons who have poor employment prospects, and to increase the number of persons who may enjoy the benefits of unsubsidized employment in both the public and private sectors. The 2006 Amendments instituted a number of program changes. The amendments increased the emphasis on placements into unsubsidized employment; imposed a time limit on enrollees' program participation; restricted fringe benefits for participants; enabled grantees to spend additional funds on training; and mandated the adoption of core indicators of performance aligned with the Employment and Training Administration (ETA)'s common measures. The new law became effective July 1, 2007. Each State SCSEP grantee must prepare an application for funding each year. This application is a thorough explanation of how the project will operate. A State that chooses to include the SCSEP program in a Unified Plan must prepare a separate grant application according to SCSEP program requirements.

Options for Programs Funded by the U.S. Department of Education

With respect to the programs authorized by the Adult Education and Family Literacy Act (AEFLA), the U.S.

Department of Education has already issued guidance to States that discusses the option of extending the existing State plans with certain necessary revisions, and requests for extending plans were due April 1, 2008. Further, the U.S. Department of Education anticipates that the States will have the option of extending their State plans again in April 2009, in the absence of a reauthorization of the AEFLA. This option of extending the existing plan applies as well to any subsections of a Unified State Plan that are related to programs under AEFLA. A State's request to extend subsections of a unified plan must be submitted directly to the U.S. Department of Education and is due April 1, 2009, for AEFLA programs. See Guide for the Development of a State Plan under the Adult Education and Family Literacy Act (OMB Control Number 1830–0026). The U.S. Department of Education anticipates that States will choose the option of extending their existing subsections of the currently approved Unified State Plans with only the revisions discussed in the above-referenced guidance. However, any State that chooses to submit new subsections related to AEFLA programs in its Unified State Plan submitted in accordance with this notice must fully comply with all the planning, content, and other requirements that applied when the Unified Plan was originally developed, adopted, and submitted. These requirements are summarized together with references to the underlying statutory and regulatory requirements in the second section of this notice.

The U.S. Department of Education issued a program memorandum and guidance to States on March 12, 2007, regarding their options for submission of State plans under the newly authorized Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV), 20 U.S.C. 2301 *et seq.* as amended by Public Law 109–270. States were given the option of submitting a one-year transitional plan (starting July 1, 2007), or a six-year full plan (starting July 1, 2007). The guidance also provided States direction for submitting a Unified Plan under WIA. See Program Memorandum Transmittal of the Carl D. Perkins Career and Technical Education Act of 2006 State Plan Guide and the Guide for the Submission of State Plans (OMB Control Number: 1830–0029) at: *http://www.ed.gov/policy/sectech/guid/cte/perkinsiv/stateplanmemo.pdf* or *http://www.ed.gov/policy/sectech/guid/cte/perkinsiv/stateplan.doc.*

The U.S. Department of Education also issued a program memorandum on October 30, 2007, that required each eligible agency that submitted a one-year transition plan for the first program year to submit a five-year State plan (starting July 1, 2008), covering the remaining program years, that meet all the requirements of Perkins IV, as covered in the March 2007 memo and guidance. See Program Memorandum Submission of Five-Year State Plans under the Carl D. Perkins Career and Technical Education Act of 2006 at *http://www.ed.gov/policy/sectech/guid/cte/perkinsiv/fiveyear-stateplan.pdf.* All States, including the outlying areas as defined in section 3(21) of Perkins IV, have submitted a five-year plan, or will submit a five-year plan. No State has notified the Department of Education that it plans to submit a Unified Plan under WIA that includes Perkins IV requirements. These Perkins IV State plans will remain in effect for five years once the U.S. Department of Education approves these plans (starting July 1, 2008, or the date of approval if later). If a State wishes to revise or amend its Perkins IV State plan in the future to make it part of its State Unified Plan, then the State would have to meet the requirements for revising or amending its State plan that are in section 122(a)(2) of Perkins IV and Department of Education Administrative Regulations (EDGAR) at 34 CFR 76.140, as well as the Department of Labor's requirements for amending a Unified State Plan. Additionally, a State would have to satisfy the requirements of section 501 of WIA with respect to State plans, e.g. legislature approval to include secondary Perkins IV programs.

C. Section 501 Programs and Activities

Below is a listing of the programs and activities covered in section 501 of WIA, along with the commonly used name. In this document, we generally refer to the activities and programs by their commonly used names. Should State staff need information on the programs listed, a staff contact is provided here also.

- Secondary Career and Technical Education programs (Perkins IV/ Secondary) Note that inclusion of this program in the Unified Plan requires prior approval of State legislature. Administered by Department of Education, Office of Vocational and Adult Education. *Staff Contact:* Dale King: 202–245–7405 (phone); 202–245–7837 (fax); (E-mail: *Dale.king2@ed.gov*).
- Postsecondary Career and Technical Education programs (Perkins IV/ Postsecondary) Administered by Department of Education, Office of Vocational and Adult Education. *Staff Contact:* Dale King: 202–245–7405 (phone); 202–245–7837 (fax); (E-mail: *Dale.king2@ed.gov*).
- Tech-Prep Education (title II of Perkins IV) Administered by Department of Education, Office of Vocational and Adult Education. *Staff Contact:* Dale King: 202–245–7405 (phone); 202–245–7837 (fax); (E-mail: *Dale.king2@ed.gov*).
- Activities authorized under title I, Workforce Investment Systems (Workforce Investment Activities for Youth, or WIA title I Youth) Administered by Department of Labor, Employment and Training Administration. *Staff Contact:* Gregg Weltz: 202–693–3527 (phone); 202–693–3861 (fax); (E-mail: *Weltz.Gregg@dol.gov*).
- Activities authorized under title I, Workforce Investment Systems (Workforce Investment Activities for Adults, and Dislocated Workers, or WIA title I) Administered by Department of Labor, Employment and Training Administration. *Staff Contact:* Christine D. Ollis: 202–693–3937 (phone); 202–693–3015 (fax); (E-mail: *Ollis.Christine@dol.gov*).
- Activities authorized under title II of WIA, Adult Education and Family Literacy (Adult Education and Family Literacy Programs) Administered by Department of Education, Office of Vocational and Adult Education. *Staff Contact:* Dale King: 202–245–7405 (phone); 202–245–7837 (fax); (E-mail: *Dale.king2@ed.gov*).
- Food Stamp Employment and Training Program (FSET) Administered by USDA, Food and Nutrition Service. *Staff Contact:* Micheal Atwell: 703–305–2449 (phone); 703–305–2486 (fax); (E-mail: *micheal.atwell@fns.usda.gov*).
- Activities authorized under chapter 2 of title II of the Trade Act of 1974 (Trade Act Programs) Administered by Department of Labor, Employment and Training Administration. *Staff Contact:* Terry Clark: 202–693–3707 (phone); 202–693–3585 (fax); (E-mail: *Clark.Terry@dol.gov*).
- Programs authorized under the Wagner-Peyser Act (Employment Service) Administered by Department of Labor, Employment and Training Administration. *Staff Contact:* Maggie Ewell: 202–693–3160 (phone); 202–693–3787 (fax); (E-mail: *Ewell.Maggie@dol.gov*).
- Programs authorized under Part B of title I of the Rehabilitation Act of 1973, other than section 112 of such Act (Vocational Rehabilitation) Administered by Department of Education, Rehabilitation Services Administration. *Staff Contact:* Jerry Elliott: 202–245–7335 (phone); 202–

245–7590 (fax); (E-mail: *jerry.elliott@ed.gov*).

• Programs authorized under chapters 41 and 42 of Title 38, USC, and 20 CFR 1001 and 1005 (Veterans Programs, including Veterans Employment, Disabled Veterans' Outreach Program, and Local Veterans' Employment Representative Program) Administered by Department of Labor, Veterans' Employment and Training Service. *Staff Contact:* Patrick J. Hecker: 202–693–4709 (phone); 202–693–4755 (fax); (E-mail: *Hecker.Patrick@dol.gov*).

• Programs authorized under State unemployment compensation laws (Unemployment Insurance) Administered by Department of Labor, Employment and Training Administration. *Staff Contacts:* Mary Vrany: 202–693–3357 (phone); 202–693–3975 (fax); (E-mail: *Vrany.Mary@dol.gov*); or Delores Mackall: 202–693–3183 (phone); 202–693–3975; (E-mail: *Mackall.Delores@dol.gov*).

• Programs authorized under part A of title IV of the Social Security Act (Temporary Assistance for Needy Families (TANF) Administered by Health and Human Services, Administration for Children and Families. *Staff Contact:* Robert M. Shelbourne: 202–401–5150 (phone); 202–401–5554 (fax); (E-mail: *rshelbourne@acf.hhs.gov*).

• Programs authorized under title V of the Older Americans Act of 1965 (Senior Community Service Employment Program, or SCSEP) Administered by Department of Labor, Employment and Training Administration. *Staff Contact:* Alexandra Kielty: 202–693–3730 (phone); 202–693–3587 (fax); (E-mail: *Kielty.Alexandra@dol.gov*).

• Training activities funded by the Department of Housing and Urban Development under the Community Development Block Grants (CDBG) and Public Housing Programs. *Staff Contact:* Manuel Ochoa: 202–708–2111; Fax: 202–708–3672; (E-mail: *Manuel.T.Ochoa@hud.gov*).

• Programs authorized under the Community Services Block Grant Act (CSBG) Administered by Health and Human Services, Administration for Children and Families. *Staff Contact:* Brandy RayNor: 202–205–5926 (phone); 202–402–5718 (fax); (E-mail: *BRayNor@acf.hhs.gov*).

While the statute specifies that States may submit a Unified Plan that includes ''training activities'' carried out by the Department of Housing and Urban Development (HUD), for a number of reasons, the Federal Partners agree that the unique nature of HUD's training activities warrants special treatment in a Unified Plan.

Accordingly, the Unified Plan guidance provides for informal inclusion of HUD's programs. Since HUD programs are generally funded and implemented through local communities, and HUD's relevant State formula grant programs are not specifically employment and training programs, States that follow the Unified Planning guidance will not automatically receive funding for HUD's formula programs through their Unified Plans. However, to encourage States to think strategically about developing a comprehensive workforce investment system—including how that system relates to the housing and workforce investment needs of the population receiving housing assistance—the guidance includes references to HUD customers and services, as well as local housing agencies, in the overarching questions pertaining to the Unified Plan's vision and goals, One-Stop service delivery, and needs assessment.

D. Submission of State Unified Plans

1. Requirements for Submission and Points of Contact:

States have the option of submitting a Unified Plan to meet the requirements for submission of a State Plan.

a. *AEFLA Extensions.* A State's request to extend subsections of a Unified Plan related to programs under AEFLA must be submitted directly to the U.S. Department of Education and is due April 1, 2009 for AEFLA programs. See Guide for the Development of a State Plan under the Adult Education and Family Literacy Act (OMB Control number 1830–0026).

b. *Federal Coordinator.* To reduce the reporting and processing burden, States have the option of submitting their Unified Plan to either *WIA.PLAN@DOL.GOV* or to the designated Federal Coordinator for Plan Review and Approval (hereafter, ''Federal Coordinator''), depending upon the submission option chosen by the State (as discussed below). The Federal Coordinator is Janet Sten, E-mail: *Sten.janet@dol.gov*; phone: 202–693–3045.

c. *Federal Departments.* States also have the option of submitting their Unified Plans directly to each Federal Department whose programs are included in the Unified Plan, except for AEFLA simple extensions, which must be submitted to the U.S. Department of Education as stated above. States choosing this option are only required to send the Plan to the designated Federal Departmental State Unified Plan Contact (hereafter, ''Departmental Contact''). The Departmental Contact will be responsible for ensuring that affected agencies and appropriate Regional Offices in that Department receive copies of the Unified Plan. For example, if a Unified Plan contains plans for both the Vocational Rehabilitation and the Adult Education programs, both of which are administered by different agencies within the United States Department of Education, the State need only submit the Plan to the U.S. Department of Education once, and it should be sent to the Departmental Contact. E-mail addresses for the Departmental Contacts are as follows:

Department of Labor: *Sten.janet@dol.gov*
Department of Education: *Jerry.Elliott@ed.gov*
Department of Health and Human Services: *rshelbourne@acf.hhs.gov*
Department of Agriculture: *Micheal.Atwell@fns.usda.gov*
Department of Housing and Urban Development: *Manuel.T.Ochoa@hud.gov*

2. Submission Options—Electronic, CD–ROM or Hard Copy Format:

States have the option to submit Unified Plans in an electronic, hard copy, or CD–ROM format. The Federal Government is encouraging States to submit Unified Plans in electronic format to reduce the reporting and process burden and to ensure timely receipt by each Federal agency whose programs are included in the Unified Plan.

a. *Electronic Submission.* States can submit a Unified Plan electronically either by posting it on an Internet Web site that is accessible to the Department of Labor or by transmitting it through e-mail to the Department. Unified Plan certifications with electronic signatures are acceptable. If a State chooses not to use an electronic signature, then the Plan Signature(s) Page (Attachment B) must be submitted in hard copy.

i. *Posting Unified Plans on an Internet Web Site.* Under this option, a State should post its Plan on an Internet Web site; inform the Federal Coordinator through electronic mail of the URL and the location of the document on the Web site; provide contact information in the event of problems with accessing the Web site; and certify that no changes will be made to the version of the Plan posted on the Web site after it has been submitted to the Department, unless the Federal Coordinator or Federal agency overseeing the portion to be changed gives prior approval. The Federal Coordinator will ensure that Federal agencies whose programs are included

in the Unified Plan, and the appropriate DOL Regional Office, receive the relevant information.

ii. *Transmitting Unified Plans by E-Mail.* Any State submitting its Plan by e-mail should send it to *WIA.PLAN@DOL.GOV.* The Federal Coordinator will ensure that Federal agencies whose programs are included in the Unified Plan receive a copy. The Federal Coordinator will also provide a copy to the appropriate DOL Regional Office. If a State chooses to submit its Unified Plan by transmitting it through electronic mail, the State must submit it in Microsoft Word or PDF format.

b. *Hard Copy or CD–ROM Submission.* States choosing to submit a hard copy should submit one copy of the Plan with an original signature to Janet Sten, the Federal Coordinator for Plan Review and Approval, at the following address: Division of Workforce System Support, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Ave., NW, Room S–4231, Washington, DC 20210, ATTN: Janet Sten.

States submitting a Unified Plan on CD–ROM should submit one copy of the Plan to Janet Sten, the Federal Coordinator for Plan Review and Approval. The Federal Coordinator will ensure that each Federal agency whose programs are included in the Unified Plan, and the appropriate DOL Regional Office, receive copies of the Plan.

If the Plan on the CD–ROM does not include the signature of the governor on the signature page, the State must submit separately an electronic signature or a signature page in hard copy. Plans submitted on a CD–ROM must be in Microsoft Word or PDF format.

States submitting a hard copy of their Plan are encouraged to provide an unbound copy to facilitate duplication.

3. Table of Contents:

States are encouraged to include a table of contents at the beginning of the State Unified Plan. This will provide easy reference on the Plan's details to the public as well as aid the Federal Government in the review of the Unified Plan.

4. Receipt Confirmation:

The Federal Coordinator, without regard to which option the State uses for submission, will confirm receipt of the State Unified Plan within two workdays of receipt and indicate the date for the start of the review period. When a State submits an incomplete Plan, the period for review will not start until all required components of the Unified Plan have been received.

E. Federal Government Review and Approval of Unified Plan

Section 501(d)(2) of WIA states that a portion of a State Unified Plan covering an activity or program is to be considered to be approved by the appropriate Secretary at the end of the 90-day period beginning on the day the appropriate Secretary receives the portion unless the appropriate Secretary makes a written determination, during the 90-day period, that the portion is not consistent with the requirements of the Federal statute authorizing the activity or program or section 501(c)(3) of WIA.

The appropriate Secretary, or his/her representative, will advise the State by letter, as soon as possible, that the portion of the Unified Plan over which his/her agency exercises administrative authority is approved or disapproved. If the Plan is not approved, the appropriate Secretary, or his/her representative, will advise the State by letter that the portion of the Unified Plan over which his/her agency exercises administrative authority is not consistent with the requirements of the Federal statute authorizing the activity or program, or with section 501(c)(3) of WIA, and clearly indicate the reasons for disapproval and specify what additional information is required or what action needs to be taken for the Unified Plan to be approved.

F. How To Use ''Attachment B''

1. Forms for State Use:

In Attachment B you will find three forms for use in submitting the State Unified Plan. These forms are available for electronic download, along with this entire guidance, at *http://www.doleta.gov/usworkforce.*

a. *Unified Plan Activities and Programs Checklist:* Please provide a list of the section 501 programs and activities you have included in the Plan. Use of this specific format is optional.

b. *Contact Information:* Please provide the contact information requested for each of the Section 501 programs and activities that you have included in the Plan. Programs and activities may be combined on one form if they have the same contact information. Use of this specific format is optional.

c. *Plan Signature(s):* Please provide the required signatures as appropriate for the programs and activities you have included in the State Unified Plan. Use of this specific format is optional, but the wording on the signature page must be identical to that provided here.

2. Program Descriptions:

Please respond fully to the general questions in the program descriptions section, as well as the additional questions that relate to the programs and activities that are included in the State's Unified Plan.

3. Certifications and Assurances:

By signing the signature page(s), you are assuring or certifying those items in the Certifications and Assurances section that apply to the programs and activities you have included in the State's Unified Plan.

G. Negotiated WIA and Wagner-Peyser Act Performance Indicators

WIA allows considerable flexibility in system design and service delivery, in exchange for both accountability for a key set of outcomes and improving those outcomes over time. To accomplish this, the Secretary of Labor and the governor of each State must reach agreement on the State's negotiated performance levels for the core indicators of performance, and for customer satisfaction indicators of employers' and participants' satisfaction. These levels of performance become the basis for sanctions for failed performance and, with additional performance levels for WIA title II Adult Education and Family Literacy Act programs and Carl D. Perkins Career and Technical Education Act of 2006 programs, the basis for incentive grants.

At a minimum, the State Plan should include proposed performance goals for WIA and Wagner-Peyser Act programs for each of the performance indicators for each program year covered by the Plan. While the State Plan is under review, the ETA Regional Administrator and the State will discuss the performance levels, and negotiate on them as appropriate. The Department expects States to enter into preliminary discussions with the Local Workforce Investment Boards and the ETA Regional Administrators before submitting the State Plan. States are expected to come to the negotiating table with support from their Local Workforce Investment Boards for the proposed performance goals. Entering into preliminary discussions prior to Plan submission will maximize the time available to States, local areas, and the Department to develop a shared set of goals. ETA Regional Administrators will coordinate with other DOL program administrators, including the Veterans' Employment and Training Service (VETS) Regional Administrators, to assure comprehensive Departmental participation.

States should note that the proposed levels of performance are subject to public review and comment requirements. States that have completed negotiations with ETA

should include their agreed-upon levels of performance for each program year covered by the Plan for the WIA and Wagner-Peyser Act programs.

In cases where final agreement on performance goals is reached after the State Plan is submitted to ETA for review and approval, but before ETA approval of the State Plan, the letter advising the States of approval of the State Plan will include ETA's approval of the agreed-upon goals.

In cases where final agreement on performance goals has not been reached until after the State Plan has been approved, the ETA Regional Administrator's letter advising the State of the agreed-upon goals will constitute a modification to the State Plan. For subsequent revisions to performance goals during the life of the State Plan, the ETA Regional Administrator's letter advising the State of the agreed upon goals will also constitute a modification to the State Plan. The State must ensure that the agreed-upon goals are included in the State's official copy of the State Plan, and that any published State Plan, on the State's Web site or through other forums, includes the agreed-upon goals. ETA will incorporate these performance goals into the Regional and National Office copies of the State's Plan.

H. Modifications to State Plan

1. Reasons for Modifications:

Modifications may be needed in any number of areas to keep the Unified Plan a viable, living document over its life span. WIA regulations permit states to modify their Plan at any time and 20 CFR 652.212 and 661.230 outline the circumstances under which modifications must be submitted. Modifications are required when:

a. Changes in Federal or State law or policy substantially change the assumptions upon which the Plan is based.

b. There are changes in the statewide vision, strategies, policies, performance indicators, the methodology used to determine local allocation of funds, reorganizations which change the working relationship with system employees, changes in organizational responsibilities, changes to the membership structure of the State Board or alternative entity and similar substantial changes to the State's workforce investment system.

c. The State has failed to meet performance goals, and must adjust service strategies.

The WIA regulations, at 20 CFR 652.212, which relate to the Wagner-Peyser Act portions of the Plan, also require modifications when there is any reorganization of the State agency designated to deliver services under the Wagner-Peyser Act, any change in service delivery strategy, any change in levels of performance when performance goals are not met, or any change in services delivered by State merit-staff employees. In general, it is substantial changes to the Unified Plan that require a modification, i.e., any change that significantly impacts the operation of the state's workforce investment system.

2. Submitting a Modification:

Plan modifications must be submitted to the Federal Coordinator, who will ensure that Federal agencies whose programs are included in the unified plan receive a copy, in accordance with the procedures of the affected agency. Prior to submission of the modification for review and approval by the Federal Government, the designated State agency must circulate the modifications among the other State and/or local agencies that may be affected by the changes. Inclusion of a program in the State Unified Plan does not remove the statutory requirement for certain programs to annually review the Plan and submit modifications as needed.

Modifications to the Unified Plan are subject to the same public review and comment requirements that apply to the development of the original Plan. States wishing to submit a State Plan modification should follow the submission guidelines listed in Section D ''Submission of Unified Plans.'' States should direct any questions about the need to submit a Plan modification to the Federal Coordinator, the Departmental Contacts listed above, or to the Regional Administrator or Regional Commissioner who exercises administrative authority over the activity or program(s) impacted by the modification.

I. Inquiries

General inquiries about the State Unified Plan process may be directed to Janet Sten, the Federal Coordinator for Plan Review and Approval. The electronic mail address for the Federal Coordinator is *Sten.Janet@dol.gov.* The Federal Coordinator may be contacted by phone at 202–693–3045. Inquiries related to specific activities and programs can be directed to the staff contacts listed above.

*Part II. National Strategic Direction*

The purpose of Part II is to communicate ETA's national direction and strategic priorities for the workforce investment system.

A. Vision and Goals Related to WIA Title I and Wagner-Peyser Act

The U.S. economy and its labor markets are undergoing changes of historic proportion. Globalization has forced change in every region in the country and impacted every aspect of our economy. While global competition is typically seen as a national challenge, the front lines of the battlefield are regional, where businesses create competitive advantage by collaborating with researchers, entrepreneurs, and government entities. That advantage stems from the ability to transform new ideas and knowledge into advanced, high-quality products or services—in other words, to innovate. Those regions that will be most successful will connect three key elements: Talent, infrastructure, and investment. In particular, they will connect workforce skills and lifelong learning strategies; regional infrastructure and economic development strategies; and investment and entrepreneurship strategies. Entrepreneurship plays a critical role in fueling innovation, as entrepreneurs account for more than half of all technological innovation which powers America's competitiveness.

Maintaining America's competitive position in the global economy requires a workforce with postsecondary education credentials, the capacity to work in a high-technology environment, and the opportunity to engage in lifelong learning to keep pace with change. Preparing workers to be part of such a workforce is the role of our system. ETA envisions that the workforce investment system will operate as a talent development system; it is no longer defined only as a job training system. A talent development system not only meets the needs of industry, but contributes to economic prosperity by collaborating with economic development to identify emerging industries that it can help foster and grow. Its vision is an educated and prepared workforce that is able to compete in the global economy.

Broadly, the ETA strategic priorities for the workforce investment system for this planning cycle include:

- Building a demand-driven system within a regional economic development context;
- Implementing system reform, with streamlined governance and alignment of economic and workforce development regions;
- Enhancing an integrated service delivery system that focuses on functions and services rather than programs or funding streams;

• Advancing a vision for serving youth most in need;

• Expanding the workforce information system as the foundation for strategic planning and career guidance;

• Strengthening partnerships with community and faith-based organizations;

• Increasing the use of flexibility provisions in WIA to design innovative programs that fuel regional economic competitiveness and create employment opportunities for career seeker customers; and

• Utilizing an integrated and enhanced performance accountability system.

B. Demand-Driven Workforce Investment System Within a Regional Economic Development Context

In today's economy, the workforce investment system has an opportunity to play a critical role in fueling competitiveness by developing talent—one of the three key requirements for innovation. To become a dynamic catalyst, the workforce investment system must evolve beyond its current configuration and status. Ideally, the system will be positioned to respond to a variety of economic conditions with talent development strategies that range from retrofitting an economy in an area where an entire industry is being reengineered, to building new industries from the ground up, to building an entrepreneurial culture that fosters job creation.

The challenge for the workforce investment system is to become agile enough to serve an economy driven by innovation, recognizing the reality that approximately two-thirds of all new jobs are created by small businesses. Jobs in today's economy increasingly hinge on specialized skills, as 90 percent of the fastest growing jobs require education and training past high school.

Therefore, it is imperative that the system continue its transformation as a catalyst in reshaping talent development strategies in support of regional economic competitiveness. While the workforce investment system has implemented a number of key strategies to become increasingly demand-driven, new strategies are needed in the workforce investment system to drive regional economic growth. The workforce system must transform to be relevant in the 21st century economy. Elements of transformation include:

(1) The workforce investment system operates as a talent development system; it is no longer defined as a job training system. Its goal is an educated and prepared workforce—on a U.S. or global standard.

(2) Workforce investment system formula funds are transformed, providing significantly increased opportunity for postsecondary education for lifelong learning aligned with the region's talent development strategy.

(3) The workforce investment system no longer operates as an array of siloed programs and services.

(4) Workforce Investment Boards are structured and operate on a regional basis and are composed of regional strategic partners who drive investments by aligning spending with a regional economic vision for talent development.

(5) Economic and workforce development activities within regions are aligned, leading to the adoption of common and innovative policies across the workforce, education, and economic development systems and structures that support talent development and the regional economy.

(6) The workforce investment system is agile enough to serve the innovation economy, recognizing the reality that two-thirds of all new jobs are created by small businesses.

(7) The workforce investment system actively collaborates with economic development, business, and education partners to gather and analyze a wide array of current and real-time workforce and economic data in order to create new knowledge about regional economies and support strategic planning, routinely track economic conditions, measure outcomes, and benchmark economic competitiveness in the global marketplace.

C. System Reform and Increased Focus on Workforce Education and Training

The needs of the 21st century labor market are radically different from what we have known in the past, and for which most workers are currently trained. As a result, the American economy is facing a shortage of skilled workers which necessitates a talent development system that cultivates an educated and prepared workforce committed to life-long learning. The following strategies can help advance an essential culture of life-long learning:

• K–12 and alternative education curricula must be designed to academically prepare students to successfully move into postsecondary education as well as prepare students for success in the workplace through a range of strategies.

• Educational strategies for adult learners must offer more entry and exit points in recognition that students will need to earn and learn simultaneously. Such strategies may need to approach education and career progression incrementally rather than on one continuous path to a specific degree with the aim of moving the learner to the workplace. This is particularly essential for incumbent workers who need lifelong education to remain in economically self-sustaining jobs.

• New education models are needed to support the development of cross-disciplinary learning that matches the expanding number of cross-functional competencies and skill sets that are needed on the job.

States have multiple ways to drive system transformation and integration through policies, required practices, and investment of State set-aside funds, among others. There are a number of key areas the State may consider addressing in its Strategic Plan to respond to the current challenges of maintaining a competitive advantage and ensuring a prepared and educated workforce. These key areas may include, but are not limited to, the following:

• Aligning economic and workforce development strategies and facilitating the adoption of common and innovative policies across the workforce, education, and economic development systems and structures that support talent development in a regional economy;

• Reorganizing governance structures to operate on a regional basis and in a way that reduces administrative costs, streamlines service delivery systems, and increases flexibility to address the needs of State and regional economies;

• Promoting the engagement of strategic partners who drive investments in economic regions and align spending within a regional economic vision for talent development;

• Using State set-aside funds to respond more efficiently to economic trends and shocks, enabling State and Local Workforce Investment Boards greater agility;

• Increasing use of system resources for training through targeted policies such as setting a specific percentage of WIA funding that must be devoted to training and transforming the use of WIA formula funds to postsecondary education and lifelong learning opportunities aligned with the region's talent development strategy;

• Promoting the use of Registered Apprenticeship as an important talent development strategy and a critical postsecondary education, employment and training opportunity as part of the suite of options offered through the workforce system;

• Developing statewide polices to guide the use of assessments of

individuals to enhance service delivery for business and job seekers; and

• Developing comprehensive, user-friendly economic data and skills information to enable informed decisions by the system, and its customers and partners.

D. Enhanced Integration Through the One-Stop Delivery System With Improved Service Delivery and Increased Efficiencies

The workforce investment system, as currently constituted, struggles to meet the challenges of educating and training a workforce that is prepared to compete in today's economy. This is partly due to the lack of integration, which causes too much money to be spent on competing bureaucracies, overhead costs, and unnecessary infrastructure, and not enough on meaningful skills training that leads to job growth and economic prosperity. The ultimate objective is a workforce system that eliminates duplicative costs for physical infrastructure, information systems, and administrative and managerial personnel; this will enable the system to devote scarce resources to more efficiently and effectively implement talent development strategies across multiple programs.

In addition to infrastructure integration, integrated service delivery remains essential to a demand-driven workforce system that effectively serves businesses and individuals. The workforce investment system must operate as a seamless system functionally organized around service delivery rather than an array of separate programs with separate processes. The objective is for ''customers'' to be seen as customers of the workforce investment system, not of a particular program. This goal is particularly important when focusing on targeted populations such as veterans, individuals with disabilities, military spouses, migrant and seasonal farm workers, older workers, and others. All of these populations need access to all of the services in a One-Stop Career Center.

Achieving the goal of integrated service delivery requires strong State leadership to overcome administrative challenges and to foster a policy environment conducive to the integration of funding, facilities, and service delivery. The WIA State planning process offers a vehicle for the governor and State Workforce Investment Board to set forth policy expectations for integration and to help eliminate obstacles.

E. A Vision for Serving Youth Most in Need

Currently, there are nearly four million youth who are not in school, do not have a diploma, and are not working. Over 30 percent of our youth are dropping out of high school nationally, and the number is closer to 50 percent in many urban areas. In an attempt to address this problem, the U.S. Department of Labor has developed a Youth Vision which proposes that the public workforce investment system serve the neediest youth: youth aging out of foster care, those involved with the juvenile justice system, children of incarcerated parents, migrant youth, Native American youth, and youth with disabilities. Transforming the system to meet this objective requires that the current capacity, knowledge, and models in the workforce investment system be strengthened. Transformation is also necessary if the system is to meet new performance expectations and the specific performance measures for out-of-school youth literacy and numeracy gains, diploma attainment, and transition to postsecondary education.

Governors must continue to provide strong leadership in advancing the vision for serving youth most in need. States should expand upon existing efforts by aligning resources to address barriers and challenges and increase opportunities to access postsecondary education. States are encouraged to expand their cross-agency partnerships to ensure the right set of agencies:

• Are represented in the development of a coordinated strategic plan;

• Build upon State-level collaborative efforts by conducting strategic planning sessions to better understand the range of issues that impact their ability to serve the neediest youth;

• Develop a comprehensive understanding of resources that are available in the State for serving the neediest youth;

• Conduct analyses that identify where gaps in services and resource coordination exist; and

• Develop new strategies for serving the neediest youth through jointly funded solicitations.

States should also engage employers and civic leaders to identify demand-driven workforce solutions that address the unique challenges that out-of-school youth present. This includes building the capacity of the workforce system to provide services to these youth in a business solutions environment by identifying replicable models and innovative business solutions which connect secondary and postsecondary education, businesses and industry associations, and the workforce system.

Recognizing the critical need to reconnect out-of-school youth with high quality educational opportunities, the Youth Vision emphasizes the development of academically rigorous alternative education pathways. WIA-funded Youth programs should serve as a catalyst for increasing both the quality and quantity of alternative learning environments and connecting out-of-school youth with secondary and postsecondary educational opportunities and high-growth employment opportunities. A system for serving out-of-school youth should include high quality educational programs that will meet the learning styles and needs of youth who need to be reconnected to educational opportunities.

F. Increased Economic and Workforce Information Data Integration and Analysis

ETA reaffirms and strengthens its message about the centrality of workforce information for the workforce system leaders, and their economic development, business, and education partners. To be successful in its new role as a catalyst for leading talent development, the workforce investment system needs to actively collaborate with its partners to gather and analyze a wide array of current and real-time workforce and economic data in order to compile new knowledge about regional economies and support strategic planning, routinely track economic conditions, measure outcomes, and benchmark economic competitiveness in the global marketplace.

Not only is workforce information critical to support decisions of the national State and local political leadership, economic developers, business and industry, investors, and educators and to drive the investments of the workforce investment system, it is also a fundamental tool for guidance counselors, students, job seekers, and workers. The provision of workforce information in an economic context, through easy-to-use electronic tools will empower customers in career planning and lifelong learning required by today's dynamic global economy.

Fulfilling the mandate for leadership in workforce and economic information can only occur by embracing a wide array of data sources, greater integration of the data, more complex analysis, new strategies for making it available to strategic partners engaged in developing regional economic agendas and talent development strategies. Accomplishing this requires collaboration among the owners of the data and developing methods to leverage public and private

resources to produce the economic and workforce intelligence needed in a regional economy.

G. Effective Utilization of Faith-Based and Community Organizations

In every community, including those facing high poverty rates and other serious challenges, there are faith-based and community organizations (FBCOs) working to improve their community. These organizations can be valuable partners for the workforce investment system. The Department of Labor (DOL) encourages States to build and strengthen both monetary and non-monetary partnerships with FBCOs.

These partnerships can strengthen participant outcomes by expanding access to services that complement those provided by the One-Stop Career Center, including job readiness and life skills training and niche and specialized services. These partnerships can also create new ''points of access'' to the One-Stop's electronic tools and job search assistance in many struggling communities.

Two distinct activities are critical to utilizing fully the complementary strengths of FBCOs. First, States must ensure compliance with the DOL's equal treatment regulations 29 CFR part 2, subpart D. Compliance includes taking the administrative steps necessary to create a ''level playing field'' for all organizations willing to join with the government in service, including faith-based groups and other non-traditional community partners.

Second, States should actively cultivate FBCO partnerships to expand the reach of the workforce investment system and to improve outcomes for participants, including high-need individuals.

H. Increased Use of Flexibility Provisions in WIA

To fuel regional economic competitiveness and create employment opportunities for workers, States should exercise their authority to design and implement innovative strategies. States should take advantage of flexibility provisions under current legislative authority, including waivers and work-flex, to tailor service delivery and program design to fit the unique characteristics of their workforce areas.

The State planning process is a vehicle for identifying waiver opportunities and formally requesting waivers, including extensions of approved waivers, in concert with overall strategic planning. States are strongly encouraged to think about flexibility in broad terms and to utilize the flexibility provided by WIA to advance their strategic goals. States have received waivers in multiple program areas, during this and the previous five-year planning cycle, that have allowed them to implement a wide range of innovations to transform their workforce systems. States have received waivers that:

- Increase training opportunities by permitting the use of a portion of local area formula funds or funds reserved for rapid response activities to provide incumbent worker training.
- Decrease the amount that small and medium-sized businesses need to invest in order to take advantage of WIA's provision for customized and on-the-job training.
- Allow States to choose the most appropriate mix of youth services needed within each local and regional economy.

DOL provides technical assistance on waivers and work-flex and provides information on the waiver strategies States have utilized to date.

I. An Integrated and Enhanced Performance Accountability System That Provides Improved System Results

In an effective accountability system, a clear link exists between the State's program and service delivery design and the results achieved. Further, the performance information should be available and easily understood by all customers, stakeholders, and operators of the workforce investment system.

While great strides have been made in our reporting system in recent years, the accountability outcomes for the workforce investment system have not yet reached all goals. In addition, various reporting requirements for the multiple programs operated by the workforce investment system impede the integrated service delivery system required for the demand-driven workforce systems that support regional economic competitiveness. To address this issue, DOL implemented a set of common performance measures for many of its workforce programs, including WIA title IB, the Wagner-Peyser Act, and the Trade Adjustment Assistance Act. The common measures allow DOL to clearly state the core purposes of all the programs operated by the workforce investment system—helping people find jobs; stay employed; and improve earnings.

The common measures are the foundation of DOL's evolving performance accountability system. DOL continues to collect from States and grantees other information on program activities, participants, and outcomes necessary for program management, including data that support the existing WIA performance measures that are required to convey full and accurate information on the performance of workforce programs to policymakers and stakeholders.

*Part III. Unified Planning Instructions*

**Note:** The statutes cited in parentheses refer to the authorizing legislation for each respective program. This Unified Planning guidance only relates to planning requirements; it does not affect the statutory and regulatory requirements relating to other aspects of programs included in the Plan.

A. State Vision and Priorities

Describe the governor's vision for a statewide workforce investment system. Provide a *summary* articulating the governor's vision for utilizing the resources of the workforce investment system in support of the State's economic development that addresses the issues and questions below. States are encouraged to attach more detailed documents to expand upon any aspect of the summary response if available. (WIA § 112(a) and (b)(4)(A–C).)

1. What are the State's economic development goals for attracting, retaining and growing business and industry within the State? (§ 112(a) and (b)(4)(A–C).)

2. Given that a skilled workforce is a key to the economic success of every business, what is the governor's vision for maximizing and leveraging the broad array of Federal and State resources available for workforce investment flowing through the State's cabinet agencies and/or education agencies in order to ensure a skilled workforce for the State's business and industry? (§ 112(a) and (b)(4)(A–C).)

3. Given the continuously changing skill needs that business and industry have as a result of innovation and new technology, what is the governor's vision for ensuring a continuum of education and training opportunities that support a skilled workforce? (§ 112(a) and (b)(4)(A–C).)

4. What is the governor's vision for bringing together the key players in workforce development including business and industry, economic development, education, and the workforce system to continuously identify the workforce challenges facing the State and to develop innovative strategies and solutions that effectively leverage resources to address those challenges? (§ 112(b)(10).)

5. What is the governor's vision for ensuring that every youth has the opportunity to develop and achieve career goals through education and workforce training, including youth most in need, such as youth who are:

Out of school, homeless, in foster care or aging out of foster care, offenders, children of incarcerated parents, migrant and seasonal farmworker youth, have disabilities, or are other youth at risk? (§ 112(a).)

6. Given the labor shortage that will continue to increase over the next 25 years, describe the governor's vision for how it will ensure that older individuals receive workforce training that will prepare them to reenter the labor market and become a workforce solution for employers. (§ 112(b)(17)(A)(iv).)

B. One-Stop Delivery System

1. Describe the State's comprehensive vision of an integrated service delivery system, including the role each program incorporated in the Unified Plan in the delivery of services through that system.

In answering this question, if the Unified Plan includes *WIA title I and Wagner-Peyser Act and/or Veterans Programs:*

a. Identify how the State will use WIA title I funds to leverage other Federal, State, local, and private resources in order to maximize the effectiveness of such resources and to expand the participation of business, employees, and individuals in the statewide workforce investment system. (§ 112(b)(10).)

b. What strategies are in place to address the national strategic direction discussed in Part II of this guidance, the governor's priorities, and the workforce development issues identified through the analysis of the State's economy and labor market? (§ 112(a) and 112(b)(4)(D).)

c. Based on the State's economic and labor market analysis, what strategies has the State implemented or does the State plan to implement to identify and target industries and occupations within the State that are high growth, high demand, and vital to the State's economy? (§ 112(a) and 112(b)(4)(A).) The State may want to consider:

- Industries projected to add a substantial number of new jobs to the economy;
- Industries that have a significant impact on the overall economy;
- Industries that impact the growth of other industries;
- Industries that are being transformed by technology and innovation that require new skill sets for workers; or
- Industries that are new and emerging and are expected to grow.

d. What strategies are in place to promote and develop ongoing and sustained strategic partnerships that include business and industry, economic development, the workforce system, and education partners (K–12, community colleges, and others) for the purpose of continuously identifying workforce challenges and developing solutions to targeted industries' workforce challenges? (§ 112(b)(8).)

e. What State strategies are in place to ensure that sufficient system resources are being spent to support training of individuals in high growth/high demand industries? (§ 112(b)(4)(A) and 112(b)(17)(A)(i).)

f. What workforce strategies does the State have to support the creation, sustainability, and growth of small businesses and support for the workforce needs of small businesses as part of the State's economic strategy? (§ 112(b)(4)(A) and 112(b)(17)(A)(i).)

g. How are the funds reserved for statewide activities used to incent the entities that make up the State's workforce investment system at the State and local levels to achieve the governor's vision and address the national strategic direction identified in Part I of this guidance? (§ 112(a).)

h. Describe the State's strategies to promote collaboration between the workforce system, education, human services, juvenile justice, and others to better serve youth that are most in need and have significant barriers to employment, and to successfully connect them to education and training opportunities that lead to successful employment. (§ 112(b)(18)(A).)

i. Describe the State's strategies to identify State laws, regulations, and policies that impede successful achievement of workforce development goals and strategies to change or modify them. (§ 112(b)(2).)

j. Describe how the State will take advantage of the flexibility provisions in WIA for waivers and the option to obtain approval as a workflex State pursuant to § 189(i) and § 192.

2. Describe the actions the State has taken to ensure an integrated One-Stop service delivery system statewide. (§§ 112(b)(14) and 121).)

a. What State policies and procedures are in place to ensure the quality of service delivery through One-Stop Career Centers such as development of minimum guidelines for operating comprehensive One-Stop Career Centers, competencies for One-Stop Career Center staff or development of a certification process for One-Stop Career Centers? (§ 112(b)(14).)

b. What policies or guidance has the State issued to support maximum integration of service delivery through the One-Stop delivery system for both business customers and individual customers? (§ 112(b)(14).)

c. What actions has the State taken to promote identifying One-Stop infrastructure costs and developing models or strategies for local use that support integration? (§ 112(b)(14).)

d. How does the State use the funds reserved for statewide activities pursuant to §§ 129(b)(2)(B) and 134(a)(2)(B)(v) to assist in the establishment and operation of One-Stop delivery systems? (§ 112(b)(14).)

e. How does the State ensure the full spectrum of assets in the One-Stop delivery system support human capital solutions for businesses and individual customers broadly? (§ 112(b)(14).)

C. Plan Development and Implementation

1. Describe the methods used for joint planning and coordination of the programs and activities included in the Unified Plan. (WIA § 501(c)(3)(A).)

The authorizing statutes for many of the programs that may be included in a Unified Plan require that the State Plan be developed in consultation with various public and private entities, as well as members of the general public. Some statutes also require formal public hearings. Depending upon the programs that a State chooses to include in its Unified Plan, it may be possible for the State to satisfy many of these consultation requirements through a single set of processes.

2. Describe the process used by the State to provide an opportunity for public comment and participation for each of the programs covered in the Unified Plan.

In addition, if the Unified Plan includes:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs,* describe the process used by the State, consistent with section 111(g) of WIA, to provide an opportunity for public comment, including comments by representatives of business and representatives of labor organizations, and input into development of the Plan, prior to submission of the Plan.

b. *AEFLA,* describe the process that will be used for public participation and comment with respect to the AEFLA portion of the Unified Plan. (§ 224(b)(9).)

c. *TANF,* the State shall make available to the public a summary of any Plan or Plan amendment submitted by the State under this section. With respect to the TANF plan design, the State should describe how local governments and private sector organizations have been consulted regarding the plan and design of welfare services in the State so that the services are provided in a manner appropriate to

local populations; and have had at least 45 days to submit comments on the plan and the design of such services. (§ 402(c).)

d. *CSBG,* provide evidence that the public participation requirements were met, including documents which confirm that a legislative public hearing on the State Plan was conducted as required by subsection 675(b) and that the Plan was also made available for public inspection and review as required by subsection 675(d)(2).

3. Describe the types of activities and outcomes that were conducted to meet the consultation requirement. Demonstrate, as appropriate, how comments were considered in the Plan development process including specific information on how the various WIA agency and program partners were involved in developing the unified State Plan.

The following agencies, groups, or individuals must be consulted if the Unified Plan includes:

a. *WIA title I, Wagner-Peyser Act, or Veterans Programs:* (§ 112(b)(1) and 112(b)(9))

- The governor of the State
- State Board
- Local chief elected officials
- Business community
- Labor organizations

The following agencies, groups and individuals should also be consulted for WIA title I, Wagner-Peyser, or Veterans Programs: Local Boards and Youth Councils, educators, Vocational Rehabilitation Agencies, service providers, welfare agencies, faith and community-based organizations and the State Employment Security Agency.

In addition, describe the role of the State Board and Local Boards in planning and coordination in the Unified Plan (§ 501(c)(3).)

**Note:** While WIA only requires the involvement of State Board and Local Boards in the planning and coordination of the programs and activities authorized under title I, the intent of the Unified Plan approach is to enable all the relevant parties in an area, if they so choose, to come together more readily to coordinate their activities in the best interests of the population to be served. However coordination is achieved, nothing in the Unified Plan or in WIA itself permits a Board or any other entity to alter the decisions made by another program grantee in accord with that grantee's statutes.

b. *AEFLA* (§ 224(d)):

- Governor of the State (any comments made by the governor must be included in the Plan)

c. *Vocational Rehabilitation* (§ 101(a)(21)(A)(ii)(III.):

- State Rehabilitation Council (include the response of the designated State unit to such input and recommendations)

d. *CSBG:*

- Low-income individuals
- Community organizations
- Religious organizations
- Representatives of low-income individuals

e. *TANF:*

- Local governments
- Private sector organizations

States must consult local governments and private sector organizations regarding the plan and design of services in the State so that services are provided in a manner appropriate to local populations. Local governments and private sector organizations must have had at least 45 days to submit comments on the plan and the design of such services.

D. Needs Assessment

1. Many of the programs that may be included in a Unified Plan require a needs assessment. State agencies should fulfill these assessment responsibilities collaboratively or, at a minimum, create a planning process that promotes the sharing of needs assessment information among all agencies involved in preparing the Unified Plan. Sharing of assessment data can create a framework for the coordination and integration of services that are to be provided through the One-Stop delivery system. The State may organize the presentation of assessment data in its Unified Plan in a manner it deems most appropriate and useful for planning, such as on a program-by-program basis, by geographic region, or by special population.

Describe the educational and job-training needs of individuals in the overall State population and of relevant subgroups of all the programs included in the Unified Plan.

In answering this question, if the Unified Plan includes:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs,* identify the types and availability of workforce investment activities currently in the State. (§ 112(b)(4)(A–D).)

b. *AEFLA,* objectively assess the adult education and literacy needs of individuals, including an assessment of those most in need and hardest to serve, including low income students, individuals with disabilities, single parents, displaced homemakers, and individuals with multiple barriers to educational enhancement (including individuals with limited English proficiency, criminal offenders in correctional institutions and other institutionalized individuals.) (§§ 224(b)(10) and 225).)

c. *Food Stamp Employment and Training (E&T),* explain the method used to:

i. Estimate the number and characteristics of the expected pool of work registrants during the fiscal year;

ii. Estimate the number of work registrants the State agency intends to exempt from E&T, along with a discussion of the proposed exemption criteria;

iii. Estimate the number of placements into E&T components during the fiscal year;

iv. Estimate the number of ABAWDs (able-bodied adults without dependents) in the State during the fiscal year;

v. Estimate the number of ABAWDs in both waived and unwaived area of the State during the fiscal year;

vi. Estimate the average monthly number of ABAWDs included in the State's 15 percent exemption allowance, along with a discussion of how the State intends to apply the exemption;

vii. Estimate the number of qualifying education/training and workfare opportunities for ABAWDs the State will create during the fiscal year.

d. *Vocational Rehabilitation:*

i. Assess the needs of individuals with disabilities in the State, particularly the vocational rehabilitation needs of individuals with the most significant disabilities (including their need for supported employment services), individuals with disabilities who have been unserved or under-served by the vocational rehabilitation program, and individuals with disabilities served through other components of the statewide workforce investment system. (§§ 101(a)(15)(A)(i)(I–III) and 625(b)(2).)

ii. Include State estimates of the number of individuals in the State who are eligible for services under title I of the Rehabilitation Act, the number of such individuals who will receive services provided with funds provided under part B of title I and under part B of title VI (including, if the designated State agency uses an order of selection, estimates of the number of individuals to be served under each priority category within the order), and the costs of the services provided (including, if the designated State agency uses an order of selection, the service costs for each priority category within the order.) (§ 101(a)(15)(B).)

iii. Provide an assessment of the need to establish, develop, or improve community rehabilitation programs within the State. (§ 101(a)(15)(A)(ii).)

e. *HUD Employment and Training Programs:* Address the educational and training needs of public housing

residents and other families receiving housing assistance.

Reminder: this question is a suggestion for incorporating HUD programs into the State's Unified Plan. However, following this guidance will not trigger funding for HUD programs.

2. *WIA Title I and Wagner-Peyser Act* Economic and Labor Market Analysis (§ 112(b)(4)): As a foundation for this Plan and to inform the strategic investments and strategies that flow from this Plan, provide a detailed analysis of the State's economy, the labor pool, and the labor market context. Elements of the analysis should include the following:

a. What is the current makeup of the State's economic base by industry?

b. What industries and occupations are projected to grow and/or decline in the short term and over the next decade?

c. In what industries and occupations is there a demand for skilled workers and available jobs, both today and projected over the next decade? Estimate projected demand.

d. What jobs/occupations are most critical to the State's economy?

e. What are the skill needs for the available, critical and projected jobs?

f. What is the current and projected demographics of the available labor pool (including the incumbent workforce) both now and over the next decade?

g. Is the State experiencing any ''in migration'' or ''out migration'' of workers that impact the labor pool?

h. Based on an analysis of both the projected demand for skills and the available and projected labor pool, what skill gaps is the State experiencing today and what skill gaps are projected over the next decade?

i. Based on an analysis of the economy and the labor market, what workforce development issues has the State identified?

j. What workforce development issues has the State prioritized as being most critical to its economic health and growth?

E. State and Local Governance

1. What is the organization, structure, and role/function of each State and local entity that will govern the activities of the Unified Plan?

In answering this question, if the Unified Plan includes:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs:*

i. Organization of State agencies:

*a.* Provide an organizational chart that delineates the relationship to the governor of the agencies involved in the workforce investment system, including education and economic development and the required and optional One-Stop partner programs managed by each agency.

*b.* In a narrative describe how the agencies involved in the public workforce investment system interrelate on workforce and economic development issues and the respective lines of authority.

ii. State Workforce Investment Board:

*a.* Describe the organization and structure of the State Board. (§ 111.)

*b.* Include a description of the process by which State and Local Boards were created.

*c.* Identify the organizations or entities represented on the State Board. If you are using an alternative entity which does not contain all the members required under section 111(b)(1), describe how each of the entities required under this section will be involved in planning and implementing the State's workforce investment system as envisioned in WIA. How is the alternative entity achieving the State's WIA goals? (§§ 111(a–c), 111(e), and 112(b)(1).)

*d.* Describe the process the State used to identify the State Board members. How did you select Board members, including business representatives, who have optimum policy-making authority and who represent diverse regions of the State as required under WIA? Describe how the Board's membership enables you to achieve the vision described above. (20 CFR 661.200)

*e.* Describe how the Board carries out its functions as required in section 111(d) and 20 CFR 661.205. Include functions the Board has assumed that are in addition to those required. Identify any functions required in section 111(d) the Board does not perform and explain why.

*f.* How will the State Board ensure that the public (including people with disabilities) has access to Board meetings and information regarding State Board activities, including membership and meeting minutes? (20 CFR 661.207).)

*g.* Identify the circumstances which constitute a conflict of interest for any State or Local Workforce Investment Board member or the entity that s/he represents, and any matter that would provide a financial benefit to that member or his or her immediate family. (§§ 111(f), 112(b)(13), and 117(g).)

*h.* What resources does the State provide the Board to carry out its functions, *e.g.*, staff, funding, etc.?

iii. What is the structure/process for the State agencies and State Board to collaborate and communicate with each other and with the local workforce investment system (§ 112(b)(8)(A).):

*a.* Describe the steps the State will take to improve operational collaboration of the workforce investment activities and other related activities and programs outlined in section 112(b)(8)(A), at both the State and local level (e.g., joint activities, memoranda of understanding, planned mergers, coordinated policies, etc.). How will the State Board and agencies eliminate any existing State-level barriers to coordination? (§§ 111(d)(2) and 112(b)(8)(A).)

*b.* Describe the lines of communication established by the governor to ensure open and effective sharing of information among the State agencies responsible for implementing the vision for the workforce system and between the State agencies and the State Workforce Investment Board.

*c.* Describe the lines of communication and mechanisms established by the governor to ensure timely and effective sharing of information between the State agencies/State Board and local workforce investment areas and Local Boards. Include types of regularly issued guidance and how Federal guidance is disseminated to Local Boards and One-Stop Career Centers. (§ 112(b)(1).)

iv. Describe any cross-cutting organizations or bodies at the State level designed to guide and inform an integrated vision for serving youth in the State within the context of workforce investment, social services, juvenile justice, and education. Describe the membership of such bodies and the functions and responsibilities in establishing priorities and services for youth? How is the State promoting a collaborative cross-agency approach for both policy development and service delivery at the local level for youth? (§ 112(b)(18)(A).)

v. Describe major State policies and requirements that have been established to direct and support the development of a statewide workforce investment system not described elsewhere in this Plan as outlined below. (§ 112(b)(2).)

*a.* What State policies and systems are in place or planned to support common data collection and reporting processes, information management, integrated service delivery, and performance management? (§§ 111(d)(2) and 112(b)(8)(B).)

*b.* What State policies are in place that promote efficient use of administrative resources such as requiring more co-location and fewer affiliate sites in local One-Stop systems to eliminate duplicative facility and operational costs or to require a single administrative structure at the local level to support Local Boards and to be

the fiscal agent for WIA funds to avoid duplicative administrative costs that could otherwise be used for service delivery and training? Include any specific administrative cost controls, plans, reductions, and targets for reductions, if the State has established them. (§§ 111(d)(2) and 112(b)(8)(A).)

*c.* What State policies are in place to promote universal access and consistency of service statewide? (§ 112(b)(2).)

*d.* What policies support a demand-driven approach to workforce development, as described in Part II ''Demand-Driven Workforce Investment System within a Regional Economic Context,'' such as training on the economy and labor market data for Local Board and One-Stop Career Center staff? (§§ 112(b)(4) and 112(b)(17)(A)(iv).)

*e.* What policies are in place to ensure that the resources available through the Federal and/or State Registered Apprenticeship programs, the Job Corps and SCSEP are fully integrated with the State's One-Stop delivery system? (§§ 112)(b)(17)(A)(iv) and (b)(18)(C).)

vi. Local Area Designations—Identify the State's designated local workforce investment areas and the date of the most recent area designation, including whether the State is currently re-designating local areas. (§§ 112(b)(5).) Include a description of the process used to designate such areas. Describe how the State considered the extent to which such local areas are consistent with labor market areas: geographic areas served by local and intermediate education agencies, post-secondary education institutions and area vocational schools; and all other criteria identified in section 116(a)(1) in establishing area boundaries, to assure coordinated planning. Describe the State Board's role, including all recommendations made on local designation requests pursuant to § 116(a)(4). (§§ 112(b)(5) and 116(a)(1).) Describe the appeals process used by the State to hear appeals of local area designations referred to in § 116(a)(5) and 112(b)(15).

vii. Local Workforce Investment Boards—Identify the criteria the State has established to be used by the Chief Elected Official(s) in the local areas for the appointment of Local Board members based on the requirements of section 117. (§§ 112(b)(6), 117(b).)

viii. Identify the circumstances which constitute a conflict of interest for any State or Local Workforce Investment Board member or the entity that s/he represents, and any matter that would provide a financial benefit to that member or his or her immediate family. (§§ 111(f), 112(b)(13), and 117(g).)

ix. Identify the policies and procedures to be applied by local areas for determining eligibility of local level training providers, how performance information will be used to determine continuing eligibility and the agency responsible for carrying out these activities. Describe how the State solicited recommendations from Local Boards and training providers and interested members of the public, including representatives of business and labor organizations, in the development of these policies and procedures.

x. Individual Training Accounts (ITAs):

*a.* What policy direction has the State provided for ITAs?

*b.* Describe innovative training strategies used by the State to fill skills gaps. Include in the discussion the State's effort to broaden the scope and reach of ITAs through partnerships with business, education, economic development, and industry associations and how business and industry involvement is used to drive this strategy.

*c.* Discuss the State's plan for committing all or part of WIA title I funds to training opportunities in high-growth, high-demand, and economically vital occupations.

*d.* Describe the State's policy for limiting ITAs (e.g., dollar amount or duration).

*e.* Describe the State's current or planned use of WIA title I funds for the provision of training through Registered Apprenticeship.

*f.* Identify State policies that permit the use of WIA title I financial assistance to employ or train participants in religious activities when the assistance is provided indirectly, such as through an ITA.

xi. Identify the criteria to be used by Local Boards in awarding grants for Youth activities, including criteria that the governor and Local Boards will use to identify effective and ineffective Youth activities and providers of such activities. (§ 112(b)(18)(B).)

xii. Describe the competitive and non-competitive processes that will be used at the State level to award grants and contracts for activities under title I of WIA, including how potential bidders are being made aware of the availability of grants and contracts. (§ 112(b)(16).)

b. *Vocational Rehabilitation*, designate a State agency as the sole State agency to administer the Plan, or to supervise the administration of the Plan by a local agency, in accordance with section 101(a)(2)(A). (§ 101(a)(2)(A).)

c. *TANF*, describe the objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process. (§ 402(a)(1)(B)(iii).)

F. Funding

What criteria will the State use, subject to each program's authorizing law, to allocate funds for each of the programs included in the Unified Plan? Describe how the State will use funds the State receives to leverage other Federal, State, local, and private resources, in order to maximize the effectiveness of such resources, and to expand the participation of business, employees, and individuals in the statewide workforce investment system. (WIA § 112(b)(10).)

In answering this question, if the Unified Plan includes:

1. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs (§ 112(b)(12):*

a. If applicable, describe the methods and factors (including weights assigned to each factor) the State will use to distribute funds to local areas for the 30 percent discretionary formula Adult employment and training funds and Youth funds pursuant to sections 128(b)(3)(B) and 133(b)(3)(B).

b. Describe how the allocation methods and factors help ensure that funds are distributed equitably throughout the State and that there will be no significant shifts in funding levels to a local area on a year-to-year basis.

c. Describe the State's allocation formula for dislocated worker funds under 133(b)(2)(B).

d. Describe how the individuals and entities on the State Board were involved in the development of the methods and factors, and how the State consulted with Chief Elected Officials in local areas throughout the State in determining such distribution.

e. Describe the procedures and criteria that are in place under 20 CFR 663.600 for the governor and appropriate Local Boards to direct One-Stop operators to give priority of service to public assistance recipients and other low-income individuals for intensive and training services if funds allocated to a local area for adult employment and training activities are determined to be limited. (§§ 112(b)(17)(A)(iv) and 134(d)(4)(E).)

f. Specify how the State will use the 10 percent Wagner-Peyser Act funds allotted to it under section 7(b) in

accordance with the three provisions of allowable activities: performance incentives; services for groups with special needs; and extra costs of exemplary service delivery models. (§ 112(b)(7) and 20 CFR 652.204).)

2. *Adult Education and Family Literacy:*

a. Describe how the eligible agency will fund local activities in accordance with the considerations described in section 231(e) and the other requirements of title II of WIA. (§ 224(b).)

b. Describe the process to show that public notice was given of the availability of Federal funds to eligible recipients and the procedures for submitting applications to the State, including approximate time frames for the notice and receipt of applications. (§ 231(c).)

c. Describe how the eligible agency will use funds made available under section 222(a)(2) for State leadership activities. (§ 223(a).)

d. Describe the steps the eligible agency will take to ensure direct and equitable access, as required in section 231(c). (§ 224(b)(12).)

3. *Food Stamp Employment and Training:* Estimate the total cost of the State's E&T program and identify the source of funds according to the format for Table 5, Planned Fiscal Year Costs, contained in the most current release of ''The Handbook on Preparing State Plans for Food Stamp Employment and Training Programs.''

4. *TANF:* Indicate the name, address, and EIN number of the TANF administering agency and estimate for each quarter of the fiscal year by percentage the amount of TANF grant that it wishes to receive.

5. *Vocational Rehabilitation:*

a. Describe how the State will utilize funds reserved for the development and implementation of innovative approaches to expand and improve the provision of vocational rehabilitation services to individuals with disabilities under the State Plan, particularly individuals with the most significant disabilities. (§ 101(a)(18)(B).)

b. Describe the quality, scope, and extent of supported employment services authorized under the Act to be provided to individuals who are eligible under the Act to receive the services. (§ 625(b)(3).)

c. In the event that vocational rehabilitation services cannot be provided to all eligible individuals with disabilities in the State who apply for services, indicate the order to be followed in selecting eligible individuals to be provided vocational rehabilitation services and provide the justification for the order. (§ 101(a)(5)(A)–(B).)

6. *CSBG:* Describe how the State intends to use discretionary funds made available from the remainder of the grant or allotment described in section 675C(b), including a description of how the local entity will use the funds to support innovative community and neighborhood-based initiatives.

G. Activities To Be Funded

For each of the programs in the Unified Plan, provide a general description of the activities the State will pursue using the relevant funding.

In answering the above question, if the Unified Plan includes:

1. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs:*

Describe the approaches the State will use to provide direction and support to Local Boards and the One-Stop Career Center delivery system on the strategic priorities to guide investments, structure business engagement, and inform service delivery approaches for all customers. (§ 112(b)(17)(A).)

a. One-Stop Service Delivery Strategies: (§ 111(d)(2) and 112(b)(2).)

i. How will the services provided by each of the required and optional One-Stop partners be coordinated and made available through the One-Stop system? (§ 112(b)(8)(A).)

ii. How are Youth formula programs funded under § 128(b)(2)(A) integrated in the One-Stop system?

iii. What minimum service delivery requirements does the State mandate in a comprehensive One-Stop Career Center or an affiliate site?

iv. What tools and products has the State developed to support service delivery in all One-Stop Career Centers statewide?

v. What models/templates/approaches does the State recommend and/or mandate for service delivery in the One-Stop Career Centers? For example, do all One-Stop Career Centers have a uniform method of organizing their service delivery to business customers? Is there a common individual assessment process utilized in every One-Stop Career Center? Are all One-Stop Career Centers required to have a resource center that is open to anyone?

b. Workforce Information—A fundamental component of a demand-driven workforce investment system is the integration and application of the best available State and local workforce information including, but not limited to, economic data, labor market information, Census data, private sources of workforce information produced by trade associations and others, educational data, job vacancy surveys, transactional data from job boards, and information obtained directly from businesses. (§§ 111(d)(8), 112(b)(1), and 134(d)(2)(E).)

i. Describe how the State will integrate workforce information into its planning and decision-making at the State and local level, including State and Local Boards, One-Stop operations, and case manager guidance.

ii. Describe the approach the State will use to disseminate accurate and timely workforce information to businesses, job seekers, and employment counselors, in easy to use formats that are readily accessible within One-Stop Career Centers and at remote locations such as libraries, schools, worksites, and at home.

iii. Describe how the activities funded through the Workforce Information grants are aligned with other workforce investment activities to ensure that the investments in core products and services support the State's overall strategic direction for workforce investment.

iv. Describe how State workforce information products and tools are coordinated with the national electronic workforce information tools including America's Career Information Network and Career Voyages.

c. Adults and Dislocated Workers

i. Core Services. (§ 112(b)(17)(a)(i).)

*a.* Describe State strategies and policies to ensure adults and dislocated workers have universal access to the minimum required core services as described in § 134(d)(2).

*b.* Describe how the State will ensure the three-tiered service delivery strategy for labor exchange services for job seekers and employers authorized by the Wagner-Peyser Act includes (1) self-service, (2) facilitated self-help service, and (3) staff-assisted service, and is accessible and available to all customers at the local level.

*c.* Describe how the State will integrate resources provided under the Wagner-Peyser Act and WIA title I for adults and dislocated workers as well as resources provided by required One-Stop partner programs, to deliver core services.

ii. Intensive Services. Describe State strategies and policies to ensure adults and dislocated workers who meet the criteria in § 134(d)(3)(A) receive intensive services as defined.

iii. Training Services. Describe the governor's vision for increasing training access and opportunities for individuals including the investment of WIA title I funds and the leveraging of other funds and resources.

iv. Eligible Training Provider List. Describe the State's process for

providing broad customer access to the statewide list of eligible training providers and their performance information including at every One-Stop Career Center. (§ 112(b)(17)(A)(iii).)

v. On-the-Job (OJT) and Customized Training (§ 112(b)(17)(A)(i) and 134(b).) Based on the outline below, describe the State's major directions, policies and requirements related to OJT and customized training.

*a.* Describe the governor's vision for increasing training opportunities to individuals through the specific delivery vehicles of OJT and customized training.

*b.* Describe how the State:

*1.* Identifies OJT and customized training opportunities;

*2.* Markets OJT and customized training as incentives to untapped employer pools including new business to the State and employer groups;

*3.* Partners with high-growth, high-demand industries and economically vital industries to develop potential OJT and customized training strategies;

*4.* Taps business partners to help drive the strategy through joint planning, competency and curriculum development; and determining appropriate lengths of training, and

*5.* Leverages other resources through education, economic development and industry associations to support OJT and customized training ventures.

vi. Veterans' Priority of Service. What policies and strategies does the State have in place to ensure that, pursuant to the Jobs for Veterans Act (Pub. L. 107–288) (38 U.S.C. 4215), that priority of service is provided to veterans and certain spouses who otherwise meet the eligibility requirements for all employment and training programs funded by the U.S. Department of Labor, in accordance with the provisions of Training and Employment Guidance Letter 5–03 (9/16/03)?

vii. Rapid Response. Describe how the State provides Rapid Response services with the funds reserved under section 133(a)(2).

*a.* Identify the entity responsible for providing Rapid Response services. Describe how Rapid Response activities involve Local Boards and Chief Elected Officials. If Rapid Response activities are shared between the State and local areas, describe the functions of each and how funds are allocated to the local areas.

*b.* Describe the process involved in carrying out Rapid Response activities.

*1.* What methods are involved in receiving notice of impending layoffs (include WARN Act notice as well as other sources)?

*2.* What efforts does the Rapid Response team make to ensure that rapid response services are provided, whenever possible, prior to layoff date, onsite at the company, and on company time?

*3.* What services are included in Rapid Response activities? Does the Rapid Response team provide workshops or other activities in addition to general informational services to affected workers? How do you determine what services will be provided for a particular layoff (including layoffs that may be trade-affected)?

*4.* How does the State ensure a seamless transition between Rapid Response services and One-Stop activities for affected workers?

*5.* Describe how Rapid Response functions as a business service. Include whether Rapid Response partners with economic development agencies to connect employees from companies undergoing layoffs to similar companies that are growing and need skilled workers. How does Rapid Response promote the full range of services available to help companies in all stages of the economic cycle, not just those available during layoffs? How does the State promote Rapid Response as a positive, proactive, business-friendly service, rather than only as a reactive service?

*6.* What other partnerships does Rapid Response engage in to expand the range and quality of services available to companies and affected workers and to develop an effective early layoff warning network?

*7.* What systems does the Rapid Response team use to track its activities? Does the State have a comprehensive, integrated Management Information System that includes Rapid Response, Trade Act programs, National Emergency Grants, and One-Stop activities?

*8.* Are Rapid Response funds used for other activities not described above; e.g., the provision of additional assistance to local areas that experience increased workers or unemployed individuals due to dislocation events?

d. Veterans Programs. For the grant period FY 2005–FY 2009, States submitted five year strategic plans to operate Disabled Veterans' Outreach Programs (DVOP) and Local Veterans' Employment Representative (LVER) programs under the Jobs for Veterans Act. These plans may be incorporated by reference as part of a state's Unified Plan. Modifications to these five year Jobs for Veterans Act plans will be managed in accordance with policy guidance from the Veterans' Employment and Training Service.

e. Youth. ETA's strategic vision identifies youth most in need, such as youth who are: Out-of-school, at risk, in foster care or aging out of foster care, offenders, children of incarcerated parents, homeless, and migrant and seasonal farmworker youth as those most in need of service. State programs and services should take a comprehensive approach to serving these youth, including basic skills remediation; helping youth stay in or return to school, employment, or internships; and helping youth attain a high school diploma or GED, post-secondary vocational training, Registered Apprenticeship, or enrollment in community and four-year colleges. (§ 112(b)(18).)

i. Describe the State's strategy for providing comprehensive, integrated services to eligible youth, including those most in need as described above. Include any State requirements and activities to assist youth who have special needs or barriers to employment, including those who are pregnant, parenting, or have disabilities. Include how the State will coordinate across State agencies responsible for workforce investment, foster care, education, human services, juvenile justice, and other relevant resources as part of the strategy. (§ 112(b)(18).)

ii. Describe how coordination with Job Corps and other youth programs will occur. (§ 112(b)(18)(C).)

iii. How does the State Plan to utilize the funds reserved for statewide activities to support the State's vision for serving youth? Examples of activities that would be appropriate investments of these funds include:

*a.* Utilization of the funds to promote cross agency collaboration;

*b.* Demonstration of cross-cutting models of service delivery;

*c.* Development of new models of alternative education leading to employment; or

*d.* Development of demand-driven models with business and industry working collaboratively with the workforce investment system and education partners to develop strategies for bringing these youth successfully into the workforce pipeline with the right skills.

iv. Describe in general how the State will meet the Act's provisions regarding Youth program design. (§§ 112(b)(18) and 129(c).)

f. Business Services.

i. Describe how the needs of employers will be determined in the local areas and on a statewide basis.

ii. Describe how integrated business services, including Wagner-Peyser Act services, will be delivered to employers through the One-Stop system.

iii. How will the system streamline administration of Federal tax credit programs within the One-Stop system to maximize employer participation (20 CFR 652.3(b), § 112(b)(17)(A)(i).)

g. Innovative Service Delivery Strategies. Describe innovative service delivery strategies the State has or is planning to undertake to maximize resources, increase service levels, improve service quality, achieve better integration or meet other key State goals. Include in the description the initiative's general design, anticipated outcomes, partners involved and funds leveraged (e.g., title I formula, statewide reserve, employer contributions, education funds, non-WIA State funds). (§ 112(b)(17)(A).)

h. Strategies for Faith-Based and Community Organizations

i. Describe those activities to be undertaken to:

*a.* Increase the opportunities for participation of faith-based and community organizations as committed and active partners in the One-Stop delivery system; and

*b.* Expand the access of faith-based and community organizations' clients and customers to the services offered by the One-Stops in the State.

ii. Outline those action steps designed to strengthen State collaboration efforts with local workforce investment areas in conducting outreach campaigns to educate faith-based and community organizations about the attributes and objectives of the demand-driven workforce investment system.

iii. Indicate how these resources can be strategically and effectively leveraged in the State's workforce investment areas to help meet the objectives of the Workforce Investment Act. (§ 112(b)(17)(i).)

2. *Adult Education and Literacy Services, including workplace literacy services*:

a. Describe the State's family literacy services.

b. Describe the State's English literacy programs.

3. *Food Stamp Employment and Training*:

a. Describe the components of the State's E&T program.

b. Discuss the weekly/monthly hours of participation required of each program component.

c. Describe planned combinations of components to meet the statutory requirement of 20 hours of participation per week to qualify as a work program for ABAWDS.

4. *TANF*: Outline how the State intends to:

a. Conduct a program, designed to serve all political subdivisions in the State (not necessarily in a uniform manner), that provides assistance to needy families with (or expecting) children and provides parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient. (§ 402(a)(1)(A)(i).)

b. Require a parent or caretaker receiving assistance under the program to engage in work (as defined by the State) once the State determines the parent or caretaker is ready to engage in work, or once the parent or caretaker has received assistance under the program for 24 months (whether or not consecutive), whichever is earlier, consistent with section 407(e)(2). (§ 402(a)(1)(A)(ii).)

c. Ensure that parents and caretakers receiving assistance under the program engage in work activities in accordance with section 407. (§ 402(a)(1)(A)(iii).)

d. Take such reasonable steps as deemed necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal government. (§ 402(a)(1)(A)(iv).)

e. Describe the financial eligibility criteria and corresponding benefits and services covered with State Maintenance of Effort (MOE) funds. This description applies to State MOE funds that are used in the State's TANF program or used to fund a separate State program.

5. *SCSEP*: Provide a description of each project function or activity and how the State will implement the project. The following activities should be discussed separately: (title V of the Older Americans Act, as amended.)

a. Describe how the services proposed support the State Senior Employment Services Coordination Plan.

b. Describe how recruitment and selection of participants will be achieved under Training and Employment Guidance Letter 13–04 and the regulations at 20 CFR 641.500 and 641.525. Include a description of the new recruitment strategies that will be used to reach the target population.

c. Describe how participant income will be recertified each year, including where eligibility records will be maintained.

d. Describe the arrangements that will be made to offer physical examinations as a required fringe benefit.

e. Describe the orientation procedures for participants and host agencies.

f. Describe the procedures for assessing job aptitudes, job readiness, and job preferences of participants and their potential for transition into unsubsidized employment.

g. Describe how the assessment will be used to develop the participant's Individual Employment Plan (IEP).

h. Describe how the participant will be assigned to community service including: The types of community service activity that will be emphasized and how they were chosen; methods used to match participants with community service training; the extent to which participants will be placed in the administration of the project itself; the types of host agencies used and the procedures and criteria for selecting the assignments; the average number of hours in a participant's training week; the average wage paid during training; the fringe benefits offered (if any); procedures for ensuring adequate supervision.

i. Describe the training that will be provided during community service training and any other types of training provided, including linkages with local One-Stop Career Centers, the Registered Apprenticeship Program, and the Disability Program Navigators.

j. Describe the supportive services that will be offered to help participants obtain and retain an unsubsidized job.

k. Describe arrangements that will be made to provide transportation assistance to participants.

l. Describe the steps that will be taken to move or place participants into unsubsidized employment, including cooperative measures that will be taken with the One-Stop Delivery System, and that support the Administration's focus on high-growth industries. Any grantee that failed to meet at least 20 percent unsubsidized placements in program year 2004 must submit a corrective action plan.

m. Describe any policy for maximum duration of enrollment or maximum time in community service.

n. Describe procedures for terminating a participant, including Individual Employment Plan terminations and the grievance procedures that will address termination from the program.

o. Describe the procedures for addressing and resolving participant complaints.

p. Describe procedures for over enrolling participants, including how over enrollments will be balanced with Equitable Distribution requirements.

q. Describe steps that will be taken to ensure compliance with the Maintenance of Effort provision of section 501(b)(1)(F).

r. Describe payroll procedures and how workers' compensation premiums are paid.

s. Describe collaboration efforts with the One-Stop System and with other partner programs under the Workforce Investment Act to maximize opportunities for SCSEP participants.

t. Describe efforts to work with local economic development offices in rural locations.

u. Describe current slot imbalances and proposed steps to correct inequities to achieve equitable distribution.

v. List the cities and counties where the project and subprojects will be conducted. Include the number of SCSEP authorized positions and indicate where the positions changed from the prior year.

w. Describe the organizational structure of the project and how subprojects will be managed, including assurances that adequate resources for administrative costs will be provided. Also describe the training that will be provided to local staff and describe how projects will be monitored for program and financial compliance, including audit plans.

x. Describe how the State will manage its providers and how it will transfer participants if new providers are selected to serve in the State.

y. Include a proposed level for each performance measure for each of the program years covered by the Plan. While the Plan is under review or through a subsequent modification, the State will negotiate with the Division of Adult Services, Older Worker Unit to set the appropriate levels for the next year. At a minimum, States must identify the performance indicators required under the Interim Final Rule for performance accountability published on June 29, 2007, and, for each indicator, the State must develop an objective and quantifiable performance goal for the next year. The performance measures include: Entered employment, employment retention, average earnings, service level, service to most in need, and community service.

z. Describe any request for an increase in administrative costs consistent with section 502(c)(3) of the Older Americans Act.

aa. Describe plans to provide a copy of this section to Area Agencies on Aging consistent with section 502(d) of the Older American Act.

6. *CSBG,* explain how the activities funded will:

a. Remove obstacles and solve problems that block the achievement of self-sufficiency, including those families and individuals who are attempting to transition off a State program carried out under part A of title IV of the Social Security Act.

b. Secure and retain meaningful employment.

c. Attain an adequate education, with particular attention toward improving literacy skills of the low-income families in the communities involved, which may include carrying out family literacy initiatives.

d. Make better use of available income.

e. Obtain and maintain adequate housing and a suitable living environment.

f. Obtain emergency assistance through loans, grants, or other means to meet immediate and urgent family and individual needs.

g. Achieve greater participation in the affairs of the communities involved, including the development of public and private grassroots partnerships with local law enforcement agencies, local housing authorities, private foundation, and other public and private partners.

h. Create youth development programs that support the primary role of the family, give priority to the prevention of youth problems and crime, and promote increased community coordination and collaboration in meeting the needs of youth, and support development and expansion of innovative community-based youth development programs that have demonstrated success in preventing or reducing youth crime.

i. Provide supplies, services, nutritious foods, and related services, as may be necessary to counteract conditions of starvation and malnutrition among low-income individuals.

H. Coordination and Non-Duplication

Describe how the State will coordinate and integrate the services provided through all of the programs identified in the Unified Plan in order to meet the needs of its customers, ensure there is no overlap or duplication among the programs, and ensure collaboration with key partners and continuous improvement of the workforce investment system. (States are encouraged to address several coordination requirements in a single narrative, if possible.)

In answering the above question, if the Unified Plan includes:

1. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs*

Structure/Process for State agencies and State Board to collaborate and communicate with each other and with the local workforce investment system. (§ 112(b)(8)(A).)

a. Describe the steps the State will take to improve operational collaboration of the workforce investment activities and other related activities and programs outlined in section 112(b)(8)(A), at both the State and local level (*e.g.*, joint activities, memoranda of understanding, planned mergers, coordinated policies, etc.). How will the State Board and agencies eliminate any existing State-level barriers to coordination? (§§ 111(d)(2) and 112(b)(8)(A).)

b. Describe the lines of communication and mechanisms established by the governor to ensure timely and effective sharing of information between the State agencies/State Board and local workforce investment areas and Local Boards. Include types of regularly issued guidance and how Federal guidance is disseminated to Local Boards and One-Stop Career Centers. (§ 112(b)(1).)

c. Describe any cross-cutting organizations or bodies at the State level designed to guide and inform an integrated vision for serving youth in the State within the context of workforce investment, social services, juvenile justice, and education. Describe the membership of such bodies and the functions and responsibilities in establishing priorities and services for youth. How is the State promoting a collaborative cross-agency approach for both policy development and service delivery at the local level for youth? (§ 112(b)(18)(A).)

2. *Adult Education and Family Literacy,* describe how the Adult Education and Family Literacy activities that will be carried out with any funds received under AEFLA will be integrated with other adult education, career development, and employment and training activities in the State or outlying area served by the eligible agency. (§ 224(b)(11).)

3. *Vocational Rehabilitation:*

Describe the State agency's plans, policies, and procedures for coordination with the following agencies or programs:

a. Federal, State and local agencies and programs, including programs carried out by the Under Secretary for Rural Development of the Department of Agriculture and State use of contracting programs to the extent that such agencies and programs are not carrying out activities through the statewide workforce investment system. (§ 101(a)(11)(C).)

b. Education officials responsible for the public education of students with disabilities, including a formal interagency agreement with the State educational agency. (§ 101(a)(11)(D).)

c. Private, nonprofit vocational rehabilitation service providers through the establishment of cooperative agreements. (§ 101(a)(24)(B).)

d. Other State agencies and appropriate entities to assist in the provision of supported employment services. (§ 625(b)(4).)

e. Other public or nonprofit agencies or organizations within the State, employers, natural supports, and other entities with respect to the provision of extended services. (§ 625(b)(5).)

4. *Unemployment Insurance,* summarize requests for any Federal partner assistance (primarily non-financial) that would help the SWA attain its goal.

5. *CSBG,* describe how the State and eligible entities will coordinate programs to serve low-income residents with other organizations, including:

a. Religious organizations.

b. Charitable groups.

c. Community organizations.

I. Special Populations and Other Groups

1. Describe how the State will develop program strategies to target and serve special populations. States may present information about their service strategies for those special populations that are identified by multiple Federal programs as they deem most appropriate and useful for planning purposes, including by special population or on a program-by-program basis.

In providing this description, if the Unified Plan includes any of the programs listed below, please address the following specific relevant populations:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs* (§ 112(b)(17)(A)(iv) and 112(b)(17)(B)):

i. Describe the State's strategies to ensure that the full range of employment and training programs and services delivered through the State's One-Stop delivery system are accessible to and will meet the needs of dislocated workers, displaced homemakers, low-income individuals such as migrants and seasonal farmworkers, women, minorities, individuals training for non-traditional employment, veterans, public assistance recipients and individuals with multiple barriers to employment (including older individuals, limited English proficiency (LEP) individuals, and people with disabilities). (§ 112(b)(17)(iv).)

ii. Describe the reemployment services you will provide to unemployment insurance claimants and the Worker Profiling services provided to claimants identified as most likely to exhaust their unemployment insurance benefits in accordance with section 3(c)(3) of the Wagner-Peyser Act.

iii. Describe how the State administers the unemployment insurance work test and how feedback requirements (under § 7(a)(3)(F) of the Wagner-Peyser Act) for all UI claimants are met.

iv. Describe the State's strategy for integrating and aligning services to dislocated workers provided through the WIA rapid response, WIA dislocated worker, and Trade Adjustment Assistance (TAA) programs. Does the State have a policy supporting co-enrollment for WIA and TAA? (§ 112(b)(17)(A)(ii and iv).)

v. How is the State's workforce investment system working collaboratively with business and industry and the education community to develop strategies to overcome barriers to skill achievement and employment experienced by the populations listed above in section (b)(i)(a.) of this section and to ensure they are being identified as a critical pipeline of workers?

vi. Describe how the State will ensure that the full array of One-Stop services are available to individuals with disabilities and that the services are fully accessible.

vii. Describe the role LVER/DVOP staff have in the One-Stop delivery system. How will the State ensure adherence to the legislative requirements for veterans' staff? How will services under this Plan take into consideration the agreement reached between the Secretary and the State regarding veterans' employment programs? (§§ 112(b)(7), 322, 38 U.S.C. Chapter 41 and 20 CFR 1001.120.)

viii. Department of Labor regulations at 29 CFR 37 require all recipients of Federal financial assistance from DOL to provide meaningful access to LEP individuals. Federal financial assistance includes grants, training, equipment usage, donations of surplus property, and other assistance. The regulations also apply to sub-recipients when Federal DOL funds are passed through from one recipient to a sub-recipient. Describe how the State will ensure access to services through the State's One-Stop delivery system by persons with limited English proficiency and how the State will meet the requirements of ETA Training and Employment Guidance Letter (TEGL) 26–02 (May 29, 2003) which provides guidance on methods of complying with the Federal rule.

ix. Describe the State's strategies to enhance and integrate service delivery through the One-Stop delivery system for migrant and seasonal farmworkers and agricultural employers. How will the State ensure that migrant and seasonal farmworkers have equal access to employment opportunities through the State's One-Stop delivery system? Include the number of migrant and seasonal farmworkers the State anticipates reaching annually through outreach to increase their ability to access core, intensive, and training services in the One-Stop Career Center System.

b. *Adult Education and Family Literacy:*

i. Low income students (§ 224(b)(10)(A).)

ii. Individuals with disabilities (§ 224(b)(10)(B).)

iii. Single parents and displaced homemakers (§ 224(b)(10)(C).)

iv. Individuals with multiple barriers to educational enhancement, including individuals with limited English proficiency (§ 224(b)(10)(D).)

v. Criminal offenders in correctional institutions and other institutionalized individuals (§ 225.)

c. *TAA and NAFTA–TAA,* describe how rapid response and basic readjustment services authorized under other Federal laws will be provided to trade-impacted workers.

d. *Vocational Rehabilitation:*

i. Minorities with most significant disabilities. (§ 21(c).)

e. *TANF:* indicate whether the State intends to:

i. Treat families moving into the State from another State differently than other families under the program, and if so, how the State intends to treat such families under the program;

ii. Provide assistance under the program to individuals who are not citizens of the United States, and if so, include an overview of such assistance (§ 402(a)(1)(B) (i) and (ii)); and

iii. Outline how the State intends to conduct a program designed to reach State and local law enforcement officials, the education system, and relevant counseling services, that provides education and training on the problem of statutory rape so that teenage pregnancy prevention programs may be expanded in scope to include men. (§ 401(a)(1)(A)(vi).)

f. *SCSEP* (§ 3(a)(1).): Indicate how the State will meet the priority for serving individuals age 65 and older and individuals

i. with a disability;

ii. with limited English proficiency or low literacy skills;

iii. who live in a rural area;

iv. who are veterans;

v. who have low employment prospects;

vi. who have failed to find employment after utilizing services under WIA;

vii. who are homeless or at risk for homelessness.

g. *CSBG:* Please address the following specific relevant populations in answering question 1:

i. Low-income families.

ii. Families and individuals receiving assistance under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.*).

iii. Homeless families and individuals.

iv. Migrant or seasonal farmworkers.

v. Elderly low-income individuals and families.

vi. Youth in low-income communities.

h. *HUD Employment and Training Programs:* (Reminder: The following is a suggestion for incorporating HUD programs into the State's Unified Plan. However, following this guidance will not trigger funding for HUD programs):

i. Public housing residents.

ii. Homeless and other groups.

2. Identify the methods of collecting data and reporting progress on the special populations described in question 1 of this section.

3. If the Plan includes *Adult Education and Family Literacy or Vocational Rehabilitation*, describe the steps the eligible agency will take to ensure equitable access to, and equitable participation in, projects or activities carried out with the respective funds by addressing the special needs of student, teachers, and other program beneficiaries in order to overcome barriers to equitable participation, including barriers based on gender, race, color, national origin, disability, and age. (§ 427(b) General Education Provisions Act.)

J. Professional Development and System Improvement

How will the State develop personnel to achieve the performance indicators for the programs included in the Plan?

In answering this question, if the Unified Plan includes:

1. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs:*

a. Capacity of Local Boards—How will the State build the capacity of Local Boards to develop and manage high performing local workforce investment system? (§§ 111(d)(2) and 112(b)(14).)

b. Local Planning Process—Describe the State mandated requirements for local workforce areas' strategic planning. What assistance does the State provide to local areas to facilitate this process, (§ 112(b)(2) and 20 CFR 661.350(a)(13)), including:

i. What oversight of the local planning process is provided, including receipt and review of Plans and negotiation of performance agreements? and

ii. How does the local plan approval process ensure that local plans are consistent with State performance goals and State strategic direction?

c. Oversight/Monitoring Process—Describe the monitoring and oversight criteria and procedures the State utilizes to move the system toward the State's vision and achieve the goals identified above, such as the use of mystery shoppers, performance agreements. (§ 112(b)(14).)

2. *Vocational Rehabilitation*, describe the designated State agency's policies, procedures and activities to establish and maintain a comprehensive system of personnel development designed to ensure an adequate supply of qualified State rehabilitation professional and paraprofessional personnel for the designated State unit pursuant to section 101(a)(7) of the Act. (§ 101(a)(7).)

K. Performance Accountability

Nothing in this guidance shall relieve a State of its responsibilities to comply with the accountability requirements of WIA titles I and II, including, for example, the requirements to renegotiate performance levels at statutorily defined points. The appropriate Secretary will negotiate adjusted levels of performance with the State for these programs prior to approving the State Plan.

1. What are the State's performance methodologies, indicators and goals in measurable, quantifiable terms for each program included in the Unified Plan and how will each program contribute to achieving these performance goals? (Performance indicators are generally set out by each program's statute.)

In answering the above question, if the Unified Plan includes:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs:*

Improved performance and accountability for customer-focused results are central features of WIA. To improve, States need not only reporting systems in place to collect data and track outcomes based on service delivery, but also performance management and accountability systems to analyze the information and modify strategies to improve performance. (See Training and Employment Guidance Letter (TEGL) 17–05, Common Measures Policy for the Employment and Training Administration's (ETA) Performance Accountability System and Related Performance Issues, issued February 17, 2006.)

In this section, describe how the State measures the success of its strategies in achieving its goals, and how the State uses these data to continuously improve the system.

i. Describe the State's performance accountability system, including any State-system measures and the State's performance goals established with local areas. Identify the performance indicators and goals the State has established to track its progress toward meeting its strategic goals and implementing its vision for the workforce investment system. For each of the core indicators, explain how the State worked with Local Boards to determine the level of the performance goals. Include a discussion of how the levels compare with the State's previous outcomes as well as with the State-adjusted levels of performance established for other States (if available), taking into account differences in economic conditions, the characteristics of participants when they entered the program and the services to be provided. Include a description of how the levels will help the State achieve continuous improvement over the life of the Plan. (§§ 112(b)(3) and 136(b)(3).)

ii. Describe any targeted applicant groups, such as TANF recipients, Veterans, ex-offenders, and migrant and seasonal farmworkers, under WIA title I, the Wagner-Peyser Act or Title 38 Chapters 41 and 42 (Veterans Employment and Training Programs) that the State tracks. (§§ 111(d)(2), 112(b)(3) and 136(b)(2)(C).)

iii. Identify any performance outcomes or measures in addition to those prescribed by WIA and what process is the State using to track and report them.

iv. Describe the State's common data system and reporting processes in place to track progress. Describe what performance information will be collected from the various One-Stop partners (beyond that required by DOL), use of quarterly wage records, and how the statewide system will have access to the information needed to continuously improve. (§ 112(b)(8)(B).)

v. Describe any actions the governor and State Board will take to ensure collaboration with key partners and continuous improvement of the statewide workforce investment system. (§§ 111(d)(2) and 112(b)(1).)

vi. How do the State and Local Boards evaluate performance? What corrective actions (including sanctions and technical assistance) will the State take if performance falls short of expectations? How will the State and Local Boards use the review process to reinforce the strategic direction of the

system? (§§ 111(d)(2), 112(b)(1), and 112(b)(3).)

vii. Include a proposed level for each performance measure for each program year covered by the Plan. While the Plan is under review, the State will negotiate with the respective ETA Regional Administrator to set the appropriate levels for the applicable year. States must identify the performance indicators required under section 136, and, for each indicator, the State must develop an objective and quantifiable performance goal for each program year covered by the Plan. States are encouraged to address how the performance goals for local workforce investment areas and training providers will help them attain their statewide performance goals. (§§ 112(b)(3) and 136).)

b. *Adult Education and Family Literacy:*

i. Include a description of how the eligible agency will evaluate annually the effectiveness of the Adult Education and Family Literacy activities, such as a comprehensive performance accountability system, based on the performance measures in section 212.

ii. Identify levels of performance for the core indicators of performance described in section 212(b)(2)(A) for the first three program years covered by the Plan (§ 212(b)(3)(A)(ii).), and any additional performance indicators selected by the eligible agency. (§ 212 (b)(2)(B).)

iii. Describe how such performance indicators or measures will be used to ensure the improvement of Adult Education and Family Literacy activities in the State or outlying area. (§ 224(b)(4).)

c. *TANF*, outline how the State intends to establish goals and take action to prevent and reduce the incidence of out of wedlock pregnancies, with special emphasis on teenage pregnancies. (§ 402(a)(1)(A)(v).)

d. *SCSEP:* Provisions on performance are set forth in section G.1. (g)(xxv) of these instructions.

e. *CSBG:*

i. Describe how the State and all eligible entities in the State will participate in the Results Oriented Management and Accountability System, a performance measure system pursuant to section 678E(b) of the Act, or an alternative system for measuring performance and results that meets the requirements of that section, and a description of outcome measures to be used to measure eligible entity performance in promoting self-sufficiency, family stability, and community revitalization.

ii. Describe the standards and procedures that the State will use to monitor activities carried out in furtherance of the Plan and will use to ensure long-term compliance with requirements of the programs involved, including the comprehensive planning requirements. (§ 91.330)

2. Has the State developed any common performance goals applicable to multiple programs? If so, describe the goals and how they were developed.

L. Data Collection

1. What processes does the State have in place to collect and validate data to track performance and hold providers/operators/sub-grantees accountable?

In answering the above question, if the Unified Plan includes:

a. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs*, describe the State's common data system and reporting processes in place to track progress. Describe what data will be collected from the various One-Stop partners (beyond that required by DOL), use of quarterly wage records, and how the statewide system will have access to the information needed to continuously improve. (§ 112(b)(8)(B).)

b. *Food Stamp Employment & Training*, describe how employment and training data will be compiled and where responsibility for employment and training reporting is organizationally located at the State level. Include the department, agency, and telephone number for the person(s) responsible for both financial and non-financial employment & training (E&T) reporting.

2. What common data elements and reporting systems are in place to promote integration of Unified Plan activities?

M. Corrective Action

Describe the corrective actions the State will take for each program, as applicable, if performance does not meet expectations.

In answering the above question, if the Unified Plan includes:

1. *Vocational Rehabilitation*, include the results of an evaluation of the effectiveness of the vocational rehabilitation program, and a report jointly developed with the State Rehabilitation Council (if the State has a Council) on the progress made in improving effectiveness from the previous year including:

a. An evaluation of the extent to which program goals were achieved and a description of the strategies that contributed to achieving the goals.

b. To the extent the goals were not achieved, a description of the factors that impeded that achievement.

c. An assessment of the performance of the State on the standards and indicators established pursuant to section 106 of the Act. (§ 101(a)(15)(E)(i).)

2. *Unemployment Insurance*,

a. Explain the reason(s) for the measurement areas in which the State's performance is deficient.

b. Include a description of the actions/activities which will be undertaken to improve performance.

c. If a Corrective Action Plan was in place the previous fiscal year, provide an explanation of why the actions contained in that Plan were not successful in improving performance, and an explanation of why the actions now specified will be more successful.

d. Describe plans for monitoring and assessing accomplishments of planned actions and for controlling quality after achieving performance goals.

N. Waiver and Work-Flex Requests

Will the State be requesting waivers as a part of this Unified Plan?

In answering this question, the following waiver provisions apply if the Unified Plan includes:

1. *WIA Title I and Wagner-Peyser Act and/or Veterans Programs:* States may submit a Workforce Flexibility (Work-Flex) Plan under WIA section 192 and/or a General Statutory Waiver Plan under WIA section 189(i) as part of the WIA title I Plan. These Waiver Plans may also be submitted separately, in which case they must identify related provisions in the State's title I Plan. State Waiver Plans should be developed in accordance with planning requirements at Subpart D of 20 CFR Part 661.420.

2. *Vocational Rehabilitation:* If a State requests a waiver of the statewide requirement identified in assurance number 13 for the vocational rehabilitation program in Section III of this Unified Planning guidance, the request must be made in accordance with the provisions of 34 CFR 361.26(b).

*Part IV. Certifications and Assurances*

The following certifications and assurances apply to the extent that the programs and activities are included in the State Unified Plan.

A. General Certifications and Assurances

By signing the Unified Plan signature page, you are certifying that:

1. The methods used for joint planning and coordination of the programs and activities included in the

Unified Plan included an opportunity for the entities responsible for planning or administering such programs and activities to review and comment on all portions of the Unified Plan. (WIA, § 501(c)(3)(B).)

If you submit the Unified Plan by posting it on an Internet Web site, you are certifying that:

2. The content of the submitted Plan will not be changed after it is submitted. Plan modifications must be approved by the reviewing State agency. It is the responsibility of the designated agency to circulate the modifications among the other agencies that may be affected by the changes.

B. Non-Construction Programs

By signing the Unified Plan signature page, you are certifying that the grantee has filed the Government-wide standard assurances for non-construction programs (SF 424). States can print SF 424 from *http://ocfo.ed.gov/grntinfo/appforms.htm.*

C. EDGAR Certifications

You must include the following certifications for each of the State agencies that administer one of these programs: Adult Education and Literacy or Vocational Rehabilitation. A State may satisfy the EDGAR requirement by having all responsible State agency officials sign a single set of EDGAR certifications.

By signing the Unified Plan signature page, you are certifying that:

1. The Plan is submitted by the State agency that is eligible to submit the Plan. [34 CFR 76.104(a)(1).]

2. The State agency has authority under State law to perform the functions of the State under the program. [34 CFR 76.104(a)(2)]

3. The State legally may carry out each provision of the Plan. [34 CFR 76.104(a)(3)]

4. All provisions of the Plan are consistent with State law. [34 CFR 76.104(a)(4)]

5. A State officer, specified by title in the certification, has authority under State law to receive, hold, and disburse Federal funds made available under the Plan. [34 CFR 76.104(a)(5)]

6. The State officer who submits the Plan, specified by title in the certification, has authority to submit the Plan. [34 CFR 76.104(a)(6)]

7. The agency that submits the Plan has adopted or otherwise formally approved the Plan. [34 CFR 76.104(a)(7)]

8. The Plan is the basis for State operation and administration of the program. [34 CFR 76.104(a)(8)]

9. A copy of the State Plan was submitted into the State Intergovernmental Review Process. [Executive Order 12372]

D. Debarment, Drug-Free Work Place, and Lobbying Certification

By signing the Unified Plan signature page, you are certifying that the Department of Education grantee has filed ED 80–0013. This form also applies to AEFLA and RSA. States can print ED 80–0013 from *http://ocfo.ed.gov/grntinfo/appforms.htm.*

E. WIA Title I/Wagner-Peyser Act/Veterans Programs

By signing the Unified Plan signature page, you are certifying that:

1. The State assures that it will establish, in accordance with section 184 of the Workforce Investment Act, fiscal control and fund accounting procedures that may be necessary to ensure the proper disbursement of, and accounting for, funds paid to the State through the allotments made under sections 127 and 132. (§ 112(b)(11).)

2. The State assures that it will comply with section 184(a)(6), which requires the governor to, every two years, certify to the Secretary, that—

a. The State has implemented the uniform administrative requirements referred to in section 184(a)(3);

b. The State has annually monitored local areas to ensure compliance with the uniform administrative requirements as required under section 184(a)(4); and

c. The State has taken appropriate action to secure compliance pursuant to section 184(a)(5). (§ 184(a)(6).)

3. The State assures that the Adult and Youth funds received under the Workforce Investment Act will be distributed equitably throughout the State, and that no local areas will suffer significant shifts in funding from year to year during the period covered by this Plan. (§ 112(b)(12)(B).)

4. The State assures that veterans will be afforded employment and training activities authorized in section 134 of the Workforce Investment Act, and the activities authorized in chapters 41 and 42 of Title 38 U.S. code. The State assures that it will comply with the veterans priority established in the Jobs for Veterans Act. (38 U.S.C. 4215.)

5. The State assures that the governor shall, once every two years, certify one Local Board for each local area in the State. (§ 117(c)(2).)

6. The State assures that it will comply with the confidentiality requirements of section 136(f)(3).

7. The State assures that no funds received under the Workforce Investment Act will be used to assist, promote, or deter union organizing. (§ 181(b)(7).)

8. The State assures that it will comply with the nondiscrimination provisions of section 188, including an assurance that a Methods of Administration has been developed and implemented. (§ 188.)

9. The State assures that it will collect and maintain data necessary to show compliance with the nondiscrimination provisions of section 188. (§ 185.)

10. The State assures that it will comply with the grant procedures prescribed by the Secretary (pursuant to the authority at section 189(c) of the Act) which are necessary to enter into grant agreements for the allocation and payment of funds under the Act. The procedures and agreements will be provided to the State by the ETA Office of Grants and Contract Management and will specify the required terms and conditions and assurances and certifications, including, but not limited to, the following:

a. General Administrative Requirements:

i. 29 CFR part 97—Uniform Administrative Requirements for State and Local Governments (as amended by the Act).

ii. 29 CFR part 96 (as amended by OMB Circular A–133)—Single Audit Act.

iii. OMB Circular A–87—Cost Principles (as amended by the Act).

b. Assurances and Certifications:

i. SF 424 B—Assurances for Non-construction Programs.

ii. 29 CFR part 37—Nondiscrimination and Equal Opportunity Assurance (and regulation) 29 CFR § 37.20.

iii. CFR part 93—Certification Regarding Lobbying (and regulation).

iv. 29 CFR part 98—Drug Free Workplace and Debarment and Suspension Certifications (and regulation).

c. Special Clauses/Provisions: Other special assurances or provisions as may be required under Federal law or policy, including specific appropriations legislation, the Workforce Investment Act, or subsequent Executive or Congressional mandates.

11. The State certifies that the Wagner-Peyser Act Plan, which is part of this document, has been certified by the State Employment Security Administrator.

12. The State certifies that veterans' services provided with Wagner-Peyser Act funds will be in compliance with 38 U.S.C. Chapter 41 and 20 CFR part 1001.

13. The State certifies that Wagner-Peyser Act-funded labor exchange activities will be provided by merit-

based public employees in accordance with DOL regulations.

14. The State assures that it will comply with the MSFW significant office requirements in accordance with 20 CFR part 653.

15. The State certifies it has developed this Plan in consultation with local elected officials, Local Workforce Boards, the business community, labor organizations and other partners.

16. As a condition to the award of financial assistance from the Department of Labor under title I of WIA, the grant applicant assures that it will comply fully with the nondiscrimination and equal opportunity provisions of the following laws:

a. Section 188 of the Workforce Investment Act of 1998 (WIA), which prohibits discrimination against all individuals in the United States on the basis of race, color, religion, sex, national origin, age, disability, political affiliation or belief, and against beneficiaries on the basis of either citizenship/status as a lawfully admitted immigrant authorized to work in the United States or participation in any WIA title I financially-assisted program or activity;

b. Title VI of the Civil Rights Act of 1964, as amended, which prohibits discrimination on the bases of race, color and national origin;

c. Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination against qualified individuals with disabilities;

d. The Age Discrimination Act of 1975, as amended, which prohibits discrimination on the basis of age; and

e. Title IX of the Education Amendments of 1972, as amended, which prohibits discrimination on the basis of sex in educational programs.

f. The grant applicant also assures that it will comply with 29 CFR part 37 and all other regulations implementing the laws listed above. This assurance applies to the grant applicant's operation of the WIA title I financially-assisted program or activity, and to all agreements the grant applicant makes to carry out the WIA title I financially-assisted program or activity. The grant applicant understands that the United States has the right to seek judicial enforcement of this assurance.

17. The State assures that funds will be spent in accordance with the Workforce Investment Act and the Wagner-Peyser Act and their regulations, written Department of Labor Guidance implementing these laws, and all other applicable Federal and State laws.

F. Adult Education and Family Literacy

By signing the Unified Plan signature page, you are certifying that:

1. The eligible agency will award not less than one grant to an eligible provider who offers flexible schedules and necessary support services (such as child care and transportation) to enable individuals, including individuals with disabilities, or individuals with other special needs, to participate in Adult Education and Literacy activities, which eligible provider shall attempt to coordinate with support services that are not provided under this subtitle prior to using funds for Adult Education and Literacy activities provided under AEFLA for support services. (§ 224(b)(5).)

2. The funds received under subtitle A of title II of WIA will not be expended for any purpose other than for activities under subtitle A of title II of WIA. (§ 224(b)(6).)

3. The eligible agency will expend the funds under subtitle A of title II of WIA only in a manner consistent with fiscal requirements in section 241. (§ 224(b)(8).)

G. Food Stamp Employment and Training (FSET)

By signing the Unified Plan signature page, you are certifying that:

1. Federal funds allocated by the Department of Agriculture to the State under section 16(h)(1) of the Food Stamp Act of 1977 (the Act), or provided to the State as reimbursements under sections 16(h)(2) and 16(h)(3) of the Act will be used only for operating an employment and training program under section 6(d)(4) of the Act.

2. The State will submit to the Food and Nutrition Service (FNS) annual updates to its Employment and Training Plan for the coming fiscal year. The updates are due by August 15 of each year. The annual update must include any changes the State anticipates making in the basic structure or operation of its program. At a minimum, the annual update must contain revisions to Tables 1 (Estimated Participant Levels), 2 (Estimated E&T Placement Levels), 4 (Operating Budget), and 5 (Funding Categories).

3. If significant changes are to be made to its E&T program during the fiscal year, the State will submit to FNS a request to modify its Plan. FNS must approve the modification request before the proposed change is implemented. The State may be liable for costs associated with implementation prior to approval. See ''The Handbook on Preparing State Plans for Food Stamp Employment and Training Programs'' for additional information.

4. The State will submit a quarterly E&T report, FNS–583. Reports are due no later than 45 days after the end of each Federal fiscal quarter. The information required on the FNS–583 is listed in Exhibit 3 of the ''The Handbook on Preparing State Plans for Food Stamp Employment and Training Programs.''

5. The State will submit E&T program financial information on the SF–269, Financial Status Report. It must include claims for the 100 percent Federal grant, 50 percent matched funding, and participant reimbursements. The SF–269 is due 30 days after the end of each Federal fiscal quarter.

6. The State will deliver each component of its E&T program through the One-Stop delivery system, an inter-connected strategy for providing comprehensive labor market and occupational information to job seekers, employers, core services providers, other workforce employment activity providers, and providers of workforce education activities. If the component is not available locally through such a system, the State may use another source.

H. Vocational Rehabilitation

By signing the Unified Plan signature page, you are certifying that:

1. As a condition for the receipt Federal funds under title I, part B of the Rehabilitation Act for the provision of vocational rehabilitation services, the designated State agency agrees to operate and administer the State Vocational Rehabilitation Services Program in accordance with provisions of this title I State Plan, the Act and all applicable regulations, policies and procedures established by the Secretary. Funds made available under section 111 of the Act are used solely for the provision of vocational rehabilitation services under title I and the administration of the title I State Plan.

2. As a condition of the receipt of Federal funds under title VI, part B of the Act for supported employment services, the designated State agency agrees to operate and administer the State Supported Employment Services Program in accordance with the provisions of the supplement to this State Plan, the Act, and all applicable regulations, policies, and procedures established by the Secretary. Funds made available under title VI, part B are used solely for the provision of supported employment services and the administration of the supplement to the title I State Plan.

3. The designated State agency or designated State unit is authorized to submit this State Plan under title I of the

Act and its supplement under title VI, part B of the Act.

4. The State submits only those policies, procedures, or descriptions required under this State Plan and its supplement that have not been previously submitted to and approved by the Commissioner of the Rehabilitation Services Administration. (§ 101(a)(1)(B).)

5. The State submits to the Commissioner at such time and in such manner as the Secretary determines to be appropriate, reports containing annual updates of the information relating to the: comprehensive system of personnel development; assessments, estimates, goals and priorities, and reports of progress; innovation and expansion activities; and requirements under title I, part B or title VI, part B of the Act. (§ 101(a)(23).)

6. The State Plan and its supplement are in effect subject to the submission of such modifications as the State determines to be necessary or as the Commissioner may require based on a change in State policy, a change in Federal law, including regulations, an interpretation of the Act by a Federal court or the highest court of the State, or a finding by the Commissioner of State noncompliance with the requirements of the Act, until the State submits and receives approval of a new State Plan or Plan supplement. (§ 101(a)(1)(C).)

7. The State has an acceptable plan for carrying out part B of title VI of the Act, including the use of funds under that part to supplement funds made available under part B of title I of the Act to pay for the cost of services leading to supported employment. (§ 101(a)(22).)

8. The designated State agency, prior to the adoption of any policies or procedures governing the provision of vocational rehabilitation services under the State Plan and supported employment services under the supplement to the State Plan, including making any amendment to such policies and procedures, conducts public meetings throughout the State after providing adequate notice of the meetings, to provide the public, including individuals with disabilities, an opportunity to comment on the policies or procedures, and actively consults with the Director of the client assistance program, and, as appropriate, Indian tribes, tribal organizations, and Native Hawaiian organizations on the policies or procedures. (§ 101(a)(16)(A).)

9. The designated State agency takes into account, in connection with matters of general policy arising in the administration of the Plan, the views of individuals and groups of individuals who are recipients of vocational rehabilitation services, or in appropriate cases, the individual's representatives; personnel working in programs that provide vocational rehabilitation services to individuals with disabilities; providers of vocational rehabilitation services to individuals with disabilities; the Director of the client assistance program; and the State Rehabilitation Council, if the State has such a Council. (§ 101(a)(16)(B))

10. The designated State agency (or, as appropriate, agencies) is a State agency that is:

a.____ Primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities; or

b.____ not primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities, and includes within the State agency a vocational rehabilitation bureau, or division, or other organizational unit that: Is primarily concerned with vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities, and is responsible for the designated State agency's vocational rehabilitation program; has a full-time director; has a staff, all or substantially all of whom are employed full time on the rehabilitation work of the organizational unit; and is located at an organizational level and has an organizational status within the designated State agency comparable to that of other major organizational units of the designated State agency. (§ 101(a)(2)(B).)

11. The designated State agency (or, as appropriate, agencies):

a.____ Is an independent commission that is responsible under State law for operating, or overseeing the operation of, the vocational rehabilitation program in the State; is consumer-controlled by persons who are individuals with physical or mental impairments that substantially limit major life activities; and represent individuals with a broad range of disabilities, unless the designated State unit under the direction of the commission is the State agency for individuals who are blind; includes family members, advocates, or other representatives, of individuals with mental impairments; and undertakes the functions set forth in section 105(c)(4) of the Act; or

b.____ has established a State Rehabilitation Council that meets the criteria set forth in section 105 of the Act and the designated State unit: Jointly with the Council develops, agrees to, and reviews annually State goals and priorities, and jointly submits annual reports of progress with the Council, in accordance with the provisions of section 101(a)(15) of the Act; regularly consults with the Council regarding the development, implementation, and revision of State policies and procedures of general applicability pertaining to the provision of vocational rehabilitation services; includes in the State Plan and in any revision to the State Plan, a summary of input provided by the Council, including recommendations from the annual report of the Council described in section 105(c)(5) of the Act, the review and analysis of consumer satisfaction described in section 105(c)(4), and other reports prepared by the Council, and the response of the designated State unit to such input and recommendations, including explanations for rejecting any input or recommendation; and transmits to the Council all Plans, reports, and other information required under this title to be submitted to the Secretary; all policies, and information on all practices and procedures, of general applicability provided to or used by rehabilitation personnel in carrying out this title; and copies of due process hearing decisions issued under this title, which shall be transmitted in such a manner as to ensure that the identity of the participants in the hearings is kept confidential. (§ 101(a)(21).)

12. The State provides for financial participation, or if the State so elects, by the State and local agencies, to provide the amount of the non-Federal share of the cost of carrying out title I, part B of the Act. (§ 101(a)(3).)

13. The Plan is in effect in all political subdivisions of the State, except that in the case of any activity that, in the judgment of the Commissioner, is likely to assist in promoting the vocational rehabilitation of substantially larger numbers of individuals with disabilities or groups of individuals with disabilities, the Commissioner may waive compliance with the requirement that the Plan be in effect in all political subdivisions of the State to the extent and for such period as may be provided in accordance with regulations prescribed by the Commissioner, but only if the non-Federal share of the cost of the vocational rehabilitation services involved is met from funds made available by a local agency (including funds contributed to such agency by a private agency, organization, or individual); and in a case in which earmarked funds are used toward the non-Federal share and such funds are earmarked for particular geographic areas within the State, the earmarked

funds may be used in such areas if the State notifies the Commissioner that the State cannot provide the full non-Federal share without such funds. (§ 101(a)(4).)

14. The State agency employs methods of administration found by the Commissioner to be necessary for the proper and efficient administration of the State Plan. (§ 101(a)(6)(A).)

15. The designated State agency and entities carrying out community rehabilitation programs in the State, who are in receipt of assistance under title I of the Act, take affirmative action to employ and advance in employment qualified individuals with disabilities covered under and on the same terms and conditions as set forth in section 503 of the Act. (§ 101(a)(6)(B).)

16. Facilities used in connection with the delivery of services assisted under the State Plan comply with the provisions of the Act entitled ''An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped,'' approved on August 12, 1968 (commonly known as the ''Architectural Barriers Act of 1968''), with section 504 of the Act and with the Americans with Disabilities Act of 1990. (§ 101(a)(6)(C).)

17. If, under special circumstances, the State Plan includes provisions for the construction of facilities for community rehabilitation programs—

a. The Federal share of the cost of construction for the facilities for a fiscal year will not exceed an amount equal to 10 percent of the State's allotment under section 110 for such year;

b. The provisions of section 306 (as in effect on the day before the date of enactment of the Rehabilitation Act Amendments of 1998) shall be applicable to such construction and such provisions shall be deemed to apply to such construction; and

c. There shall be compliance with regulations the Commissioner shall prescribe designed to assure that no State will reduce its efforts in providing other vocational rehabilitation services (other than for the establishment of facilities for community rehabilitation programs) because the Plan includes such provisions for construction. (§ 101(a)(17).)

18. The designated State unit submits, in accordance with section 101(a)(10) of the Act, reports in the form and level of detail and at the time required by the Commissioner regarding applicants for and eligible individuals receiving services under the State Plan and the information submitted in the reports provides a complete count, unless sampling techniques are used, of the applicants and eligible individuals in a manner that permits the greatest possible cross-classification of data and ensures the confidentiality of the identity of each individual. (§ 101(a)(10)(A) and (F).)

19. The designated State agency has the authority to enter into contracts with for-profit organizations for the purpose of providing, as vocational rehabilitation services, on-the-job training and related programs for individuals with disabilities under part A of title VI of the Act, upon the determination by the designated State agency that such for-profit organizations are better qualified to provide such vocational rehabilitation services than non-profit agencies and organizations. (§ 101(a)(24)(A).)

20. The designated State agency has cooperative agreements with other entities that are components of the statewide workforce investment system of the State in accordance with section 101(a)(11)(A) of the Act and replicates these cooperative agreements at the local level between individual offices of the designated State unit and local entities carrying out activities through the statewide workforce investment system. (§ 101(a)(11)(A) and (B).)

21. The designated State unit, the Statewide Independent Living Council established under section 705 of the Act, and the independent living centers described in part C of title VII of the Act within the State have developed working relationships and coordinate their activities. (§ 101(a)(11)(E).)

22. If there is a grant recipient in the State that receives funds under part C of the Act, the designated State agency has entered into a formal agreement that meets the requirements of section 101(a)(11)(F) of the Act with each grant recipient. (§ 101(a)(11)(F).)

23. Except as otherwise provided in part C of title I of the Act, the designated State unit provides vocational rehabilitation services to American Indians who are individuals with disabilities residing in the State to the same extent as the designated State agency provides such services to other significant populations of individuals with disabilities residing in the State. (§ 101(a)(13).)

24. No duration of residence requirement is imposed that excludes from services under the Plan any individual who is present in the State. (§ 101(a)(12).)

25. The designated State agency has implemented an information and referral system that is adequate to ensure that individuals with disabilities are provided accurate vocational rehabilitation information and guidance, using appropriate modes of communication, to assist such individuals in preparing for, securing, retaining, or regaining employment, and are appropriately referred to Federal and State programs, including other components of the statewide workforce investment system in the State. (§ 101(a)(20).)

26. In the event that vocational rehabilitation services cannot be provided to all eligible individuals with disabilities in the State who apply for the services, individuals with the most significant disabilities, in accordance with criteria established by the State for the order of selection, will be selected first for the provision of vocational rehabilitation services and eligible individuals, who do not meet the order of selection criteria, shall have access to services provided through the information and referral system implemented under section 101(a)(20) of the Act. (§ 101(a)(5)(C) and (D).)

27. Applicants and eligible individuals, or, as appropriate, the applicants' representatives or the individuals' representatives, are provided information and support services to assist the applicants and eligible individuals in exercising informed choice throughout the rehabilitation process, consistent with the provisions of section 102(d) of the Act. (§ 101(a)(19).)

28. An individualized plan for employment meeting the requirements of section 102(b) of the Act will be developed and implemented in a timely manner for an individual subsequent to the determination of the eligibility of the individual for services, except that in a State operating under an order of selection, the Plan will be developed and implemented only for individuals meeting the order of selection criteria; services under this Plan will be provided in accordance with the provisions of the individualized plan for employment. (§ 01(a)(9).)

29. Prior to providing any vocational rehabilitation services, except:

- Assessment for determining eligibility and vocational rehabilitation needs by qualified personnel, including, if appropriate, an assessment by personnel skilled in rehabilitation technology;
- Counseling and guidance, including information and support services to assist an individual in exercising informed choice consistent with the provisions of section 102(d) of the Act;
- Referral and other services to secure needed services from other agencies through agreements developed under section 101(a)(11) of the Act, if such

services are not available under this State Plan;

- Job-related services, including job search and placement assistance, job retention services, follow-up services, and follow-along services;
- Rehabilitation technology, including telecommunications, sensory, and other technological aids and devices; and
- Post-employment services consisting of the services listed under subparagraphs (a) through (e), to an eligible individual, or to members of the individual's family, the State unit determines whether comparable services and benefits exist under any other program and whether those services and benefits are available to the individual unless the determination of the availability of comparable services and benefits under any other program would interrupt or delay:
- Progress of the individual toward achieving the employment outcome identified in the individualized plan for employment;
- An immediate job placement; or
- Provision of such service to any individual who is determined to be at extreme medical risk, based on medical evidence provided by an appropriate qualified medical professional. (§ 101(a)(8)(A).)

30. The governor of the State in consultation with the designated State vocational rehabilitation agency and other appropriate agencies ensures that there is an interagency agreement or other mechanism for interagency coordination that meets the requirements of section 101(a)(8)(B)(i)–(iv) of the Act between any appropriate public entity, including the State Medicaid program, public institution of higher education, and a component of the statewide workforce investment system, and the designated State unit so as to ensure the provision of the vocational rehabilitation services identified in section 103(a) of the Act, other than the services identified as being exempt from the determination of the availability of comparable services and benefits, that are included in the individualized plan for employment of an eligible individual, including the provision of such services during the pendency of any dispute that may arise in the implementation of the interagency agreement or other mechanism for interagency coordination. (§ 101(a)(8)(B).)

31. The State agency conducts an annual review and reevaluation of the status of each individual with a disability served under this State Plan who has achieved an employment outcome either in an extended employment setting in a community rehabilitation program or any other employment under section 14(c) of the Fair Labor Standards Act (29 U.S.C. 214(c)) for 2 years after the achievement of the outcome (and annually thereafter if requested by the individual or, if appropriate, the individual's representative), to determine the interests, priorities, and needs of the individual with respect to competitive employment or training for competitive employment; provides for the input into the review and reevaluation, and a signed acknowledgment that such review and reevaluation have been conducted, by the individual with a disability, or, if appropriate, the individual's representative; and makes maximum efforts, including the identification and provision of vocational rehabilitation services, reasonable accommodations, and other necessary support services, to assist such individuals in engaging in competitive employment. (§ 101(a)(14).)

32. Funds made available under title VI, part B of the Act will only be used to provide supported employment services to individuals who are eligible under this part to receive the services. (§ 625(b)(6)(A).)

33. The comprehensive assessments of individuals with significant disabilities conducted under section 102(b)(1) of the Act and funded under title I will include consideration of supported employment as an appropriate employment outcome. (§ 625(b)(6)(B).)

34. An individualized plan for employment, as required by section 102 of the Act, will be developed and updated using funds under title I in order to specify the supported employment services to be provided; specify the expected extended services needed; and identify the source of extended services, which may include natural supports, or to the extent that it is not possible to identify the source of extended services at the time the individualized plan for employment is developed, a statement describing the basis for concluding that there is a reasonable expectation that such sources will become available. (§ 625(b)(6)(C).)

35. The State will use funds provided under title VI, part B only to supplement, and not supplant, the funds provided under title I, in providing supported employment services specified in the individualized plan for employment. (§ 625(b)(6)(D).)

36. Services provided under an individualized plan for employment will be coordinated with services provided under other individualized plans established under other Federal or State programs. (§ 625(b)(6)(E).)

37. To the extent job skills training is provided, the training will be provided on site. (§ 625(b)(6)(F).)

38. Supported employment services will include placement in an integrated setting for the maximum number of hours possible based on the unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice of individuals with the most significant disabilities. (§ 625(b)(G).)

39. The State will expend not more than 5 percent of the allotment of the State under title VI, part B for administrative costs of carrying out this part. (§ 625(b)(7).)

40. The supported employment supplement to the title I State Plan contains such other information and be submitted in such manner as the Commissioner of the Rehabilitation Services Administration may require. (§ 625(b)(8).)

I. Unemployment Insurance (UI)

By signing the Unified Plan/SQSP Signature Page, the State administrator is certifying that the State will comply with the following assurances, and that the State will institute plans or measures to comply with the following requirements. The assurances are identified and explained below:

A. *Assurance of Equal Opportunity (EO).* As a condition to the award of financial assistance from ETA, the State must assure that the operation of its program, and all agreements or arrangements to carry out the programs for which assistance is awarded, will comply with the following laws:

- Title VI of the Civil Rights Act of 1964, as amended;
- Sections 504 and 508(f) of the Rehabilitation Act of 1973, as amended;
- Age Discrimination Act (ADA) of 1975, as amended,
- Section 188 of the Workforce Investment Act; and
- Title IX of the Education Amendments of 1972, as amended.

Further, the State must assure that it will establish and adhere to Methods of Administration that give a reasonable guarantee of compliance with the above equal opportunity and nondiscrimination laws and regulations regarding the program services it provides and in its employment practices. These Methods of Administration must, at a minimum, include the following:

1. *Designation of an Equal Opportunity Officer.* The state must designate a senior-level individual to coordinate its EO responsibilities. The

person designated must report to the top official on equal opportunity and nondiscrimination matters and be assigned sufficient staff and resources to ensure the capability to fulfill the agency's equal opportunity and nondiscrimination obligations.

2. *Equal Opportunity Notice and Communication.* The state must take affirmative steps to prominently display the *Equal Opportunity is the Law* poster in all of its facilities and inform applicants for programs, participants, applicants for employment, and employees:

a. that the state does not discriminate in admission, access, treatment, or employment; and

b. of their right to file a complaint and how to do so.

Other than the *Equal Opportunity is the Law* poster, methods of notification of this information may include placement of notices in offices and publication of notices in newsletters, newspapers, or magazines.

3. *Assurances.* The state must develop and implement procedures for transferring nondiscrimination and EO obligations in sub-contracts and sub-agreements.

4. *Universal Access.* The state must take appropriate steps to ensure that they are providing universal access to their programs. These steps should include reasonable efforts to include members of both sexes, various racial and ethnic groups, individuals with disabilities and individuals in differing age groups.

5. *Compliance with Section 504.* The state must take the necessary measures to ensure access to its programs and facilities for persons with disabilities, as well as make certain communication with persons with disabilities is as effective as that with others.

6. *Data Collection and Recordkeeping.* The state must collect such data and maintain such records in accordance with procedures prescribed by the Director of the U.S. Department of Labor's Civil Rights Center. These characteristics data (e.g., race, sex, national origin, age, disability) are utilized to determine whether the state and its local office are in compliance with Federal nondiscrimination and equal opportunity statutes and regulations.

7. *Monitoring.* The state must establish a system for periodically monitoring the delivery of program services for compliance.

8. *Discrimination Complaint Procedures.* The state must develop and follow procedures for handling complaints of discrimination covering all of the regulations applicable to it as a recipient of Federal financial assistance.

9. *Corrective Actions and Sanctions.* The state must establish procedures for taking prompt corrective action regarding any noncompliance finding relating to the administration, management, and operation of its programs and activities.

B. *Assurance of Administrative Requirements and Allowable Cost Standards.* The State must comply with administrative requirements and cost principles applicable to grants and cooperative agreements as specified in 20 CFR part 601 (Administrative Procedure), 29 CFR part 93 (Lobbying Prohibitions), 29 CFR part 96 and part 99 (Audit Requirements), 29 CFR part 97 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), and OMB Circular A–87 (Revised), 2 CFR 225, (Cost Principles for State, Local, and Indian Tribal Governments), and with administrative requirements for debarment and suspension applicable to sub-grants or contracts as specified in 29 CFR part 98 (Debarment and Suspension). The state assures that state staff will attend mandatory meetings and training sessions, or return unused funds.

States that have subawards to organizations covered by audit requirements of 29 CFR Part 99 (Audit of States, Local Governments, and Non-Profit Organizations) must (1) ensure that such subrecipients meet the requirements of that circular, as applicable, and (2) resolve audit findings, if any, resulting from such audits, relating to the UI program.

The state also assures that it will comply with the following specific administrative requirements:

1. Administrative Requirements.

a. *Program Income.* Program income is defined in 29 CFR 97.25 as gross income received by a grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. States may deduct costs incidental to the generation of UI program income from gross income to determine net UI program income. UI program income shall be added to the funds committed to the grant by ETA. The program income must be used only as necessary for the proper and efficient administration of the UI program. Any rental income or user fees obtained from real property or equipment acquired with grant funds from prior awards shall be treated as program income under this grant.

b. *Budget Changes.* Except as specified by terms of the specific grant award, ETA, in accordance with the regulations, waives the requirements in 29 CFR 97.30(c)(1)(ii) that states obtain prior written approval for certain types of budget changes.

c. *Real Property Acquired with Reed Act Funds.* The requirements for real property acquired with Reed Act or other non-Federal funds and amortized with UI grants are in UIPL 39–97, dated September 12, 1997, 29 CFR 97.31 to the extent amortized with UI grants; and in TEGL 7–04, Issues Related to Real Property Used for ETA Program Purposes.

d. *Equipment Acquired with Reed Act Funds.* The requirements for equipment acquired with Reed Act or other non-Federal funds and amortized with UI grants are in UIPL 39–97, and UIPL 39–97 Changes 1 and 2, and in 29 CFR 97.31, to the extent amortized with UI grants.

e. *Real Property, Equipment, and Supplies.*

(1) Real property, equipment, and supplies acquired under prior awards are transferred to this award and are subject to the relevant regulations at 29 CFR part 97.

(2) For computer systems and all associated components which were installed in states for the purpose of Regular Reports, Benefits Accuracy Measurement, and other UI Activities, the requirements of 29 CFR part 97 apply. The National Office reserves the right to transfer title and issue disposition instructions in accordance with paragraph (g) of Federal regulations at 29 CFR 97.32. States also will certify an inventory list of system components which will be distributed annually by ETA.

2. Exceptions and Expansions to Cost Principles. The following exceptions or expansions to the cost principles of OMB Circular No. A–87 (Revised) are applicable to states:

a. *Employee Fringe Benefits.* As an exception to OMB Circular A–87 (Revised) with respect to personnel benefit costs incurred on behalf of state employees who are members of fringe benefit plans which do not meet the requirements of OMB Circular No. A–87 (Revised), Attachment B, item 11, the costs of employer contributions or expenses incurred for state fringe benefit plans are allowable, provided that:

(1) For retirement plans, all covered employees joined the plan before October 1, 1983; the plan is authorized by state law; the plan was previously approved by the Secretary; the plan is insured by a private insurance carrier

which is licensed to operate this type of plan in the applicable state; and any dividends or similar credits because of participation in the plan are credited against the next premium falling due under the contract.

(2) For all state fringe benefit plans other than retirement plans, if the Secretary granted a time extension after October 1, 1983, to the existing approval of such a plan, costs of the plan are allowable until such time as the plan is comparable in cost and benefits to fringe benefit plans available to other similarly employed state employees. At such time as the cost and benefits of an approved fringe benefit plan are equivalent to the cost and benefits of plans available to other similarly employed state employees, the time extension will cease and the cited requirements of OMB Circular A–87 (Revised) will apply.

(3) For retirement plans and all other fringe benefit plans covered in (1) and (2) of this paragraph, any additional costs resulting from improvements to the plans made after October 1, 1983, are not chargeable to UI grant funds.

b. *UI Claimant's Court Appeals Costs*. To the extent authorized by state law, funds may be expended for reasonable counsel fees and necessary court costs, as fixed by the court, incurred by the claimant on appeals to the courts in the following cases:

(1) Any court appeal from an administrative or judicial decision favorable in whole or in part for the claimant;

(2) Any court appeal by a claimant from a decision which reverses a prior decision in his/her favor;

(3) Any court appeal by a claimant from a decision denying or reducing benefits awarded under a prior administrative or judicial decision;

(4) Any court appeal as a result of which the claimant is awarded benefits;

(5) Any court appeal by a claimant from a decision by a tribunal, board of review, or court which was not unanimous;

(6) Any court appeal by a claimant where the court finds that a reasonable basis exists for the appeal.

c. *Reed Act*. Payment from the state's UI grant allocations, made into a state's account in the Unemployment Trust Fund for the purpose of reducing charges against Reed Act funds (section 903(c)(2) of the Social Security Act, as amended (42 U.S.C. 1103(c)(2)), are allowable costs provided that:

(1) The charges against Reed Act funds were for amounts appropriated, obligated, and expended for the acquisition of automatic data processing installations or for the acquisition or major renovation of state-owned buildings, but not land;

(2) With respect to each acquisition or improvement of property, the payments are accounted for as credit against equivalent amounts of Reed Act funds previously withdrawn under the respective appropriation.

d. *Prior Approval of Equipment Purchases*. As provided for in OMB Circular No. A–87 (Revised), Attachment B, item 19, the requirement that grant recipients obtain prior approval from the Federal grantor agency for all purchases of equipment (as defined in 29 CFR 97.3) is waived and approval authority is delegated to the state administrator.

e. *Federal Cash Transaction Report*. The state is exempt from submission of the SF 272, Federal Transactions Report, and the SF 272A, Continuation Sheet, per 29 CFR 97.41 (c) discretion.

C. *Assurance of Management Systems, Reporting, and Record Keeping*.

The state assures that:

1. Financial systems provide fiscal control and accounting procedures sufficient to permit timely preparation of required reports, and the tracing of funds to a level of expenditure adequate to establish that funds have not been expended improperly (29 CFR 97.20).

2. The financial management system and the program information system provide Federally-required reports and records that are uniform in definition, accessible to authorized Federal and state staff, and verifiable for monitoring, reporting, audit, and evaluation purposes.

3. It will submit reports to ETA as required in instructions issued by ETA and in the format ETA prescribes.

4. It will retain all financial and programmatic records, supporting documents, and other required records at least three years as specified in 29 CFR 97.42(b).

5. The financial management system provides for methods to insure compliance with the requirements applicable to procurement and grants as specified in 29 CFR part 98 (Debarment and Suspension), and for obtaining the required certifications under 29 CFR 98.510(b) regarding debarment, suspension, ineligibility, and voluntary exclusions for lower tier covered transactions.

D. *Assurance of Program Quality*. The state assures that it will administer the UI program in a manner that ensures proper and efficient administration. ''Proper and efficient administration'' includes performance measured by ETA through Core measures, Management Information measures, program reviews, and the administration of the UI BAM, BTQ, Data Validation (DV), and TPS program requirements.

E. *Assurance on Use of Unobligated Funds*. The state assures that non-automation funds will be obligated by December 31 of the following fiscal year, and liquidated within 90 days thereafter. ETA may extend the liquidation date upon written request. Automation funds must be obligated by the end of the 3rd fiscal year, and liquidated within 90 days thereafter. ETA may extend the liquidation date upon written request. Failure to comply with this assurance may result in disallowed costs from audits or review findings.

Note. Travel costs for state agency personnel are considered obligated when the travel is actually performed.

F. *Assurance of Prohibition of Lobbying Costs (29 CFR Part 93)*. The state assures and certifies that, in accordance with the DOL Appropriations Act, no UI grant funds will be used to pay salaries or expenses related to any activity designed to influence legislation or appropriations pending before the Congress of the United States.

G. *Drug-Free Workplace (29 CFR Part 98)*. The state assures and certifies that it will comply with the requirements at this part. (29 CFR part 93)

H. *Assurance of Disaster Recovery Capability*. The state assures that it will maintain a Disaster Recovery plan.

I. *Assurance of Conformity and Compliance*. The state assures that the state law will conform to, and its administrative practice will substantially comply with, all Federal UI law requirements, and that it will adhere to DOL directives.

J. *Assurance of Automated Information Systems Security*. The state assures that its automated information systems have security protections commensurate with the risk and magnitude of harm.

K. *Assurance of Confidentiality*. The state will keep confidential any business information, as defined at 29 CFR 90.33 and any successor provision(s), it obtains or receives in the course of administering the Trade Adjustment Assistance or Alternative Trade Adjustment Assistance programs under this Agreement. The state shall not disclose such information to any person, organization, or other entity except as authorized by applicable state and Federal laws.

J. Temporary Assistance for Needy Families (TANF)

By signing the Unified Plan signature page, you are certifying that:

1. During the fiscal year, the State will operate a child support enforcement program under the State Plan approved under part D. (§ 402(a)(2).)

2. During the fiscal year, the State will operate a foster care and adoption assistance program under the State Plan approved under part E, and that the State will take such actions as are necessary to ensure that children receiving assistance under such part are eligible for medical assistance under the State Plan under title XIX. (§ 402(a)(3).)

3. Which State agency or agencies will administer and supervise the TANF program for the fiscal year, which shall include assurances that local governments and private sector organizations have been consulted regarding the plan and design of welfare services in the State so that services are provided in a manner appropriate to local populations; and have had at least 45 days to submit comments on the Plan and the design of such services. (§ 402(a)(4).)

4. That, during the fiscal year, the State will provide each member of an Indian tribe, who is domiciled in the State and is not eligible for assistance under a tribal family assistance plan approved under section 412, with equitable access to Federally-funded assistance under the State's TANF program (§ 402(a)(5).)

5. That the State has established and is enforcing standards and procedures to ensure against program fraud and abuse, including standards and procedures concerning nepotism, conflicts of interest among individuals responsible for the administration and supervision of the State program, kickbacks, and the use of political patronage. (§ 402(a)(6).)

6. (Optional) that the State has established and is enforcing standards and procedures to:

a. Screen and identify individuals receiving assistance under this part with a history of domestic violence while maintaining the confidentiality of such individuals;

b. Refer such individuals to counseling and supportive services; and

c. Waive, pursuant to a determination of good cause, other program requirements such as time limits (for so long as necessary) for individuals receiving assistance, residency requirements, child support cooperation requirements, and family cap provisions, in cases where compliance with such requirements would make it more difficult for individuals receiving assistance under this part to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence. (§ 402(a)(7)(A)(i), (ii), (iii).)

K. Senior Community Service Employment Program (SCSEP)

By signing this Unified Plan you also certify that the State agrees to meet the requirements of or submit the following documents as applicable, in addition to the general ETA requirements for receipt of Federal funds:

1. General Administrative Requirements:

a. 29 CFR part 97—Uniform Administrative Requirements for State and Local Governments (as amended by the Act).

b. 29 CFR part 96 (as amended by OMB Circular A–133)—Single Audit Act.

c. OMB Circular A–87—Cost Principles (as amended by the Act).

2. Assurances and Certifications:

a. SF 424—Application for Federal Assistance.

b. SF 424A—Budget Information—Non-construction Programs.

c. SF 424 B—Assurances for Non-construction Programs.

d. Hatch Act Notices must be placed in all work locations.

e. Privacy Statement must be provided to all participants.

f. ETA–8705—Equitable Distribution Report.

L. Community Services Block Grant (CSBG)

By signing the Unified Plan signature page, you are certifying that:

1. Funds made available through the grant or allotment will be used—

a. To support activities that are designed to assist low-income families and individuals, including families and individuals receiving assistance under part A of title IV of the Social Security Act (42 U.S.C. 601 *et seq.* ), homeless families and individuals, migrant or seasonal farmworkers, and elderly low-income individuals and families, and a description of how such activities will enable the families and individuals:

b. To remove obstacles and solve problems that block the achievement of self-sufficiency (including self-sufficiency for families and individuals who are attempting to transition off a State program carried out under part A of title IV of the Social Security Act); to secure and retain meaningful employment;

c. To attain an adequate education, with particular attention toward improving literacy skills of the low-income families in the communities involved, which may include carrying out family literacy initiatives;

d. To make better use of available income;

e. To obtain and maintain adequate housing and a suitable living environment;

f. To obtain emergency assistance through loans, grants, or other means to meet immediate and urgent family and individual needs; and to achieve greater participation in the affairs of the communities involved, including the development of public and private grassroots partnerships with local law enforcement agencies, local housing authorities, private foundations, and other public and private partners to:

g. Document best practices based on successful grassroots intervention in urban areas, to develop methodologies for widespread replication; and strengthen and improve relationships with local law enforcement agencies, which may include participation in activities such as neighborhood or community policing efforts.

2. The needs of youth in low-income communities are being met through youth development programs that support the primary role of the family, give priority to the prevention of youth problems and crime, and promote increased community coordination and collaboration in meeting the needs of youth, and support development and expansion of innovative community-based youth development programs that have demonstrated success in preventing or reducing youth crime, such as—

a. Programs for the establishment of violence-free zones that would involve youth development and intervention models (such as models involving youth mediation, youth mentoring, life skills training, job creation, and entrepreneurship programs); and

b. After-school child care programs.

There is an effective use of, and to coordinate, other programs related to the purposes of this subtitle (including State welfare reform efforts).

3. There is an effective use of, and to coordinate with, other programs related to the purposes of this subtitle (including State welfare reform efforts).

4. A description is provided on how the State intends to use discretionary funds made available from the remainder of the grant or allotment described in section 675C(b) in accordance with this subtitle, including a description of how the State will support innovative community and neighborhood-based initiatives related to the purposes of this subtitle.

5. Information is provided by eligible entities in the State, containing—

a. A description of the service delivery system, for services provided or coordinated with funds made available through grants made under section

675C(a), targeted to low-income individuals and families in communities within the State;

b. A description of how linkages will be developed to fill identified gaps in the services, through the provision of information, referrals, case management, and follow-up consultations;

c. A description of how funds made available through grants made under section 675C(a) will be coordinated with other public and private resources; and

d. A description of how the local entity will use the funds to support innovative community and neighborhood-based initiatives related to the purposes of this subtitle, which may include fatherhood initiatives and other initiatives with the goal of strengthening families and encouraging effective parenting.

6. Eligible entities in the State will provide, on an emergency basis, for the provision of such supplies and services, nutritious foods, and related services, as may be necessary to counteract conditions of starvation and malnutrition among low-income individuals.

7. The State and the eligible entities in the State will coordinate, and establish linkages between, governmental and other social services programs to assure the effective delivery of such services to low-income individuals and to avoid duplication of such services, and a description of how the State and the eligible entities will coordinate the provision of employment and training activities, as defined in section 101 of such Act, in the State and in communities with entities providing activities through statewide and local workforce investment systems under the Workforce Investment Act of 1998.

8. The State will ensure coordination between antipoverty programs in each community in the State, and ensure, where appropriate, that emergency energy crisis intervention programs under title XXVI (relating to low-income home energy assistance) are conducted in such community.

9. The State will permit and cooperate with Federal investigations undertaken in accordance with section 678D.

10. Any eligible entity in the State that received funding in the previous fiscal year through a community services block grant made under this subtitle will not have its funding terminated under this subtitle, or reduced below the proportional share of funding the entity received in the previous fiscal year unless, after providing notice and an opportunity for a hearing on the record, the State determines that cause exists for such termination or such reduction, subject to review by the Secretary as provided in section 678C(b).

11. The State will require each eligible entity in the State to establish procedures under which a low-income individual, community organization, or religious organization, or representative of low-income individuals that considers its organization, or low-income individuals, to be inadequately represented on the board (or other mechanism) of the eligible entity to petition for adequate representation.

12. The State will secure from each eligible entity in the State, as a condition to receipt of funding by the entity through a community services block grant made under this subtitle for a program, a community action plan (which shall be submitted to the Secretary, at the request of the Secretary, with the State Plan) that includes a community-needs assessment for the community served, which may be coordinated with community-needs assessments conducted for other programs.

13. The State and all eligible entities in the State will participate in the Results Oriented Management and Accountability System, another performance measure system for which the Secretary facilitated development pursuant to Section 678E(b), or an alternative system for measuring performance and results that meets the requirements of that section, and a description of outcome measures to be used to measure eligible entity performance in promoting self-sufficiency, family stability, and community revitalization.

14. The information describing how the State will carry out the assurances is described in this subsection.

M. OMB Burden Statement

These reporting instructions have been approved under the Paperwork Reduction Act of 1995. Persons are not required to respond to this collection of information unless it displays a valid OMB control number. Public reporting burden for this collection of information includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Submission is required by the Workforce Investment Act section 112(a). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Office of Workforce Investment, Room S–4231, 200 Constitution Ave., NW., Washington, DC 20210.

**Attachment A**

**ETA REGIONAL ADMINISTRATORS**

November 2008

REGION 1—BOSTON

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REGION 6—SAN FRANCISCO

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**Attachment B**

*1. Unified Plan Activities and Programs Checklist*

Under section 501 of the Workforce Investment Act, the following activities or programs may be included in a State's Unified Plan. From the list below, please place a check beside the programs and activities the State or Commonwealth is including in this Unified Plan.

The State Unified Plan shall cover one or more of the following programs and activities:

____ a. Secondary vocational education programs (Perkins IV/Secondary). Note that inclusion of this program requires prior approval of State legislature. (Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*)

____b. Postsecondary vocational education programs (Perkins IV/Postsecondary). Note that for the purposes of what the State Unified Plan shall cover, Perkins IV/Secondary and Perkins IV/Postsecondary count as one program. (Carl D. Perkins

Career and Technical Education Act of 2006 (20 U.S.C. 2301 *et seq.*))

____c. Activities authorized under title I, Workforce Investment Systems (Workforce Investment Activities for Adults, Dislocated Workers and Youth, or WIA title I, and the Wagner-Peyser Act) (Workforce Investment Act of 1998 (29 U.S.C. 2801 *et seq.*))

____d. Activities authorized under title II, Adult Education and Family Literacy (Adult Education and Family Literacy Programs) (Workforce Investment Act of 1998 (20 U.S.C. 9201 *et seq.*))

The State Unified Plan may cover one or more of the following programs and activities:

____a. Food Stamp Employment and Training Program, or FSET (7 U.S.C. 2015(d))

____b. Activities authorized under chapter 2 of title II of the Trade Act of 1974 (Trade Act Programs) (19 U.S.C. 2271 *et seq.*)

____c. Programs authorized under Part B of title I of the Rehabilitation Act of 1973 (29 U.S.C. 720 *et seq.*), other than section 112 of such Act (29 U.S.C. 732) (Vocational Rehabilitation)

____d. Activities authorized under chapters 41 & 42 of Title 38, USC, and 20 CFR 1001 and 1005 (Veterans Programs, including Veterans Employment, Disabled Veterans' Outreach Program, and Local Veterans' Employment Representative Program)

____e. Programs authorized under State unemployment compensation laws (Unemployment Insurance) (in accordance with applicable Federal law which is authorized under title III, title IX and Title XII of the Social Security Act and the Federal Unemployment Tax Act)

____f. Programs authorized under part A of title IV of the Social Security Act (Temporary Assistance for Needy Families (TANF)).

____g. Programs authorized under title V of the Older Americans Act of 1965 (Senior Community Service Employment Program (SCSEP).) (42 U.S.C. 3056 *et seq.*)

____h. Training activities funded by the Department of Housing and Urban Development under the Community Development Block Grants (CDBG) and Public Housing Programs). Note that programs funded by the CDBG and Public Housing programs can only be included in the State Unified Plan if the State is the funds recipient, and approval of the Unified Plan will not trigger funding for these programs.

____i. Community Development Block Grants

____j. Public Housing

____k. Programs authorized under the Community Services Block Grant Act (Community Services Block Grant, or CSBG) (42 U.S.C. 9901 *et seq.*)

*2. Contact Information*

Please complete one copy for EACH of the separate activities and programs included in the State Unified Plan.

Program: _____

State Name for Program/Activity:

_____

Name of Grant Recipient Agency for Program/Activity:

_____

Address: _____

Telephone Number: _____

Facsimile Number: _____

E-mail Address: _____

Name of State Administrative Agency (if different from the Grant Recipient):

_____

Address: _____

Telephone Number: _____

Facsimile Number: _____

E-mail Address: _____

Name of Signatory Official:

_____

Address: _____

Telephone Number: _____

Facsimile Number: _____

E-mail Address: _____

Name of Liaison: _____

Address: _____

Telephone Number: _____

Facsimile Number: _____

E-mail Address: _____

*3. Plan Signature(s)*

Governor (if Applicable)

As the Governor, I certify that for the State/Commonwealth of _____, for those activities and programs included in this Plan that are under my jurisdiction, the agencies and officials designated above under ''Contact Information'' have been duly designated to represent the State/Commonwealth in the capacities indicated for the programs and activities indicated. I will provide subsequent changes in the designation of officials to the designated program or activity contact as such changes occur.

I further certify that, for those activities and programs included in this Plan that are under my jurisdiction, we will operate the workforce development programs included in this Unified Plan in accordance with this Unified Plan and the assurances described in Section III of this Unified Plan.

_____

Typed Name and Signature of Governor

Date _____

Responsible State Official for Eligible Agency for Career and Technical Education (if Applicable)

I certify that for the State/Commonwealth of _____, for those activities and programs included in this Plan that are under my jurisdiction, the agencies and officials designated above under ''Contact Information'' have been duly designated to represent the State/Commonwealth in the capacities indicated for the programs and activities indicated. I will provide subsequent changes in the designation of officials to the designated program or activity contact as such changes occur.

I further certify that, for those activities and programs included in this Plan that are under my jurisdiction, we will operate the programs included in this Unified Plan in accordance with this Unified Plan and the applicable assurances described in Section III of this Unified Plan.

_____

Typed Name, Title, and Agency of Responsible State Official for Career and Technical Education

Signature _____

Date _____

Responsible State Official for Eligible Agency for Vocational Rehabilitation (if Applicable)

I certify that for the State/Commonwealth of _____, for those activities and programs included in this Plan that are under my jurisdiction, the agencies and officials designated above under ''Contact Information'' have been duly designated to represent the State/Commonwealth in the capacities indicated for the programs and activities indicated. I will provide subsequent changes in the designation of officials to the designated program or activity contact as such changes occur.

I further certify that we will operate those activities and programs included in this Unified Plan that are under my jurisdiction in accordance with this Unified Plan and the assurances described in Section III of this Unified Plan.

_____

Typed Name, Title, and Agency of Responsible State Official for Vocational Rehabilitation

Signature _____

Date _____

Responsible State Official for Eligible Agency for Adult Education (if applicable)

I certify that for the State/Commonwealth of _____, for those activities and programs included in this Plan that are under my jurisdiction, the agencies and officials designated above under ''Contact Information'' have been duly designated to represent the State/Commonwealth in the capacities indicated for the programs and activities indicated. I will provide subsequent changes in the designation of officials to the designated program or activity contact as such changes occur.

I further certify that, for those activities and programs included in this Plan that are under my jurisdiction, we will operate the programs included in this Unified Plan in accordance with this Unified Plan and the applicable assurances described in Section III of this Unified Plan.

_____

Typed Name, Title, and Agency of Responsible State Official for Adult Education

Signature _____

Date _____

**Attachment C**

OPTIONAL TABLE FOR WIA STATE PERFORMANCE INDICATORS AND GOALS

| WIA requirement at section 136(b) | Previous year performance | Performance goal |
|---|---|---|
| Adults: | | |
| Entered Employment Rate. | | |
| Employment Retention Rate. | | |
| Average Six-Months Earnings. | | |
| Certificate Rate. | | |
| Dislocated Workers: | | |
| Entered Employment Rate. | | |
| Employment Retention Rate. | | |
| Average Six-Months Earnings. | | |
| Certificate Rate. | | |
| Youth Aged 19–21: | | |
| Entered Employment Rate. | | |
| Employment Retention Rate. | | |
| Six-Months Earnings Change. | | |
| Certificate Rate. | | |
| Youth 14–18: | | |
| Skill Attainment Rate. | | |
| Diploma or Equivalent Attainment Rate. | | |
| Retention Rate. | | |
| Youth Common Measures: [1] | | |
| Placement in Employment or Education. | | |
| Attainment of a Degree or Certificate. | | |
| Literacy and Numeracy Gains. | | |
| Participant Customer Satisfaction. | | |
| Employer Customer Satisfaction. | | |
| Additional State-Established Measures. | | |

[1] Goals are negotiated for these measures by states reporting common performance measure outcomes only.

Dated: November 24, 2008.

**Gay M. Gilbert,**

*Administrator, Office of Workforce Investment, Employment and Training Administration.*

[FR Doc. E8–28406 Filed 12–2–08; 8:45 am]

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Wednesday, December 3, 2008

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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**DEFENSE DEPARTMENT**

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Outer Continental Shelf Air Regulations Update to Include New Jersey State Requirements; published 11-3-08

Pesticide Tolerances:

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**INTERIOR DEPARTMENT**

**Fish and Wildlife Service**

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Tuberculosis in Cattle and Bison; State and Zone Designations:

Minnesota; comments due by 12-9-08; published 10-10-08 [FR E8-24223]

**AGRICULTURE DEPARTMENT**

**Commodity Credit Corporation**

McGovern Dole International Food for Education and Child Nutrition Program and Food for Progress Program; comments due by 12-8-08; published 10-24-08 [FR E8-25186]

**AGRICULTURE DEPARTMENT**

**Foreign Agricultural Service**

McGovern Dole International Food for Education and Child Nutrition Program and Food for Progress Program; comments due by 12-8-08; published 10-24-08 [FR E8-25186]

**DEFENSE DEPARTMENT**

Defense Contract Management Agency (DCMA) Privacy Program; comments due by 12-8-08; published 10-9-08 [FR E8-23999]

Office of the Secretary of Defense and Joint Staff Freedom of Information Act Program; comments due by 12-8-08; published 10-9-08 [FR E8-23998]

**ENERGY DEPARTMENT**

Advanced Technology Vehicles Manufacturing Incentive Program; comments due by 12-12-08; published 11-12-08 [FR E8-26832]

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Revisions to the Nevada State Implementation Plan; Clark County; comments due by 12-8-08; published 11-7-08 [FR E8-26513]

Environmental Statements; Notice of Intent:

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Florida and South Carolina; Open for comments until further notice; published 2-11-08 [FR 08-00596]

National Emission Standards for Hazardous Air Pollutants From Petroleum Refineries; comments due by 12-10-08; published 11-10-08 [FR E8-26403]

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Performance Specification and Quality Assurance Requirements for Continuous Parameter Monitoring Systems, etc.; comments due by 12-8-08; published 10-9-08 [FR E8-22674]

National Volatile Organic Compound Emission Standards for Aerosol Coatings; comments due by 12-8-08; published 11-7-08 [FR E8-26614]

Pesticide Tolerance Nomenclature Changes; Technical Amendments; comments due by 12-9-08; published 10-10-08 [FR E8-24027]

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Oxford, Tiffin and Solon, Iowa Exchanges; Section 251(h)(2); comments due by 12-10-08; published 11-10-08 [FR E8-26813]

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GSAR Case 2007G507; Describing Agency Needs; comments due by 12-8-08; published 10-9-08 [FR E8-23703]

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**HEALTH AND HUMAN SERVICES DEPARTMENT**

**Food and Drug Administration**

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**Federal Emergency Management Agency**

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Proposed Flood Elevation Determinations; comments due by 12-8-08; published 9-9-08 [FR E8-20822]

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**Fish and Wildlife Service**

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Louisiana Black Bear; comments due by 12-12-08; published 11-12-08 [FR E8-26733]

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Waste Confidence Decision Update; comments due by 12-8-08; published 10-9-08 [FR E8-23381]

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**Federal Aviation Administration**

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Hawker Beechcraft Corporation Model 390 Airplanes; comments due by 12-8-08; published 10-9-08 [FR E8-23643]

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MD Helicopters, Inc. Model 600N Helicopters; comments due by 12-9-08; published 10-10-08 [FR E8-23540]

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Proposed Amendment of Class E Airspace; Bethel, AK; comments due by 12-12-08; published 10-28-08 [FR E8-25714]

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Proposed Modifications of Class E Airspace:

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Request for Information Regarding Sections 101 through 104 of the Genetic Information Nondiscrimination Act (of 2008); comments due by 12-9-08; published 10-10-08 [FR E8-24194]

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''P L U S'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.R. 5714/P.L. 110–450**

United States Army Commemorative Coin Act of 2008 (Dec. 1, 2008; 122 Stat. 5017)

**Last List November 24, 2008**

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